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CASES ARGUED AND DETERMINED IN THE

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

WITH TABLE OF STATUTES CONSTRUED

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JUDGES

OF THE

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

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[1] Died July 4, 1910.

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Hon. GEORGE DONWORTH, District Judge, W. D. Washington.....Seattle, Wash.
Hon. CARL RASCH, District Judge, Montana.....Helena, Mont.

[2] Died March 28, 1910.
[3] Appointed May 2, 1910, Circuit Justice to succeed David J. Brewer.
[4] Appointed June 26, 1910, to succeed John F. Philips, retired.

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

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

BURLEY v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. July 5, 1910.)

No. 1,803.

1. EMINENT DOMAIN (§ 29*)—GOVERNMENT IRRIGATION PROJECT—STATUTES—CONSTRUCTION.

Irrigation Act June 17, 1902, c. 1093, § 1, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 596), provides for the formation of a reclamation fund with money received from the sale of public lands in certain states and territories. Section 3 authorizes the withdrawal from entry of lands required for irrigation works, and on the completion of surveys of such lands, etc., makes it the duty of the Secretary of the Interior to determine whether the project is practicable, and, if so, the public lands which they propose to irrigate shall only be subject to entry of specified tracts. Section 4 provides that, if there are necessary funds in the reclamation fund available for the purpose, the project shall be constructed on a contract with the Secretary, who shall give notice of the lands irrigable and of the charges to be made per acre on the entries to be made and on lands in private ownership which may be irrigated by the waters in the project. Section 5 declares that no right to the use of water for land of private ownership shall be sold exceeding 160 acres to any one landowner. *Held*, that the act contemplated the irrigation of private lands as well as lands belonging to the government, and that the fact that a scheme contemplated the irrigation of private as well as a large tract of government land did not render the project illegal, so as to prevent the condemnation of land necessary to carry it out.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.*]

2. EMINENT DOMAIN (§ 5*)—IRRIGATION—RIGHTS OF THE UNITED STATES.

The United States has constitutional authority to organize and maintain an irrigation project within a state where it owns arid lands, whereby it will associate with itself other owners of like lands for the purpose of reclaiming and improving them, and for that purpose may exercise the right of eminent domain against other landowners to obtain land necessary to carry the proposed project in effect.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 19–23; Dec. Dig. § 5.*

Nature and extent of power of United States to condemn property for public use, see note to Town of Nahant v. United States, 70 C. C. A. 653.]

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

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

Condemnation proceedings by the United States of America and the County of Canyon, Idaho, against David E. Burley. From an order directing condemnation (172 Fed. 615), defendant brings error. Affirmed.

This action was brought in the Circuit Court of the United States for the District of Idaho, by authority of the Attorney General of the United States, on behalf of the United States, pursuant to an application made therefor by the Secretary of the Interior, proceeding under section 7 of the Act of June 17, 1902, c. 1093, § 7, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 600), entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands." The state of Idaho is one of the states made subject to the provisions of this act. Section 7 provides as follows: "That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application to the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

It is alleged in the amended complaint that the Secretary of the Interior had caused to be surveyed and located a certain irrigation project in the state of Idaho, known as the "Payette-Boise Project," and had determined that the same was practicable, and had let the contracts for the construction thereof; that the said irrigation project included as a part thereof the construction of a reservoir in Canyon county, Idaho, commonly known and designated as the "Deer Flat Reservoir"; that the site of the reservoir included two certain described tracts of land in Canyon county, Idaho, containing in the aggregate 296 acres, the title to which stood in the name of the defendant Burley, who was capable of conveying title in fee to said premises free and clear of all incumbrances, except the interest therein of the county of Canyon, Idaho; that the county of Canyon claimed some interest, estate, or title in said premises; that the reservoir was at the time of the filing of the complaint in the actual course of construction, and when completed the water impounded by said reservoir would completely overflow the lands described in the complaint; that it had become necessary that the United States acquire title to the lands described in the complaint for use as a part of said reservoir site, and for such purpose the United States, acting through the Secretary of the Interior, had been and was desirous of purchasing and acquiring title in fee to said tract of land for that purpose; that the Secretary of the Interior was authorized by law to acquire said lands by condemnation, and in his opinion it was necessary and advantageous to the government that the said lands should be so acquired; that said irrigation project was being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon counties, in the state of Idaho, which were public lands of the United States, and that more than 50,000 acres of the public lands of the United States would be supplied with water for irrigation and reclamation from the said project by means of said Deer Flat reservoir; that the land described, the title to which was in the defendant, and which was included in said reservoir site, was absolutely necessary for the use of the government in the construction of said reservoir; that the reasonable value of said land did not exceed $10 per acre, amounting to $2,960, and the United States offered to purchase said lands at said valuation; that a disagreement had occurred and then existed between the defendant and the United States concerning the purchase of said tracts of land by the United States, to wit, that the United States and defendant were unable to agree upon a price for the land which the United States considered to be reasonable; and that the defendant asked and demanded therefor a price which in the opinion of the United States was more than said land was worth. The United States prayed for judgment that it should be adjudged that the public use required the

condemnation of the land described, and that the United States should be entitled to take and hold title in fee to said land for the public use specified upon making compensation therefor, and that the court proceed to determine in the manner prescribed by law; compensation to be paid by the United States for the said property.

To this amended complaint the defendant interposed a demurrer on various grounds of uncertainty, among others, that it did not appear therefrom whether it was the purpose of the United States to devote said irrigation project wholly and entirely to the irrigation of lands owned or possessed by the United States, or whether its purpose was to devote said reservoir and project in part or otherwise to furnishing water for the purpose of irrigating lands in which the United States had no title or possession, but which were owned and possessed by other persons. The demurrer upon the ground mentioned was overruled, and thereupon the defendant answered, in which he admitted, among other things, the allegation in the amended complaint that a disagreement had occurred and then existed between the defendant and the United States concerning the purchase of said tracts of land by the United States; that is to say, the disagreement was as to the purchase price, but the defendant denied that he demanded or asked a price for said lands in excess of their worth. The defendant, further answering, and as a further defense to the cause of action, alleged that he was informed and believed, and therefore averred the fact to be, that it was the design, intention, and purpose of the United States to construct the irrigation project mentioned and described in said amended complaint for the purpose of supplying water to lands not owned or possessed by the United States, or in which the United States had any interest of any kind or character, but which were owned and possessed by, and in which private individuals alone were interested, and that the proceeding was instituted for the purpose of, and it was the design and intention of the United States, if successful therein, to devote said land of defendant to said purposes, in order to enable the United States to irrigate such lands, the title to which was reposed in private ownership, and to further the interests of the owners thereof, and to use and devote defendant's lands in aid of private enterprises in the improvement of lands not owned, possessed, or controlled in any wise by the United States, or in which it had any right, title, interest, or possession of any kind or character whatsoever, of a public or governmental nature.

Upon the issues thus presented the case was tried before the court and a jury upon a stipulation between the parties to the action that all issues, except that of the value of the land sought to be condemned, should be heard before the court without a jury, and that the question 'of the value of the land should be submitted to the jury. Thereupon a jury was impaneled, and, the court having announced its decision upon the issues submitted to it, the jury, under the instructions, returned a verdict for the amount agreed upon by counsel for the respective parties, to wit, the sum of $5,920. The findings of the court upon the issues submitted to it were as follows:

"(1) That this action is brought by the authority of the Attorney General of the United States, on behalf of the United States, pursuant to an application made therefor by the honorable Secretary of the Interior of the United States, proceeding under the provisions of an act of Congress entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain states and territories for the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902. 32 Stat. 388.

"(2) That long prior to the commencement of this action the honorable Secretary of the Interior, proceeding under authority of said act, caused to be surveyed and located a certain irrigation project in the state of Idaho known as the 'Payette-Boise Project,' and determined that the same was practicable, and let contracts for the construction thereof; said project being situate in the counties of Ada and Canyon. That said project includes, as a part thereof, the construction of a reservoir in Canyon county, Idaho, commonly known and designated as the 'Deer Flat Reservoir,' the site of which is a natural basin comprising approximately 10,000 acres of land. That the land described in the amended complaint as belonging to the defendant, the title to which the plaintiff seeks by this action to acquire, is situate within

said basin, and will, if said basin is used as a reservoir site, be covered with water. That said reservoir was, at the time of the commencement of this action, in the actual course of construction. That both the lands embraced in said reservoir site and those in the vicinity thereof are arid in character, and cannot be profitably farmed without artificial irrigation. That of the lands embraced within the reservoir site the plaintiff owned only a small portion, but of the lands adjacent thereto and in the vicinity thereof, and susceptible of irrigation therefrom, the plaintiff was the owner of approximately 45,000 acres, and approximately the same amount of lands had passed to patent and were in private ownership. That at the time said project was surveyed and its feasibility considered all the natural flow of Boise river, the only available source of supply for the irrigation of said and other lands during a large portion of the irrigating season, had been appropriated, and was being diverted by private corporations for the irrigation of agricultural lands, and no considerable additional area could be irrigated, except by storing and conserving waters flowing in the river during the winter months, or during the high-water season. The project as finally decided upon by the honorable Secretary of the Interior contemplated the taking over of an existing canal, called the 'New York Canal,' which was to be improved, enlarged, and extended, and through which water was to be carried to said reservoir for the supply thereof during seasons of the year when there was an adequate supply of water in the river for such purpose, and for delivering water to parties who already had the right to receive water from said canal by reason of existing contracts, and also to furnish water for the irrigation of lands belonging to the plaintiff which were susceptible of irrigation from said canal, and for the irrigation of unreclaimed lands belonging to private individuals, but the entire project was for the irrigation and reclamation of arid lands. That after the government had made some investigation, but before said project was decided upon, property owners and citizens of said counties of Ada and Canyon entered upon a systematic agitation of the project, and certain individuals, acting upon behalf of the public, and complying with the laws of the state of Idaho relative to securing permits for the appropriation of water, secured permits for such appropriation from the Boise river, and assigned the same to the United States, and the owners of arid lands, for the irrigation of which there was no available water, proffered to the government their cooperation and assistance, agreeing that if the government would undertake the project, and thereby furnish water for the irrigation of their lands, they would bear their proportion of the expense thereof. That in consideration of the large tract of public land to be irrigated and reclaimed by means of said project, and such co-operation and assistance from private owners, the honorable Secretary of the Interior adopted said project and entered upon its construction. That in order to irrigate some of the public lands lying in the vicinity of said reservoir it is necessary to maintain the water in said reservoir at such a level as will cause the same to overflow the defendant's land. That at the time said project was being investigated the public lands lying in the vicinity of said reservoir site and susceptible to irrigation from said reservoir were withdrawn from entry under the public land laws, and since said withdrawal substantially all of said lands have been entered under and subject to the conditions of said reclamation act.

"(3) That the honorable Secretary of the Interior entered upon said project of the construction of said reservoir primarily for the purpose of irrigating public lands of the United States, and that the United States has a large and substantial interest in the successful execution of that project, in that thereby water will be rendered available for the irrigation of large tracts of its own lands, thus rendering them marketable; and that, for the purpose of carrying out said irrigation project, it is necessary that the plaintiff acquire the title to the defendant's lands, as the same are described in the amended complaint, in order that it may use them for a part of said reservoir site.

"(4) That the defendant, David E. Burley, is the sole owner of said lands, and the county of Canyon has no title thereto or interest therein.

"(5) That the plaintiff and the defendant, David E. Burley, were unable to agree upon the value of said lands, or the price to be paid therefor by the plaintiff.

"And as conclusions of law from the foregoing facts it is found that the plaintiff seeks to condemn said lands and to acquire title thereto for a lawful purpose, and that the honorable Secretary of the Interior, in entering upon said project, did not exceed the authority conferred upon him by the provisions of said act of June 17, 1902, and that said lands are necessary to such purpose, and that the plaintiff is entitled to expropriate them and acquire title thereto upon the payment to the defendant of a just compensation therefor, namely, the amount found by the jury."

The compensation agreed upon and found by the jury having been paid into court, the judgment and order of condemnation was made. The case comes here upon writ of error from the judgment.

John G. Willis, for plaintiff in error.

C. H. Lingenfelter, U. S. Atty., and B. E. Stoutemyer, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The allegation of the amended complaint that a disagreement had occurred and existed between the defendant and the United States concerning the purchase price of the land sought to be condemned, in this, that the parties were unable to agree upon a price for said land, the admission of the answer that this allegation was true, except that the defendant denied that he demanded or asked a price for the land in excess of its worth, the stipulation of the parties at the trial that the question of value of the land should be submitted to a jury, and the fact that the amount for which the jury was asked to render a verdict was agreed upon by counsel for the respective parties and paid into court, have the appearance of stating a single original subject of controversy, and come very nearly rendering other questions in the case feigned issues. But this feature of the proceeding was evidently not so intended and will not be so considered. It will be treated, however, as showing conclusively that there is no claim on the part of the defendant that the United States is seeking to appropriate defendant's land without just and adequate compensation. A just and adequate compensation has been agreed upon and paid into court, and the defendant is not required to surrender his title or any rights that he may have therein without just and adequate compensation being first paid to him by the United States as provided by law.

It is contended by the defendant that the demurrer to the complaint should have been sustained because of the insufficiency of the complaint and uncertainty of the allegation as to the purpose of the United States in acquiring title to defendant's property; that is to say, it is uncertain, because it does not appear whether it was the purpose of the United States to devote the proposed irrigation project wholly and entirely to irrigation of lands owned or possessed by the United States, or whether it was proposed to devote said reservoir and project, in part or otherwise, to furnishing water for the purpose of irrigating lands in which the United States had no title, interest, or possession, but which were owned and possessed by other persons.

The specific objection to the complaint is that it is uncertain, because it alleges "that said irrigation project is being primarily constructed for the purpose of supplying water for irrigation," etc., and

that a statement as to secondary and other purposes is withheld, giving birth to a suspicion that the United States has a purpose which it does not disclose, lest such disclosure should work a failure of the proceeding. It appears from the opinion of the learned judge in the court below (United States v. Burley [C. C.] 172 Fed. 615, 618) that the original complaint was silent as to the ownership of the lands to be irrigated from the reservoir. A demurrer to the complaint was accordingly sustained by the court upon that ground, and, complying with the suggestion of the court, the attorney for the United States in the amended complaint alleged that the "project was being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon counties in the state of Idaho, which are public lands of the United States." There was a demurrer to this amended complaint on the ground of uncertainty, and the objection renewed that the allegation as to the "primary" purpose of the United States in appropriating this land was not sufficient. The demurrer was overruled, and the allegation of the complaint denied in defendant's answer; and upon the issue thus joined evidence was taken, a finding made, and judgment of condemnation entered in favor of the United States.

We need not stop to discuss the various meanings of the word "primarily." It will be sufficient to assign to it a meaning having reference to the subject-matter and the surrounding circumstances. This rule of interpretation permits us to refer to the findings of fact in this case, based upon the evidence admitted in support of the allegation concerning the primary purpose of the irrigation project described in the complaint. It was there found that the entire project was for the irrigation and reclamation of arid lands. It contemplated the taking over of an existing canal, called the "New York Canal," which was to be improved, enlarged, and extended, and through which water was to be carried to a reservoir for the supply thereof during the seasons of the year when there was an adequate supply of water in the river for such purpose. The project so far appears to be entirely in accord with the act of June 17, 1902, which provides in section 1 that certain money received from the sale and disposal of public lands in certain states and territories including the state of Idaho shall be "reserved, set aside, and appropriated as a special fund in the treasury to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said states and territories" named.

But the findings go further, and find that the project contemplated: (1) The delivery of water to parties who already had the right to receive water from said canal by reason of existing contracts. (2) To furnish water for the irrigation of lands belonging to the United States which were susceptible of irrigation from said canal. (3) For the irrigation of unreclaimed lands belonging to private individuals. It was found, further, that the project of the construction of said reservoir was entered upon "primarily" for the purpose of irrigating public lands of the United States, and that the United States had a large

and substantial interest in the successful execution of that project, in that thereby water would be rendered available for the irrigation of large tracts of its own land, thus rendering them marketable, and that for the purpose of carrying out said irrigation project it was necessary that the United States should acquire the title to the defendant's lands as the same were described in the amended complaint in order that it might use them for a part of said reservoir site.

We now have a clear understanding of the meaning of the word "primarily" as used in the complaint. It means that the entire project is for the irrigation and reclamation of arid lands, and that the dominating purpose of the United States is to store and supply water for the irrigation and reclamation of its own arid lands. But the use of the word "primarily" in describing the project and the dominating purpose concerning such lands admits the existence of a secondary or concomitant purpose to deliver water to parties who already had the right to receive water from the existing canal, and also to furnish water for the irrigation of unreclaimed arid lands belonging to private individuals. The defendant contends that the United States has no right to take his property for a purpose which includes such secondary or concomitant purpose, and because the complaint has been framed in view of this construction he contends that it is open to his demurrer for insufficiency and uncertainty.

In determining this question our first inquiry must be whether the irrigation of private lands of an arid character is authorized by the act of June 17, 1902. The title of the act is:

"An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands."

In section 1 of that act there is a provision for the formation of a "reclamation fund" with the money received from the sale of public lands in certain states and territories. In section 3 the Secretary of the Interior is authorized to withdraw from public entry the lands required for irrigation works contemplated by the act, and also lands believed to be susceptible of irrigation from said works, and upon the completion of surveys of such lands, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior is required to determine whether or not the project is practicable and advisable, and, if found to be so, the public lands which it is proposed to irrigate by means of the contemplated works shall be subject to entry only under the homestead laws in tracts of not less than 40 nor more than 160 acres, and shall be subject to the limitations, charges, terms, and conditions in the act provided. In section 4 an irrigation project determined by the Secretary of the Interior to be practicable may be constructed by contract, providing there are the necessary funds in the "reclamation fund" available for that purpose. If there is, the Secretary of the Interior is then required to give notice of the lands irrigable under such project, and, among other things, the charges which shall be made per acre upon the entries made under the provisions of the act and "upon lands in private ownership which may be irrigated by the waters of the said irrigation project." In section 5 it is further

provided that "no right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner." The act clearly provides for the irrigation of private lands under the conditions therein specified where such lands are arid and within the limits of an irrigation project deemed by the Secretary of the Interior to be practicable and advisable. We are therefore of the opinion that the complaint is not open to the defendant's demurrer on the ground of insufficiency or uncertainty under the provisions of the act of Congress.

We come now to the consideration of the real question in this case, which is presented as a constitutional question and may be stated in the following terms: Can the United States, owning arid lands within a state, organize and maintain a scheme or project whereby it will associate with itself other owners of arid lands for the purpose of reclaiming and improving such lands, and in that behalf exercise the right of eminent domain against another landowner for the purpose of obtaining the title and possession of land absolutely necessary in carrying the proposed scheme or project into effect?

It is contended by the defendant that this cannot be done, and the case of Kansas v. Colorado, 206 U. S. 46, 91, 27 Sup. Ct. 655, 665, 51 L. Ed. 956, is cited as authority for such a limitation upon the power and authority of Congress. It is said that the court, referring to the statute under consideration, held in substance that article 4, § 3, of the Constitution of the United States, providing that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States," did not authorize Congress to provide an irrigation project to be carried out within a state for the reclamation of arid lands not the property of the United States. The controversy in that case was between the states of Kansas and Colorado concerning the diversion of the waters of the Arkansas river for the irrigation of lands in Colorado. It was alleged that such diversion damaged certain riparian proprietors in Kansas, through which state the river flows. The case was decided against the state of Kansas on the ground that the detriment to Kansas in the diminution of the flow of water by the diversion in Colorado, while substantial, was not so great as to make the appropriation of the water in Colorado an inequitable apportionment between the states. The United States intervened in the case for its interest, contending that the determination of the rights of the two states inter sese in regard to the flow of water in the Arkansas river was subordinate to the superior right on the part of the national government to control the whole system of reclamation of arid lands within the states. It was in answer to this contention that the court expressed the opinion, the substance of which has been stated. But the court said further concerning the national control of the arid regions:

"It does not follow that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of section 3 of article 4 heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitu-

tion, and therefore it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner, and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same, no greater and no less than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

That is to say, it would be strange if the national government could enter the territory of a state where there were no public lands of the United States requiring irrigation and no public lands through which water flows necessary for the irrigation of arid lands, and by legislation provide a system of irrigation for the private lands within the state and control its administration. It would indeed be a strange proceeding and obviously wholly outside of the authority of Congress. But in this case the United States is the owner of large tracts of land within the states named in the act of June 17, 1902. The public welfare requires that these lands, as well as those held in private ownership, should be reclaimed and made productive. To do this effectively and economically with the available water supply, large tracts must be brought into relation with a single system or project. These states having arid lands have accordingly acted upon the subject, and in the state of Idaho, where the land is located in this case, it has been provided in section 14 of article 1 of the Constitution that:

"The necessary use of lands for the construction of reservoirs, or storage basins, for the purposes of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes to convey water to a place of use, for any useful, beneficial or necessary purpose or for drainage or for the drainage of mines, etc. * * * is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for public use but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

The act of June 17, 1902, not only recognizes the Constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the act, shall proceed in conformity with such laws. In what respect does such a proceeding contravene the Constitution of the United States? Has not the United States as a landowner the same rights within the state that any other landowner has? And when the land is of such a character that, to be useful, it must be irrigated and reclaimed in large tracts, may not the United States, co-operating with such other landowners, organize and establish an effective and economical system or project for such irrigation and reclamation? And, finally, if the necessary use of lands for such a purpose is made a public use by the state, is there any reason why the United States should not exercise its right of eminent domain to acquire title to lands absolutely necessary to such public use?

We can think of no constitutional objection to such a proceeding, when it is clearly established that with respect to surrounding circumstances and conditions the use is a public use; and, while it has been held that the law of the state is not conclusive upon this subject, the Supreme Court of the United States in numerous cases has determined that such a use as here described in the project under consideration is a public use.

In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161, 17 Sup. Ct. 56, 64 (41 L. Ed. 369), the Supreme Court had under consideration the validity of the law of the state of California providing for the organization and government of irrigation districts. It was contended that the proceedings under the act with respect to an assessment upon certain land within the district, if upheld as constitutional, would result in the taking of the property of one person or class of persons and giving it to another—"an act," it was said, "of pure spoliation." It had been held by the Supreme Court of the state of California that the use of water for irrigation purposes under the provision of the state act was a public use, and a corporation organized by virtue of the act for the purpose of irrigation would be a municipal corporation, and organized for the promotion of the prosperity and welfare of the people. The Supreme Court of the United States, reviewing the provisions of the act and the considerations for its enactment, said:

"Viewing the subject for ourselves and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California. The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance and over or through private property, which cannot be taken in invitum if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. Cole v. La Grange, 113 U. S. 1 [5 Sup. Ct. 416, 28 L. Ed. 896]. A private company or corporation without the power to acquire the land in invitum would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual. No one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them, it could only be upon the ground that the property they took was to be taken for a public purpose. While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state."

The conditions referred to in that case are almost identical with the conditions in the present case, and the opinion of the court is peculiarly applicable to the question under consideration.

In Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, the action was brought in the state court of Utah by an individual landowner as plaintiff to condemn a right of way to enable the plaintiff to enlarge a ditch belonging to the defendants for the conveying of water across the land of the defendants for the purpose of irrigating plaintiff's land. The trial court found the facts to be that plaintiff's land was arid land and would not produce without artificial irrigation, but that with artificial irrigation the same would produce abundantly of grain, vegetables, fruits, and hay; that the use of the surplus waters of a certain creek which it was proposed to convey to plaintiff's land by the enlarged ditch was a public use; and that the plaintiff was entitled to a decree condemning a right of way across defendants' land for the purpose of carrying such surplus waters to the plaintiff's land. The case was taken to the Supreme Court of the United States as involving a constitutional question in the taking of defendants' land for a private use. Upon the facts stated in the findings of the trial court and having reference to the conditions stated it was held that the proceedings did not in any way violate the Constitution of the United States.

In Strickley v. Highland Boy Mining Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, the action was also brought in a state court of Utah to condemn a right of way under a statute of the state for an aërial bucket line across defendant's placer mining claim. It was objected that the right of way was solely for private use, and that the taking of the land for that purpose was in violation of the Constitution of the United States. The statute was held to be constitutional, and the proceeding upheld by the Supreme Court of the state, and the decision affirmed by the Supreme Court of the United States.

In the case of Bacon v. Walker, 204 U. S. 311, 316, 27 Sup. Ct. 289, 290, 51 L. Ed. 499, it was said with respect to the last-named case that it "was the recognition of the power of the state to work out from the conditions existing in a mining region the largest welfare of the inhabitants." This is the theory upon which the laws relating to the irrigation and reclamation of arid lands is based, and justifies the laws of the states upon the subject and the co-operation of the United States under the act of June 17, 1902.

The objection that the United States has no constitutional authority to enter into such co-operation and engage in the business of organizing and maintaining irrigation and reclamation projects of the character provided by the act of June 17, 1902, is equally untenable. The act was held constitutional by this court in United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371, and we can add but little to what was said in that case. But, considering the provisions of the act in view of the specific objections against its constitutionality in this case, we must say that our opinion is not shaken as to the correctness of that decision. The policy of reclaiming the arid region of the West for a beneficial use open to all the people of the United States is as much a national policy as the preservation of rivers and harbors for the benefit of navigation. President Roosevelt, in his message to Congress in 1901, in urging the legislation which resulted in the passage of the reclamation act, made use of language applicable here. He said:

"It is as right for the national government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams."

Again he says in the same message:

"The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi Valleys brought prosperity to the Atlantic states. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would not otherwise come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, was held by this court in Winters v. United States, 143 Fed. 740, 74 C. C. A. 666, and 148 Fed. 684, 78 C. C. A. 546. This decision was affirmed by the Supreme Court of the United States in Winters v. United States, 207 U. S. 564, 577, 28 Sup. Ct. 207, 212, 52 L. Ed. 340, where the court said:

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 702 [19 Sup. Ct. 770, 43 L. Ed. 1136]; United States v. Winans, 198 U. S. 371 [25 Sup. Ct. 662, 49 L. Ed. 1089]."

To the same effect was the decision of this court in Conrad Inv. Co. v. United States, 161 Fed 829, 831, 88 C. C. A. 647.

The authority of the United States to reserve the waters of its streams in the arid region for a beneficial purpose has been recently extended to the settlement of a long-standing controversy between the United States and Mexico respecting the use of the waters of the Rio Grande. By the Act Feb. 25, 1905, c. 798 (33 Stat. 814), the provisions of the reclamation act of June 17, 1902, were extended to the portion of the state of Texas bordering upon the Rio Grande which could be irrigated from a dam constructed near Engle in the territory of New Mexico. This act was passed for the purpose of enabling the United States to carry into effect the terms of a proposed treaty or convention with Mexico, which was afterwards signed on May 21, 1906 (34 Stat. 2953). This treaty or convention provided that:

"After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the city of Juarez, Mexico."

By the Act March 4, 1907, c. 2918 (34 Stat. 1357), an appropriation of $1,000,000 was made available as needed, and to be expended under the direction of the Secretary of the Interior, for the construction of the above-mentioned dam in connection with the irrigation project on

the Rio Grande. By the Act June 12, 1906, c. 3288, 34 Stat. 259 (U. S. Comp. St. Supp. 1909, p. 603), the provisions of the reclamation act were extended so as to include and apply to the state of Texas, where there never has been any public lands of the United States, but where such streams as the Pecos and the Rio Grande, rising in New Mexico, a territory of the United States, and flowing into Texas, have become important factors in the irrigation and reclamation of the arid lands of that state.

This legislation illustrates the scope of the reclamation act and its purpose in preserving the waters and reclaiming the arid lands of the Western states, where, as said in Kansas v. Colorado, supra:

"The national government is the most considerable owner, and has power to dispose of and make all needful rules and regulations respecting its property."

The judgment of the Circuit Court is affirmed.

UNITED STATES v. ALLEN et al.†

(Circuit Court of Appeals, Eighth Circuit. June 8, 1910.)

Nos. 3150–3163, 3265, 3276, 3279.

1. INDIANS (§ 15*)—LANDS—RESTRICTION ON ALIENATION BY ALLOTTEES—RIGHT OF UNITED STATES TO ENFORCE BY SUITS.

The plan of the United States government in dissolving the Five Civilized Tribes of Indians and distributing their lands in severalty was a great governmental project, having for its object the social and industrial advancement of the Indians, and the various acts pertaining thereto must be construed in consonance with such purpose and not merely as real estate transactions. The relation of the government to the Indians is not to be measured by the law governing the ordinary relation of guardian and ward, nor are the limitations imposed on the alienation of land governed by the strict rules of law relating to grantor or grantee, but the United States, by virtue of its peculiar relationship to the Indians and to prevent the policy to be worked out through such legislation from being defeated may enforce such restrictions on alienation in the courts although retaining neither a legal nor an equitable estate in the lands after the allotment.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—RIGHT OF UNITED STATES TO MAINTAIN SUITS—CONSTRUCTION OF STATUTE.

The provision of Act May 27, 1908, c. 199, § 6, 35 Stat. 314, that "nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary including the bringing of any suit * * * to acquire or retain possession of restricted Indian lands * * * in cases where deeds, leases or contracts * * * have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof, such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act" is more than a saving clause and when read in connection with the part of the section appropriating $50,000 to cover the expenses incurred in such litigation is an implied grant of power to maintain such suits

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

† Rehearing denied August 20, 1910.

and such power extends to suits relating to allotments which were freed from restrictions by section 1 of the act in respect to conveyances or contracts previously made.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. § 15.*]

3. STATUTES (§ 185*)—CONSTRUCTION—IMPLIED PROVISIONS.

That which is implied is as much a part of a statute as that which is expressed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 264; Dec. Dig. § 185.*]

4. STATUTES (§ 217*)—CONSTRUCTION—EXTRINSIC EVIDENCE TO AID CONSTRUCTION.

The effect of a statute actually passed by Congress cannot be narrowed by reference to a bill which was never voted on, but was merely proposed in committee.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

5. INDIANS (§ 31*)—PROTECTION OF RIGHTS BY UNITED STATES—EFFECT OF GRANTING CITIZENSHIP.

The grant of citizenship to the Indians in Indian Territory by Act Feb. 8, 1887, c. 119, 24 Stat. 388, as amended by Act March 3, 1901, c. 868, 31 Stat. 1447, was intended for their protection, and was not a renunciation by the United States of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23; Dec. Dig. § 31.*]

6. INDIANS (§ 15*)—SUITS RESPECTING LANDS—PARTIES.

To a suit brought by the United States under the authority conferred by Act May 27, 1908, c. 199, § 6, 35 Stat. 314, to set aside a deed, lease, or contract made by an Indian allottee in violation of the statutory restrictions on alienation, the allottee is not an indispensable party.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. § 15.*]

7. PARTIES (§ 51*)—INDISPENSABLE PARTIES—RULE GOVERNING.

It is not the mere convenience of the parties before the court that renders absent parties indispensable, but the protection of the rights of those absent parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 76, 77; Dec. Dig. § 51.*]

8. EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS OF BILL.

A bill filed by the United States to cancel a large number of separate conveyances made by individual Indian allottees to the several defendants as invalid, because made in violation of a statute imposing restrictions upon the alienation of the land by the Indians, is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371–379; Dec. Dig. § 150.*]

9. INDIANS (§ 31*)—RESTRICTION ON POWER TO ALIENATE LAND—POWER OF CONGRESS TO EXTEND.

It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23; Dec. Dig. § 31.*]

Adams, Circuit Judge, dissenting.

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

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

These were seventeen suits in equity by the United States against James P. Allen and others, N. E. Patterson and others, Charles E. McPherren and others, F. B. Severs and others, Wilson Bruton and others, Norman Pruitt and others, James Jefferson and others, J. J. Creamer and others, Felix R. Phillips and others, J. M. Dickenson and others, James P. Allen and others, Walter F. Nichols and others, John F. McClellan and others, Alfred F. Goat and others, George C. Crump and others, C. J. Benson and others, and J. O. Davis and others. Decrees for defendants (171 Fed. 907), and complainant appeals. Reversed.

Charles W. Russell, Asst. Atty. Gen., for the United States.

S. T. Bledsoe, George S. Ramsey, B. B. Blakeney, James E. Humphrey, Joseph C. Stone, and Robert L. Owen, pro se (A. W. Clapp, O. L. Rider, Kenneth S. Muchison, Wm. M. Matthews, C. L. Thomas, N. A. Gibson, Robert J. Boone, George C. Butte, Garfield Johnson, T. S. Cobb, Crump, Rogers & Harris, Willmott & Wilhoit, W. L. McCann, Thomas H. Owen, W. B. Crossan, and Davis & Davis, on the briefs), for appellees.

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

AMIDON, District Judge. The lands of the Five Civilized Tribes were allotted in severalty to their members, subject to express restrictions against their alienation for specified periods of time. The bills in these suits charge that many thousand conveyances have been made in violation of those restrictions, and the suits have been brought by the United States to have some 4,000 of these conveyances declared to be void and canceled of record. The restrictions against alienation arise out of numerous statutes and treaties, and vary according to such matters as the amount of Indian blood of the allottee, whether the land was a homestead, and whether it was held as an original allotment or by inheritance. The grantees under the conveyances are classified according to some distinct feature of the restriction upon alienation, and all grantees coming under each class are combined as defendants in a single suit. The allottees are not made parties either as plaintiff or defendant, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration. They are assailed solely upon the ground that they were made in violation of the restriction which Congress imposed upon the alienation of the allotments.

These bills were demurred to upon numerous grounds. The demurrers were sustained by the trial court for the reason (1) that the complainant has not such an interest in the matters involved as entitles it to maintain the action; (2) that the allottees are necessary parties, and that there is therefore a defect of parties; (3) that the bills are multifarious. A decree was entered in each case dismissing the bill upon the merits, to review which is the object of this appeal.

The consideration of the case will be simplified if it is understood

at the outset that the plan of the government, in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) The added incentive which comes from the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far as it could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedience to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and, wherever they do not fit the private law of real property, they are declared to be ineffective.

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are, however, words of illustration, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the Five Civilized Tribes leads only to confusion and the subversion of the real scheme of government.

Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere brutum fulmen. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of Congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts?

To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the nation a pauperized, discontented, and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. When a suit in equity is an appropriate method for the enforcement of a governmental policy, the national government may maintain such a suit. The present case presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity. If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without redress. Governmental action cannot be thus paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes.

The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the Heff Case, 197 U. S. 489, 509, 25 Sup. Ct. 512, 49 L. Ed. 848:

"Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted), and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation."

Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of 25 years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. It is contended, however, in the present case, that that decision

is not controlling because there the government held the legal title to the property for a period of 25 years in trust for the Indian, whereas here the legal title has been conveyed to the Indian, but subject to a restraint upon alienation. The decision in the Rickert Case does not rest upon a principle of the law of real property, but upon the power of the nation to enforce its own measures. At page 444 of the opinion 188 U. S., at page 478 of 23 Sup. Ct. (47 L. Ed. 532), the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon "the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians." In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S. 444, 23 Sup. Ct. 478, 47 L. Ed. 532. This statement is approved in McKay v. Kalyton, 204 U. S. 458, 467, 27 Sup. Ct. 346, 51 L. Ed. 566.

But we are not left to inference from the general scheme of the national government in its dealings with the Five Civilized Tribes, to find authority for the maintenance of these suits. They are authorized by express act of Congress. The last paragraph of section 6 of the act of May 27, 1908, c. 199, 35 Stat. 312, is a saving clause. Viewed solely in that light it declares the belief and intent of Congress that the rights which it saves, exist. It does not, however, stop with the language which saves the rights specified, but proceeds to declare the conditions upon which those rights shall be exercised by stating that the suits shall be brought upon the recommendation of the Secretary of the Interior, and without cost to the allottees. It thus passes beyond the scope of a saving clause, and uses language which is consistent only with the grant of the power to institute the suits. When this language is read in connection with the earlier part of the section appropriating $50,000 to cover the expenses incurred by the Attorney General in this litigation, the intent of Congress, that the power to maintain the suits is granted, and its purpose that such suits should be instituted in proper cases, is clearly manifest. It is incredible that the purpose of Congress was simply to provide for the institution of suits to obtain a judicial determination as to whether the power of the government to maintain such suits existed. Congress by its own declaration could have placed that question beyond controversy, and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds. That which is implied is as much a part of a statute as that which is expressed. City of Little Rock v. U. S., 103 Fed. 418, 43 C. C. A. 261; United States v. Babbit, 1 Black, 55, 17 L. Ed. 94. Implications, far less clear than the power to maintain these suits, have been enforced by the courts. Gelpcke v. City of Dubuque, 1 Wall. 220, 17 L. Ed. 530; Postmaster General v. Early, 12 Wheat. 136, 146, 6 L. Ed. 577; Telegraph Company v. Eyser, 19 Wall. 419, 22 L. Ed. 43; Great Northern Railway Co. v. United States, 155 Fed. 945, 84 C. C. A. 93. The trial court held that because a statute conferring the jurisdiction here in question by more direct language was not enacted, though brought to the

attention of the committee having the present act in charge, that this amounted to an expression of the legislative intent that the right itself either did not exist or was so doubtful that the only proper procedure was to make provision for a judicial determination of its existence. Courts can find the intent of the Legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought to a vote in Congress and rejected. It was simply one of the measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed, would be to invent a new and dangerous canon of statutory interpretation.

Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the Heff Case, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. That decision, however, as now explained by the Supreme Court in United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. ——, lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the state." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the Celestine Case, where he expressly states that the Heff opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the Heff Case simply gives effect to this positive declaration of the legislative intent. In its dealings with the Five Civilized Nations, Congress has been at great pains to indicate a different purpose. Here it has from time to time, down to the organic act admitting Oklahoma and the provisions which it insisted should be embodied in the Constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the Heff Case is this: In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See, also, U. S. v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. ——.

The grant of citizenship to the members of the Five Nations was intended for their protection, and not to strip them of the protection of

the national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the state of their residence, this court still said in the case of United States v. Thurston County, 143 Fed. 287, 288, 74 C. C. A. 425, 426: "Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race." Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language.

Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to several classes of allotments. Section 6 of that act provides for the appointment of representatives of the Secretary of the Interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the name of the allottee to cancel and annul any conveyance or incumbrance thereof made in violation of any act of Congress. These provisions standing alone would afford a strong implication against the right of the government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property. By section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. How can the Attorney General contend that as to lands thus freed from restriction by the government he is truthfully representing its present policy by prosecuting these suits in its name? Again, it might well be urged that, inasmuch as Congress has authorized the agents of the Secretary of the Interior to maintain suits in the name of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. These contentions, in our judgment, would be controlling were it not for the last paragraph of section 6 of the act. It reads as follows:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit, and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

"Nothing in this act" includes the provisions from which the implication is drawn against the right of the government to maintain these suits. The later language of the paragraph extends that right to all conveyances which "have been made contrary to law with respect to said lands prior to the removal therefrom of restrictions upon the alienation thereof." According to the averments of the bills, every conveyance here involved falls clearly within these words. To deny the right of the government to maintain these suits is to repudiate the plain language and manifest object of the paragraph which we have quoted. The Indians and their lands were subject to the supervision of the Secretary of the Interior, and the act provides that the suits shall only be brought on his recommendation. The power of Congress to confer such an authority is beyond question. Whether the suits should be brought presents a question of administrative rather than judicial discretion. If Congress saw fit to reinvest allottees with a clear title to their allotments before freeing them from restraint by section 1 of the act, that is clearly a subject with whose wisdom the courts cannot interfere. It is our duty to give effect to the intent of Congress as declared by the statute. The Supreme Court in the case of United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. —, again enforces the duty of the courts to construe legislation of Congress in relation to the Indians so as to promote their interest. Applying that canon, we entertain no doubt of the right of the government to maintain these suits. They are brought in the name of the United States to enforce a right created by federal law. The jurisdiction of the Circuit Court is therefore plain.

Is there a defect of parties? The rule as to parties in equity was early stated by Mr. Justice Curtis in language so accurate and comprehensive that it has since been accepted by all federal courts. He says that parties are:

"(1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine, the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 130, 139, 15 L. Ed. 158.

Th Supreme Court in Waterman v. Canal Louisiana Bank Co., 215 U. S. 33, 49, 30 Sup. Ct. 10, 54 L. Ed. —, after quoting the above language with approval, condenses the rule as to indispensable parties as follows:

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court, without injuriously affecting the rights of such absent party."

That is the real ground of the decision of the Supreme Court in Minnesota v. Northern Securities Company, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. The decree there could not be enforced against the Northern Securities Company without destroying the rights of the Northern Pacific and Great Northern Railroad Companies, and their stockholders, who were not parties. See, also, Rogers v. Penobscott Mining Co., 154 Fed. 615, 83 C. C. A. 380. The allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds, their titles will be cleared of clouds; but, if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unnecessarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties.

The defense of multifariousness is without merit. That defense, as the Supreme Court has frequently declared, is "very largely a matter of convenience." United States v. Bell Telephone Co., 128 U. S. 315, 352, 9 Sup. Ct. 90, 91, 32 L. Ed. 450; Graves v. Ashburn, 215 U. S. 331, 335, 30 Sup. Ct. 108, 54 L. Ed. ——. It is addressed to the sound discretion of the court. The convenience both of the defendants and the government is conserved by joining in one action all such conveyances as the government claims are invalid because made in violation of a specific statute.

Only one question remains for consideration. The statutes imposing restraints upon alienation were changed from time to time between the year 1893, when the allotment of the lands in severalty began, and the time of their completion some 15 years later. It is earnestly contended by the defendants that after allotments had been made subject to a specific limitation, the government was without power to enlarge the period of that limitation; that the Indian obtained a vested right in his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the fourteenth amendment to the Constitution. So long

as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the federal government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the national government. Congress has from time to time asserted this authority, and to hold that its enactments in that regard are unconstitutional, would be disastrous to the Indian, and would probably still further confuse the already complicated title to lands in Oklahoma. The extension of the period of restriction under the general allotment act is referred to with approval in U. S. v. Celestine, 215 U. S. 291, 30 Sup. Ct. 93, 54 L. Ed. ——. It is, of course, true that conveyances of allotments to third parties in accordance with the law in force at the time the conveyances were made, could not be impaired by subsequent legislation on the part of Congress enlarging the period of restriction against alienation.

The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the federal government to adopt such measures for his welfare as experience should show to be necessary.

The decrees are reversed, and the trial court is directed to proceed with the suits in accordance with the views here expressed.

ADAMS, Circuit Judge (dissenting). I am unable to agree with my Associates that the United States can of its own motion, without the request or consent of the Indians whose rights are involved, maintain these suits to remove a cloud from their title. When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. The undivided interests which they originally owned in tribal property had been effectually partitioned in the process of allotment provided by the act of March, 1893 (Act March 3, 1893, c. 209, 27 Stat. 612), and subsequent acts supplemental thereto. Any reversionary interest of the United States dependent upon possible abandonment of the land or extinction of the tribe had been relinquished. The United States, therefore, had no proprietary right legal or equitable to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the state of Oklahoma, and had become entitled to all the rights, privileges, and immunities of such citizens. As a result of all these things guardianship of the government over them had ceased, and the Indians had become completely emancipated from federal control. Laws restricting alienation, hereafter referred to, had been passed for their protection, but this fact does not militate against the completeness of their emancipation. Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848.

With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be dis-

covered to justify the maintenance of these suits by the government; and this, it is claimed, is found in the obligation of the government to enforce a great national policy. The Debs Case, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and others of that character are cited in support of this discovery; but they do not, as I understand them, justify governmental intervention, in behalf of private citizens except in the discharge of duties intrusted to the care of the nation by the Constitution. The intervention of the government in the Debs Case appears to be justified on the ground that power over interstate commerce and the transportation of the mails was vested in the national government by the Constitution. Conceding, however, without admitting, that the government may intervene as complainant to redress the wrongs of a limited number of citizens arising out of matters not committed to its control by the Constitution, I think the national policy with respect to the Five Civilized Tribes is entirely inconsistent with the right or duty of the United States to institute suit in its own name for their benefit. The majority opinion dwells largely upon that part of the Indian policy which prevailed before the cessation of the national guardianship, that part of it which concerned the treatment of the Indians before emancipation, when a duty rested upon the government to protect them and prepare them for citizenship; but that time and that duty have passed away. Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. It has accordingly modified its former policy to meet the new conditions. It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence, and thrift. Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto—the defense of their rights, the redress of their wrongs, the establishment of homes, the support of themselves and their families, and generally speaking, the practice of the arts of civilized life—may aid them in their social and economic development. In view, doubtless, of the cupidity of men, and of their own natural improvidence, Congress with a view of encouraging and aiding them in their upward progress enacted (35 Stat. 312) that "All allotted lands of enrolled fullbloods, and enrolled mixedbloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one" except by permission of the Secretary of the Interior.

The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy, and thrift, and to this end after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their

right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases without the request or consent of the Indians is not only humiliating in itself but tends to defeat the true national policy by discouraging self-reliance and independence of action. The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized, if not commanded, in section 6 of the act of May 27, 1908, above cited. Section 1 of that act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Section 6 after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship enacts that:

"Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this act or any other act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

Notwithstanding other provisions of the act, referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States by and through the Secretary of the Interior should act with respect to the violation of restrictions primarily in an advisory way and instead of ever bringing suits in its own name at pleasure, should bring them only when requested by allottees, and then only in their names. If these suits can be maintained, it is not apparent where the government can stop in its litigation in behalf of private persons in the enforcement of national policies. There are certainly many recognized policies besides the Indian policy which might be materially subserved by the practice of governmental intervention as in this case. Where would it end?

In my opinion the judgment below should be affirmed.

DAY v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. April 16, 1910.)

No. 934.

1. MASTER AND SERVANT (§ 179*)—INJURIES TO SERVANT—FELLOW-SERVANT LAW—ABOLITION—CONSTITUTIONALITY.

A state constitutional provision abolishing the fellow-servant rule with reference to railroad employés is not in conflict with the federal Constitution or its amendments.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354–358; Dec. Dig. § 179.*]

2. MASTER AND SERVANT (§ 100*)—INJURIES TO SERVANT—RELIEF DEPARTMENT CONTRACT.

A railroad relief department contract, by which the employé was merely put to his election, on receiving an injury, between receiving benefits or suing the railroad company for damages, was not in violation of Const. Va. § 162 (Code 1904, p. cclix), abolishing the fellow-servant rule with reference to railroads, and declaring that every contract or agreement, express or implied, made by an employé to waive the benefits of the section, should be invalid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 166; Dec. Dig. § 100.*]

3. COURTS (§ 334*)—FEDERAL COURTS—STATE PRACTICE.

On a writ of error in an action at law, the Circuit Court is governed on questions of practice by rules prevailing in the courts of the state in which the case was tried.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 899; Dec. Dig. § 334.*]

4. MASTER AND SERVANT (§ 100*)—INJURIES TO SERVANT—RELIEF DEPARTMENT CONTRACT—PUBLIC POLICY.

Where a railroad employé became a member of its relief department pursuant to a voluntary application in writing, and was fully advised at the time of all the departmental regulations, a provision thereof that, in case of injury, he was required to elect between his right to sue for damages or to receive benefits, was not invalid as contrary to public policy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166–170; Dec. Dig. § 100.*

Acceptance of benefits from relief association or insurance procured by master as affecting master's liability for injuries to servant, see note to Atlantic Coast Line R. Co. v. Dunning, 94 C. C. A. 139.]

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

Action by W. T. Day against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error, hereinafter called the "plaintiff," sued the defendant in error, hereinafter called the "defendant," for the recovery of damages alleged to have been sustained by a personal injury caused by the negligence of defendant. In his declaration he avers: That on and prior to August 2, 1907, he was in the employment of defendant as an engineman, operating and running a locomotive engine drawing a train of freight cars over defendant's road between Rocky Mount, in the state of North Carolina, and Pinners Point, in the state of Virginia. That on the 3d day of August, 1907, the throttle valve on the engine was, and had been for several days, out of repair. "That

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

he had notified defendant's employé at Rocky Mount, whose duty it was to repair same. That, notwithstanding such notice, they negligently and carelessly failed to repair said valve and permitted it to remain out of repair." That by reason of the condition of said valve the steam "came into the dome of the engine." The declaration describes the construction of the engine, the office performed by the several parts in its operation, and the manner of operating it. He states that it is necessary, in operating the engine, that an engineman and fireman shall be upon it; the engineman being the superior in authority. He sets out a rule of the defendant company by which the engineman is directed not to leave his engine during a trip, except in case of necessity, and when he does so the fireman, or some other competent person, be left in charge. The fireman is required to take charge of the engine when the engineman is absent, and not to leave it until his return; nor suffer any unauthorized person to be upon it.

Plaintiff thus describes the manner in which he was injured: "On the evening of August 3, 1907, when plaintiff had reached the town of Suffolk, in Virginia, on his usual trip from Rocky Mount to Pinners Point, he stopped his train to take on water for his engine. Plaintiff dismounted from cab, directing the fireman to take charge of the engine in his absence, and walked on the ground to the front of the engine, where he proceeded to oil the eccentric of the engine, which needed oiling. Before dismounting he closed the throttle as well as it could be in its leaky condition, set the upright lever at the center of the quadrant, which made it impossible for steam to get into the cylinder and start the engine. He got up on the main driving rod of the engine, a large bar of iron, which connects the two driving wheels and is operated on a crank, so that it rises and falls as the driving wheels revolve. He was on his knees on said driving rod at the front end of the engine, 25 feet from the cab, and from the lever and other appliances that control the engine and out of sight of them, with his arm extended under the boiler oiling the eccentric. While in this position, the fireman being in charge of the engine, and wanting a hammer that was behind the upright lever, carelessly and negligently pushed said lever forward so that he might reach in behind it and get the hammer. This opened the valve that let steam into the cylinder. The leaky throttle had allowed the steam to come down the said valve, and this, being opened by the fireman's careless and negligent act, let the steam into the cylinder and started the engine. The driving rod, being raised by this motion, threw the plaintiff to the ground without any negligence on his part, upon his back, and he fell upon an old iron drawhead and sustained serious injury to his spine, by reason of which injury he is unable to continue his work as an engineman, all of which was the result of said fireman's careless and negligent act," etc. He puts his damage at $30,000.

Defendant filed a special plea in which it sets forth that, "realizing the hazards to which its employés were exposed, and the large premiums demanded of them by the insurance companies, it has, prior to the time when plaintiff entered into the employment, established, for such of its employés as voluntarily desired to join it, a mutual benefit department of its service, called the 'Relief Department.'" The provisions of the Relief Department are set out in full, and a copy of the rules and regulations by which it is operated and controlled are attached and made a part of the plea. Defendant in its special plea also sets out the amount received and paid out by it in the operation of said department, together with the amount for which it is liable by reason of insurance. It further avers that plaintiff, at the time of entering its employment on October 27, 1906, was eligible to, and made a voluntary application in writing in due form to be admitted as a member of, said Relief Department under the terms of which said application he agreed to the terms and conditions of said contract, and further agreed to be bound by all the regulations of said department under the terms of which said application he was, on said 27th day of October, 1906, duly admitted to membership in said Relief Department and remained a member thereof until the 5th day of May, 1908. "That on or about the 2d day of August, 1907, the plaintiff in this action was injured by an accident at Suffolk, Va." That by reason of said injury plaintiff was en-

titled, under the terms of his contract of membership, to benefits provided by said regulations, from the 3d day of August, 1907, at the rate of $2 per day, during the continuance of disability occasioned by said accident and injury, for the term of 52 weeks thence next ensuing, and thereafter at the rate of $1 per day during the continuance of said disability or until he was able to work. That, after said injury, pursuant to his contract of membership and to the regulations of said department, plaintiff was entitled to elect between his right to receive benefits from said department and his right to bring suit against this defendant on account of said injury. That, pursuant to his said right, plaintiff did exercise his election and did accept and receive from the said department benefits to which he was entitled under the regulations thereof, to wit, $2 per day for the term of 84 days, and that, pursuant to said election the said department paid plaintiff, by way of benefits, the sum of $168; said payment being made under the terms of said regulations, by drafts or checks on said relief fund. Defendant set up and relies upon the matters and things set forth in its special plea, the election of plaintiff, and the receipts by him of the benefits to which he was entitled, as a full and complete release from any and all claims or demands against it by reason of the injury sustained by him, all of which is properly pleaded. Defendant also, by proper plea, denied any liability to plaintiff, averring that it was not guilty, etc.

Plaintiff demurred to the special plea for that "it appears from the declaration that the plaintiff was injured through the negligence of a fellow servant, and that section 162 of the Constitution of Virginia (Code 1904, p. cclix) makes null and void any and all and every contract that waives the benefits of that section, and the contract set up by the defendant attempts to waive the benefit of that section."

The cause came on for trial upon the demurrer to the special plea. The court overruled the demurrer and gave plaintiff leave to answer the plea, which he declined to do, whereupon the court rendered judgment, dismissing the action. Plaintiff excepted, assigned as error the action of the court overruling the demurrer, and rendered judgment against him, and brought the case to this court upon a writ of error.

W. S. McNeill, for plaintiff in error.

W. B. McIlwaine and M. Carter Hall, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge (after stating the facts as above). Passing, for the present, other questions discussed on the argument, we pause to inquire whether, as alleged by plaintiff, the Constitution of Virginia, section 162 (Code 1904, p. cclix), prohibits or invalidates the contract relied upon by defendant, as the basis of the release by the plaintiff, of the cause of action set out in the declaration. For this purpose the averments of the declaration are taken to be admitted by the special plea, and those of the plea to be admitted by the demurrer. So much of section 162 of the Constitution of Virginia as relates to the question presented by the pleadings is in these words:

"The doctrine of fellow servants, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant, or servants of the common master, to the extent hereinafter stated, is abolished as to every railroad company engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in, or upon a car or engine standing upon a track, or, in the physical operation of a train, car, engine or switch, or in any service requiring his presence upon a train, car or engine; and every such employé shall have the same right to recover for every injury suffered by him from the acts or omissions of any other

employé or employés of the common master that a servant would have (at the time when this Constitution goes into effect) if such acts or omissions were those of the master himself in the performance of a non assignable duty."

The section contains further provisions, in regard to liability for the negligence of a fellow servant not material to any phase of this case, and further provides:

"The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operation of trains, cars or engines shall be regarded as different departments of labor, within the meaning of this section; knowledge by any such railroad employé injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby."

After providing for an action by the legal or personal representative of any employé whose death shall be caused by any injury sustained by the acts or omissions of a fellow servant or defective ways, it is provided:

"Every contract or agreement, express or implied, made by an employé to waive the benefits of this section shall be null and void." Section 162, Const. Va.

It was evidently the purpose of the framers of this section of the Constitution of Virginia to abolish the common-law doctrine of the nonliability of the common master for injuries resulting from the negligence, either by acts, or omissions, of a fellow servant, subject to certain exceptions and limitations. Beginning with the enactment of the employer's liability act by the British Parliament, we find, in many American states and continental countries of Europe, the enactment of similar statutes, the purpose and effect of which are either to abolish the doctrine altogether or to restrict and limit its application—they are usually confined to employés of railroads. Their constitutionality has been upheld by the courts with practical uniformity. That they do not conflict with the federal Constitution, or the amendments thereto, is settled. Missouri Pacific Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Chicago, Kansas & Western Railroad Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675.

Assuming that the averments of the declaration bring the plaintiff's case within the provisions of the Constitution, and that "he was injured by an act or omission of a fellow servant," as defined and limited by the language of the section, does the contract, set forth in the special plea, waive any of the "benefits" conferred by said section? It is manifest that, by becoming a member of the Relief Department, plaintiff did not waive, or deprive himself of the right to maintain, an action against defendant for an injury sustained by him while in its service as defined by the Constitution "by an act or omission of a fellow servant." There is nothing in the rules or regulations of the Relief Department which could be averred or pleaded in bar of an action brought by him for such injury; nor did he, by becoming a member thereof, make any "contract, express or implied," by which he waived any of the "benefits" conferred upon, or secured to, him by the Constitution. Giving the language of the section the most liberal

construction possible, nothing more is secured to the employé, injured by the negligence of a fellow servant, than the right to recover from the common master damages for such injury, in the same manner and to the same extent, as if the same acts or omissions were those of the master himself in the performance of a nonassignable duty. We are unable to perceive how, by any possible interpretation, the scheme known as the Relief Department, or becoming a member thereof, can be said to waive the right of action secured to the employé by the Constitution. As uniformly held by other courts, in which the same contention has been made, the employé does not waive, or agree to waive, any rights to which he is entitled by becoming a member of the Relief Department. He simply agrees that, after the injury is sustained, and his cause of action accrues, he will elect whether to sue for damages or accept the benefits secured by the Relief Department—that he will not do both. There is no suggestion that plaintiff made his election under such circumstances or conditions, either mental, moral, or physical, making it inequitable to enforce it; similar statutes have been enacted, whereby agreements made in advance of an injury, caused by the negligence of a fellow servant, or defective appliances, ways, or means are declared to be invalid. The courts have held that becoming a member of the Relief Department was not within the letter or spirit of these statutes. Pittsburgh, C., C. & St. L. R. R. v. Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 511; Railroad v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 643; Hamilton v. Railroad (C. C.) 118 Fed. 94. At the moment plaintiff sustained the injury for which this action is brought, the right of action, or "benefit," secured to him by the Constitution (section 162) of Virginia was complete; his membership in the Relief Department did not affect it in the slightest degree.

Defendant insists that, the ground of the demurrer being specifically limited to the provisions of the section 162 of the Constitution, it is not open to plaintiff, upon this writ of error, to attack the special plea for any other ground. The assignment of error is confined to the action of the court in overruling the demurrer and rendering judgment against plaintiff. This being an action at law, we are governed, in questions of practice, as near as may be, by rules prevailing in the courts of the state of Virginia. Passing the question of practice, we will consider the other question, argued by counsel for plaintiff in a well-considered oral argument and printed brief, in which he insists that, independent of the prohibitory provisions of the Constitution, the contract entered into by plaintiff, when he became a member of the Relief Department, is against public policy and void. In passing upon this contention we are confined to averments in the special plea, which are admitted pro hac vice to be true. This excludes any suggestion that the plaintiff was not fully advised of the regulations of the Relief Department as it alleges "that a book containing the regulations of the said Relief Department was on or about May 30, 1907, delivered to the plaintiff," or that he did not enter into it voluntarily, as it is alleged that "he made a voluntary application in writing in due and legal form to be admitted as a member of said Relief Department," or that, after sustaining the injury, he was under coercion, or was misled, or

kept in ignorance of his rights in the premises, as it is alleged "that he did exercise his election and did accept and receive from said department benefits to which he was entitled under the regulations thereof."

The sole question, therefore, is whether there is such inherent vice in the plan or scheme, established by defendant, set forth in the plea, as brings it under the condemnation of the principles of the common law, rendering all contracts made, and all acts done under and pursuant to it, null and void, or whether the relations existing between the plaintiff and the defendant were such as to render it contrary to sound public policy for them to enter into the contract, or to enforce rights, or set up defenses acquired under it. The question of the validity of the contract, or contracts, in all respects similar to the one before us, has been so fully discussed by the courts, both state and federal, and so uniformily upheld, that nothing new is open to be said. It has been expressly decided by this court. In A. C. L. R. Co. v. Dunning, 166 Fed. 850, 94 C. C. A. 128, in a well-considered and amply-sustained opinion by Judge Morris, in which Mr. Chief Justice Fuller concurred, the same contract relied upon by defendant herein was upheld. The learned judge says:

"By a great number of carefully considered adjudications of the courts, both state and federal, contracts of this character have been upheld and determined not to be against a sound public policy, but distinctly beneficial to the employé, as well as wise on the part of the employer."

He cites a large number of cases sustaining his opinion. It is not necessary that we do more than refer to the volume of the Federal Reporter in which the case is reported. The basis upon which all of the decisions rest is that, by becoming a member of the Relief Department, the employé does not waive, or contract against, liability for damages for an injury sustained by the negligence of the employé. That, after sustaining the injury, he is free to maintain an action for damages without regard to his being a member of the department. That he is entitled to the benefits secured by membership without regard to negligence or legal liability of the employer. That when he elects to take such benefits he releases, and not until then, the employer from other or further liability. With an evident and frequently expressed determination to strictly construe all contracts made by employés of public service corporations, or those in whose service the employment involves unusual hazard, waiving any rights, the courts have, with practical uniformity, and by the same process of reasoning, upheld this plan or scheme, adopted by railroad companies, and, so far as we are informed, concurred in by their employés.

This injury having occurred prior to the enactment of the federal employer's liability act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), the provision of that statute in regard to these contracts is not presented.

The judgment must be affirmed.

FIDELITY TRUST & SAFE DEPOSIT CO. et al. v. ARCHER.

(Circuit Court of Appeals, Third Circuit. October 6, 1909. Rehearing Denied April 2, 1910.)

No. 35 (1,211).

CORPORATIONS (§ 259*)—JURISDICTION—ADEQUATE REMEDY AT LAW—PREVENTING MULTIPLICITY OF SUITS—SUITS BY RECEIVER AGAINST STOCKHOLDERS.

A federal court of equity is without jurisdiction of a suit by the receiver of an insolvent corporation against numerous stockholders to enforce payment of an assessment of a fixed sum per share on its stock, made by authority of a court in another jurisdiction in a suit to wind up the affairs of the corporation to which suit the defendant stockholders were not individually parties, either on the ground of preventing a multiplicity of suits, or on the ground that it is ancillary to the main suit, where it does not appear that there is any ground of defense common to the defendants, and the bill does not pray for any equitable relief, but merely seeks to collect from each defendant a definite sum as the assessment against his stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1059–1067; Dec. Dig. § 259.*

Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

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

In Equity. Suit by F. Morse Archer, who was substituted for Arthur K. Brown, as receiver of the American Alkali Company, against the Fidelity Trust & Safe Deposit Company, Annie E. Sinnott, Mary E. Sinnott, John Sinnott, and Walter George Smith, executors of the will of Joseph F. Sinnott, deceased. Decree for complainant, and defendants appeal. Reversed.

For opinions below, see 156 Fed. 697; 166 Fed. 488.

Ira J. Williams, for appellants.

Reynolds D. Brown, for appellee.

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

BRADFORD, District Judge. This is an appeal by Fidelity Trust and Safe Deposit Company, Annie E. Sinnott, Mary E. Sinnott, John Sinnott and Walter George Smith, Executors of Joseph F. Sinnott, deceased, from a decree of the circuit court of the United States for the eastern district of Pennsylvania, in a suit brought by Arthur K. Brown, surviving receiver of American Alkali Company, against the appellants and a large number of other defendants as preferred stockholders of that company, for the purpose of collecting an assessment for each share of preferred stock held by them in that company. A decree against the appellants was entered December 30, 1908, directing the payment by them, as the holders of 1,000 shares of preferred

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

stock, of $2,910, being an assessment of $2,50 per share and the interest thereon from April 5, 1906. There are numerous assignments of error, the first of which is to the effect that the court below had no equitable jurisdiction in this case, there being, as alleged, an adequate remedy at law. We shall now consider this point and in order satisfactorily to deal with it it is necessary to allude to the circumstances under which the suit was brought. The American Alkali Company was incorporated under the laws of New Jersey May 4, 1899, for the purpose, among other things, of manufacturing, buying, selling, dealing in and using alkalies and chemicals of all kinds and obtaining letters patent for any invention in connection with its business. Its total authorized capital stock amounted to $30,000,000, divided into 600,000 shares of the par value of $50 each, of which 120,000 were preferred stock and the remaining 480,000 common stock. The certificate of incorporation provided that:

"After payment of $10 per share on the preferred stock, the subscribers thereto shall not be liable for any balance of their subscription excepting upon such shares as shall stand of record on the books of the company in their names at the time when any subsequent assessments or calls are made, but the holders of such shares of record on the books of the company at that time, and they only, shall be liable for the same."

It further provided that the corporation might commence business after $2,000 of the capital stock had been subscribed for. Walter A. Kirkpatrick on behalf of himself and all other creditors and stockholders of the American Alkali Company filed a bill in equity against that corporation September 9, 1902, in the circuit court of the United States for the district of New Jersey, setting forth, among other things, that he was the registered owner of one hundred shares of its capital stock, and that the corporation was insolvent, and praying, among other things, that a receiver of the corporation be appointed with power to collect and take possession of all its property, and to exercise all rights of ownership with respect to shares of stock owned by and registered in its name, including the right to vote thereon, collect and receive dividends and income therefrom and apply the same as directed by the court; that the rights of the complainant and all other stockholders and creditors of the corporation be ascertained and that all the assets of the corporation be marshaled and administered. On the above bill the court, September 9, 1902, appointed Arthur K. Brown and Henry I. Budd, Jr., receivers of the corporation. The interlocutory decree appointing the receivers authorized them to exercise "all the general powers of receivers in cases of this kind," and contained other provisions touching their power and authority not necessary to mention in this connection. The receivers so appointed duly qualified and entered upon the discharge of their duties. September 11, 1902, Kirkpatrick, on whose bill receivers were appointed in New Jersey, as above mentioned, filed a bill against the American Alkali Company in the circuit court of the United States for the eastern district of Pennsylvania, which, after setting forth the proceedings in New Jersey, prayed the appointment of receivers of the corporation for Pennsylvania, and contained, among others, the following prayer:

"(3) That your Honorable Court will make such orders and decrees, preliminary and final, as are prayed for in said bill by your complainant, in the circuit court for the district of New Jersey, and that your Honors will also make all such other and necessary orders, judgments and decrees as may be required in aid of said bill; and that your Honors will take ancillary jurisdiction with said circuit court of the United States for the district of New Jersey, and will give your complainant all the relief which may be necessary to accomplish the purpose of filing said bill; and finally that your Honors will order and direct the receivers appointed in this suit as herein prayed, to account to the receivers appointed as aforesaid in the United States Circuit Court for the district of New Jersey for all sums which shall be received by them after the costs and expenses incident to this suit, and all reasonable allowance to complainant by way of counsel fees shall have been provided for and paid."

On this bill Brown and Budd were, September 11, 1902, appointed receivers for Pennsylvania with powers similar, save as to territory, to those conferred on them in New Jersey. The court, however, made no order or decree in conformity to the above quoted prayer. The receivers duly qualified and entered upon the discharge of their duties in Pennsylvania. It appears from the record that September 12, 1901, the board of directors of the American Alkali Company, for the purpose of providing funds for the completion of its then works, the building of additional works, and furnishing working capital, by resolution laid an assessment of $10 per share on each share of the preferred stock, payable in four instalments of $2.50 each respectively October 21, 1901, January 21, 1902, April 21, 1902, and July 21, 1902. September 25, 1901, the time for paying the first instalment was extended to November 11, 1901. It further appears that Joseph F. Sinnott was an original subscriber for 2,000 shares of the preferred stock of the corporation of 1,000 of which he became the registered owner, under certificates Nos. 141 and 142, each for 500 shares, dated May 31, 1899. The shares represented by these two certificates were held and owned by him until his death and by his executors thereafter until and after the bringing of this suit October 13, 1906. The decedent had full knowledge of the laying of the above mentioned assessment at or about the time it was laid. Budd having died, Brown as surviving receiver applied July 14, 1905, to the circuit court in New Jersey for an order authorizing an assessment of $2.50 per share upon the holders of the preferred stock who had not paid the first instalment of the assessment laid September 12, 1901, and the court, August 31, 1905, granted his application. The assessment thus authorized was made payable on or before October 4, 1905, and subsequently the time was extended to April 5, 1906. In September, 1906, the surviving receiver presented his petition to the court below setting forth, among other things, as follows:

"Your petitioner notified the holders of the preferred stock of the American Alkali Company who had not paid the assessment levied by the board on September 12, 1901, of the assessment authorized by the court on August 31, 1905, and has collected from some of the holders of said preferred stock the assessment thus authorized by the court. There are, however, a large number (aggregating between 100 and 200) of the holders of the preferred stock who have not paid the said assessment, and who are residents of the eastern district of Pennsylvania, and therefore within the jurisdiction of your Honorable Court. Against most of these persons either the American Alkali Company itself, be-

fore the date of the day of the appointment of the receivers in September, 1902, or the receivers after their appointment, have instituted separate suits at law in order to recover the assessment made by the board on September 12, 1901, and many of these suits in which the plaintiffs have not hitherto been able to reduce the claims to judgment, are still pending in the various courts in the eastern district of Pennsylvania. Your petitioner is now advised by counsel that rather than press all of the existing suits (to which certain technical defences growing out of the form of the assessment by the board have been made), and rather than bring new and separate suits against the various holders of the preferred stock, it would be much more advantageous and expeditious and tend to a prompter termination of the receivership for him to file a single bill in equity in this case against all of the holders of the preferred stock who are residents of the eastern district of Pennsylvania who can be properly included in such a bill, and thus avoid much litigation, delay and expense,"

and praying

"for leave to discontinue such of the pending suits at law against the various stockholders who have not paid the assessment as he may be advised by counsel, and for leave to file a single bill in equity in this cause against such holders of the preferred stock of the American Alkali Company who have not paid the assessment aforesaid as are residents of the eastern district of Pennsylvania, and as, in the opinion of counsel, should be included in such bill."

On this petition the court below, September 18, 1906, granted an order in conformity to its prayer, and pursuant to this order this suit was brought. The facts enumerated show that this suit, while not brought by petition but by bill, is nevertheless part and parcel of the proceedings theretofore instituted in Pennsylvania in aid of the proceedings had in New Jersey for winding up the affairs and distributing the assets of the American Alkali Company. If the bill as filed came within the equitable jurisdiction of the court below, that jurisdiction could not be defeated by subsequent payments of the assessment made by some of the defendants. Under these circumstances did or not the bill fall within the equitable jurisdiction of the court below? Aside from the prayer for further or other relief and for subpœna, the bill contains only the following prayer:

"That it be decreed that each of the defendants be ordered to pay to the plaintiff the assessment of $2.50 per share authorized by the United States circuit court for the district of New Jersey on August 31, 1905, and levied by plaintiff on September 19, 1905, upon the number of shares of preferred stock of the American Alkali Company set opposite their respective names, together with interest thereon from April 5, 1906."

Waiving for present purposes the question whether the assessment directed in New Jersey August 31, 1905, and there levied by the surviving receiver September 19, 1905, was operative with respect to preferred stockholders residing in Pennsylvania, and not within the jurisdiction of the circuit court in New Jersey, and on the assumption that the above question should be answered in the affirmative—a point on which we express no opinion—the claims made by the bill against the defendants are legal, in contradistinction to equitable demands, for which actions at law might be brought against the several defendants respectively. The bill does not pray for an account, nor does it involve contribution of any kind between the defendants. If it can be sustained the equitable jurisdiction must rest upon the avoidance of a

multiplicity of suits and special circumstances rendering a resort to equity proper. While it may be urged that it would be of advantage that the claims made against the several defendants should all be embraced in one suit to prevent multiplicity, it may also, on the other hand, be urged that such a suit, while single in form, is but a conglomeration of suits for legal demands involving different issues and different proofs and resulting in saving, if any, but little expense. Nor does the fact that this bill is ancillary to the receivership proceedings in Pennsylvania and New Jersey furnish any justification, so far as jurisdiction is concerned, for resorting to a suit in equity rather than having recourse to actions at law. For the usual jurisdictional requisites of diversity of citizenship and a controversy involving a jurisdictional amount have no application to ancillary proceedings whether in equity or at law.

At the threshold of the discussion of the question of jurisdiction we are confronted with the case of Hale v. Allinson, 188 U. S. 156, 23 Sup. Ct. 244, 47 L. Ed. 380, which went up from this circuit. In that case it was held, among other things, that a receiver of an insolvent Minnesota corporation, appointed by a court of equity in that state, could not maintain a single suit in equity in the circuit court of the United States in Pennsylvania against all of the Pennsylvania stockholders of the corporation to enforce the statutory liability of each defendant as a stockholder, on the ground that a single action would prevent a multiplicity of suits, or on the ground that it was an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree in the proceedings in Minnesota, in which the Pennsylvania stockholders had been named as defendants with all the other stockholders, the Pennsylvania stockholders not having been served with process and not having appeared. The court in discussing the first point said:

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction. We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject matter among such defendants, but where there is a community of interest among

them in the questions of law and fact involved in the general controversy. Is there, upon the complainant's theory of this case, any such common interest among these defendants as to the questions of fact that may be put in issue between them and the plaintiff? Each defendant's defence may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defence, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another. * * * The facts surrounding the present case and the reasons for holding that they do not bring it within the principle of preventing a multiplicity of suits are so well stated in the opinion of McPherson, District Judge, in this case [C. C.] 102 Fed. 790, that we quote the same. After speaking of the alleged conclusiveness of the Minnesota decree upon the question therein decided, the judge continued:

" 'Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individuals charged therewith? And in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. Bank v. Farnum, 176 U. S. 640 [20 Sup. Ct. 506, 44 L. Ed. 619]. Assuming that position to be sound (and, if I do not so assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are to be affected—the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defence, and defences may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defences are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was a forgery; what connection has that averment with B's contention, that his subscription was made by an agent who had exceeded his powers? or with C's defence, that his subscription was obtained by fraudulent representations? or with D's defence, that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defence, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defences, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.' We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

In discussing the contention that the suit should have been maintained on the ground that it was an ancillary proceeding the court said:

"All the non-resident stockholders were but nominal parties in the Minnesota suit. * * * The complainant claims that the non-resident stockholders are bound because the corporation was a party, not because they were parties to the suit. There is no decree or judgment, therefore, against the stockholders who were non-residents. The claim that they are bound by certain findings of fact by the court, because of the corporation being a party and in law representing them to that extent, assuming it for this purpose to be well founded, is far from transforming a decree against resident stockholders into one against non-residents who were not parties to the action. Even assuming that the decree concludes them upon certain facts found in that action where there was no decree against them, still, another action in another jurisdiction to enforce their liability as originally created by statute cannot within any reason be said to be one to enforce the former judgment. Indeed it is because of the very fact that no judgment was or could be obtained against the non-resident stockholders in the Minnesota suit that the Pennsylvania Federal court is asked to exercise its jurisdiction and give judgment against the defendants on their statutory liability."

The case of Hale v. Allinson has never, so far as we are aware, been overruled; nor have the views expressed in the opinion been questioned by the Supreme Court. That case supports the contention that the court below was without authority to entertain the present bill, unless the case before us can be substantially distinguished from it in principle. We shall refer to some of the cases bearing upon the subject. In White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, the receiver of an insolvent corporation presented a petition stating that a large proportion of its assets consisted of promissory notes given for land purchased from it, upon which liens had been retained to secure their payment, and asked and obtained leave to proceed by bill or petition in a single suit against all the persons indebted to the corporation on such notes. The receiver pursuant to this leave filed a bill against all of such alleged debtors, in which it was, among other things, alleged that special liens were retained in each case in the deed to the purchaser to secure the deferred payments of the purchase money, and the court was asked to enforce such liens by sale of the lands for the satisfaction of the balance of the purchase money due separately from each and all of the defendants upon their respective notes. No exception was taken to the form of the bill by demurrer or otherwise; and nearly all of the defendants answered denying their liability. A decree having been entered for the complainant, an appeal was taken to the circuit court of appeals and the following question was certified to the Supreme Court:

"Had the circuit court of the United States in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2,000."

This question was answered in the affirmative; the court, among other things, saying:

"While the receiver prayed in his petition to bring in all the debtors by bill or petition in one suit, alleging that it was so requested by creditors, in

order to avoid the expense of a separate suit against each; and the bill was brought in that form against 130 defendants, who were charged to be severally indebted upon notes given for lots of land purchased from the company, no exception was taken to the form of the bill by demurrer or otherwise, but the defendants answered, denying their liability. The question certified does not, as we understand it, demand the opinion of this court as to whether a single bill against all these defendants would lie for the amounts severally due by them (upon which point we do not feel called upon to express an opinion); but whether so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2,000, the court has jurisdiction to render a judgment against them."

White v. Ewing is different from the case before us in several particulars. It involved the enforcement of liens against real estate which is a subject of equitable cognizance. It passed upon the right of the receiver to recover from any one debtor a sum not exceeding $2,000; the amount decreed against the appellants here being $2,500 with interest from a certain date. No question was raised whether a single bill against all of the defendants would lie for the amounts severally due from them, on which point the Supreme Court expressly refrained from expressing an opinion. It is evident that White v. Ewing is not an authority to support the contention of the appellee. Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189, decided by the circuit court of appeals for the eighth circuit is one of the leading cases on the subject of equitable jurisdiction founded on the prevention of a multiplicity of suits. In that case it was held that a receiver of an insolvent corporation of Nebraska properly filed a single bill against a number of defendants to enforce the collection of their unpaid subscriptions to the stock of that corporation. It was held that where there is a common and decisive point of litigation between a complainant and several defendants separately liable a bill in equity may lie against all of them. But the court carefully distinguished that case from such a case as that before us, and in referring to Hale v. Allinson, among other things, said:

"In that case there was no community of interest among the defendants in the controversies presented for litigation, and the convenience of the complainant in pursuing the single suit was overcome by the inconvenience of such a course to the several defendants. In this case there is a community of interest among the defendants in every question of law and of fact presented by the controversies, and the convenience of all parties will be better served by a determination of them here in a single suit, than by repeated decisions of them in nine separate actions at law. * * * In the suit under consideration, every point of litigation between complainant and the defendants is common to all the latter. * * * The same facts proved by the same evidence condition the defenses of each of the defendants, and the same questions of law are presented by each of them for our determination."

In Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, a bill had been filed for an injunction to restrain a number of ticket brokers or scalpers from dealing in non-transferable round trip tickets over the lines of the railroad company. There was no connection or common interest in the suit between the defendants. The case came before the Supreme Court on certiorari to the circuit court of appeals which decreed that the defendants should be enjoined. The Supreme Court in affirming the decree rec-

ognized and approved the distinction made by the same court in Hale v. Allinson. It said:

"The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the circuit court of appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in Hale v. Allinson, 188 U. S. 56, 77 [23 Sup. Ct. 244, 47 L. Ed. 380]."

In Bailey v. Tillinghast, 99 Fed. 801, 40 C. C. A. 93, the circuit court of appeals of the sixth circuit held that the receiver of an insolvent national bank might maintain a suit in equity to enforce an assessment against stockholders, where such an assessment is less than the full amount of their liability and where the question of law involved is common to the defendants and rests upon substantially the same facts. The court said:

"There is a common question in the case between the receiver and the defendants, namely, the question whether the latter were released from their stock subscription by the fact that, whereas the resolution for increasing the stock in the sum of $300,000 was that under which their subscription took place, yet subsequently, by proceedings to which they did not consent, the proposed increase was reduced to $150,000. The protest interposed by Bailey in behalf of himself and the other stockholders to the certification by the comptroller of the modified increase of the capital stock of the bank assumes that they stood on the common ground already stated. And these circumstances, namely, the great number of the parties on one side or the other, the identity of the question of law, and the similarity of the facts in the several controversies between the respective parties, are the basis on which the jurisdiction rests."

Pennsylvania Co. v. Bay (C. C.) 150 Fed. 770, and Illinois Cent. R. Co. v. Caffrey (C. C.) 128 Fed. 770, 775, and other cases unnecessary to cite, also support the proposition that a bill is not multifarious by reason of the joinder of many defendants not connected with each other where all are engaged in the same business and there is a common ground of defense in law and fact to the relief sought against them. But in the case now before us it does not appear that there was any common ground of law or of fact as between the defendants on which they stood by way of defense; and possibly each might urge by way of defense to the collection of the assessment facts and points of law variant from those relied on by any other defendant.

At this point it is material to consider whether the present bill prays relief against any one of the defendants of such nature as to require or justify a proceeding in equity rather than an action at law. As already stated the bill does not pray for or involve an accounting or contribution. It seeks simply the collection of legal pecuniary claims from the several defendants fixed in amount at the sum of $2.50 on each of the preferred shares held by them respectively. The object of the suit is to place in the hands of the receiver such moneys as he may be entitled by reason of the assessment to receive from them for the payment of the debts of the American Alkali Company.

The authorities clearly establish the principles which must determine whether in a given case a statutory liability of a stockholder or his liability for unpaid subscriptions or assessments on his stock should be enforced in equity or at law. In Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376, an action at law had been brought by a creditor of an insolvent state bank against one of its stockholders to recover a claim he held against the bank. The charter provided that "individual stockholders, having shares in said bank, shall be bound respectively for all the debts of the bank in proportion to their stock holden therein." The court below gave judgment for the plaintiff, which was reversed by the Supreme Court; the latter court, among other things, saying:

"Each stockholder is bound for the debts in proportion to his stock. His liability is not limited to the par value of his stock, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. For the purposes of this case it is not necessary to decide what effect the insolvency of any of the stockholders would have upon the liability of such as are solvent. It is certain that no stockholder is liable for more than his proportion of the debts. This proportion can only be ascertained upon an account of the debts and stock and a pro rata distribution of the indebtedness among the several stockholders. The proper action, therefor, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, which can bring before it all the necessary parties and adjust all their rights. Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors."

In Terry v. Tubman, 92 U. S. 156, 161 (23 L. Ed. 537), the court said:

"The case of Pollard v. Bailey, 20 Wall. 520 [22 L. Ed. 376], is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt to the possible exclusion of others similarly situated. The proper proceeding is in equity where all claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made."

While the principle of Pollard v. Bailey and Terry v. Tubman and other similar cases palpably has no application to that now before us, they are valuable as illustrating the essential difference between them and this suit considered with reference to any one of the defendants. In Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, the court held that the liability of a stockholder of a New York corporation under a provision in a general incorporation act of that state that "all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company," to the amount of stock held by them respectively, created a legal claim enforceable at law. The court, among other things, said:

"Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard v. Bailey, 20 Wall. 520 [22 L. Ed. 376]; Terry v. Tubman, 92 U. S. 156 [23 L. Ed. 537], to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefor, only liable for his proportion of the debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit

in equity. But in this case the statute makes every stockholder individually liable for the debts of the company to an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors."

In Auer v. Lombard, 72 Fed. 209, 19 C. C. A. 72, in the circuit court of appeals of the first circuit, a bill had been brought by some of the creditors of a Colorado bank against a portion of its shareholders to enforce the statutory double liability of the latter. The court had occasion to refer to two acts of Colorado, one passed in 1877 and in 1883 made applicable to the officers and stockholders of savings banks, and the other in 1885. The first provided:

"The officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation, equally and ratably to the extent of their respective shares of stock in any such corporation or association, except" &c. Gen. St. 1883, § 279.

The second provided:

"Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts and engagements of said associations in double the amount of the par value of the stock owned by them respectively." Laws 1885, p. 264.

The court, among other things, said:

"The earlier of these two statutes required an apportionment among stockholders. In many jurisdictions, if not in all, this would involve a bill in equity with an accounting of all the corporate liabilities and a contribution by the stockholders, and for this the further making the corporation, and perhaps all stockholders, parties. * * * The act of 1885 establishes a liability of an essentially different character from that of 1883, in the fact that it is not ratable, and also of an essentially different amount. The two cannot stand together with reference to the same corporation, and debts of the same period of contracting; and we have no doubt that, so far as this controversy is concerned, the later act wholly supersedes the earlier one, and the complainant's rights rest on it alone. As the liability involves no accounting, the remedy is at law only. Kennedy v. Gibson, 8 Wall. 498, 505 [19 L. Ed. 476]. Casey v. Galli, 94 U. S. 673 [24 L. Ed. 168]. We do not say that there might not be a case under the statute which would involve an accounting, and the securing and distribution of a fund, but only that no such case is shown here."

The assessment was laid for the purpose of paying the debts of the American Alkali Company. It was fixed at the definite sum of $2.50 on each preferred share held by the defendants respectively. There is no suggestion in the bill that the assessment will not be sufficient to pay in full the debts of the corporation and all expenses. Further, the bill neither prays nor involves any accounting or contribution. Each defendant is separately and independently charged with a definite sum for which, if liable, he is liable without reference to any other defendant. The bill does not pray for the ascertainment or marshaling of assets or debts, or for the fixing of priorities, or for the payment of the debts of the corporation, or for a distribution. It was filed simply for the recovery of separate and independent legal pecuniary demands. It is wholly immaterial, so far as ulterior purposes are concerned, whether the receiver shall receive those moneys through the instru-

mentality of a bill in equity, on the one hand, or, on the other, by actions at law. In either event the fund after its collection by the receiver would be applied to the payment of debts under order of court. Should there be any residue after the payment of all debts it would be distributed among the stockholders in proportion to the number of their shares, save in so far as any of them had failed to pay the several amounts assessed against them; and in the event of such failure, whether from insolvency of individual stockholders or from any other cause, the several amounts for which they were respectively in default would, preparatory to a final distribution, be deducted from the amount of the shares of the fund which they otherwise would be entitled to receive. But all these matters belong to subsequent proceedings in one or both of the suits instituted in New Jersey and Pennsylvania in September, 1902, and still pending, and do not pertain to the present bill.

There is no distinction in principle, so far as jurisdiction in equity or at law is concerned, between the enforcement of the total liability of a stockholder for his unpaid subscriptions of stock and the enforcement of an assessment less than his total liability, such as is disclosed in the present case. It is true that in Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476, which was a suit by a receiver of an insolvent national bank, appointed under the national banking act of June 3, 1864, c. 106, 13 Stat. 99, to enforce the personal liability of some of the stockholders, the court said:

"The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted."

This statement was unnecessary to the determination of the question before the court, as the bill sought to enforce the full statutory liability, and the case was decided on the ground that it did not appear that the comptroller of the currency had taken any action touching the enforcement of the personal liability of the stockholders. Further, the passage must be read in the light of the law and facts there involved, and when so read is inapplicable to the case before this court. The statement that when less than the total liability is sought to be enforced "an interlocutory decree may be taken for contribution" has, for the reasons hereinbefore expressed, no pertinency to the case before us. Again, we are not aware of any case, similar or analogous to this, in which the decision proceeded on the ground that, while the total separate and independent liability of a stockholder, in the absence of special circumstances of an equitable nature, can be enforced only at law, a fixed liability for less than such total can, in the absence of such circumstances, be enforced in equity. We should long hesitate before recognizing the soundness of a contention which, were it to be sustained, would withhold from stockholders when sued for statutory liability or unpaid subscriptions trial by jury at the whim of those laying an assessment. A remarkable spectacle would be presented if,

knowing that an assessment of the total liability would enable stockholders to enjoy the right of trial by jury, those charged with making it were permitted to deprive stockholders of such trial by making an assessment amounting to ninety or ninety-nine per cent. of the total liability, with the intention of subsequently collecting the balance.

In conclusion we have failed to find any well-considered case supporting the contention that under the principles enunciated in Hale v. Allinson the court below properly could, under the circumstances disclosed, and on the bill as filed, assume equitable jurisdiction for the enforcement of the assessment in question. The bill must, therefore, be dismissed as to the appellants, with costs, and it is so ordered.

THE BAILEY GATZERT.

(Circuit Court of Appeals, Ninth Circuit. April 25, 1910.)

No. 1,746.

1. COLLISION (§ 100*)—PRECAUTIONS FOR PREVENTING COLLISIONS—SPEED IN FOG—"MODERATE SPEED."

A steam vessel passing from Portland down the Willamette river in a dense fog at a speed of 15 miles an hour, in view of the extensive commerce on such river, was not going at the moderate speed required by article 16 of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]), which provides that in a fog a vessel shall go at a moderate speed, "having careful regard to the existing circumstances and conditions."

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 215; Dec. Dig. § 100.*

For other definitions, see Words and Phrases, vol. 5, pp. 4551, 4552.

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

2. COLLISION (§§ 75, 99*)—PRECAUTIONS FOR PREVENTING COLLISIONS—VESSELS AT ANCHOR—LIGHTS, SIGNALS, AND LOOKOUTS.

A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch and other measures calculated to make its position known.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 113, 115, 211, 212; Dec. Dig. §§ 75, 99.*]

3. ADMIRALTY (§ 118*)—APPEAL—REVIEW—FINDINGS OF FACT.

On appeals in admiralty, when questions of fact are dependent on conflicting evidence, the decision of the District Judge who heard and saw the witnesses will not be reversed unless clearly against the evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 770; Dec. Dig. § 118.*]

4. COLLISION (§ 100*)—VESSELS AT ANCHOR—LOOKOUT.

Whether or not an efficient lookout was maintained on a dredge at work in a channel during a dense fog *held* immaterial, in a suit for collision with the dredge by a moving steamer, where the fog bell on the dredge was being rung at intervals of less than a minute, and could be

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

heard many times the distance at which an approaching vessel could be seen.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 214; Dec. Dig. § 100.*]

5. COLLISION (§ 100*)—PRECAUTIONS FOR PREVENTING COLLISIONS—SPEED IN FOG.

A decree affirmed, holding a steamer passing down the Willamette river from Portland in a dense fog at a speed of about 15 miles an hour solely in fault for a collision with a stationary dredge which was working in the channel, on the ground of excessive speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 215; Dec. Dig. § 100.*]

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

Suit in admiralty by the Port of Portland against the Steamboat Bailey Gatzert, The Dalles, Portland & Astoria Navigation Company, claimant, and cross-libel by the claimant. Decree for libelant (170 Fed. 101), and claimant appeals. Affirmed.

Charles H. Carey, James B. Kerr, and Harrison Allen, for appellant.

Williams, Wood & Linthicum, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. This suit was commenced by the filing of a libel by the port of Portland, a municipal corporation, owner of the hydraulic dredge Portland, against the steamboat Bailey Gatzert, to recover damages for injuries to the dredge Portland, caused by a collision between the Bailey Gatzert and the dredge on the morning of November 6, 1907, in the channel of the Willamette river, at a point about nine miles below the city of Portland. The damage claimed by the libelant for the injuries to the dredge was $25,000. In a cross-libel filed by the Dalles, Portland & Astoria Navigation Company, owner of the steamboat Bailey Gatzert, it was charged that the collision was the fault of the dredge, and for injuries received by the Bailey Gatzert in the collision damages were claimed in the sum of $2,500. The libel alleged that the dredge was without motive power; and that on the morning of November 6, 1907, was engaged in dredging the channel of the Willamette river at a point nearly abreast of Willamette slough, and was at that time affixed to the bed of the Willamette river by means of a spud and anchors attached to cables on board the dredge; that the morning of November 6th was foggy, and fog bells were rung on board the dredge in accordance with law and regulations of the United States inspectors of steam vessels. It was charged, notwithstanding the fact that said morning was foggy, the Bailey Gatzert, while being navigated on a voyage down the Willamette river from Portland to The Dalles, was up to the instant of collision navigated by her master at full speed, and although the bell of the Portland was being rung at intervals as required by law the master of the Bailey Gatzert failed and neglected to observe the bell of the Port-

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

land, and himself navigated the Bailey Gatzert at such a high and dangerous rate of speed in said fog that when the Portland came into view of the Bailey Gatzert he failed to check the headway of the Bailey Gatzert, and collided with the dredge, causing the dredge to sink within a few minutes.

It was charged in the cross-bill and answer that, notwithstanding the fact that the morning was foggy, the dredge Portland was lying at anchor in the channel and fairway of the Willamette river at the point mentioned, and in such position that the Bailey Gatzert, following the usual and customary course of steamboats down the river, would necessarily collide with the dredge if not forewarned of her position in the channel; that the libelant so negligently and carelessly conducted itself and so misbehaved in the management of the dredge that fog bells were not rung on board of said dredge in accordance with the law or regulations of the United States inspectors of steam vessels for inland waters of the Pacific Coast, requiring vessels at anchor to ring a fog bell rapidly for about five seconds at intervals of not more than one minute. The District Court found the Bailey Gatzert to have been at fault in running at such a high rate of speed that after the dredge could be seen through the fog the Bailey Gatzert could not by reversing her engines come to a standstill and avoid a collision with the dredge. The court also found that the bell on the dredge was rung at appropriate intervals while the Bailey Gatzert was approaching; and that the fault resulting in the collision was entirely that of the Bailey Gatzert. The court accordingly dismissed the cross-bill, and awarded a decree in favor of the libelant, which, upon the testimony relating to the damages sustained by the dredge, was fixed at $18,058.28.

The Bailey Gatzert is a steam stern-wheel vessel. Her gross tonnage is 642; her net tonnage is 536. She is 194.3 feet in length, and 32.8 feet in width, with a depth of 8 feet. She was at the time of the collision engaged in the passenger and freight service between Portland on the Willamette river and The Dalles on the Columbia river.

The dredge Portland was a hydraulic river dredge; scow shape. She was 130 feet in length, and 36 feet in width, with a depth of hull of 11 feet, and a normal draught of 5 feet. She had two spud wells on each side of the stern of the dredge. Each of these wells carried a spud, which, projecting through the hull of the dredge, was driven into the bed of the river to such a distance that it held the dredge securely in place. Only one spud was dropped at a time when the dredge was at work, and on these two spuds working alternately the dredge would swing from side to side as on a pivot or trunnion, dredging over an area having a radius of 150 feet. Attached to the forward end of the dredge was the dredging mechanism, consisting of a revolving cutter, supported by a suitable and substantial framework. The revolving cutter cut up the material in the bottom of the river which is pumped up through a pipe, and then carried through a line of pipe supported on pontoons to a distance for deposit. In dredging navigable rivers this material is usually deposited in such places as may be designated by the engineer in charge so that it may not be carried back into the river. In the present case the discharge was through a pipe 20 inches

in diameter and more than 400 feet in length, supported on pontoons leading from the starboard side of the dredge nearly to the eastern shore of the Willamette river. At the time of the collision the dredge was at work dredging the channel of the river on the range between two points on the river designated as the "Linnton and Upper Post Office Lights," the line of range following approximately the channel of the river. The distance between these two points is 9,150 feet. The distance from Linnton Light down the river to the dredge was 5,650 feet, and the distance from the dredge down the river to the Post Office Light was 3,500 feet. The dredge had been placed at this point on Monday morning, November 4th, and had commenced the work of dredging the channel on Tuesday morning, November 5th, about 2:30 o'clock. The work had the approval of the United States engineers. Its purpose was to improve the channel at this place which at this point had 25 feet of water at zero.

On the morning of November 6, 1907, the Bailey Gatzert was bound down the river on her regular voyage from Portland to The Dalles. The master of the vessel, Capt. F. H. Sherman, was at the wheel. The vessel was running in a fog. She passed the Linnton Light five minutes past 8, and at nine minutes past 8, or a few seconds thereafter, the captain sighted the dredge straight ahead of him, and he says at a distance between 100 and 150 feet. He gave the engineer bells for stopping and backing, and placed his wheel hard aport, but failed to avoid a collision. The Bailey Gatzert was going at such a high rate of speed that she drove her bow into the dredge from 12 to 14 feet, crushing timbers averaging in size from 12 by 12 to 14 by 14 inches. The dredger sunk at once.

Was the Bailey Gatzert in fault? The master testified that the vessel was running at half speed, which on that morning was probably about nine miles per hour. The engineer testified that the vessel was under a full-speed bell, but had only been under that bell for a minute and a half or two minutes; that under a full-speed bell the vessel would have gone through the water at about 15 miles per hour. The testimony of the master that they passed Linnton Light five minutes past 8, and that it was nine minutes past 8 a few seconds before the collision, establishes the fact that the vessel had gone a distance of over a mile in four minutes, or at a speed of 15 miles per hour. This was full speed for the four minutes preceding the collision.

Article 16 of the act of June 7, 1897 (Regulations for Preventing Collisions Upon Certain Harbors, Rivers, and Inland Waters of the United States), provides as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions." 30 Stat. 99, c. 4 (U. S. Comp. St. 1901, p. 2880).

The moderate rate of speed required by the rules must depend upon the circumstances of the case. What might be considered as moderate speed in unfrequented waters might be immoderate in a situation where the presence of other vessels might reasonably be expected. Spencer on Marine Collisions, § 44, and cases there cited.

The channel of the Willamette river between the Columbia river and

the city of Portland carries a large commerce, and the vessels engaged in its transportation are to be expected at all points and at all hours in passing up or down the river. It was therefore the duty of the Bailey Gatzert to have exercised the utmost caution in navigating this channel in a fog. The Pennsylvania, 86 U. S. 125, 133, 22 L. Ed. 148. A rule applicable to such a situation was to proceed at such a rate of speed as would enable her after discovering a vessel through the fog to have stopped and reversed her engines in time to prevent a collision. The Great Eastern, Brown. & L. 287, 291; The Nacoochee, 137 U. S. 330, 339, 11 Sup. Ct. 122, 34 L. Ed. 687; The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Belgian King, 125 Fed. 869, 876, 60 C. C. A. 451. This she did not do, and she was therefore clearly at fault.

Was the dredge also in fault? A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch, and measures calculated to make its situation known. Spencer on Marine Collisions, § 118. American Dredging Co. v. The Bedowin, 1 Fed. Cas. No. 299. The Virginia Ehrman and The Agnese, 97 U. S. 309, 24 L. Ed. 890. The Portland was lawfully engaged in dredging the channel at the point of collision. She was therefore to be considered as a vessel at anchor. "A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for five seconds." Article 15, cl. "d," Act June 7, 1897 (30 Stat. 96, 99). The dredge had a bell, but whether it was rung rapidly for about five seconds at intervals of not more than one minute during the fog immediately preceding the collision was a question of fact upon which the evidence was conflicting. The testimony upon this question was furnished by 16 witnesses—4 by deposition, and 12 by testimony in open court. The court reviewed this testimony, and said:

"I think there can be no question that the bell on the dredge was rung at proper intervals during the approach of the Bailey Gatzert, and for several minutes at least before the collision."

We have read this testimony very carefully, and considered it with respect to the situation of each of the witnesses, and their opportunity to know the facts concerning which they testified and we are of the opinion that the court was correct in the conclusion it reached. It was certainly not against the evidence. "The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed unless it clearly appears that the decision is against the evidence. The Albany [C. C.] 48 Fed. 565, and authorities there cited." The Alijandro, 56 Fed. 621, 624, 6 C. C. A. 54; The City of Naples, 69 Fed. 794, 796, 16 C. C. A. 421; The Columbia, 73 Fed. 226, 237, 19 C. C. A. 436; The Captain Weber, 89 Fed. 957, 958, 32 C. C. A. 452; Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. 920, 924, 62 C. C. A. 552; Perriam v. Pacific Coast Co., 133 Fed. 140, 144, 66 C. C. A. 206; Peterson & Glynn v. Larsen, 177 Fed. 617.

It is next contended that the dredge did not keep a proper lookout or take the precautions required by the circumstances of the case. It appears from the evidence that one John Cosgrove, who was the day foreman on the dredge, and whose duty it was to ring the bell, was also required to keep a lookout for approaching vessels. This he testified he did on the morning of the collision; but the bell was located forward of the cabin or upper house about midship, and at a distance of not less than 110 feet from the stern of the dredge. The dredge was heading down the stream. The Bailey Gatzert approached the dredge from upstream. It was not possible for Cosgrove to ring the bell for about five seconds at intervals of not more than one minute while stationed at the forward end of the vessel and also keep a lookout from a station at the other end of the vessel. What he did do, he testified, was to keep a lookout up and down the river from his station at the forward end of the dredge by walking to and fro across the vessel when not engaged in ringing the bell. The court held that any supposed dereliction on the part of the lookout by reason of his station did not contribute to the accident; that had the lookout been in the best possible position on the dredge he could not have discovered the Bailey Gatzert sooner than the lookout of the Bailey Gatzert discovered the dredge, and this was too late to avoid a collision.

The efficiency of the bell was a subject of inquiry. The superintendent of the dredge testified that it was a large ship's bell; that it had been taken from the Glanmorogue which had been wrecked on the coast at Clatsop Beach. The bell was produced in court and measured. It had a clear inside diameter of 13 inches with a depth of 11 inches. The hanger above the bell was 8 inches, and the length of the bell was 19 inches in all. The length of the rope attached to the lower end of the clapper was 19 inches. From the top of the bell to the end of the rope was, therefore, 38 inches. The bell was rung by pulling the rope so that the clapper would strike the bell. The efficiency of this bell was tested on the afternoon of the collision. At that time the dredge was sunk, but the bell was about three or four feet above the surface of the water. The bell was rung continuously while four persons went up the river to Linnton Light, and it was found that the bell would be heard very distinctly for a distance from the dredge of approximately 3,600 feet. Having determined that this bell was rung at proper intervals prior to the collision, it does not appear in what way a lookout stationed at the stern or upstream end of the dredge could have more effectively made known the situation of the dredge to the lookout and pilot on the Bailey Gatzert. If the ringing of the bell did not warn them of the location of the dredge for a distance of 3,600 feet upstream, or at any point beyond 150 feet, what could the lookout on the dredge have done to convey to them a more effective warning? Certainly his mere presence at a point on the dredge of 110 feet further upstream would have added nothing to the efficiency of this warning. We think the court was correct in this conclusion.

It is next contended that the dredge remaining at anchor in the channel in the fog then prevailing violated the act of March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), which provides:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft."

This charge does not appear to have been brought to the attention of the court below, and no evidence appears to have been taken with specific reference to that question, but the evidence in the record sufficiently shows that the dredge was not anchored in such manner as to prevent or obstruct the passage of other vessels or craft.

The witness George M. Shaver, pilot on the Bailey Gatzert, testified that the channel at the mouth of the Willamette slough opposite to which the dredge was anchored was about 200 feet wide. On the morning of November 5, 1907, the steamer Stranger on a voyage down the river passed within 60 feet of the dredge, and on the morning of the collision the stern-wheel steamer G. T. Wentworth passed down the river at 8 o'clock, or 9 or 10 minutes before the collision. Neither of these vessels appears to have been prevented or obstructed by the dredge in passing down the river. Both the captain and pilot of the G. T. Wentworth testified that their vessel was about 100 or 150 feet from the dredge as it passed, the dredge being on the starboard side, showing that there was plenty of room in the channel for the passage of vessels up and down the river without encountering the dredge.

It is contended, further, that the damages allowed the libelant were exorbitant, and reference is made to the testimony offered by the libelant and to the cost of raising and restoring the dredge to the condition in which it was prior to the collision. The testimony on the part of the libelant gave this cost in detail, and an examination of the items does not disclose any unreasonable or exorbitant charges. We think the evidence fully and satisfactorily sustains the decree.

The decree of the District Court is affirmed.

PHILADELPHIA & R. COAL & IRON CO. v. BARRIE.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1910.)

No. 3,170.

1. MUNICIPAL CORPORATIONS (§ 821*)—SIDEWALKS—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

A plaintiff, who was injured by stepping into an open coal hole in a sidewalk on a public street at a time when it was quite dark, cannot be held chargeable with contributory negligence as matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754–1756; Dec. Dig. § 821.*]

2. MASTER AND SERVANT (§ 300*)—MASTER'S LIABILITY FOR NEGLIGENT ACT OF SERVANT—GROUNDS.

The ground upon which a master in any case is held liable for a negligent act of his servant is not because the servant in his negligent conduct represents the master, but upon the distinct ground that he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209; Dec. Dig. § 300.*]

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

3. MASTER AND SERVANT (§ 301*)—LIABILITY FOR INJURIES TO THIRD PERSONS —RELATION OF PARTIES.

Where defendant, a coal dealer, in delivering coal from its yards to customers, hired from another dealer a team and a driver in the latter's general employ, paying a stipulated sum per hour for their services, and having full control and direction of the work and the method of its performance, the driver, while engaged in such work, was a servant of defendant, which was liable for an injury to a third person, caused by the driver's negligence in its performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210–1216; Dec. Dig. § 301.*]

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

Action by Lenora M. Barrie against the Philadelphia & Reading Coal & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. H. Boutelle and N. H. Chase, for plaintiff in error.

Owen P. McElmeel (Paul J. Thompson, on the brief), for defendant in error.

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

RINER, District Judge. This was an action to recover damages for personal injuries alleged to have been sustained by the defendant in error, hereafter called the plaintiff, as a result of the negligence of the plaintiff in error, hereafter called the defendant. The record discloses the following facts:

The defendant had for some time prior to the accident been engaged in the general wholesale and retail coal business in the city of St. Paul, Minn., where various yards were maintained by it for storage, and from which coal was delivered in ordinary course to its customers as ordered. The defendant did not own its own teams, or furnish drivers in making local deliveries, but employed teams from other dealers from time to time. In this particular case it employed the team of one J. J. Martin, a dealer in coal in St. Paul, for which it agreed to pay him a certain amount per hour for the use of the team and driver, and agreed to settle with him twice a month for the number of hours his team or teams were employed in hauling and delivering the coal for the defendant. On the day of the accident to the plaintiff, Martin had furnished one of his teams to the defendant to haul coal for it, furnishing with the team a driver by the name of McQuistran. Further than furnishing the team and driver to deliver coal for the defendant at so much per hour for the time the team was actually employed, Martin had nothing whatever to do with the delivery of coal from the defendant's yards. The drivers, including McQuistran, received their instructions from the defendant as to the delivery of coal. The defendant directed from which of its yards the coal should be taken, how much, and where it was to be delivered, and issued all orders to the driver in connection with the delivery of coal to purchasers in various parts of the city.

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

On the 11th day of January, 1909, McQuistran, the driver, was directed by the defendant to deliver a load of coal to Tibbs, Hutchings & Co.'s store in St. Paul, and between 5 and 6 o'clock in the evening of that day he was engaged in unloading this load of coal, by shoveling the same from a wagon into a coal hole in the sidewalk in front of the store. The evidence shows that this coal hole, when not open for the purpose of delivering coal, was covered with an iron plate, or covering, set into the sidewalk a sufficient depth to bring the top of the upper side of the iron plate level with the top of the sidewalk. The plaintiff, as the record shows, was a customer at Tibbs, Hutchings & Co.'s store on the evening in question. She came out of the store with some bundles in her hands, and started to walk rapidly across the sidewalk for the purpose of taking a car to Minneapolis. She had only taken a few steps, when she fell into the open coal hole and was injured. Just what the driver was doing at the time plaintiff fell into the coal hole is not clear from the evidence. He testified that he noticed her as she came out of the store and stood for a moment on the steps, looking towards the street car, and did not see her again until he saw her prostrate on the sidewalk near the coal hole. Whether part of her body was in the coal hole he was not certain, but he testified that he thought not. He further testified that, upon discovering her, he went to her assistance, and, with the aid of another lady that came along at that time, lifted her up and helped her into the store. The evidence of all of the witnesses was to the effect that it was quite dark at the time the accident occurred, and the driver testified that the only guard placed about the hole to keep passers-by from falling into it was a few chunks of coal which he had placed around it.

Several errors are assigned, but the one relied upon is that the Circuit Court erred in refusing the defendant's motion, at the close of all the evidence, to direct a verdict in its favor. This motion is based upon two grounds: First, that McQuistran, the driver, was not the servant of the defendant, but the servant of an independent contractor; and, second, that the plaintiff was guilty of contributory negligence. The defendant admits that the weight of authority sustains the action of the Circuit Court in submitting the issue of contributory negligence to the jury. This admission is in harmony with our views, and it becomes unnecessary, therefore, to discuss the second ground of the motion. Mosheuvel v. District of Columbia, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170, and cases there cited.

We come, then, to consider the first ground of the motion. The servant himself is, of course, liable for the consequences of his own carelessness; but when, as in this case, an attempt is made to impose upon the master liability for the negligence of the servant, it becomes necessary to inquire who was the master at the very time of the negligent act or omission. Standard Oil Co. v. Parkinson, 152 Fed. 681, 82 C. C. A. 29. It is elementary, notwithstanding the liability of a servant for his own negligence, that one who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service; but this is the extent of the master's liability. If the servant is engaged in work outside of the line of service for which he was employed, as, for instance,

doing his own work, or doing the work of some person other than the master, the master is not liable for his negligence. The reason that the master, in any case, is held liable for the negligent acts of his servants is not because the servant, in his negligent conduct, represents the master, but upon the distinct ground that he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. Farwell v. Worcester & Boston Railway Corporation, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

It is a rule universally recognized by the courts that, while one may be in the general service of another, yet he may, with respect to particular work, be transferred, with his own acquiescence, to the service of a third person in such a way that he becomes the servant of that person, with all the legal consequences of the new relation; and the question here is whether McQuistran was, under the facts disclosed by the record, the servant of Martin, his general employer, or the servant of the defendant, with respect to the particular work in which he was engaged at the time of the injury to the plaintiff. In discussing a similar question, the Supreme Court, in the case of Standard Oil Company v. Anderson, 212 U. S. 215, 29 Sup. Ct. 254 (53 L. Ed. 480), said:

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it, nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are for the time his workmen. In the second place, he who agrees to furnish the completed work, through servants over whom he retains control, is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his work. To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details, or the necessary co-operation, where the work furnished is part of the larger undertaking."

We think the facts disclosed by the record bring this case within the classification first mentioned in the case just cited, and that the Circuit Court correctly held that McQuistran, the driver, was the servant of the defendant at the time the plaintiff was injured. The evidence is undisputed that the only connection Martin had with the work there being conducted was to place the team and driver at the disposal of the defendant, to be used by it in its work, and to be under its exclusive control and subject to its orders, receiving therefor so much per hour for the use of the team and driver for the time engaged in the service of the defendant, not reserving to himself any control whatever over the team and driver in the performance of the work of delivering the coal. If Martin had agreed with the defendant to deliver a certain amount of coal at a given place, furnishing his own men and teams for

the work, retaining control over them, and directing the manner in which the work should be conducted to completion, subject only to the general direction of the defendant as to the work to be done, we would have a case more nearly within the rule contended for by the defendant, and within the second classification mentioned in Standard Oil Company v. Anderson, supra.

We do not consider it necessary to review the numerous cases in which courts have had occasion to examine this question, but call attention to the following cases, in addition to those already cited, in which, upon facts not differing in principle from those before us, the same conclusion was reached. Waters v. Pioneer Fuel Company, 52 Minn. 475, 55 N. W. 52, 38 Am. St. Rep. 564; Singer Manufacturing Company v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; Atlantic Transport Company v. Coneys, 82 Fed. 177, 28 C. C. A. 388; Byrne v. Kansas City Railway Company, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; De Forrest v. Wright, 2 Mich. 367.

Finding no error in the record prejudicial to the defendant, the judgment is affirmed.

SANBORN, Circuit Judge (concurring). The question in this case is whether the Coal & Iron Company or Martin was the master of the driver, McQuistran, in the latter's performance of the specific act of protecting pedestrians from stepping into the coal hole in the sidewalk while he was unloading the coal into it. When a master who has and exercises the power to hire and discharge his servant lets him and a team to a hirer, to go where and to do such known work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to carry, or haul, or do, the driver still remains subject to the control of his general employer in the method of his performance of the work to which the hirer assigns him, and the hirer is not liable, in the absence of an agreement to the contrary for the negligence of the servant in the method or manner of his performance of his service. Donovan v. Laing, [1893] 1 Q. B. 629; Delory v. Blodgett, 185 Mass. 126, 129, 69 N. E. 1078, 1080, 64 L. R. A. 114, 102 Am. St. Rep. 328; Driscoll v. Towle, 181 Mass. 416, 419, 63 N. E. 922; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 394; Brady v. Chicago & G. W. Ry. Co., 52 C. C. A. 48, 58, 114 Fed. 100, 110, 57 L. R. A. 712; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Quarman v. Burnett, 6 M. & W. 499; Jones v. Corporation of Liverpool, 14 Q. B. D. 890; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Stewart v. California Improvement Co., 131 Cal. 125, 129, 63 Pac. 177, 724, 52 L. R. A. 205; Frerker v. Nicholson, 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.) 1122.

If, therefore, the proof in this case stopped with testimony that the Coal & Iron Company under its hiring had and exercised the power to direct the driver what amount of coal to take, and where and when to take and to deliver it, this evidence, in my opinion, would not have overcome the legal presumption that his general employer, Martin, was liable for his negligence in his method of doing his work, and that

the Coal Company was free from liability. But the local manager of the Coal Company testified, regarding this driver and others, that these men were instructed to deliver the coal under the Coal Company's orders:

"Q. And the method of delivery is under your orders? A. Yes, sir. Q. Place, the time, the amount, and all, is under your orders? A. I have said so two or three times."

Because this testimony indicates that the control of the method of the performance of the work of protecting the coal hole while the driver was unloading the coal had been transferred by some agreement between his general employer and the Coal Company from the former to the latter, this case seems to me to be taken out from the general rule and presumption which have been stated, and to have been properly submitted to the jury, and for that reason I concur in the affirmance of the judgment.

UNITED SURETY CO. v. IOWA MFG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1910.)

No. 3,087.

1. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF BUSINESS —"MANUFACTURING, TRADING, OR MERCANTILE PURSUITS."

A corporation whose business as actually conducted consists of installing heat and power plants, constructing conduits, waterworks, and sewers, buying, selling, and erecting steam engines, and occasionally making reports with reference to the proposed construction of electric light and power plants is engaged principally in "manufacturing, trading, or mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), and may be adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

2. BANKRUPTCY (§ 58*)—"CREDITORS"—"ACT OF BANKRUPTCY"—GIVING PREFERENCE TO SURETY.

A surety on the bond of a contractor for government work, who under the federal statute is directly liable to laborers to whom the contractor is indebted for labor performed under the contract, is a creditor of the contractor to the extent of such liability, within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 644 (U. S. Comp. St. 1901, p. 3418), and the lending of money by the surety to the contractor to pay such claims, and the taking of security therefor, at a time when the contractor was insolvent and within four months prior to its bankruptcy, was the giving of a preference to a creditor and constituted an act of bankruptcy under section 3a (2) of the act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58.*

For other definitions, see Words and Phrases, vol. 2, pp. 1713–1727; vol. 8, pp. 7622, 7623; vol. 1, p. 118; vol. 8, p. 7562.]

3. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—GIVING PREFERENCE TO CREDITOR.

In such case the preference is not avoided by the fact that the laborers' claims, if unpaid, would have been entitled to priority of payment from

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

the bankrupt's estate, since, having been paid by the principal debtor, they were not in existence at the time of the bankruptcy, and no right of subrogation could arise from their payment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58.*]

4. BANKRUPTCY (§ 348*)—PRIORITIES—"WAGES DUE THE WORKMEN."

Where a surety company, acting as surety on the bond of an insolvent, lends him money which is used to extinguish debt to his laborers, the claims of the surety company are not, at the time bankruptcy proceedings are instituted against the borrower, "wages due the workmen," within the meaning of section 64b (4) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 348.*]

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

In the matter of the E. H. Abadie Company, bankrupt. Appeal from order of adjudication. Affirmed.

Henry T. Ferriss and Joseph H. Zumbalen (Franklin Ferriss, on the brief), for appellant.

Herbert R. Marlatt (George S. Johnson, Charles A. Houts, Harry B. Hawes, and W. O. Anderson, on the brief), for appellees.

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

ADAMS, Circuit Judge. Creditors of the E. H. Abadie Company filed a petition in bankruptcy in the court below charging that that company was a corporation engaged principally in trading, manufacturing, and mercantile pursuits, and had committed an act of bankruptcy by suffering, while insolvent, the United Surety Company, one of its creditors, to obtain an unlawful preference through legal proceedings, and had not, within five days before the sale or final disposition of the property affected by such preference, vacated or discharged the same. The debtor and surety company joined in an answer denying, first, that the former was engaged principally in trading, manufacturing, or mercantile pursuits, and, second, that it had committed the alleged act of bankruptcy. The referee to whom the issues joined were referred found against the petitioners on the first of those issues and in their favor on the second. The district judge overruled the referee on his first finding, sustained him on the second, and adjudicated the company a bankrupt. From this order of adjudication the surety company appeals.

There are only two questions for consideration: Was the debtor corporation amenable to the bankruptcy act, and did it commit the act of bankruptcy charged against it? Of these in the order stated.

The referee whose finding of fact is accepted by both sides found that the business "actually transacted by the Abadie Company consisted of installing heat and power plants, constructing conduits, waterworks, and sewers, buying, selling, and erecting steam engines, and occasionally making reports with reference to the proposed construction of electric light and power plants," and specified with much detail the method of carrying on the business. From it all we conclude that the

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

business of the debtor was substantially the same as that disclosed in the case In re First Nat. Bank of Belle Fourche, 81 C. C. A. 260, 152 Fed. 64, and that the present case fairly falls within the principles there announced and applied. We there held that a corporation carrying on such business was engaged in manufacturing, trading, or mercantile pursuits within the meaning of section 4b of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1309]), and to that holding we are disposed to adhere. This is in harmony with the decision of the Supreme Court of the United States handed down February 21, 1910, in the case of Friday v. Hall & Kaul Co., 216 U. S. 449, 30 Sup. Ct. 261, 54 L. Ed. ——.

Did the Abadie Company commit the act of bankruptcy charged in the creditors' petition?

The referee's finding on this issue, which was also accepted by both parties, may be summarized as follows: On April 15, 1908, the Abadie Company having a contract with the United States for building a sewer system at Jefferson Barracks, Mo., executed a bond with the surety company as surety, conditioned that it would faithfully perform the contract and promptly make full payment to all persons supplying labor or material for the prosecution of the work. The Abadie Company was also then engaged in performing another contract which it had entered into with the United States for installing a heating plant at Jefferson Barracks. In June, 1908, the principal became financially embarrassed, and secured a loan from the surety company of $1,400, assigning to it the unpaid balance coming to it from the government under the sewer contract, estimated to be $2,924. Then and soon after the surety company loaned the Abadie Company in three different installments $3,464 with which the cost of labor and material employed in executing the sewer contract was paid. Later, on August 1, 1908, it needed more money to meet its pay roll then coming due, whereupon the surety company loaned it $1,605.50, $1,071.50 of which was to be used to pay laborers working on the sewer contract, whose wages in that amount were then due, and the balance, $534, to pay for labor and materials employed in executing the heating contract; and agreed to loan it when needed the further sum of $1,200, estimated to be required to finish both contracts. As security for the money so loaned and agreed to be loaned the Abadie Company, pursuant to an agreement to that effect, assigned to the surety company the balance due it on the heating contract, estimated at $1,309, and gave it its demand note for $3,187.75 with its written entry of appearance and consent to a judgment in a suit to be brought on the note. Thereupon on that day, August 1, 1908, a suit was brought in a local court on the note, the written appearance and consent to a judgment filed, and judgment duly rendered in favor of the surety company thereon in the sum of $3,187.75 and costs. Execution, which was forthwith issued, was levied upon certain property of the judgment debtor, which was in due course sold, realizing $3,121.50. Soon thereafter the surety company loaned the Abadie Company $1,-

953.75, $1,728.20 whereof was used for paying labor and materials employed on the sewer contract and $225.20 for paying labor and materials employed on the heating contract. The surety company, as surety on the bond of the Abadie Company became, by virtue of the provisions of the act requiring that bond, directly liable to laborers who performed work and materialmen who furnished material, for their value (Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]; Act Feb. 24, 1905, c. 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1909, p. 948]; United States, to Use of, etc., v. National Surety Company, 34 C. C. A. 526, 92 Fed. 549; United States, to Use of, etc., v. Rundle, 40 C. C. A. 450, 100 Fed. 400), and being on August 1, 1908, so liable as surety for the principal for the workmen's wages amounting to $1,071.50 then due, it was within the meaning of the bankruptcy act a creditor of its principal and had a debt provable in bankruptcy against it in that sum. Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13; Kobusch v. Hand, 84 C. C. A. 372, 156 Fed. 660, 18 L. R. A. (N. S.) 660.

The Abadie Company was then insolvent, and could not lawfully prefer an existing creditor. Whether other advances made then or thereafter which were secured or intended to be secured by the judgment note afforded a present consideration for that note, and therefore saved it, and the property soon thereafter transferred to the surety company by virtue of it from annulment it is unnecessary to decide. The judgment note and subsequent transfer of property by execution and sale were admittedly intended as security in part for the repayment of the $1,071.50 advanced on that day to pay matured labor demands. The transfer, therefore, became, to that extent at least, a preference in favor of the surety company, and as there is no pretense that it was ever vacated or discharged, it was, unless for some consideration, which we will take up later, an act of bankruptcy within the meaning of section 3 (3) of the bankruptcy act.

But it is contended by the surety company that, as labor claims are entitled to priority of payment under the provisions of section 64b (4) of the bankruptcy act, it, having paid them, was entitled to be subrogated to the rights of the laborers, and hence that the transfer to it by the levy and sale of the property under the judgment note worked no unlawful preference. Labor claims are assignable, and the priority accorded to them by the bankruptcy act goes with them to a transferee (Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436), but in this case there was no assignment of the claims and none was intended by the parties. The transaction consisted simply in the Abadie Company borrowing money from the surety company to pay a debt which, as between the borrower and lender, was alone owed by the former, and instead of buying the claims from the laborers, and thereby securing some equitable right as against the principal debtor, the surety company took what it conceived to be ample security for the loan, turned over the money to the borrower, and with it the latter paid and extinguished its own debt to the laborers. Their claims, therefore, were not at the time bankruptcy proceedings were instituted against the borrower "wages due the workmen" within the meaning of section 64b (4) of the bankruptcy act. Neither were they assigned claims of that kind entitling the assignee to stand in the shoes of the laborers.

To allow the surety company, in view of these facts, to be subrogated to the rights of the laborers against the estate of the bankrupt would give it a right which it never intended to secure. The fact that it took security for this item of $1,071.50, as well as the advantage it gained with respect to its other dealings with its principal, renders it, in our opinion, entirely inequitable to now, when other creditors' rights have intervened, allow it to change its hold. Subrogation is not a matter of strict right but purely equitable in its nature, dependent upon the facts and circumstances of each particular case. National Surety Co. v. State Savings Bank, 84 C. C. A. 187, 156 Fed. 21, 14 L. R. A. (N. S.) 155.

Several other questions were ably argued by counsel, but in view of the conclusion already reached with respect to the item of $1,071.50 we find it unnecessary to protract this opinion further. The judgment of adjudication was right and must be affirmed.

NOTE.—The following is the opinion of Dyer, District Judge, in the court below:

DYER, District Judge. In October, 1908, an involuntary petition in bankruptcy was filed, seeking to have the E. H. Abadie Company, a corporation, adjudged a bankrupt. On the 17th of October, 1908, the court referred the case to Walter D. Coles as special master, to try all the issues and report his findings of facts and conclusions of law to this court. This report of the special master was filed December 2, 1908, and thereafter, on December 7th, the petitioning creditors filed exceptions to the report. The exception that is before this court at the present time is that portion of the special master's report which finds that the E. H. Abadie Company is not such a corporation as may be put into involuntary bankruptcy.

The petition filed by certain creditors alleges that the E. H. Abadie Company "is engaged principally in trading, manufacturing, and mercantile pursuits." The master reports as follows: "The business actually transacted by the company consists of installing heating and power plants, constructing conduits, waterworks, and sewers, buying, selling, and erecting steam engines, and occasionally making reports with reference to the proposed construction of electric light and power plants." The master in his report further says: "The first question presented herein is whether the evidence shows that the respondent was principally engaged in trading, manufacturing, and mercantile pursuits, within the meaning of section 4b of the bankrupt act." The master concludes that the respondent was not so engaged, and therefore not subject to being placed in bankruptcy by petitioning creditors. It is this conclusion of the special master that the court is now to deal with. Extensive briefs have been filed by both attorneys for the petitioning creditors and the attorneys for the respondent. Without undertaking to discuss the various decisions cited in the briefs, it is ouly necessary for this court to determine whether the Court of Appeals for the Eighth Circuit has disposed of the question now before this court. If it has, it is conceded by both sides that the decision is binding upon this court.

The master in his report (and it is a very able report and entitled to great consideration) thinks that the question here presented has not been decided by the Court of Appeals for the Eighth Circuit. He says, however, in his report, in discussing the question as to whether the decision of the Circuit Court of this district in Re First National Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, as follows: "It is, however, contended by the petitioning creditors that under the doctrine announced in the case of In re First National Bank of Belle Fourche, 18 Am. Bankr. Rep. 265, 152 Fed. 64, 81 C. C. A. 260, decided by the Circuit Court of Appeals for this circuit, respondent should be held to be principally engaged in 'manufacturing.' The case referred to is, of course, as to the matters there in judgment, controlling authority in this ju-

risdiction; but the special master is of opinion that it does not establish the doctrine contended for. In the First National Bank Case it was held that an averment in a petition in bankruptcy that a corporation 'is, and during all said time has been, engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone, and selling the same, and railroad ditch contracting,' was sufficient to sustain a default adjudication, where objection was first made by motion to vacate after judgment, and that the trial court had not abused its judicial discretion in refusing to sustain the motion to vacate, where the objecting creditor was cognizant of the prior proceedings, and had waited for more than a month before making his objection. The basic propositions upon which this case was determined were, first, that an averment that the alleged bankrupt was one of the class of corporations subject to be adjudged bankrupt was not essential to give the trial court jurisdiction to make the adjudication; and, second, that the delay in presenting the application to vacate the adjudication, in the circumstances disclosed by the record, justified the trial court in denying such application. Judge Sanborn, in delivering the opinion of the court, discusses incidentally the meaning of the term 'manufacturing,' as employed in section 4b of the bankrupt act. No doubt, if all that is said by the judge who wrote the opinion is to be regarded as having the force of law, the case referred to would tend in a measure to sustain the contention here made by the petitioning creditors. But the language employed in this opinion must be read in the light of the facts actually in judgment, and when so read the special master is of opinion that the case cannot be treated as an authority sustaining the contention made by the petitioning creditors herein, and does not constrain us to reach a conclusion at variance with the decisions previously referred to. In accordance with the foregoing views, the special master finds that the respondent is not principally engaged in trading, manufacturing, or mercantile pursuits, within the meaning of the bankrupt act."

With the reasoning and conclusions of the master in reference to this decision I cannot agree. In construing the word "manufacturing," as contained in the bankrupt act, the court says: "The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning 'making with the hand,' its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when, by the application of skill and labor to the materials of which it is composed, it constructs it. As usual, in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority; but the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit, and subject to adjudication in bankruptcy upon an involuntary petition."

Applying the rule to this alleged bankrupt as declared in this opinion by Judge Sanborn, it is quite clear to the court that the alleged bankrupt is such a manufacturing concern as brings it within the provisions of the bankruptcy law. The attorneys for the alleged bankrupt have been most diligent in their search of the authorities in support of their contention, and have filed in this case a very able brief. Satisfied, however, as I am that the opinion written by Judge Sanborn in the case above cited, is decisive of the one here, the exception to the master's report in this particular will be sustained.

The other questions raised by the exceptions to the report by counsel on the other side are reserved for further consideration.

STAUNTON v. WOODEN.

In re UNITED HARNESS CO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1910.)

No. 1,776.

1. BANKRUPTCY (§ 206*)—ADMINISTRATION OF ESTATE—SUMMARY PROCEEDINGS AGAINST CLAIMANT UNDER ATTACHMENT.

Where a claim to possession of property of a bankrupt's estate, as against the trustee's right of possession, is based solely on an attachment lien, which is avoided by the adjudication in bankruptcy, the person or officer so in possession is not an adverse claimant, but holds as bailee for the trustee, and must deliver the property on proper demand, and may be required to do so by a summary order of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 206.*]

2. BANKRUPTCY (§ 14*)—JURISDICTION OF COURTS—ORDER TO BE ENFORCED IN ANOTHER DISTRICT.

The court in which a petition in bankruptcy is filed has plenary jurisdiction in bankruptcy coextensive with the United States to order and control the disposition of the bankrupt's estate and to determine all liens thereon and all interests affecting it, and may issue citation to persons in another jurisdiction to appear before it in respect to such matters; but it cannot issue process to be enforced in another territorial jurisdiction, nor make a summary order for the delivery of property which must be there enforced, but such an order can only be obtained by ancillary proceedings by the trustee in the court of the district where it must be executed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Petition for Revision of a Certain Order of the District Court of the United States for the Northern District of California.

In the matter of the United Harness Company, bankrupt. Petition by Dave Staunton for revision of an order of the District Court. Order reversed.

The petitioner presents, in a petition for revision in bankruptcy, the following facts: The United Harness Company was a corporation of the state of California, having a branch store in Nevada. On April 22, 1908, a petition in bankruptcy was filed against the corporation, in the District Court of the United States for the Northern District of California, and on May 12, 1908, at 12 o'clock m., the corporation was adjudged a bankrupt. On April 20, 1908, two days before the petition in bankruptcy was filed, certain personal property of the bankrupt in Nevada was attached in an action brought against the corporation in a court of that state. Judgment was rendered against the corporation in that action, and on May 1, 1908, execution was issued against the attached property, and on May 12, 1908, at 2 o'clock p. m., the sheriff sold and delivered the same to Dave Staunton, the petitioner herein, and he paid the sheriff the purchase price therefor. On June 25, 1908, the trustee of the bankrupt was elected, and thereafter he made demand for the possession of the property so attached, which demand was refused. On February 23, 1909, the trustee filed a petition in the bankruptcy court, setting forth the facts above stated, and praying for an order that said Dave Staunton produce and surrender the said property to the trustee. The referee made an order fixing a time and place for hearing the petition, and directed that said Staunton show cause why the prayer of the petition should not be granted. A copy of

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

the petition and order were duly served upon him. At the time and place designated for the hearing, he specially appeared and objected to the jurisdiction of the court over the matter and the property in controversy. The referee overruled the objection, and made the order, and thereafter the District Court affirmed his ruling.

D. M. Duffy, for petitioner.

O. K. Cushing, Elliott McAllister, Charles S. Cushing, and Wm. S. McKnight, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The petition presents two questions for review: First, had the court in which the bankruptcy proceedings were pending jurisdiction, on the petition of the trustee in bankruptcy, to act in personam against a citizen and resident of another state, who within that state was served with notice to appear and show cause before the bankruptcy court? And, second, conceding such jurisdiction, could the bankruptcy court require the surrender of the property by a summary order, or was it necessary to proceed by a plenary suit instituted by the trustee against the petitioner in the state in which he resided, and where the property was?

The moment a petition in bankruptcy is filed the jurisdiction of the bankruptcy court begins, and the petition so filed is lis pendens, and notice to all the world. It has the effect both of an attachment and an injunction, and the adjudication of bankruptcy discharges any attachment levied within four months prior to the filing of the petition, unless the bankruptcy court shall order the lien preserved for the benefit of the bankrupt's estate, and it operates as a seizure of the property, the title to which subsequently passes to the trustee. Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien, which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and must deliver the property upon proper demand, and may be required to do so by a summary order issued from the bankruptcy court. He is not an adverse claimant, and his mere refusal to surrender the property does not make him such. In re Walsh Bros. (D. C.) 159 Fed. 560; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; In re Breslauer (D. C.) 121 Fed. 910; In re Graessler & Reichwald, 154 Fed. 478, 83 C. C. A. 304; Louisville Trust Co. v. Comingor, 184 U. S. 25, 22 Sup. Ct. 293, 46 L. Ed. 413, Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

But can the bankruptcy court make a summary order which is directly enforceable outside of its territorial jurisdiction? It is said that the question is answered affirmatively in Wood v. Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046. In that case the majority of the court held that the bankruptcy court in which bankruptcy proceedings are pending has jurisdiction under section 60d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), to re-examine, on petition of the trustee, the validity of a payment or transfer made by the bankrupt, in contemplation of bankruptcy, to an attorney for legal services to be rendered by him,

and to ascertain and adjudge what is the reasonable amount to be allowed for such services, and to direct payment of any excess to the trustee, and that, if such attorney is a nonresident of the district, an order directing him to show cause, or a citation or notice of the proposed hearing, may be served without the district. This was held in view of the fact that section 60d gave to the bankruptcy court, and to no other court, jurisdiction to determine the question of the reasonableness of the amount so paid. Said the court:

"There is no provision for the enforcement of this section in any other court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit. Such court is not given authority to re-examine the transaction. No other court has authority to determine the reasonable amount for which the transaction can stand"—citing Swartz v. Frank, 183 Mo. 439, 82 S. W. 60.

The court further held that, while section 60d made no provision for the service of process, reasonable and appropriate notice to the parties affected should be required, and an opportunity should be given them to be heard. But the decision does not go so far as to hold that the order of the bankruptcy court made upon such a hearing may be enforced by that court. In the opinion it is said:

"It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed."

In brief, it is the decision of the court that the proceeding under section 60d is administrative, and not judicial, and that while the bankruptcy court may, upon notice to a person without the territorial limits of the court's jurisdiction, determine the amount of the wrongful prepayment to him, it leaves the recovery of that amount to be accomplished by an action in a court acquiring jurisdiction of the person in the ordinary way of legal proceedings. But in that case the order of the court went no farther than to determine the validity of the transaction, fix the reasonable sum which the attorneys might retain, and order the trustee to proceed to recover the excess. The order could only be carried out, as the Supreme Court intimated, by an action in which jurisdiction could be had of the parties defendant therein. The bankruptcy court in its order made no attempt to control the action of the attorneys, or to require them to pay the excess to the trustee.

In the present case the court made a summary order, directed against a resident of another state, ordering him to surrender property in that state to the trustee. It may be conceded that the court in which the petition in bankruptcy is filed has plenary jurisdiction in bankruptcy, coextensive with the United States, to order and control the disposition of the bankrupt's estate, and is vested with jurisdiction to determine all liens thereon and all interests affecting it. Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535; In re Dempster, 172 Fed. 353, 97 C. C. A. 51; In re Muncie Pulp Co., 151 Fed. 732, 81 C. C. A. 116; Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285; In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316. But this is not to say that the court of bankruptcy may issue its process to run into another district. It is one thing to issue citation to persons in

another jurisdiction to appear before the court of bankruptcy in a proceeding which, in its exclusive jurisdiction, it is authorized to institute with a view to determining liens or rights of property wherever situate; but it is quite another thing to issue process to be enforced in another jurisdiction.

By whom is the summary order in this case to be executed, and in what manner is obedience to it to be enforced? There is no express provision in the bankruptcy act, or in any statute, indicating the intention of Congress to confer such power. In Toland v. Sprague, 12 Pet. 328, 9 L. Ed. 1093, it was said:

"Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any state of the Union. It has not done so."

The bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) limited the jurisdiction of courts of bankruptcy to "their respective districts." The present act invests them with jurisdiction "within their respective territorial limits as now established, or as they may be hereafter changed"; and it has been held that a court of bankruptcy may not extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised. In re Waukesha Water Co. (D. C.) 116 Fed. 1009; In re Alphin & Lake Cotton Co. (D. C.) 131 Fed. 824; In re Steele (D. C.) 161 Fed. 886. In view of these considerations, and the authorities, we are of the opinion that the District Court was not possessed of jurisdiction to make and enforce the summary order.

Since writing the above, there has come to our notice the decision of the Supreme Court in Babbitt, Trustee, v. Dutcher (decided in February, 1910, and not yet officially reported) 30 Sup. Ct. 372, 54 L. Ed. ——, in which the court quoted with approval the language of Mr. Justice Bradley in Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414, concerning the bankruptcy courts under the act of 1867, as follows:

"Their jurisdiction is confined to their respective districts, it is true; but this extends to all matters and proceedings in bankruptcy without limit. When the act says they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts."

And the court held that the District Court of the United States for the Southern District of New York had ancillary jurisdiction to entertain a petition of a trustee in bankruptcy appointed by the District Court for the Eastern Division of the Eastern District of Missouri for a summary order directing the surrender of property belonging to the bankrupt's estate then in the hands of persons within the Southern District of New York. It follows from that decision that the remedy of the trustee in the present case is to obtain his summary order by petition to the bankruptcy court of Nevada.

The order of the District Court is reversed, with costs.

McINTOSH et al. v. McKANY & CARMICHAEL MERCANTILE CO.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1910.)

No. 1,795.

SALES (§ 355*)—ACTION FOR PRICE—EVIDENCE OF SALE AND DELIVERY OF GOODS.

An allegation in a complaint that plaintiff sold and delivered goods to defendants at their special instance and request is supported by evidence that defendants were the general contractors for building a line of railroad, and that on defendants' request, and on their promise to pay for the same, plaintiff furnished supplies to camps on the line of work on orders given by a firm of subcontractors, and charged the same to such firm, as directed by defendants.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1030, 1041: Dec. Dig. § 355.*]

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

Action by the McKany & Carmichael Mercantile Company against James A. McIntosh and others. Judgment for plaintiff, and defendants bring error. Affirmed.

George F. Shelton, Charles A. Ruggles, and H. H. Field, for plaintiffs in error.

Ike E. O. Pace and McBride & McBride, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. We do not agree with counsel for the plaintiffs in error in their contention that there is only a scintilla of evidence to support the allegations of the defendant in error's complaint that they sold and delivered the goods in question to the plaintiffs in error at their special instance and request. On the contrary, there was substantial testimony introduced before the court and jury to sustain that contention, which satisfied both the court and jury. A part of that evidence is the testimony of the president of the plaintiff company, who testified, among other things, substantially as follows:

That in January, 1907, he took the train at Whitehall to go to Butte, Mont., to see McIntosh, and was introduced to him on the train by Jennings, who was McIntosh Bros.' superintendent of construction on the Milwaukee road; that during the conversation the witness told McIntosh that Perine and Robinson, who were subcontractors under Orman & Crook, were owing him a lot of money, which they had failed to pay; that McIntosh replied to the witness that any supplies that he furnished to Perine and Robinson he furnished at his own risk, and that he should have an order from Orman & Crook, who were subcontractors under McIntosh Bros. on the Milwaukee road; that the plaintiff company did not then have an account with Orman & Crook, and that the witness told McIntosh that he would just as soon have Perine and Robinson owing him as Orman & Crook, as he had examined into their financial condition and found that it was poor; that McIntosh then told the witness that Orman & Crook had filed a bond to protect

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

them against any liens or accounts against their contracts on the Milwaukee road, and that the witness should have an order from Orman & Crook to furnish supplies to any of the subcontractors; that, if the witness got an order from Orman & Crook to furnish supplies to Perine and Robinson, he would be responsible for it, and would pay the accounts, as McIntosh Bros. were the general contractors and the accounts came through their office; that the next day in Butte, at the Thornton Hotel, the witness told McIntosh that he had found that the bond that was furnished by Orman & Crook did not cover supplies furnished to the different camps along the line, and that McIntosh told the witness that that made no difference, and for him to go home and do as he had been told, which he did; that McIntosh told the witness to furnish Orman & Crook any supplies which they needed at their camps, or to any of their subcontractors, and that he would be responsible to them for their accounts, as it was his contract, and he was anxious to have the contract go on, and it was necessary to have these supplies to carry on the work; that at that time the plaintiff company had no account with Orman & Crook; that McIntosh told the witness to carry the account in the name of Orman & Crook, and to furnish any supplies that they needed for the construction of the work over there; that the witness then went home, and that the next morning Perine and Robinson had three four-horse teams there to get supplies, and the plaintiff's clerks were putting up the orders, but that the witness stopped them, and told the men in charge of the teams that he could not furnish any more supplies unless an order from Orman & Crook was obtained, whereupon they phoned to Orman & Crook's office, explaining the situation to them, and the latter called up the witness, and told him to go ahead and supply the goods, which the plaintiff did; that subsequently the witness saw McIntosh about once a month, and told him the amounts that were due the plaintiff, and conversed with him in a general way about the accounts up to April, 1907, about which time Orman & Crook had taken away from Perine and Robinson their contract; that in April, 1907, the witness and one George Franks came to Butte to see McIntosh, and met him at the Thornton Hotel, telling him that the accounts had not been paid, and that they needed the money—that is to say, the amount for the goods that plaintiff had delivered on the order of McIntosh; that McIntosh then told the witness and Franks to go ahead and furnish the camps with the supplies that were necessary to carry on the work; that he had taken part of the work away from Orman & Crook, and was likely to take more of it, as they were not doing the work satisfactory to him, but, whether he did or not, in any event they needed supplies, and for him to go home and rest easy, and he would be responsible for any supplies, and pay the plaintiff for any supplies furnished under the contract, and that the witness then went home and furnished all the supplies that were ordered from the plaintiff for those camps; that in December, 1907, the witness went to see McIntosh, and found him at the Thornton Hotel, in Butte, and told him that he had come to see about getting the money on the account, as he understood that Orman & Crook had failed; that McIntosh said that he would pay every dollar of the plaintiff's account when the proper time came, but that he was busy then, and

could not attend to it at that time, and that there were two of the camps still running out there, and that he might as well furnish what little stuff they wanted until the United States Fidelity & Guaranty man would come, or McIntosh Bros. would take charge of the work and complete the contract; that the witness went back and kept on furnishing the supplies in the same way; that in January following the witness and Franks went to see McIntosh at the Thornton Hotel about their respective accounts, when McIntosh told them that they were arranging to pay off the time checks, that he was busy with that, that when he paid those off he would take up the matter of paying the plaintiff's and Franks' accounts, and that the plaintiff's account would be one of the first that would be paid, and that McIntosh would leave Butte with clean skirts and pay every dollar that they owed.

Jennings, McIntosh Bros.' superintendent, testified, among other things, that he introduced McKany and McIntosh on the train to Butte, and sat in the seat immediately in front of them, when this conversation occurred, as near as he could remember:

"Mr. McKany said, 'Mr. McIntosh, I have been furnishing Perine and Robinson a lot of goods on the Milwaukee grade,' and Mr. McIntosh says, 'Who is Perine and Robinson? And Mr. McKany said, "They are subcontractors under Orman & Crook,' and he said, 'Don't know them at all.' He said, 'Any goods that you sell those people, or any of Orman & Crook's subs, we will not be responsible for, and you will have to take your own chances, unless you have an order from Orman & Crook.' I think I remember that Mr. McKany said he would just as lief have Perine and Robinson as Orman & Crook, and Mr. McIntosh said it didn't make any difference, that Orman & Crook were the head contractors, and they had furnished them the necessary bonds, and without their orders they would not be responsible for anything, and then he said, 'Orman & Crook's account will be good.' Mr. McKany said, 'How will I carry those accounts?' And Mr. McIntosh says, 'Carry them in the name of Orman & Crook, and we will pay the bill.'"

Franks, a witness called on behalf of the plaintiff company, testified, among other things, that he was engaged in the butchering business, and was present at the Thornton Hotel in Butte about April, 1907, and heard the conversation between McIntosh and McKany; that the way he happened to be present was that he had been furnishing Orman & Crook with meat, and they had stopped paying him, and he came in to see McIntosh about the matter; that in that conversation McIntosh told McKany to go home and furnish merchandise, and for him (Franks) to furnish meat, and that he would pay the bill; that he was under a heavy bond to complete the work, and he did not want those camps broken up; that men were hard to get, and to go ahead and furnish the merchandise and the meat, and he would pay the bill; that he said that to McKany and himself, and he further said that the account should be carried in Orman & Crook's name; that he had already taken part of the work from Orman & Crook, and that he would have to have meat and provisions on his own work, and they would have to have the same if they continued theirs, and to go ahead and furnish them, and he would pay the bills; that he (Franks) was present with McKany and McIntosh at the same place, about January, 1908, when McKany and himself had gone to try and get their money for the provisions that the plaintiff company had furnished and for meat that he had furnished, at which conversation McIntosh said that he was very busy with the time

checks, and that it would take him ten days or two weeks to get that matter straightened out, and that he would pay the plaintiff's and his own bills at that time, and that he expected to pay every cent that was standing against McIntosh, and that he would go out of there with clean skirts.

This testimony certainly tended strongly to support the plaintiff's contention that they sold the goods to McIntosh Bros. at their special instance and request. If, as the plaintiff's testimony tended to show, and as the jury must have found, McIntosh Bros. authorized the plaintiff company to carry the account in the name of Orman & Crook, and to deliver the goods to them or on their order, it was none the less a sale and delivery to McIntosh Bros. The question of such a sale and delivery was the real issue in the case. It was submitted to the jury upon somewhat conflicting evidence, it is true, but in the light of instructions which were full, correct and clear, and we see no good reason to interfere with the result.

The judgment is affirmed.

ANDERSON et al. v. J. J. MOORE & CO.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1910.)

No. 1,808.

1. SHIPPING (§ 181*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—ARRIVAL OF SHIP—LAY DAYS—"READY TO DISCHARGE."

A charter party of a ship to carry a cargo of coal from New Castle, Australia, to San Francisco, there to be discharged "as customary, in such customary berth as consignees shall direct," lay days to commence when the vessel was "ready to discharge," on written notice by the master, gave the consignee the right to designate any customary place for discharging, and the ship did not reach her destination, and was not ready to discharge, so as to be entitled to give the notice, until she was in the berth assigned; and where the master was promptly notified on arrival in port that the cargo had been sold to a fuel company and was to be discharged at its bunkers, which were customary places for discharging coal, a delay of 42 working days while awaiting her turn to discharge at such bunkers, which was required by the custom of the port, was at her own risk, and did not entitle her to recover demurrage, the delay being without fault of the charterer, but caused by a congestion of coal vessels in the port at the particular time.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589–592; Dec. Dig. § 181.*

For other definitions, see Words and Phrases, vol. 7, pp. 5935, 5936.

Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

2. SHIPPING (§ 181*)—CONSTRUCTION OF CHARTER PARTY—REASONABLENESS OF PROVISIONS—LAY DAYS.

A deliberate contract, made by the parties in a charter party, giving the charterer the right to designate the place of discharge, and providing that lay days shall commence when the vessel is ready to discharge, cannot be varied or relaxed on the ground that its enforcement subjects the vessel to an unreasonable delay.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589–592; Dec. Dig. § 181.*]

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

Appeal from the District Court of the United States for the Northern District of California.

Suit in admiralty by Andrew Anderson and others, as owners of the ship Columbia, against J. J. Moore & Co., a corporation. Decree for respondent (173 Fed. 539), and libelants appeal. Affirmed.

H. W. Hutton, E. B. McClanahan, and S. H. Derby, for appellants.

William Denman, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On June 26, 1907, the American ship Columbia, owned by the appellants, was chartered by the appellee for a round voyage via Newcastle, N. S. W., there to take on a cargo of coals, and thence proceed to San Francisco. The terms of the charter party material to this case are the following:

"And, being so loaded, shall proceed to San Francisco Harbor, Cal., to discharge at any safe wharf or place within the Golden Gate, and deliver the said full and complete cargo in the usual and customary manner at any safe wharf or place, or into craft alongside, as directed. * * * Frosts or floods, fire, strikes, lockouts, or accidents at the colliery directed, or on railways, or any other hindrance of what nature soever beyond the charterer's or their agent's control, throughout this charter always excepted. * * * To be discharged as customary, in such customary berth as consignees shall direct, ship being always afloat, and at the average rate of not less than 150 tons per weather working day (Sundays and holidays excepted), to commence when the ship is ready to discharge and notice thereof has been given by the captain in writing. If detained over and above the said laying days, demurrage to be at 3d. per registered ton per day."

The vessel arrived in San Francisco Harbor on January 14, 1908, and on the following day notice was given the appellee that the ship—

"has arrived at this port, and entry effected at custom house. Vessel is awaiting your orders, and lay days will commence as per charter party."

On the same day the master called at the appellee's office and asked where he was to discharge. The answer was that the appellee did not know, and that there would "not be anything done for three or four weeks to come." There was testimony, however, and the trial court found the fact to be, that, two days after the ship's arrival, J. J. Moore, the president of the appellee, told Capt. Nelson, the managing owner of the vessel, that the cargo of coal had been sold to the Western Fuel Company, and that the ship would dock at their bunkers. On January 18th a second notice was sent by Capt. Nelson to the appellee, saying:

"You will please take notice that, as per notice served upon you January 15, 1908, ship Columbia has arrived at San Francisco and has been ready to discharge on and since said 15th day of January. Please procure and advise me of place of discharge. Demurrage will be charged as per charter party."

There was further correspondence between the parties, not necessary here to be set forth. On March 16, 1908, the appellee gave notice that the vessel be docked at the Folsom Street bunkers of the Western Fuel Company at 11 a. m. of the following day, and she was finally discharged at 1 p. m., March 20, 1908. She was detained in San Francisco Harbor 67 days, and the appellants contend that she was detained more than 42 days beyond her lay days. The trial court held

that on January 16th the appellee properly and sufficiently exercised the option, given it by the charter party, to name a discharging berth, and that the place so designated was to be regarded as if specifically named in the charter party as the place of delivery, and that hence the Columbia's voyage did not terminate until she reached it, and that until then she was not ready, or entitled to give notice of readiness, to discharge her cargo. The reason for the delay in discharging the cargo was that, during the period of delay, other vessels which had arrived ahead of the Columbia, were discharging coals at the only available bunkers. During the months of January, February, and March there was an extraordinary and general congestion of shipping in the port of San Francisco. There had been a coal famine in the winter of 1906 and 1907, and the coal which caused the congestion a year later had been ordered at that time. Although the Columbia was chartered by the appellee on June 26, 1907, the coal which she carried had been sold to the Western Fuel Company under a contract made on November 24, 1906, more than a year before the congestion. The delay in discharging cargo in the port began soon after January 1, 1908. The evidence indicates that the congestion was induced, in part at least, by the financial depression of 1907, which had the effect to thrust upon the Western market coals which otherwise would have been shipped to Eastern points. The congestion was not caused by the act of the appellee. No vessel chartered by it had been discharged at the Western Fuel Company's bunkers for two months prior to the arrival of the Columbia. It was shown to be the custom of the port that vessels arriving in port were discharged in the order of their arrival, and this custom was observed in the present case, with the unimportant exception that a schooner which arrived after the Columbia was permitted to discharge 300 tons at the Western Fuel Company's bunkers on February 22d, a national holiday.

The first question presented on the appeal is: When did the lay days begin to run? Under the charter party they did not begin to run until the ship was "ready to discharge" "in such customary berth as the consignee shall direct." The court below held, and we find no error in its conclusion, that under such a provision in the charter party the vessel is not ready to discharge until she is in position to deliver her cargo to the consignee in the berth which he designates to her. By the terms of the charter party the appellee, at its option, could direct the vessel to discharge at any safe wharf or place within the Golden Gate, or into craft alongside, and in the exercise of the option the appellee informed the managing owner of the vessel that she was to discharge at the Western Fuel Company's bunkers. The fact that there were three berths at the bunkers did not render the notice so indefinite as to be invalid, since the bunkers were under one management, and, aside from this, the notice was accepted as sufficient, for no request was made for a more definite designation. In Hutchinson on American Law of Carriers, § 848, it is said:

"Lay days at the port of loading do not begin to run against the charterer until the master gives notice to the charterer that his vessel is ready to receive cargo. Such a notice can properly be given only after the ship is ready and at her proper place for loading."

And the same authority says that the charterers will not be liable—

"for a delay occasioned by the ship being unable to proceed to the designated berth, owing to the crowded condition of the dock."

The rule so formulated is well sustained by English and American decisions. In Murphy v. Coffin & Co., 12 Q. B. D. 87, the charter party provided that the vessel deliver her cargo—

"alongside consignees' or railway wharf or into lighters, or any vessel or wharf where she may safely deliver, as ordered."

Matthew, J., said:

"It is the ordinary and reasonable rule that the lay days under a charter party do not begin to run until the vessel has arrived at her place of destination. * * * When the vessel arrived in the dock at Dieppe, she was ordered to discharge at the railway wharf, which was then occupied by other vessels, so that there was no berth vacant for her, and it was not until she obtained one that she was in a position to discharge her cargo."

And the court held that the railway wharf was the only place of destination under the charter party, and that the lay days did not begin to run until the vessel had secured a berth there, and the court criticised Davies v. McVeagh, 4 Ex. D. 265, relied upon by the appellants herein, as "inconsistent with all the decisions."

In Tharsis Sulphur & Copper Co. v. Morel Bros., 2 Q. B. D. 647, by the charter party the vessel was to proceed to the Mersey and deliver her cargo at any safe berth, as ordered on arrival in the dock at Garston. It was held that the obligation of the charterers to unload did not commence until the vessel was berthed. Said Lord Esher:

"The contract does not express any particular berth; but it does express the equivalent to that in using the words 'as ordered,' which I take to mean as ordered by the charters. Does that give the charterers the right to fix the place where the carrying voyage is to end? Even without authority, I should say that it did. But Tapscott v. Balfour, L. R. 8 C. P. 46, has dealt with a charter party in a similar form, where a particular dock has to be named; the necessary result of the agreement being that, when the charterer exercises that power, the result is the same as if the dock had been named in the charter party. That was decided 19 years ago, and, as it was a decision on a question of frequent mercantile interest, we should not interfere with the decision, unless we were fully convinced that it was wrong. So far from entertaining that opinion, I think the decision was quite right, and that, when the charterer has to name a dock or a place in a dock, when he does so, it is as though it had been named in the charter party, and indicates the termination of the voyage. To hold otherwise would be to give no effect to the words 'as ordered.'"

Bowen, L. J., and Kay, L. J., were of the same opinion.

In Leonis Steamship Co. v. Rank, 1 K. B. Div. 499, it was held, on the other hand, that when the place of loading named in the charter party is a port or other wide district, as distinguished from a case where the charter party gives the charterer in express terms the right to order a vessel to a distinct and precise loading spot, the lay days begin when the ship is ready within the named place; but in that case the Court of Appeal, in opinions by Buckley, L. J., and Kennedy, L. J., assented to by Lord Alverstone, incidentally approved the doctrine of Tharsis Sulphur Co. v. Morel, and Kennedy, L. J., said:

"It is settled law that the point of destination is equally to be treated as designated in the charter party, whether the point be named in the document

by its local title, or there is in the charter party an express reservation to the charterer of the privilege to fix the point of destination by his order or direction"—citing Tharsis Sulphur Co. v. Morel and other cases.

The leading American case is 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. The charter provided that the vessel was to deliver the cargo alongside of any wharf or vessel, or craft, as ordered, where she could safely deliver, always afloat, or she might be required to deliver a part at a wharf, and a part at other wharves, and a part into a vessel or other craft, or into other vessels or other crafts. In the opinion Judge Putnam said:

"According to the primitive rule, a charterer who agrees to furnish a cargo for a vessel, and to discharge it, is bound to have the cargo ready when the vessel is ready, and to receive the cargo immediately on its arrival at its port of destination. This primitive rule applies to all contracts concerning the handling of merchandise, alike of sale, transportation, or bailment of any kind; but within the last century, in view, partly, of the necessities of coal ports, and of ports for shipment and receipt of ores and grain, and the modern facilities peculiarly provided at terminals for handling the immense masses of such merchandise now required to be handled, this rule has somewhat yielded, as is fully explained in Scrutton's Charter Parties and Bills of Lading (5th Ed. 1904) 17 to 22. This has gone so far that this author says, in effect, at pages 259, 260, and 261, that a mere obligation to load or to unload imports a stipulation that the work shall be done according to the settled and established practice of the port. Mr. Scrutton says, in effect, at page 260, that it has needed a long series of decisions to accomplish this proposition. 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. Accordingly, alike with regard to the port of lading and the port of discharge, large margins are given charterers, which have resulted in long detentions to vessels, extremely burdensome, but for which compensation has been refused."

Among other cases in point are Flood v. Crowell, 92 Fed. 402, 34 C. C. A. 415; Dantzler Lumber Co. v. Churchill, 136 Fed. 560, 69 C. C. A. 270; Harding v. Cargo of Coal (C. C.) 147 Fed. 971.

The appellant contends that, granting the construction of the charter party to be as we have indicated, and that under its terms a berth was designated on January 15th, the designation was nevertheless ineffectual, for the reason that the berth was not one that could be occupied within a reasonable time, and the appellant quotes the language of Bowen, L. J., in Tharsis Sulphur Co. v. Morel, where he said:

"The most that can be said is that the charterer does not exercise his option unless he names a berth that is free or is likely in a reasonable time to be so."

And from Charlton Steamship Co. v. Castle Mail Co., 2 Q. B. Div. 485, in which Lord Esher said:

"I think the order to be given must be for a berth to which the ship can go within a reasonable time, and there load, always afloat."

And from Williams v. Theobald (D. C.) 15 Fed. 472, in which it was said that a reasonable detention might be deemed within the contemplation of the parties, "but even then not any permanent or protracted detention." But Bowen, L. J., in connection with the remarks above quoted from his opinion, also said:

"To limit the option of the charterer, by saying that in the choice of a berth he is to consider the convenience of the ship owner, is to deprive him of the benefit of his option."

In Williams v. Theobald the cargo was to be delivered alongside any craft, steamer, floating depot, wharf, or pier, as might be directed by the consignees, to whom notice was to be given of the vessel being ready to discharge. The consignees named a wharf to which, because of its crowded state, the vessel could not enter, and by reason thereof the delay occurred. The court held the charterer liable for the detention, and construed the charter as making the lay days run from the time of arrival in port, and not from the time of arrival in the discharging berth; it not being expressly agreed that the lay days should run after the vessel was ready to discharge, and it was shown, moreover, that the delay was occasioned by the arrival at the harbor of an extraordinary number of vessels with cargoes of coal, but all brought by the charterer.

The language quoted from the opinion of Lord Esher in Charlton S. S. Co. v. Castle Mail Co. was used with reference to a charter party in which there was no provision for fixing the lay days, and the court held that the cargo should be discharged in a reasonable time, without saying what would be "a reasonable time." On appeal to the House of Lords (8 Asp. Mar. Cases, 402) it was held that the question on which the court below decided the case did not arise, that the difficulty existed in respect, not to a particular berth, but to the entire dock and all the berths in it, and that the question was whether, having regard to the tidal conditions of the port, there had been any unreasonable delay in the loading. But none of the expressions of opinion so quoted purport to, or do in fact, go so far as to intimate that the deliberate contract of the parties may be varied or relaxed on account of the unreasonableness of any of its provisions. The power to make such contracts is, as was said by Lord Esher in the Charlton Steamship Co. Case, a "power given to the charterers for business reasons." The owner of the vessel has it in his power to relieve himself of the embarrassment of indefinite detention, and the uncertain losses resulting therefrom, by inserting appropriate words in the charter party. The parties in this case saw fit to employ in the charter party terms which had been the subject of judicial construction, and whose fixed and settled meaning they must have known. Had the intention been other than these words indicate, we must assume that other well-known terms would have been inserted, such as that "the vessel shall have quick dispatch," or that "the unloading shall begin when the vessel is ready, whether in berth or not," or that "the lay days shall begin 24 hours after arrival in port," or that "the vessel shall be discharged promptly." Said Judge Brown in Fish v. One Hundred and Fifty Tons of Brown Stone (D. C.) 20 Fed. 201:

"It is in the power of the vessel always to provide against any loss on her part through detention from accidental causes at the place of discharge, if such be the intention of the parties, by inserting in the bill of lading the time within which the cargo must be received, or by other familiar provisions, such as that the vessel shall have dispatch, or quick dispatch, either of which would cast the risk of delay upon the consignee."

In Evans v. Blair, 114 Fed. 616, 52 C. C. A. 396, Judge Putnam, after referring to the English decisions, said:

"The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of selecting the berth, regardless of its crowded state, provided only it is a safe one. This, however, comes from the fact that the charter party or bill of lading contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the court from establishing any safe theory by which the latter can be modified to meet any supposed intent."

In the view which we take of the terms of the charter party above discussed, we find it unnecessary to enter upon a consideration of the question whether or not the provision whereby were excepted "frosts," etc., "or any other hindrance of what nature soever beyond the charterer's or their agent's control," under the facts of the case, of itself postponed the commencement of the lay days.

The decree is affirmed.

MIDLAND OIL CO. et al. v. TURNER.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1910.)

No. 3,068.

1. INDIANS (§ 16*)—INDIAN LANDS—LEASES—APPROVAL OF ASSIGNMENT BY SECRETARY OF INTERIOR.

The statutory requirement that leases made by Indian allottees of the Cherokee and other civilized tribes in the Indian Territory should be subject to approval by the Secretary of the Interior before being effective conferred on the Secretary only the power of approval or disapproval, and gave him no authority to initiate or make a lease, or to change or ignore its provisions, and his approval of an assignment of a lease, made without the consent of the lessor, in direct violation of its conditions, did not validate such assignment.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 16.*]

2. INDIANS (§ 16*)—INDIAN LANDS—SUIT TO ENJOIN TRESPASS—DEFENSES—VOID ASSIGNMENT OF OIL LEASE.

Where an allottee of Indian lands made an oil lease thereon, providing that it should not be assignable without her consent, strangers to such lease, who went upon the land, drilled wells, and produced oil therefrom, acquired no right by the subsequent assignment to them of the lease without the lessor's consent; nor was the assignment validated by an approval by the Secretary of the Interior over the lessor's protest, and a court of equity properly enjoined the trespassers from further operating their wells, and canceled the lease, where the lessee, who was made a party, made no claim thereunder.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 16.*]

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

8. MINES AND MINERALS (§ 51*)—RECOVERY OF OIL LAND FROM TRESPASSERS —RECEIVERS—EXPENSE OF OPERATING WELLS.

Where oil wells, drilled by defendants as trespassers on the land of complainant, pending a suit to recover possession, were operated by a receiver, who used defendant's tools and machinery, and the oil produced was awarded to complainant, but defendants were allowed to keep the proceeds of that produced by them, less a royalty, and to remove their tools and machinery, they were entitled to fair rental for their use by the receiver, and were not chargeable with any part of his compensation for operating the wells.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

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

Suit in equity by Susan Turner, by J. T. Parks, her guardian and next friend, against the Midland Oil Company, T. N. Barnsdall, and William J. Seep. Decree for complainant (167 Fed. 646), and defendants appeal. Modified and affirmed.

Edgar Smith and Eugene Mackey (Zevely, Givens & Smith and Cornelius D. Scully, on the brief), for appellants.

Kenneth S. Murchison (M. C. Reville and A. A. Davidson, on the brief), for appellee.

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

HOOK, Circuit Judge. This was a suit by Susan Turner, a minor, by her guardian, to enjoin William J. Seep, T. N. Barnsdall, and the Midland Oil Company from trespassing on her lands in Oklahoma, and for other relief. There was a decree for complainant, and defendants appealed.

The complainant, as a member of the Cherokee Nation of Indians, received an allotment from the tribal lands. Her guardian, acting under the orders of a court of probate in what was then Indian Territory, executed, upon payment of a bonus, an oil and gas lease to the Midland Oil Company. By its terms the lease was not to be effective until approved by the Secretary of the Interior and the execution by the lessee within 60 days thereafter of a bond as prescribed by the regulations of the department. There was also a provision against the assignment or transfer of the lease, or of any interest under it, without the written consent of the lessor and the Secretary of the Interior, and that such assignment or transfer should be void; also that a violation of any of the provisions of the lease, or a failure for 60 days to pay the stipulated monthly royalty, gave the lessor the right to avoid the lease and cause the same to be annulled, when all the rights of the lessee should cease without further proceedings. The lease was executed November 16, 1905. The Midland Oil Company never took possession of the premises. In December, 1905, without advising the complainant, or her guardian, and without awaiting the approval of the lease, or the giving of the prescribed bond, the defendants Seep and Barnsdall, who were strangers to the transaction so far as complainant was concerned, took possession. They at once commenced the drilling of wells, and

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

then the extraction of oil. The guardian first learned of this on January 7, 1907, more than a year afterwards. The lease provided for the payment monthly of a royalty of 10 per cent. of the value of the oil extracted, and under the law the payments should have been made to the Indian agent for the benefit of the complainant. Seep and Barnsdall commenced taking oil from the land in March, 1906, and at the time the suit was brought, a year later, it amounted in value to $8,134.73; but no royalty was paid or tendered until July 25, 1907. March 7, 1907, the guardian brought this suit under the authority of an order of the court of probate. Afterwards, April 29, 1907, the Midland Oil Company assigned the lease to Seep and Barnsdall, without the consent of complainant or her guardian. On June 18, 1907, the lease and assignment were approved by an Assistant Secretary of the Interior against the protest of the guardian. By the decree of the trial court Seep and Barnsdall were given the oil extracted before suit was brought, less 10 per cent. of the value, equaling the reserved royalty, which was awarded complainant, and they were allowed to remove their tools, machinery, and structures. The receiver, who had been appointed, was directed to deliver the premises to complainant, and defendants were enjoined from interfering with her possession and enjoyment.

The assignment of the lease was contrary to the express prohibition contained in it, and was void. It conferred no rights whatever on the assignees. We assume, without further consideration, that the approval of the assignment by the Assistant Secretary of the Interior had the same effect as if done by the Secretary himself. But that does not help matters. The power of the Secretary with respect to oil and gas leases of Cherokee allottees was that of approval or disapproval. He could veto, but could not initiate or make, a lease. He might refuse to approve because of the presence of a provision, and thereby render the lease ineffective; but he could not strike out a part, and have the remainder continue in force, without the concurrence of the lessor. If a lease were made to A., with a prohibition against transfer, the Secretary could not lawfully nullify the prohibition by approving a transfer to B. The land, subject to specific restrictions imposed by Congress, belonged to the Indian, and whether a lease should be made at all, and, if so, upon what terms, rested in the first place with the guardian and the court of probate.

It is urged that a court of equity will not decree a forfeiture. This rule has substantial exceptions; but it cannot in any event apply to the assignment, for that instrument never had a valid beginning and there was nothing about it to forfeit. Seep and Barnsdall were trespassers. The inquiry, therefore, turns to the status of the lease to the Midland Oil Company. It may be admitted that a void assignment does not destroy a valid lease, but the company was made a defendant, and it is asking nothing for itself by pleading or proof. Barnsdall, who organized the company and acted for it in obtaining leases, testified, and he was not contradicted, that the lease here was taken in the name of the company by mistake; that it was intended for Seep, the witness to be also interested; that the company had no interest in it, and made the assignment because it did not wish to keep something

that did not belong to it. There is no claim that the complainant or her guardian was aware of this. So to hold the lease valid in the hands of the company would either give it something it does not ask or make a new contract for the parties, by establishing the company as a naked trustee for Seep and Barnsdall, and thereby evade the express provision against any transfer, direct or indirect, of the leasehold interest. Though the company, having executed the lease, might be held to it at complainant's option, yet, if it repudiates it as being for itself, the complainant may take it at its word and end the contract relation. The company disavows personal interest in the lease. Seep and Barnsdall cannot, against complainant's will, obtrude themselves as lessees or assignees, and complainant accepts the situation and retakes possession of her property. This was the theory of the trial court, and we think it is right.

It is urged that the terms of the lease are fair, and the complainant is not injured by the assignment. But complainant did not contract with Seep and Barnsdall, and no court has power to impose a contract on a person against his express stipulation. It is as much a natural right of a person to select those with whom he contracts as it is to determine the character of his engagement and the terms and conditions by which he will be bound. As was said in National Bank v. Hall, 101 U. S. 43, 50, 25 L. Ed. 822:

"In making a contract, parties are as important an element as the terms with reference to the subject-matter. Mutual assent as to both is alike necessary."

The hardship which it is said will follow the decree results directly from the negligence of the defendants or their careless disregard of the rights of the complainant. Little attention seems to have been paid to a prudent and orderly procedure in such matters, or for that matter to any duties or obligations to the owner of the property.

The trial court preserved to the individual defendants their tools, machinery, etc. The receiver has used them in operating the wells, and the oil he extracted was awarded complainant. We think a fair compensation for the use of the tools, machinery, etc., should be given them; also that they should not be charged with any part of the compensation of the receiver for operating the wells, the exclusive benefit of which accrues to complainant.

The decree should be modified accordingly, and the cause is remanded to the Circuit Court for that purpose. As so modified, the decree is affirmed.

SEEP et al. v. SPADE.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1910.)

No. 3,067.

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

Suit in equity by Robert Spade, by J. T. Parks, his guardian and next friend, against William J. Seep, T. N. Barnsdall, and the Midland Oil Company. Decree for complainant, and defendants appeal. Modified and affirmed.

Edgar Smith and Eugene Mackey (Zevely, Givens & Smith and Cornelius D. Scully, on the brief), for appellants.

Kenneth S. Murchison (M. C. Reville and A. A. Davidson, on the brief), for appellee.

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

HOOK, Circuit Judge. The essential facts in this case are like those in Midland Oil Company et al. v. Susan Turner (just decided) 179 Fed. 74, and there is a stipulation that this case shall abide the result of the other.

It is therefore remanded to the Circuit Court for a like modification of the decree, and, as so modified, the decree is affirmed.

BUSH v. PIONEER MINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1910.)

No. 1,755.

1. EJECTMENT (§ 84*)—PLEADING AND EVIDENCE—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In ejectment, the plaintiff must recover, if at all, on his title as it existed at the time of the commencement of the action, and evidence of any after-acquired title is inadmissible, unless the foundation therefor has been laid by a supplemental complaint, under the authority of a statute which permits the filing thereof in actions at law.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 231; Dec. Dig. § 84.*]

2. PLEADING (§ 274*)—SUPPLEMENTAL COMPLAINT—NATURE AND REQUISITES.

The rule of practice under statutes allowing the filing of supplemental complaints in actions at law is similar to that of the chancery courts in reference to supplemental bills, and the supplemental complaint differs from an amended complaint in that it does not take the place of the original pleading, but stands with it, and adds to it some fact which has occurred since the beginning of the action, which fact must be set forth therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 832; Dec. Dig. § 274.*]

3. EJECTMENT (§§ 76, 84*)—PLEADING (§ 428*)—SUPPLEMENTAL COMPLAINT—SUFFICIENCY—EVIDENCE.

An amended complaint in ejectment, filed by leave of court, which merely alleged a cause of action, as did the original complaint, and which did not allege any fact occurring after the filing of the original complaint, cannot be construed as a supplemental complaint, under Carter's Code Civ. Proc. Alaska, § 98, which permits the filing of a supplemental complaint "alleging facts material to the case occurring after the former complaint," and does not warrant a recovery by plaintiff on a title acquired after the commencement of the action, which was not pleaded therein; nor does the defendant waive the right to object to the introduction of evidence of such title by failing to demur to the amended complaint.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 212, 231; Dec. Dig. §§ 76, 84;* Pleading, Cent. Dig. §§ 1433–1436; Dec. Dig. § 428.*]

4. PLEADING (§ 274*)—"SUPPLEMENTAL COMPLAINT."

A "supplemental complaint" is one which assumes that the original complaint is to stand, and must consist of facts which had arisen since

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

the filing of the original complaint, and must relate to matters which had occurred subsequent to the commencement of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 832; Dec. Dig. § 274.*

For other definitions, see Words and Phrases, vol. 8, p. 6799.]

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

Action by William H. Bush against the Pioneer Mining Company, the Nome Exploration Company, the Bear Mining & Trading Company, O. W. Carlson, R. D. Adams, and A. N. Ashley. Judgment for defendants, and plaintiff brings error. Affirmed.

On September 26, 1906, the plaintiff in error filed a complaint in ejectment against the defendants in error to recover the possession of an undivided one-fourth interest in a mining claim. In the complaint it was alleged that the plaintiff therein owned and was entitled to the possession of an undivided one-fourth interest in the Daisy or Big Clid claim, since 1905, through mesne conveyances from F. F. Bowers, who, the complaint alleged, located the claim on August 1, 1900, and thereafter, on January 12, 1901, filed an amended location thereof. In August, 1907, the plaintiff moved the court for leave to file an amended complaint, and based the motion "on records and files in the above-entitled action, and facts occurring subsequent to the filing of the original complaint," but without specifying what were the records and files or facts relied upon. On August 14, 1907, the amended pleading was filed, and it was designated an "amended complaint." It did not, as did the original complaint, set forth the deraignment of the plaintiff's claim of title, but described the mining claim by metes and bounds, and alleged title in the plaintiff of an undivided one-fourth interest therein, and his right to the immediate possession thereof "under and by virtue of valid and subsisting locations made by his predecessors in interest, under the mineral land laws of the United States, on and subsequent to August 1, 1900, who thereafter conveyed to said plaintiff by certain mesne conveyances an undivided one-fourth interest of, in, and to said premises." The defendants moved to make this complaint more definite as to the specific acts of location under which the plaintiff claimed, but the motion was overruled. The defendants answered the amended complaint, setting up claim of title under locations prior in date to the Bowers location, and the cause went to trial before a jury. On the trial the plaintiff introduced his evidence of the location made by Bowers on August 1, 1900, and of the amended location of January 12, 1901. He also sought to recover on a title derived through one Alexander, who claimed to have located the land on January 1, 1901. The deposition of Alexander, containing the evidence of his location, was introduced; but it was struck out when it was shown that the deed from Alexander to the plaintiff was not made until July 19, 1907, long after the commencement of the action. The jury returned a verdict for the defendants in error.

Albert H. Elliot, Hobbes & Bell, Geo. D. Cochran and John J. Reagan, for plaintiff in error.

Ira D. Orton, Campbell, Metson, Drew, Oatman & Mackenzie and E. H. Ryan, for defendant in error Pioneer Mining Co.

Ira D. Orton, A. J. Daly, Albert Fink, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for defendant in error Nome Exploration Co.

Joseph Hutchinson, for defendants in error Bear Mining & Trading Company, Carlson, Adams, and Ashley.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the rejection of the deposition of Alexander and of his deed to the plaintiff in error, made after the commencement of the action. In ejectment the plaintiff must recover, if at all, upon the state of his title as it subsisted at the time of the commencement of the action. Evidence of any after-acquired title is inadmissible, unless the foundation therefor has been laid by a supplemental complaint, under the authority of a statute which permits the filing thereof in actions at law. There is such authority in section 98, p. 164, Carter's Code Civ. Proc. Alaska, which provides that:

"The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply."

The rule of practice under such statutes is similar to that of the chancery courts in reference to supplemental bills, and the supplemental complaint differs from an amended complaint in that it does not take the place of the original pleading, but stands with it and adds to it some fact which has occurred since the beginning of the action. That fact must be set forth in the supplemental complaint. If the fact be that the plaintiff in ejectment has, since the commencement of the action, acquired a new or different title from that on which he brought his action, he must allege the fact, so that the defendant may be apprised of what he is required to meet. In Musselman v. Manly, 42 Ind. 462, the court said:

"A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint, and assumes that the original complaint is to stand. A supplemental complaint must consist of facts which had arisen since the filing of the original complaint, * * * and must show upon its face that it is supplemental, and relates to matters which had occurred subsequent to the commencement of the action."

Cases in point are Reily v. Lancaster, 39 Cal. 354; Roper v. McFadden, 48 Cal. 346; Taylor v. Gooch, 110 N. C. 387, 15 S. E. 2; Johnson v. Briscoe, 92 Ind. 367; Samuel Kahn v. Old Telegraph Mining Co., 2 Utah, 174; Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502.

It is argued that the so-called amended complaint was in fact a supplemental complaint, sufficient to bring to the attention of the court and the opposite party notice of a fact which occurred subsequent to the commencement of the action, and that the language of the motion for leave to file it, in referring to facts occurring since the filing of the original complaint, advised the defendants that it was a supplemental complaint, upon which the plaintiff proposed to introduce evidence of the newly acquired title. We may concede that, while a supplemental complaint should properly be designated as such, nevertheless, under the liberal rules of code pleading, the name given to the pleading by the pleader may be disregarded, and its true nature may be determined by the allegations which it contains. But the question here is whether the allegations of the so-called amended complaint were such as to indicate that it was in fact a supplemental complaint, and that the plaintiff in the action intended to offer proof of a title acquired after its commencement. To this question there can be but one answer.

There was no allegation that the plaintiff had or intended to rely on a title acquired since the commencement of the action. The allegation that the plaintiff claimed under locations made on and subsequent to August 1, 1900, "who thereafter conveyed to said plaintiff," was not a statement of a fact occurring after the commencement of the action.

But it is contended that the defendants in error waived their right to question the amended complaint, or to deny that it was a supplemental complaint, by going to trial without demurring thereto, and authorities are cited to the proposition that where no cause of action is stated in the original complaint, and a supplemental complaint is filed for the purpose of setting up a cause which has subsequently arisen, and the defendant makes no objection to such supplemental complaint, but permits the cause to be heard on the merits, he waives all objection to the supplemental complaint based on the insufficiency of the original complaint. But the doctrine of those decisions is not involved. In this case the original complaint sufficiently and properly pleaded a cause of action in ejectment. The same may be said of the amended complaint. There was nothing, therefore, to be waived by the defendants by going to trial, as they did, without demurring to the second complaint, which apparently was intended to take the place of the first. The motion which they made to require the plaintiff to set forth more definitely the nature of his claim of title could have been denied by the court only upon the theory that the second complaint was in fact what it purported to be, an amended complaint. As an amended complaint, to stand in place of the original complaint, it contained all the averments essential to good pleading in ejectment; but as a supplemental complaint it was fatally defective in not specifying the facts which had arisen since the commencement of the action, and which made a supplemental complaint necessary.

The judgment is affirmed.

SHERIDAN v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1910.)

No. 1,773.

1. EJECTMENT (§ 116*)—JUDGMENT—ADJUDGING VALIDITY OF DEFENDANT'S TITLE.

In ejectment, where both parties allege title and the evidence sustains that of defendant, it is not error for the court to render an affirmative judgment in his favor, adjudging him to be the owner of the property and entitled to possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 360; Dec. Dig. § 116.*]

2. EJECTMENT (§ 17*)—TITLE TO SUSTAIN ACTION—DEED INTENDED AS MORTGAGE.

Conceding that a deed given as a mere security for an existing debt is not effective to transfer the legal title or right of possession of the mortgaged property from the grantor to the grantee, nevertheless the voluntary surrender of actual possession to the grantee as further security is lawful, and may be effective to create a legal right of possession suf-

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

ficient to bar a right of recovery in an action of ejectment by the mortgagor against the mortgagee.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.*]

3. EJECTMENT (§ 95*)—TITLE TO SUSTAIN ACTION—EVIDENCE CONSIDERED.
Evidence considered, and *held* insufficient to establish a legal title to real estate in plaintiff which entitled him to recover in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. § 95.*]

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

Action by T. R. Sheridan against the Southern Pacific Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. C. Bristol, E. B. Watson, and Frank P. Deering, for plaintiff in error.

Wm. D. Fenton, R. A. Leiter, Ben C. Dey, James E. Fenton, and Williams, Wood & Linthicum, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

HANFORD, District Judge. This is a plain action of ejectment, in which the respective parties each claim certain real estate situated in Oregon by a legal title in fee simple and right of possession, and each maintains that the case must be determined with respect merely to legal rights, as contradistinguished from rights maintainable only in equity. The pleadings are brief; the only issues being as to the disputed title and the plaintiff's demand for damages. On the trial the Circuit Court granted a motion for an instructed verdict in favor of the defendant, and upon the verdict rendered a judgment adverse to the plaintiff and affirming the defendant's claim of title and right of possession. The evidence which the court admitted proves that the real estate records of the county in which the property is situated contain the following muniments of title, viz.:

(1) A written contract, executed and recorded on the 25th day of August, 1890, by C. H. Merchant and R. A. Graham, which recites that Merchant had subscribed $10,000 to a subsidy fund to promote the building of a railroad, which subscription Graham assumed to pay; and the contract stipulates that in consideration of Graham's assumption of that obligation and the benefits expected to accrue from the building of the railroad, etc., Merchant shall convey certain property, including that which is the subject of controversy in this action, to the plaintiff as trustee, and it defines the powers and duties of said trustee as follows:

"Said trustee shall take and hold the title to said property so to be conveyed in trust for the following purposes, to wit: He shall have full power to sell and convey for cash, or on time, and to contract for the sale and conveyance of any portion of said trust property unconditionally in such manner and upon such terms and prices as the said Graham shall direct, to carry out the objects of this trust; to receive the purchase money therefor and all notes and mortgages executed as part payment therefor. Out of the proceeds of any sales of said property the said trustee shall pay to said R. A.

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

Graham such sums as shall actually be used in the construction of the said line of railroad, or in the building of a hotel upon a part of said property, or in the building of wharves or other improvements upon said property that may be made by said Graham. When said railroad is completed to a point at or near Myrtle Point, the said trusteeship shall cease, and said trustee shall convey to said Graham all unsold portions of said property, and transfer to him all notes, mortgages, or other assets in his hands as such trustee, absolutely and without condition."

(2) A deed conveying said property to the plaintiff as trustee, executed by Merchant and his wife on the 16th day of October, 1890, and recorded on the 21st day of the same month, which deed, by reference, has incorporated into it the above-described contract.

(3) A deed conveying the property which is the subject of this action to J. D. Spreckels & Bros. Company for the expressed consideration of $50,000, executed by the plaintiff as trustee the 22d day of August, 1893, and recorded November 10, 1893. On its face this deed appears to be an unconditional conveyance of a fee-simple title and warranty of said title.

The above mentioned instruments are referred to in the record, respectively, as Exhibits 1, 2, and 3.

(4) A deed to the Bank of California, executed by the J. D. Spreckels & Bros. Company and R. A. Graham on the 8th day of June, 1899, and recorded the 19th day of July, 1907.

(5) A deed to the J. D. Spreckels & Bros. Company, executed by the Bank of California on the 15th day of May, 1907, and recorded on the 19th day of July, 1907.

(6) A deed to the defendant, executed by the J. D. Spreckels & Bros. Company July 2, 1906, and recorded July 31, 1906.

These last three conveyances are respectively identified in the record as Exhibits A, B, and C. The property which is the subject of this action is included in each of them, in form they are absolute conveyances, and Exhibit C contains covenants of general warranty of the title.

On the trial it was proved by uncontradicted evidence that the railroad was completed to Myrtle Point prior to the time of the execution of the deed referred to as Exhibit 3. Therefore, at that time the plaintiff held the title as a mere naked trustee, having no authority with respect to the property, except to convey it to Graham, whose right to it had become fixed and absolute according to the specifications of the trust in Exhibits 1 and 2, and it is a conceded fact that he had actual possession of the property until a date subsequent to the execution of the conveyance which is the last link in the chain of title.

One of the alleged errors for which a reversal of the judgment is urged is the ruling of the court in granting the defendant's motion for an instructed verdict and in rendering a judgment declaring the defendant to be the owner in fee simple and entitled to possession of the property. In their brief counsel for the plaintiff say:

"A judgment of nonsuit, in effect, was all the defendant in error was entitled to under the view entertained by the court."

The pleadings, however, make an issue as to the defendant's claim of title, as well as an issue as to the plaintiff's claim, and the defendant

acted within its rights in submitting proof and insisting upon a full determination of both issues; and to make proof sufficient to support its claim of ownership it was only necessary to introduce the deeds by which the title conveyed to the plaintiff by Exhibit 2 was transmitted to and became finally vested in the defendant. Under a rule of practice, applicable in litigation of controversies respecting real estate titles, the title of the grantor from whom all the litigants deraign is presumed to be legal. The deeds in evidence make a complete chain of conveyances from Merchant and his wife, through the plaintiff, as trustee, and Graham, to the defendant, and a perfect record title. When the action was commenced the defendant was, prima facie, the holder of the legal title and in actual possession, and the judgment of the Circuit Court is right in law, unless it is reversible for prejudicial error in rejecting evidence offered in behalf of the plaintiff to prove aliunde that Exhibit 3 is not what it purports to be; i. e., a conveyance of the legal title, but a mere mortgage. The plaintiff's contention is based upon the postulate that a mortgagor of real estate holds the legal title, and is entitled to maintain possession against the mortgagee as well as others; and he maintains that, in an action at law against a mortgagee in possession, the mortgagor is entitled to recover by virtue of his legal title.

On the trial he offered evidence to prove facts in substance as follows: That Graham, the cestui que trust, was indebted to him in an amount aggregating $50,000 for money advanced and expended in promoting and constructing the railroad; that by an agreement between Graham and himself the property, which he took as trustee, should be held by him as security for the payment of that indebtedness; that Graham was also indebted to the J. D. Spreckels & Bros. Company for money expended in constructing the railroad in the amount of $185,000; that, in the execution of a scheme for financing the enterprise, Graham intrusted to the J. D. Spreckels & Bros. Company securities to be used in raising money to pay his debts, including those above mentioned, and as part of that scheme the deed Exhibit 3 was executed and delivered, and there was no consideration for the giving of that deed, other than the agreement of the grantee to raise the necessary funds by use of the securities taken and to apply the same in payment of Graham's debts, and for the completion and betterment of the railroad; that the debt which Graham owed to him has not been paid; that the property, the title to which is the subject of this action, was in Graham's possession until a short time prior to the commencement of this action; and that the defendant had actual knowledge of the conditions and circumstances under which the deed, Exhibit 3, was given, and the purposes for which it was given, at and previous to the time of accepting the deed, Exhibit C.

In the determination of the question presented by the assignment of error predicated upon the ruling of the Circuit Court in excluding the evidence offered, this court must have in view the situation and rights of the parties at the time of the commencement of the action, rather than the time of the transaction which included the giving of the deed, Exhibit 3. Conceding that a deed given as a mere security for an existing debt is not effective to transfer the legal title or right of posses-

sion of the mortgaged property from the grantor to the grantee, nevertheless the voluntary surrender of actual possession to the grantee as further security is lawful, and may be effective to create a legal right of possession sufficient to bar a right of recovery in an action of ejectment by the mortgagor against the mortgagee. It is to be noted that the plaintiff made no offer to prove that Graham's debt to the J. D. Spreckels & Bros. Company had been extinguished prior to the execution and delivery of the conveyance to the Bank of California, Exhibit A, in which Graham joined as grantor, and there was no offer to prove the exact time when, nor the circumstances and conditions under which, possession of the property was taken by, or surrendered to, the defendant or its grantor. If the possession was voluntarily delivered by the holder of the legal title as further security for Graham's debts, or in consideration of a discharge of his obligations, or a substantial part thereof, there can be no legal ground for repudiation of the transaction. On the facts shown by the record, supplemented by the facts which the plaintiff offered to prove, the aspect of the case is entirely different from what it would be if the defendant or its grantor had acquired possession of the property by means of duress, force, or fraud. In the argument the plaintiff's counsel has tried to maintain that the possession of the defendant is a wrongful possession, as it would be if possession had been taken without judicial process and against the will of the holder of the legal title; but duress, force, and fraud are things not presumed by courts in judicial proceedings, as they must be shown affirmatively by a party who relies upon such grounds for the maintenance of a legal right. These considerations lead to the conclusion that the evidence offered was not sufficient to entitle the plaintiff to recover, and that the ruling of the court excluding it was not prejudicial error.

The attitude of the plaintiff as a litigant, asserting the legal right of possession as an incident of a legal title, is inconsistent with any claim which he can assert as a creditor of Graham, for the reason that any rights of a mere security holder must necessarily be classed among those denominated "equitable rights," as contradistinguished from legal rights. As a creditor, he could only claim a lien, which would not be a right sufficient to warrant a recovery of possession in an action of ejectment prior to a foreclosure of his lien.

On a general view of the whole record, it is the opinion of this court that at the time of the execution of the deed, Exhibit 3, the plaintiff's relationship to the property, in a legal sense, was that of a naked trustee holding the legal title for one purpose only, viz., to convey an absolute unconditional title to the cestui que trust. All of his other powers having been extinguished, as the trust deed provided they should be, if the conveyance which he made was by the consent and direction of the cestui que trust, it was valid, leaving in him no further right to control or interfere with the property, and, if not so authorized, it conveyed the legal title cum onere, and it was competent for the cestui que trust to make it complete and valid by his subsequent ratification and adoption in joining with the grantee in the execution of a deed conveying the entire property to the Bank of California. He might have repudiated the plaintiff's deed by timely action; but his own deed es-

tops him, and a fortiori estops the plaintiff. The plaintiff cannot maintain the action in his own right, because he never owned the property, nor as trustee, because his powers as trustee were exhausted by his conveyance of the legal title.

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

EISLEBEN et al. v. BROOKS et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1910.)

No. 3,125.

1. FRAUDS, STATUTE OF (§ 110*)—CONTRACTS RELATING TO REAL PROPERTY—SUFFICIENCY OF DESCRIPTION.

A written contract, describing its subject-matter as the mineral rights on which the parties of the first part held options and such as they were in process of acquiring "in all or as much thereof as can be had of what is known as the Ouita coal basin, in Pope and Yell counties, in the state of Arkansas, as shown by Branner's Map of the Arkansas Geological Coal Survey, which basin approximates 10,000 acres, more or less," *held* to contain a sufficient description of the lands to meet the requirement of the Arkansas statute of frauds (Kirby's Dig. Ark. 1904, § 3654); the option contracts then held by the first parties, embracing over 5,000 acres, containing a specific description of the lands covered thereby.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 225–236; Dec. Dig. § 110.*]

2. MINES AND MINERALS (§ 54*)—CONTRACT OF SALE—MEASURE FOR BREACH.

Where a contract for the purchase by defendants from plaintiffs of the mineral rights in certain lands, for which plaintiffs held options, gave defendants the option to furnish funds to have the lands drilled, in which case they were bound to take only such as were shown to contain a coal vein, or to accept all the lands without drilling, in an action for breach of such contract by defendants by refusing to take the lands or to furnish the drilling fund, plaintiffs were not entitled to recover the contract price for all the lands and also the cost of drilling machinery purchased by them.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 151; Dec. Dig. § 54.*]

3. MINES AND MINERALS (§ 54*)—CONTRACT OF SALE—BREACH OF CONTRACT TO FORM CORPORATION—DAMAGES.

In an action for breach of a contract by which defendants agreed to purchase from plaintiffs at a stated price the mineral rights in certain lands and to subscribe and pay for one half of the stock in a corporation to be organized by the parties, the other half to be issued to plaintiffs, where the corporation was to repay to defendants the amount paid by them for the mineral rights which exceeded the capital to be paid in by them, plaintiffs were not entitled to have the value of the stock so to be issued to them considered as an element of damages, in the absence of any evidence as to the value of the mineral rights upon which alone the value of the stock depended.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 151; Dec. Dig. § 54.*]

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

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

Action by William Brooks and John H. Ganner against Louis Eisleben, H. C. Reiner, and W. A. Miller. Judgment for plaintiffs, and defendants bring error. Reversed.

James C. Jones and Jacob Klein (Jones, Jones, Hocker & Davis, Thomas H. Sprinkle, and Klein & Hough, on the brief), for plaintiffs in error.

Charles A. Houts (Jeff Davis, U. L. Meade, and Johnson, Houts, Marlatt & Hawes, on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This was an action at law to recover damages for the breach of a contract. In the third amended petition the defendants in error, hereafter called the plaintiffs, after setting out the jurisdictional facts, alleged, in substance, that on the 14th of May, 1907, they had acquired, and were then the holders and owners of, options entitling them to purchase from the owners thereof the coal and mineral rights in and under 5,052.51 acres of land, located in what is known as the "Ouita coal basin," in Pope county, Ark., as shown by Branner's Land Map of the Arkansas Geological Survey; that the land was specifically described in the options; that the plaintiffs, under the options, were entitled to purchase said coal and mineral rights at an average price of $1.10 per acre; that these facts were known to the plaintiffs in error, hereafter called the defendants; that on the 14th of May, 1907, the plaintiffs were without the money and means necessary to acquire the coal and mineral rights under said option; that the defendants knew this, and, being desirous of acquiring said coal and mineral rights, and other coal and mineral rights in the Ouita coal basin, in Pope and Yell counties, Ark., the plaintiffs, on the 14th of May, 1907, as parties of the first part, entered into a contract in writing with the defendants, as parties of the second part, by the terms of which it was agreed that the plaintiffs should convey, by proper conveyances, to the defendant Eisleben, as trustee, or to his successor in person, or corporation, all of said coal and mineral rights in said coal basin then held under options by the plaintiffs, and such other mineral rights as the plaintiffs might thereafter acquire; that the parties to the contract should thereafter organize a corporation, under the laws of Arkansas, with a capital stock fully paid up and nonassessable, to which capital stock the defendants were to subscribe and pay for, in cash, the amount of $50,000; that, in addition to certain compensation to be paid to the plaintiffs for services in securing options on said coal and mineral rights and in organizing and promoting the business of the corporation, the parties of the first part were to receive under the terms of the contract one-half of the capital stock of the corporation; that by the terms of the contract the defendants undertook and agreed to furnish for immediate use a sum of money sufficient to drill said basin, and undertook and agreed that, in the event they failed to furnish said drilling fund, they would accept said mineral rights without drilling the land so optioned, and would pay the plaintiffs the sum of $15 per acre therefor; that, upon the execution and delivery of said

contract, plaintiffs proceeded to and did obtain options to purchase the coal and mineral rights in and under 284.50 additional acres of land in said basin; that by the terms of the options the plaintiffs were entitled to purchase said additional coal and mineral rights at an average price of $1.10 per acre; that the plaintiffs thereupon, on instructions from the defendants and in pursuance of the contract, proceeded to purchase certain drills and equipment necessary to drill said land, at a cost and expense of $3,000, a part of which cost and expense the plaintiffs paid, and for the balance of which they became liable.

It is then alleged that after the plaintiffs had acquired the additional options, and after they had purchased the drills and equipment, the defendants failed and refused to furnish the drilling fund, and failed and refused to pay for the drills and equipment so purchased by the plaintiffs; that they failed and refused to organize, or assist in organizing, a corporation as provided in the contract, and failed and refused to accept the mineral rights upon which the plaintiffs held options, and failed and refused to pay $15 per acre, or any part thereof, repudiated the entire transaction, and notified the plaintiffs that they would not carry out and perform the terms and provisions of the contract. It is further alleged in the petition that the plaintiffs have performed all of the terms and provisions of the contract by them to be performed; that they have been and are willing to convey or cause to be conveyed to the defendants, or to the defendant Eisleben, as trustee, or to a corporation when formed, the coal and mineral rights upon which they held options. It is then alleged that, by reason of the failure of the defendants to perform their part of the contract, plaintiffs were unable to exercise their options and acquire the mineral rights thereunder, and claim that they have been damaged in the sum of $74,185.30. It is also alleged that, by reason of the failure and refusal of the defendants to pay for the drills and equipment purchased by the plaintiffs, the plaintiffs have been further damaged in the sum of $3,000; that by reason of the failure and refusal of the defendants to organize or assist in organizing a corporation, one-half the capital stock of which was to be delivered to the plaintiffs, the plaintiffs have been further damaged in the sum of $25,000, and pray judgment against the defendants in the sum of $102,185.30.

To this petition the defendants answered, first, by a general denial; second, that the contract which was signed by them had never been delivered, and that at the time it was signed it was well understood between the parties, although not expressed in the contract, that it was not to take effect and be a binding contract upon them until seven other persons, in addition to the three who signed the contract, who were to be men of sufficient financial ability to contribute their share of the money, had signed it, and that each of the ten persons signing should obligate himself and become liable under the contract only to the extent of $5,000; that ten persons did not subscribe their names to the contract, but only the three defendants, and for that reason the contract was never delivered to the plaintiffs, and was not binding upon the defendants. For a third defense it was alleged that the defendants did not sign the contract described and set out in the plaintiffs' third amended petition; that before the contract was executed the defend-

ants and several other persons agreed with the plaintiffs upon the terms and conditions which were to be embodied in a contract to be prepared by Mr. Reinholdt, assistant cashier of the National Bank of Commerce, and to be approved by his attorney; that he prepared such a contract and delivered it to the plaintiffs, with a note addressed to Mr. Eisleben, and handed it to the plaintiffs to be presented to the defendants for signature; that the plaintiffs fraudulently switched the contract prepared by Mr. Reinholdt, and substituted another contract which they had prepared, and stated to the defendants that that was the contract Mr. Reinholdt had prepared, and by reason of these fraudulent misrepresentations they were induced to sign the contract upon which this action is based. They further set up as a fourth defense that the plaintiffs had been guilty of misrepresentation as to the character of the land; that they represented that the mineral rights were worth millions; that the defendants had no knowledge of coal or mineral rights, and relied entirely upon the representations made by the plaintiffs, and in reliance thereon entered into the contract; that after the contract was signed they found the representations were fraudulent, the land was not valuable as coal land, and for that reason the contract was fraudulently obtained from them. For a fifth defense they set up the statute of frauds of the state of Arkansas, and insist that the description of the lands is not sufficient to support an action for breach of the contract.

The reply was a general denial. A trial was had in January, 1909, which resulted in a verdict and judgment in favor of the plaintiffs in the sum of $79,921.48. The contract upon which this action is based is in the following words:

"Memorandum of agreement made and entered into in duplicate at St. Louis, Missouri, this 14th day of May, 1907, by and between William Brooks and John H. Ganner, both of Russellville, Arkansas, parties of the first part, and L. Eisleben, H. C. Reiner, W. A. Miller, all of St. Louis, Missouri, parties of the second part, witnesseth: That the parties of the first part are the owners of and holders of options on the mineral rights, and are in process of acquiring under purchase, options, and leases other mineral rights in all, or as much thereof as can be had, of what is known as the 'Ouita coal basin,' in Pope and Yell counties, in the state of Arkansas, as shown by Branner's Map of the Arkansas Geological Coal Survey, which basin approximates 10,000 acres, more or less. Money is needed for the immediate prospecting of and the purchasing of said mineral rights from said first parties, and the parties of the second part agree to furnish such funds.

"The parties of the first part agree to convey by proper deeds and transfers to L. Eisleben, of St. Louis, Missouri, as trustee, or his successor in person or corporation, all of said mineral rights are now owned by them or whether they acquire an option thereon, or whether they acquire them by purchase, options, or leases at any time in the future. The said parties of the second part agree to furnish for immediate use a drilling fund enough to sufficiently drill said basin, otherwise to accept same without drilling, and as said property is drilled to accept for said trustee, or his successor, the mineral rights under any and all lands in said basin, which are now and in the future may be owned, purchased, optioned, or leased by said first parties, which are shown by ordinary methods of drilling to contain a continuation of the Ouita strata or vein of coal, paying to said first parties fifteen dollars ($15.00) cash per acre for the same, upon conveyance to said trustee or successor as above.

"Upon completion of said drilling and purchasing, or before if deemed advisable, the parties hereto agree to organize a corporation for the division of and

further development of said properties, and to which corporation the parties of the second part hereby subscribe and agree to pay in the sum of fifty thousand ($50,000) dollars cash, and which organization shall be duly incorporated under the statute laws of the state of Arkansas, and whose capital stock shall be issued fully paid and nonassessable.

"The capital stock of said corporation shall be issued and divided as follows: The said parties of the first part are to receive one-half of said stock and the parties of the second part are to receive one-half of said stock. It is understood that the corporation thus formed shall refund to said second parties the amount of money paid out by them to first parties in the purchasing of said mineral rights. In the perfecting of the arrangements under this contract, it is considered and understood that the development of said properties on an extensive scale shall be carried into effect, and that no less than three fully equipped modern, 500-ton daily, plants shall be put into operation just as soon as the market by proper advertising, soliciting, yarding, etc., will justify.

"The situation being, however, that the parties of the first part are unable to furnish capital to assist in the carrying of said operation into effect, it is hereby understood and agreed, and is the chief consideration to first parties in this contract, that said second parties shall furnish or acquire for said corporation the necessary capital for said development, and to protect first parties' interests in said corporation against any and all obligations of said corporation until such time as said corporation shall have accumulation sufficient working capital to justly protect first parties' interests therein."

Numerous errors are assigned, but in the view we have taken of this case it becomes unnecessary to discuss them separately. The writer of this opinion is inclined to the view that the contract does not meet the requirements of the statute of frauds of Arkansas, for the reason that it does not contain a sufficient description of the lands containing the mineral rights which were the subject of the contract. A majority of the court, however, are of the opinion that the description is sufficient. That objection is, therefore, overruled, and we pass to notice some of the provisions of the contract, and certain instructions given by the court to the jury.

The contract provided:

"The said parties of the second part agree to furnish for immediate use a drilling fund enough to sufficiently drill said basin, otherwise to accept same without drilling, and as said property is drilled to accept for said trustee, or his successor, the mineral rights under any and all lands in said basin, which are now and in the future may be owned, purchased, optioned, or leased by said first parties, which are shown by ordinary methods of drilling to contain a continuation of the Ouita strata or vein of coal, paying to said first parties fifteen dollars ($15.00) cash per acre for the same, upon conveyance to said trustee or successor as above."

It will thus be seen that the defendants under the contract had the option to furnish the money for drilling, in which case they were only required to take such land as, by the ordinary methods of drilling, showed the land to contain a continuation of the Ouita strata or vein of coal, or, if they declined to furnish the money for drilling, then they were to take all of the mineral rights in or under the land mentioned in the contract. The plaintiffs' suit was based upon their right to recover $15 per acre for the entire acreage, and the court instructed the jury upon the theory that they could recover for the entire acreage, and also instructed that the plaintiffs were entitled to recover for the amount which they had expended in procuring machinery, drills for drilling, and labor in connection therewith.

This instruction, under the terms of the contract, was clearly error. The plaintiffs were not entitled to recover for both the mineral rights in all of the land and also for the expense of drilling; for if the defendants elected, as the contract provided, to furnish the funds for drilling, then they were only obliged to take such part of the lands as were shown, by the ordinary methods of drilling, to contain a continuation of the Ouita strata or vein of coal.

The contract further provided:

"Upon completion of said drilling and purchase, or before if deemed advisable, the parties hereto agree to organize a corporation for the division of and further development of said properties, and to which corporation the parties of the second part hereby subscribe and agree to pay in the sum of fifty thousand ($50,000) dollars cash, and which organization shall be duly incorporated under the statute laws of the state of Arkansas, and whose capital stock shall be issued fully paid and nonassessable.

"The capital stock of said corporation shall be issued and divided as follows: The said parties of the first part are to receive one-half of said stock and the parties of the second part are to receive one-half of said stock. It is understood that the corporation thus formed shall refund to said second parties the amount of money paid out by them to first parties in the purchasing of said mineral rights."

In relation to the capital stock of this corporation, the court charged the jury as follows:

"As to the second item, the claim is the contract shows they agreed to pay for one-half of the capital paid up, $100,000, to the extent of $50,000; and the plaintiffs in their petition say that the value of that was $25,000. So they would be entitled to the value of one-half of that stock, whatever that was."

After the jury had retired they requested further instructions, and by order of court were returned to the courtroom, and the court gave them the following additional instructions:

"The court instructs you that, in addition to these damages, the plaintiffs are entitled to whatever damages they sustained. That is, if you, gentlemen of the jury, determine that the stock would have been worth $25,000 if it had been turned over to them, you may assess that. If you find it was worth less, you will assess such an amount as you think it would have been worth if the company had been organized and turned over to them. It is discretionary with you as to the amount."

This element of damages, in any possible view that may be taken of the case, was too remote. The capital stock was to be paid for, $50,000 in cash by the defendants, and by the transfer to it of the mineral rights. The corporation assumed an indebtedness. It was to repay to the defendants the amount of money paid to the plaintiffs for the purchase of the mineral rights in or under the lands specified in the contract. The value of the stock would therefore depend entirely upon the value of the mineral rights, and as to the value of the mineral rights there is not a scintilla of evidence in the case. It was error, therefore, for the court to submit the value of this stock to the determination of the jury.

For the errors noticed, the judgment must be reversed, with instructions to grant a new trial.

WESTERN UNION TELEGRAPH CO. v. BURRIS.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1910.)

No. 3,126.

1. COURTS (§ 372*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

Under the rule of the federal courts there can be no recovery of damages from a telegraph company for mental anguish caused by failure to deliver a message, or by delay in delivery, where that is the only ground of damage; and in the absence of statutory provisions the question is one of general law, upon which state decisions are not controlling in the federal courts.

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

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

2. TELEGRAPHS AND TELEPHONES (§ 56*)—DELAY IN DELIVERY OF MESSAGE—RIGHT OF ACTION BY ADDRESSEE.

By the weight of authority in this country a person to whom a telegram is sent, where it is intended for his benefit or information, has a right of action against the company for negligent delay in its transmission or delivery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 37; Dec. Dig. § 56.*]

3. ACTION (§ 27*)—NATURE OF CAUSE OF ACTION.

An action by the addressee of a telegram against the company for failure to deliver the message is not one on contract, but in tort for failure to perform a duty imposed upon defendant by law.

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

4. TELEGRAPHS AND TELEPHONES (§ 27*)—ACTION FOR NONDELIVERY OF MESSAGE—MENTAL SUFFERING—STATE STATUTE.

Act Ark. March 7, 1903 (Acts 1903, p. 124), making telegraph companies doing business in the state "liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages," applies only in cases where the negligence occurred within that state, and does not authorize a recovery by the addressee of a telegram for mental anguish alone because of the negligent failure to deliver the message, where the negligence occurred in another state, by the law of which there could not be such recovery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 27.*

Damages for mental suffering from delay in delivering telegram, see notes to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 571; Western Union Telegraph Co. v. Coggin, 15 C. C. A. 250; Western Union Telegraph Co. v. Morris, 28 C. C. A. 62.]

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

Action by J. W. Burris against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

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

G. H. Fearons, U. M. Rose, W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, for plaintiff in error.

U. L. Meade, Jeff Davis, Frank Pace, O. T. Hamlin, and T. M. Seawel, for defendant in error.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This was an action brought by the defendant in error, hereafter called the plaintiff, against the plaintiff in error, hereafter called the defendant, to recover damages for the failure to deliver a telegram. The right to recover damages in this case is based upon an act of the Legislature of the state of Arkansas passed in 1903 (Acts 1903, p. 124), which reads as follows:

"(1) On and after the passage of this act all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages.

"(2) That nothing contained in this act shall prejudice the rights and remedies now provided by law against telegraph companies, and the rights and remedies provided for by this act shall be in addition to those now existing.

"(3) That in all actions under this act the jury may award such damages as they conclude resulted from the negligence of the said telegraph company."

The plaintiff, J. W. Burris, lived at Russellville, Ark. Mrs. Nora Brashear was the daughter of the plaintiff, and lived with her husband, D. W. Brashear, at Wecharty, six miles from Holdenville, Okl. Prior to the sending of the message Mrs. Brashear was taken ill, and her condition became alarming on March 12, 1908. On that date, at her husband's request, A. C. Brashear, his brother, delivered to the defendant, to be transmitted over its lines, the following telegram:

"Holdenville, Oklahoma, March 12, 1908, 3 o'clock p. m. To Mr. J. W. Burris, in care of R. C. West, Russellville, Ark. Come at once. Nora is at the point of death. A. C. Brashear."

R. C. West was a friend of the family, who lived and was engaged in business at Russellville, Ark. The telegram was correctly transmitted to the city of St. Louis, Mo., through the several relay offices of the defendant, where the destination of the message through mistake or negligence was changed from Russellville, Ark., to Russellville, Ky., and the message was forwarded to the latter place, and never received by the defendant. It was not within the state of Arkansas in the course of its transmission. On March 14th the plaintiff was notified over long-distance telephone of the serious illness of his daughter, and he immediately left Russellville for Holdenville, Okl., arriving there on the morning of March 16th, and after the death of his daughter, which occurred on the evening of March 15th. She was buried on the afternoon of the day of his arrival, and he attended the funeral.

The petition contained the following allegations:

"Plaintiff, further complaining of defendant, alleges: That said message so delivered to the agent of the defendant at Holdenville, Okl., by A. C. Brashear, and received by said agent, was, through the carelessness and neg-

ligence of said agent, missent. * * * That, by reason of the negligence and carelessness and wrongs herein alleged and complained of, plaintiff was deprived of the comfort, satisfaction, and pleasure of seeing and talking to his daughter before her death, to his great mental anguish, grief, and suffering of mind and feelings"—for which he claimed damages in the sum of $2,500.

The court directed a verdict in favor of the plaintiff upon the question of negligence, and submitted the question of the damages to be allowed plaintiff to the jury. The instruction was as follows:

"For these reasons, the court felt it its duty, under the laws of this state, to direct a verdict for the plaintiff. This leaves only one question to be determined by you, gentlemen of the jury, and that is the question of what the damages shall be."

The action is to recover damages for mental anguish alone; no claim being made that there was any personal injury or pecuniary loss. Prior to the case of So Relle v. Telegraph Company, 55 Tex. 308, 40 Am. Rep. 805, decided in 1881, the authorities were uniform to the effect that, in the absence of a statute, mental anguish alone, unaccompanied by personal injury or pecuniary loss, did not constitute a basis for the recovery of damages; but in that case a new doctrine in the law of damages was announced. It was there held by the Supreme Court of Texas that the plaintiff might recover damages for delay in delivering a telegram, though the injury sustained was solely mental anguish. The So Relle Case was in part overruled in the case of Railroad Company v. Levy, 59 Tex. 563, 46 Am. Rep. 278, and another case by the same title, 59 Tex. 542, 46 Am. Rep. 269; but in a later case (Stuart v. Telegraph Company, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623), the cases of Railroad Company v. Levy were in effect overruled, and the doctrine of the So Relle Case reinstated. So that, while it cannot be said that the So Relle Case has been at all times consistently followed, yet we think it is true that since the case of Stuart v. Telegraph Company, supra, by the decisions of the Supreme Court of that state, damages may be recovered in such a case. Railway Company v. Wilson, 69 Tex. 739, 7 S. W. 653; Telegraph Company v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; Telegraph Company v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Telegraph Company v. Simpson, 73 Tex. 423, 11 S. W. 385.

The same view has been taken by the Supreme Courts of Indiana, Alabama, Kentucky, Tennessee, and North Carolina; Wadsworth v. Telegraph Company, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Reese v. Telegraph Company, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Telegraph Company v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Thompson v. Telegraph Company, 106 N. C. 549, 11 S. E. 269; Chapman v. Telegraph Company, 90 Ky. 265, 13 S. W. 880.

The Texas doctrine has not been generally followed, for various reasons stated by the courts, among which are: (1) That it is a departure from the sound and safe principles of the common law; (2) that the difficulty of estimating a pecuniary compensation for mental anguish is in itself a sufficient reason for adhering to the common-law

rule preventing a recovery in such cases; (3) that the amount of litigation which would grow out of the adoption of such a rule would be intolerable; (4) that the measure of damages to be adopted would be so indefinite and so indefinable as to subject the defendant in such cases to the possibility of great oppression; and the difficulty of securing evidence as to the mental suffering is stated in some of the cases as another reason why mental anguish should not be made the sole basis of an action.

The federal courts have uniformly refused to sanction the recovery against a telegraph company for mental anguish caused by delay in delivering a message, where that is the only ground of damage. Chase v. Telegraph Company (C. C.) 44 Fed. 454, 10 L. R. A. 464; Crawson v. Telegraph Company (C. C.) 47 Fed. 544; Tyler v. Telegraph Company (C. C.) 54 Fed. 634; Kessler v. Telegraph Company (C. C.) 55 Fed. 603; Gahan v. Telegraph Company (C. C.) 55 Fed. 443.

In the case of Telegraph Company v. Wood, 57 Fed. 474, 6 C. C. A. 432, 21 L. R. A. 706, the court held that the question of the liability of the telegraph company for the failure to deliver a message promptly is one of general law, as to which, in the absence of statutory provisions, the decisions of the state courts are not controlling in the federal courts, and in that case, although the action originated in Texas, the court refused to follow the Texas decisions. Without attempting a full review of the authorities following the rule announced by the federal courts, we cite the following: Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; Kester v. Telegraph Co., 8 Ohio Cir. Ct. R. 236; Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; West v. Telegraph Company, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; Peay v. Western Union Telegraph Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

We think the rule announced by the federal courts and by the courts of last resort in the states just mentioned is in all respects sound, and therefore that the plaintiff's right to recover depends wholly upon the statute of Arkansas. It is the rule in England, and has been held by some of the courts in this country, that the addressee of a telegraphic message cannot maintain an action against the company for delay in delivering the message upon the ground that there was no privity of contract between the addressee and the telegraph company, unless where the company had some notice that the contract was made for his benefit. Telegraph Company v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706, and Telegraph Company v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, supra. But in most of the states it is held that the person to whom a telegram is sent, where it is intended for his benefit or information, has a right of action against the company for negligent delay in its transmission and delivery. Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Harkness v. Telegraph Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672;

Elwood v. Telegraph Co., 45 N. Y. 549, 6 Am. Rep. 140; Telegraph Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Aikin v. Telegraph Co., 5 S. C. 358; Markel v. Telegraph Co., 19 Mo. App. 80; Telegraph Co. v. Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23; Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880; Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883. The reason generally assigned is that a telegraph company is a public agency, and as such is bound to exercise ordinary care in receiving, transmitting, and delivering messages, and is, therefore, responsible to any one injured by its negligence.

The action here is to recover damages for mental anguish because of the negligence of the defendant in failing to deliver the telegram, and it is therefore not an action upon contract, but in tort. The tort which is the gist of the action is the negligence of the defendant in failing to perform a duty imposed upon it by law. Western Union Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Shingleur v. Western Union Telegraph Co., 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; New York Printing Telegraph Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Herron v. Western Union Telegraph Co., 90 Iowa, 129, 57 N. W. 696; Western Union Telegraph Company v. Ford, 77 Ark. 536, 92 S. W. 528. In the case last cited the court said:

"In fact, the right of an addressee to recover damages at all is not based upon contract, as none exists."

And while allowing a recovery in that case, because of the negligence of the defendant in failing to deliver the message, it was put upon the ground that the negligence occurred in the state of Arkansas; but the court expressly declined to decide what the effect would be if the negligence occurred in a state other than the state of Arkansas.

In the case of Western Union Telegraph Company v. Crenshaw, 125 S. W. 420, decided by the Supreme Court of Arkansas February 7, 1910, not yet officially reported, the court said:

"Under our statute there can be no recovery of damages for mental anguish unless there has been negligence 'in receiving, transmitting or delivering the message.' The purpose of our statute was to allow recovery for mental anguish only in such cases."

After expressing the view that no negligence had been established in the case, the court further said:

"But if negligence was shown, then the negligence occurred in Missouri, and no recovery could be had in Missouri for mental anguish alone. The contract itself was not made in this state, nor in a place where there could be a recovery for mental anguish, unaccompanied by physical injury. The negligence, if any, which gave a cause of action under the statute for mental anguish, did not occur in this state, or in any state where damages for mental anguish alone could be recovered. We conclude, therefore, that in no possible view of the case was the appellee entitled to recover."

If the action is one in tort, and we think it is, the plaintiff's right of recovery is governed by the law of the state wherein the act of negligence occurred. It is not charged in the complaint that the negligence of the defendant occurred in Arkansas, and we think the testimony shows that the negligence occurred at St. Louis, in the state of Mis-

souri, and this was evidently the view of the trial judge, for he instructed the jury that:

"When it [referring to the message] reached St. Louis it seems to have been directed to Russellville, Ky.; at least the telegrapher who received it there thought it was intended for Russellville, Ky., and thereupon he sent it to Russellville, Ky., and, of course, found no one there by the name of the addressee."

It is conceded that under the laws of Missouri, where the negligence occurred, there can be no recovery for mental anguish alone, unaccompanied by personal injury or pecuniary loss. This being true, the plaintiff is not entitled to damages by reason of the negligence of the defendant occurring in that state.

The view we have taken of this case renders it unnecessary to discuss the other questions suggested by counsel in their briefs.

The judgment is reversed, with instructions to grant a new trial.

PIKE et al. v. CINCINNATI REALTY CO.

(Circuit Court of Appeals, Sixth Circuit. May 3, 1910.)

No. 2,002.

1. LANDLORD AND TENANT (§ 156*)—CONSTRUCTION OF LEASE FOR LONG TERM—DESTRUCTION OF BUILDINGS BY FIRE—REBUILDING—PROCEEDS OF INSURANCE—"IN THE SAME CONDITION."

Improved city real estate left in trust by a will was leased for 99 years by authority from the court; the lease providing that the lessee should maintain the property in good condition and repair, that he should not remove nor destroy the improvements, that if he should cause improvements, repairs, or changes to be made he should "replace old improvements by new ones of equal value and fully as substantial," and that he should maintain insurance on the property, payable to the trustee of the estate, "for the use and benefit" of the beneficiaries under the will. It further provided that, should there be a partial or total loss of the buildings and improvements, the insurance money collected therefrom should "be applied and expended to replace said improvements upon said property in the same condition as before said damage occurred." *Held*, that such provisions were intended principally to afford security for the rent and the restoration of the property in unimpaired condition at the end of the term, and should be construed together with that purpose in view; that the provision that the insurance money should be used to replace the improvements "in the same condition" as before did not require the lessee, after the buildings had been destroyed by fire, to rebuild them in the same form as the old, but that his obligation was only to replace them with new ones "of equal value and fully as substantial," for which purpose he was entitled to the insurance money; nor did such provisions warrant the trustee, after collecting the insurance, and when the lessee was proceeding to build a large hotel on the property of four or five times the value of the old buildings, in refusing to pay over the insurance money on the ground that the beneficiaries did not approve of the building.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 567; Dec. Dig. § 156.*]

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

2. LANDLORD AND TENANT (§ 156*)—CONSTRUCTION OF LEASE FOR LONG TERM —REBUILDING AFTER FIRE.

Neither the fact that the estate owned a hotel in the vicinity with which the new one would come into competition, nor the fact that the new hotel also covered a lot not owned by the lessor estate, was a ground for the withholding of the insurance money by the trustee, in the absence of any such condition in the lease; it being shown that the part of the building on the leased property largely exceeded in value the old buildings, and that, if necessary at the end of the term, it could be separated from the remainder and made into a completed building at comparatively small expense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 567; Dec. Dig. § 156.*]

3. TRUSTS (§ 315*)—COMPENSATION OF TRUSTEE—PAYMENT FROM FUND.

The practice of compensating a trustee out of a fund for his services in the care of it has no application to a case where he is simply subserving the interest of one party in a contest for possession of the fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 433, 440; Dec. Dig. § 315.*]

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

Suit in equity by the Cincinnati Realty Company against Ellen M. Pike, executrix and trustee, and others. Decree for complainant, and defendants appeal. Modified and affirmed.

F. B. James and John McMahon, for appellants.

F. O. Suire and Drausin Wulsin, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this case was filed to obtain a decree requiring the appellant to turn over a fund which had come to his possession from insurance companies on account of the loss by fire of buildings situated on premises in Cincinnati, leased under and by the authority of a decretal order of the court of common pleas for 99 years, with a privilege of renewal and an option to purchase, by Albert C. Barney as the representative of certain beneficiaries of the will of Samuel N. Pike, deceased, to Powel Crosley, whose title has since been acquired by the Cincinnati Realty Company, the complainant in the suit. The right of the respective parties to this fund depends upon the due construction of various clauses in a paragraph of the lease which are here set forth:

"And the said lessee, for himself, his heirs and assigns, further covenants and agrees with the said Albert C. Barney, for and on behalf of the parties aforesaid, that he will at all times keep said property sound, tight, and thorough good repair; that he will not remove or destroy the improvements now on said property; and that if he shall cause improvements, repairs, or changes to be made upon said property, he will at all times replace old improvements by new ones of equal value and fully as substantial; and, further, that said lessee, on behalf of himself, his heirs and assigns, further agrees that he will at all times during the continuance of this lease keep said improvements, or the buildings thereon, and the rents thereof, insured in good and solvent insurance companies for not less than one hundred and sixty-five thousand dollars, to be made payable to said Ellen M. Pike, trustee, or to her successors in said trust, for the use and benefit of the parties entitled to the

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

same under the will of said Samuel N. Pike, deceased. It is further covenanted and agreed that should any partial or total loss of buildings or improvements occur and insurance money be collected therefrom, that said insurance money shall be applied and expended to replace said improvements upon said property in the same condition as before said damage occurred."

Other parts of the lease, and the circumstances leading up to and attending the making of it, which are supposed by counsel to aid in the construction of the stipulations contained in the paragraph above quoted, are to be referred to. As we have said, the lease was made under a decree of the court of common pleas. But we attach no particular importance to that fact in the construction of the lease. The authority to make it is not questioned, and, when made, we think it is subject to the ordinary rules of interpretation. During the pendency of the lease, the buildings on the premises were insured in the sum of $165,000 by the lessee, and the loss made payable to Ellen M. Pike, who was then trustee of the estate. Later on they were almost totally destroyed by fire and the losses were collected by her. Before she had completely collected the losses, the Cincinnati Realty Company, having obtained an assignment of the lease, was preparing to build, in the place of the buildings which had been destroyed, the large building now known as the "Sinton Hotel," the cost and value of which was many times greater than the value of the buildings which had been destroyed. Mrs. Pike, the trustee, after having devoted a small part to the repairing of a partly burned building on the leased property, refused to pay over the remaining bulk of the insurance money on demand by the Realty Company upon the ground that she and the beneficiaries, of whom she was one, did not agree to the structure which the Realty Company was preparing to build; and they have since maintained that attitude. If this position of the trustee is defensible, he might hold on to this money indefinitely unless the lessee should erect other buildings or should reconstruct the hotel in such form as would conform to the views of the lessors.

In support of the position taken by the trustee, his counsel point to, and chiefly rely upon, the final stipulation in the foregoing paragraph, wherein it is provided that, if any insurance money should be collected, it "shall be applied to replace said improvements upon said property in the same condition as before said damage occurred"; and they say that "the same condition" means the same forms of buildings and structures as before the fire. We do not so interpret this language. It seems to us to refer to the state, quality, or predicament of the buildings, etc., rather than to the structures themselves. This construction harmonizes with the other stipulations in the contract, while the other can only with difficulty be reconciled with them. In the first place, it is stipulated that the improvements on the premises should be kept in "thorough good repair"; then that the lessee shall not remove or destroy the improvements then on said property. This concerns his own acts. Next, apprehending that destruction from other causes than the lessee's own act might occur, as from fire, it is provided "that if he shall cause improvements, repairs, or changes to be made upon said property, he will at all times replace old improvements by new ones of equal value and fully as substantial" as the old. There is fair ground for believing that this last stipulation was intended to cover all kinds

of improvements and changes, whether resulting from his own acts or other causes, and that to the extent of his own destroying or removing it was intended to be compensatory for any disregard of that stipulation by the lessee. But we do not need to decide that question, for in this case the destruction of the old buildings was caused by accident, and not by the voluntary act of the lessee. Then comes the stipulation to keep up the insurance, with provision that, in case of loss, it should be paid to the trustee for the use of the beneficiaries under the will. And then is the stipulation as to how the money shall be used as above stated.

Now, without going further, we think it clear that the main object of these stipulations concerning demolitions, repairs, and reconstructions was to maintain constantly the security for rent and the restoration of the property in an unimpaired condition at the end of the lease. They were dealing with the security of values. A stipulation that this insurance money should only be used to replace the old by the same kind of buildings would be inconsistent with the dominating provision that, if the lessee should replace old improvements by new, the latter should be of equal value and fully as substantial as the old. And the rule in such conditions is that all parts of the instrument shall be so read as to harmonize with each other. This stipulation about the use of the insurance money seems simply in aid of the main stipulation about reconstruction, and had the same object. Making the loss payable to the trustee and usable for the purpose stated was a device to prevent its going to the lessee, who might otherwise use it as his own, without restriction. His agreement to use it for the purpose specified gave the lessor the security of that obligation. It was not intended that the lessors for whom the lease was made should themselves expend the insurance money in the construction of new improvements. That duty was devolved upon the lessee, and was an implied covenant on his part that he would expend the money in "replacing" the new improvements for the old in as good a condition as they were before the fire. In the natural order of the things to be done, the trustee for the lessors would pay the insurance money over to the lessee. The latter could not perform his covenant until that was done, nor would he be charged with any duty in that regard until the lessors had performed their precedent obligation. Neale v. Radcliff, 15 Q. B. 916; Hunt v. Bishop, 8 Exch. 675. It was said by Redfield, J., in Day v. Essex County Bank, 13 Vt. 97:

"Where the parties are to perform concurrent acts, and the plaintiff's act forms the basis or consideration for defendant's act, the defendant may always excuse himself from performance by relying upon the failure of the plaintiff."

They had no right to withhold the money upon an apprehension that the lessee would violate his covenant by misappropriating it. If he should do that, or threaten to do it, they would have their remedy upon the covenant. Gorton v. Smart, 1 Sim. & St. 35. The default would be in not performing what possibly might be a condition subsequent. According to the old law, it might give ground for forfeiting the lease, if not condoned by the lessor. But the lessor might choose not to claim a forfeiture, and to go on with the execution of the lease, and

treat the default as simply a violation of a collateral covenant of the lessee. That this would be the legal result in such circumstances is shown by several decisions of this court. In re Pennewell, 119 Fed. 139, 55 C. C. A. 571; Union Stockyards Co. v. Nashville Packing Co., 140 Fed. 701, 72 C. C. A. 195; Quinlan v. Green Co., 157 Fed. 33, 40, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849. We are not to be understood as admitting that this covenant of the lessee is of the dignity of a condition, either precedent or subsequent. We think it was neither, and gave no ground to the lessors for halting in the performance of their own stipulations.

The two principal reasons which the trustee assigns for construing the stipulation in question to require the lessee to restore the effigies of the old structures are these: First, that it would be natural to suppose that the Pike family would wish to preserve some memorial of the family and of their own associations with the property. If upon this suggestion we turn to the record, we find that not only in the lease, but in the course of the transaction on which it was made, no mention of the solicitude of the family in this behalf was made. The first suggestion that was made of it was when it was stated in the answer. That was too long after the making of the lease to be of value in interpreting it. Nor can we think that the lessors gave thought to this matter. The buildings on the premises had been built at an earlier day. They had been occupied for miscellaneous purposes, ranging from that of a hall sometimes fitted up for theatrical purposes, and sometimes for a merchants' exchange, at others for various public or social gatherings. The smaller rooms were used for miscellaneous purposes, as for restaurants, lodging rooms, kitchens, and other like uses. The buildings were respectable in appearance, and answered fairly well the current requirements in respect of their stability and their uses; but they were getting dilapidated and already in need of repair. The premises were in the heart of a large and growing city. Already in the near vicinity a larger and more massive style of buildings was being projected. It is incredible, without more evidence to go upon, that these parties intended or wished that for 100 years this spot should remain stationary, in order to furnish to the public the semblance of a family memorial. We can attribute no weight whatever to the suggestion.

The other reason, also stated for the first time in the answer, is that the Pike estate was then the owner of the "Burnet House," a hotel standing in the vicinity, and that it is not to be supposed that the lessors would grant a lease under which a rival hotel could be built and operated. But the way to effect the exclusion of such buildings was to use in the lease appropriate language to express the purpose, and not to rely on inferences which an astute interpreter might construct from doubtful language. Such a matter would be of considerable financial importance; and even if it were proven that the subject was considered by the parties at the time there would be serious difficulty in the way of importing such a limitation into the contract, which makes no mention of it. But, as we are not convinced that the parties had in mind a purpose to effect such a restriction, we will not inquire into the consequences which might ensue upon the other alternative. In

fine, there is nothing in either of the suggested reasons which ought to influence the court in forming its judgment upon the proper construction of the terms of this lease. No other reasons of more consequence and leading to a different conclusion from that which we reach, have been presented. Judge Thompson, in the court below, in a succinct and, as we think, sound opinion, disposed of the case upon a like interpretation of the stipulations of the lease.

Another question arising upon the manner of construction of the Sinton Hotel is pressed by the defendants for the purpose of showing that the complainant is not observing its duty of keeping the property intact and free from entanglement with, or subservient to, adjacent property. To make the matter clearer, we will state some of the facts on which defendants' objection is rested. The Pike property, which was the subject of the lease, while it had a northern frontage of 170 feet on Fourth street, one of the principal streets of the city, did not extend to the nearest streets to the east or west of it. Between Vine street on the west and the west side of the leased property there was another lot, some 29 feet and 4 inches wide, fronting also on Fourth street and located in the northwest corner of the square. This lot is called in the record the "Seasongood Lot." The fee simple was in other parties. But the Cincinnati Realty Company had acquired 99-year leases of it, paying rent to the owners. The Sinton Hotel extends over not merely the Pike property, but also the Seasongood lot, and there is therefore a frontage on both Fourth and Vine streets. There is nothing in the construction of the hotel to show or create any line of demarcation between the two properties. The defendants say that if their property should come back to them they might be obliged to pay the rent due for the Seasongood lot in order to enjoy their own property, and it might be a rent which they would not wish to pay. But if, as we think, the lessors were looking to the maintenance of value in their securities, rather than the forms of structures, their interests have been greatly improved. To begin with, the testimony shows that the Sinton Hotel, which is a massive building 10 stories high, cost and is of a value four or five times greater than that of the buildings standing on the property at the date of their lease. And it also shows that, if trouble should ever arise with the owners of the Seasongood lot, the hotel could be divided on the line, and a complete hotel could be finished up on the Pike property. The cost of making the change is shown to be not large, at least not so large as to compare with the improvement in value which the hotel standing on the Pike property would contribute to the value of the lessee's covenants in the lease. We think there is nothing of which the defendants can complain. More has been poured into their lap than was promised. Nor do we think that the violation, if this be a violation, of the obligation to keep the premises in good condition, furnishes any legal ground for the refusal of the defendants to pay over the insurance money; the latter covenant being first to be performed, as we have already pointed out.

Another matter remains to be considered. The defendants claim that before the insurance money is paid over there should be deducted and retained, either by the court below or by the probate court on leave

given by the court, certain charges which, as they are enumerated in appellants' brief, stand as follows:

"(a) To Jones & James for the following services: Balance service collecting said insurance money, not to exceed $———; advice given Ellen M. Pike, administrator and trustee as aforesaid, as to said insurance money from time of fire to time of her death, not to exceed $———; advice given Rankin D. Jones, administrator and trustee as aforesaid, from Ellen M. Pike's death to the 1st day of June, 1909, not to exceed $———.

"(b) To the estate of Ellen M. Pike, deceased, for services during her lifetime in the matter of care of said insurance money, not to exceed $———.

"(c) To Rankin D. Jones, as administrator and trustee as aforesaid, for the care and disbursing said insurance money as in this decree provided, not to exceed $———.

"(d) To costs and expenses incurred by said Ellen M. Pike, as administratrix and trustee as aforesaid, as to collecting said insurance and as to said premises after the fire, $———."

We think the court below might properly allow to the trustee the necessary costs and expenses incurred in collecting the insurance money. But nothing should be allowed as against the complainant for any services or expenses rendered or incurred since that time. The trustee has not been acting as a trustee for the complainant, but has been in the service of the beneficiaries of the estate, and should look to them for his compensation. The complainant was entitled to receive what the trustee received, and it would be plainly inequitable that it should contribute to the expenses of a contest set up against it or incurred in consequence thereof. The practice of compensating the trustee out of the fund for his services in the care of it has no application to a case where the trustee is simply subserving the interest of one of the parties in a contest for the possession of the fund. In this case the trustee identified himself with the beneficiaries when he refused to turn over the money after collecting it.

The decree should be modified by an allowance to the trustee of the cost and expenses necessarily incurred in recovering the insurance money, if not already allowed and compensated for in the decree appealed from, and thereupon the said decree should be affirmed. It is so ordered.

TWEEDIE TRADING CO. v. WESTERN ASSUR. CO. OF TORONTO.

SAME v. HIGGINS et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1910.)

Nos. 179, 180.

1. INSURANCE (§ 138*)—MARINE INSURANCE—CONSTRUCTION OF POLICY.

Certificates insuring freight, issued under running policies, are not invalid because the policies are upon cargo; but the policies, for the purpose of such certificates, must be read with the substitution of freight for goods and merchandise.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 246; Dec. Dig. § 138.*]

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

2. INSURANCE (§ 115*)—MARINE INSURANCE—FREIGHT—INSURABLE INTEREST.
The chartered owner of a steamship, which subchartered it for a voyage for a lump sum, one half to be paid in advance and the other half by the bill of lading freight, has an insurable interest in such freight.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 154–157; Dec. Dig. § 115.*]

3. INSURANCE (§ 415*)—MARINE INSURANCE—FREIGHT—SEAWORTHINESS OF VESSEL.
Under a charter of a vessel to carry a cargo of live stock, the fodder to be provided by the charterer, the fodder was an appurtenance of the cargo, and not of the vessel; and the fact that it was not of proper kind, by reason of which there was an excessive mortality among the animals on the voyage, did not render the ship unseaworthy for the voyage, nor affect the right of the owner to recover on policies insuring the freight, including the risk of mortality.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1111; Dec. Dig. § 415.*]

4. INSURANCE (§ 489*)—MARINE INSURANCE—EXTENT OF LOSS—EXPENDITURES UNDER SUE AND LABOR CLAUSE.
Under the sue and labor clause of marine policies insuring freight on a cargo of live stock, where, because of the refusal of the cattlemen shipped to work, the ship was compelled to deviate from her voyage to procure others, the insurers are liable in the first instance for the expenses incurred in such deviation, being subrogated to the right of the insured to recover contribution in general average.
[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 489.*]

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

Suits in admiralty by the Tweedie Trading Company against the Western Assurance Company of Toronto and against A. Foster Higgins and others. Decrees for libelant (168 Fed. 962), and respondents appeal. Affirmed.

Wing, Putnam & Burlingham (Charles C. Burlingham and L. Everett, of counsel), for appellants.

Ralph J. M. Bullowa (F. M. Brown, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. July 8, 1904, the libelant, described as the time chartered owner of the steamer Nordkyn, subchartered her carrying capacity to James Graham for a cargo of live stock and general merchandise from New Orleans to Cape Town, South Africa. The charter to the libelant is not in evidence; but we shall assume, from the description of the libelant in the subcharter as time chartered owner, that it was owner pro hac vice. The libelant claims to recover the bill of lading freight per head on animals which died during the voyage, amounting to some $3,000, and also expenses incurred under the sue and labor clause, amounting to some $2,000.

The material articles of the charter party are as follows:

"4. Also that the total amount of freight payable by the parties of the second part is to be a lump sum of £4,250 Br. Stg. in full of all primage, port charges, dues, pilotage, etc., at both ports of loading and discharging. One half of this total amount of freight say £2,125 Br. Stg. to be prepaid by the parties of the second part at New Orleans, on signing of Bills of Lading by the Mas-

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

ter. The remaining one half, say £2,125 Br. Stg. to be paid on delivery of the live stock, etc., at Cape Town, S. A. Bills of Lading to give ship lien on live stock, etc., for the balance of freight due this balance to be insured at charterer's expense for ships benefit against all risk including mortality. Insurance certificate to be turned over to the Tweedie Trading Co. as soon as received by Jas. Graham and Jas. Graham to notify the Tweedie Trading Co. before sailing of where insurance effected and conditions."

"7. Also that the Captain shall sign Bills of Lading as and when presented without reference or prejudice to this charter party, any difference in freight to be settled at port of loading before sailing, if in charterers favor, by Captain's draft payable five days after arrival at Cape Town, if in steamers favor, in cash at New Orleans less the insurance."

"9. Also that charterers to supply live stock fittings, furnish cattlemen, feed and fodder for the live stock at their own expense and to load and discharge the ship free of charge.

"10. Also that the ship is to pay for vitualing the cattlemen, furnishing them with ordinary cattlemen's food and returning them to a United States port via port or ports."

Upon shipment of the cargo at New Orleans, Graham prepaid one-half of the freight, £2,125, and the master signed bills of lading calling for freight payable at a fixed rate on each animal delivered at Cape Town, aggregating £2,125.6.10. Freight on each animal dying during the voyage would, of course, be lost. To cover this contingency, Graham took out certificates of insurance under running policies of the defendants, the Western Assurance Company of Toronto and the United States Lloyds, for the precise amount of the bill of lading freight on each head of live stock, against, among other risks, the risk of mortality; every animal being a separate subject of insurance.

Two of the running policies under which the certificates were issued were upon cargo, but we think this discrepancy presents no real difficulty. The subject of insurance under the certificates being freight, the running policies must be read with the substitution of freight for goods and merchandise. Many of counsel's contentions, arising from the use of printed forms not consistent with the real agreements of the charter, may be disposed of in a similar manner. The certificates, though payable to the order of Graham, provide that they are to be treated "as if the property was covered by a special policy direct to the holder of this certificate."

The libelant sues as the holder, and we have no doubt that the arrangement between it and Graham was that it was to be paid the balance of the charter hire by the bill of lading freight per head on animals delivered, and to be protected against loss of freight resulting from death of animals by the insurance which Graham took out. The libelant's insurable interest is perfectly clear, and that is all it need prove.

Even admitting the foregoing, the respondents still contend that the libelant cannot recover because the extraordinary mortality was due (and we shall assume this to be so) to the shipper's failure to supply enough bran or oats along with the natural or prairie grass hay to make the fodder digestible by the live stock, and that this amounted to unseaworthiness of the vessel. Assuming the mortality to have been caused as stated, the conclusion depends upon whether the fodder is to be regarded as an appurtenance of the vessel or of the cargo. If

of the vessel, the libelant cannot recover because of the implied warranty by all interests insured on the voyage of the seaworthiness of the vessel. Sleigh v. Tyser, L. R. [1900] 2 Q. B. D. 333. But there is no such implied warranty of the fitness of the cargo. As the libelant had nothing whatever to do with the fodder, we do not think its insurance on freight is affected by the character of the fodder, even if of an improper kind, or, as alleged in this case, of insufficient variety. Consequently the libelant is entitled to recover for the bill of lading freight lost on the live stock which was not delivered.

This brings us to the claim under the sue and labor clause. Some of the cattlemen supplied by the shipper having refused to work on account of the fare furnished them, the master deviated to Barbados to discharge these men and secure others in their place. We cannot say he was not justified in doing so. This cost the libelant:

7 days 18 hours, at £750 per calendar month, equal	$ 924 71
Coal consumed during that time	764 88
Extra victualing of cattlemen	84 00
Laurie & Co. bill	257 48
Total (Int. from Sept. 1, 1904)	$2,031 07

These expenses were incurred solely to prevent the mortality of the live stock, and incidentally the loss of the freight which was insured. It was a direct loss, recoverable under the policies from the underwriters in the first instance. The Pomeranian, Prob. Div. [1895] 349. Evidently the deviation was even more for the benefit of the owners and insurers of the cattle, but upon payment the underwriters on freight would have been subrogated to the right of the insured to recover contribution in general average (The St. Paul [D. C.] 100 Fed. 304), and this could have been adjusted between the two interests of freight and cargo only.

As the underwriters upon the cattle were the same as the underwriters on the freight, no inconvenience arises from the circumstance that the master did not take steps to secure average bonds and to have a general average adjustment made at the port of destination.

The District Judge found that the shippers had exercised unusual care to provide fodder, proper in kind and variety, and held that the underwriters would be liable, even if it had proved not to be so. Although we have not deemed it necessary to go into the subject, we agree with his conclusion in respect to both fact and law.

Decree affirmed, with interest and costs.

THE F. A. KILBURN.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1910.)

No. 1,792.

1. MARITIME LIENS (§ 24*)—STATUTORY LIEN FOR REPAIRS—REPAIRS MADE IN HOME PORT—NECESSITY OF CONTRACT.

The presumption that attends the making of repairs or furnishing of supplies to a vessel in a foreign port will not arise to support a lien for repairs in her home port, given only by the local law; but proof of an understanding, express or implied, that they were furnished on the credit of the vessel, is essential.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 30; Dec. Dig. § 24.*]

2. MARITIME LIENS (§ 29*)—STATUTORY LIEN FOR REPAIRS—AUTHORITY OF AGENT TO REPRESENT OWNER.

During more than 3 years and on some 30 occasions libelant had made repairs on a steamer in her home port at the request of the chief engineer, in each case on the credit of the vessel and charging the vessel and owner, and in each case it received its pay. The owner chartered the vessel by a time charter, requiring the charterer to keep her in repair and return her free from liens. He reserved the right to retain the chief engineer, and directed him to see that the charterer kept the vessel in repair. Being in need of repairs, by authority of the charterer the engineer ordered the same from libelant, which furnished them, charging vessel and owner as usual, and having no knowledge of the charter. *Held*, that the engineer had ostensible authority from the owner to order such repairs, and that libelant was entitled to a lien on the vessel therefor, under a local statute giving a lien for repairs made under contract with the owner.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 48; Dec. Dig. § 29.*]

Appeal from the District Court of the United States for the Northern District of California.

Suit in admiralty by the Moore & Scott Iron Works against the steamer F. A. Kilburn. Decree for libelant, and claimant, the Maritime Investment Company, appeals. Affirmed.

Samuel Rosenheim and Bernard Silverstein, for appellants.

Ira S. Lillick, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The libel in this case was brought to enforce an alleged lien upon the steamer F. A. Kilburn for repairs to her machinery and supplies furnished her while in her home port of San Francisco, upon the order of the chief engineer of the steamer, to the aggregate value of $1,429.44—such a lien being given by the local law. Code Civ. Proc. Cal. § 813. The presumption that attends the making and furnishing of such supplies to a ship in a foreign port upon the order of her master is not sufficient to establish a valid lien on a vessel in her home port given only by virtue of the local law. In the latter case, proof that the supplies were furnished on the credit of the ship is essential to the validity of the lien (Alaska & P. S. S. Co. v. C. W. Chamberlin & Co., 116 Fed. 600, 54 C. C. A. 56), and proof,

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

either express or implied, that both parties to the transaction so understood. In the case just cited this court said:

"It is not necessary, it is true, that the common intent so to bind the vessel be expressed in words, or in the form of an agreement. It may be established by proof of circumstances from which the common intent may be deduced; but in all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel and upon the part of the purchaser to pledge the vessel. In short, there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced either by express words to that effect or by circumstances of such a nature as to justify the inference."

The libel in the present case alleged that the repairs were made and supplies furnished the steamer in question upon the credit of the vessel and at the request of her chief engineer and agent of the owner. The judgment appealed from rests upon that alleged authority and was given upon that theory. The question in the case is whether there is sufficient evidence to support it. The case shows that Marshall A. Frank was the owner of the steamer at the time the repairs were made and supplies furnished, and had been such owner for a considerable period, although the precise date when he became such does not appear. It appears that on the 22d of June, 1907, Frank chartered the vessel for eight months to the Crescent Wharf & Warehouse Company, a corporation having its principal place of business at Los Angeles, to be operated in the waters between San Francisco and San Diego, with the option on the part of the charterer to purchase the ship at any time during that period upon certain terms, among them that Frank should have the privilege of appointing the chief engineer of the steamer and that the master should be "mutually satisfactory" to both parties—the charterer, however, to pay the wages of both master and chief engineer. The charter party contained these further provisions: The steamer to be delivered to the charterer in good order and condition, with all its then furniture and equipment, and at the expiration of the charter should be delivered back to the owner, in the same good order and condition, ordinary wear and tear excepted, and—

"(7) The party of the second part shall pay all costs of operating and maintaining the said steamer (except as hereinafter provided, which exception is not applicable to the present case), and upon the expiration of this charter the said steamer shall be delivered back to the party of the first part (owner) free of all liens and incumbrances."

The evidence shows that the Independent Steamship Company operated the F. A. Kilburn, as well as other ships chartered as well as owned by the Crescent Wharf & Warehouse Company; that one Walton was the agent of the company at San Francisco, one Mott at San Pedro, and C. F. Lehman was the president and manager of the two companies. John T. Flynn was the chief engineer of the steamer at the time it was chartered, and had been such during all the time of Frank's ownership, and for a considerable period before. He continued such chief engineer until subsequent to the transactions here in question. The principal part of the repairs and supplies for which this libel was brought grew out of the breaking of the winches of the ship. Flynn testified, among other things, as follows:

"In this particular case the winches were broken down by being overloaded. The capacity of the winches was two tons apiece. They took a launch aboard

that weighed nine tons, and they broke the winch down. It was within an hour of sailing time. Mr. Walton, the agent of the Independent Steamship Company, asked me if I could do anything with those winches. I said it would take all night to get them ready. He said there would be a man come aboard at San Pedro to fix them, and on the arrival of the vessel in San Pedro Mr. Mills, the bookkeeper—on the arrival of the ship at San Pedro, Mr. Mills, the bookkeeper, and a machinist, came aboard, the man who does Mr. Lehman's work. He said it was impossible to do it at San Pedro. I told him that we could get the freight out with one winch. On the arrival in San Francisco, I immediately went to the office and told Mr. Walton what Mr. Mills and the machinist had said at San Pedro. He told us to have the work done as quick as we could, and, as we did not want to delay the vessel, I telephoned to Mr. Caroll (one of the libelant's employés) and he came down. He said he would have to take the winch to the shop. The order was to get it done as quickly as possible. They worked night and day, and they had it ready in three days. The next trip they took the other off. When we went on that run, the vessel was making a four or five days schedule, and they cut it down—"

The evidence contained in the record leaves no room for doubt that the appellee performed the work and furnished the supplies charged for, and we think it sustains also the findings of the trial court that the charges therefor were reasonable. The evidence is without conflict to the effect that the appellee did the work and furnished the supplies upon the credit of the vessel, as it had been doing upon the order of the same chief engineer during the then 3½ years which he had occupied that position, and during which the appellee had from time to time done about 30 jobs upon the vessel, some of which were performed during Frank's ownership and some previous to his acquiring the vessel —the charges therefor in the books of the appellee always being made against the vessel and owner. It is true that the evidence is also without conflict to the effect that Frank, whose home was in San Francisco, did not know of the repairs and supplies in question, and was never told of them by either the appellee or Flynn, and that the appellee never made any inquiry as to who the owner of the ship was. It is undisputed, however, that during all of the time Flynn was chief engineer upon the vessel, whenever repairs thereon were needed, he ordered them made by the appellee, which the appellee did upon the credit of the vessel, always charging the same to the vessel and owner, all of which charges previous to those here in question were paid, and that not only did the owner, Frank, in executing the charter above referred to, reserve the right to retain Flynn as the chief engineer, but Lehman's testimony is to the effect that Frank wanted Flynn so employed "to keep the vessel in good condition," and Frank himself testified:

"When I chartered the steamer to the Crescent Wharf & Warehouse Company, I went down to the steamer, and told Mr. Flynn I had chartered it to the Crescent Wharf & Warehouse Company, and that under the charter they were to make all repairs, and keep the steamer in the same condition she was in on the day I turned her over, and that he was to see that they did that. If he needed anything, he was to go to them, and see he got whatever she needed, and, if they did not do the work, to let me know. The same instructions were given to the captain."

In view of the facts and circumstances referred to, we think the court below was right in holding that Flynn, the chief engineer of the steamer, had ostensible authority from the owner to order the repairs and the supplies mentioned in the libel.

The judgment is affirmed.

WONG HEUNG v. ELLIOTT, U. S. Marshal.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1910.)

No. 1,791.

1. HABEAS CORPUS (§ 113*)—REVIEW—FINDINGS OF FACT.

On appeal in a habeas corpus case for the discharge of a Chinese person held for deportation, the findings of the lower court are not conclusive, and all questions of fact on the evidence are open to consideration by the appellate court; but such findings should not be set aside, unless the evidence in the record is such as to convince the court that they are erroneous.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102–115; Dec. Dig. § 113.*]

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—FRAUDULENT MARRIAGE OF WOMAN TO EVADE JUDGMENT OF DEPORTATION.

Evidence considered, and *held* to sustain a finding that the marriage of a Chinese woman, after a judgment of deportation against her, and while at large on bail pending an appeal, to a native-born citizen of the United States, was not in good faith, but a mere sham, pretense, and form, for the purpose of evading the judgment of deportation.

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

Citizenship of Chinese persons, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

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

Proceeding by Mrs. Wong Heung against C. T. Elliott, United States Marshal for the Northern District of California for a writ of habeas corpus. From an order denying the writ, petitioner appeals. Affirmed.

On August 1, 1907, Wong Chun was arrested, charged with violation 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), and the act amendatory thereof, approved November 3, 1893 (Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]), and the act approved April 29, 1902 (Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1909, p. 473]). On September 27, 1907, after a hearing before a United States commissioner, she was ordered deported from the United States to China. On February 7, 1908, after a hearing on her appeal, and further evidence adduced in support thereof, the judgment of the commissioner was affirmed. On July 7, 1909, in compliance with said judgment, Wong Chun was taken into custody by the United States marshal for the purpose of deportation, and the following day, under the name of Mrs. Wong Heung, she filed a petition in the court below for a writ of habeas corpus, alleging that on October 28, 1908, pending her appeal to this court from the judgment of the district Court, she had been united in marriage to Wong Heung in the city of Oakland, state of California; that Wong Heung was a native-born citizen of the United States; and that by virtue of said marriage her status had been changed, and she was entitled to be discharged from custody. Upon the hearing on the order to show cause why the writ should not issue, the court below, upon the evidence, found that the marriage of the petitioner to Wong Heung was not entered into in good faith, but was a mere sham, pretense, and form, and had been entered into between the petitioner and Wong Heung solely for the purpose and with the intent of evading the effect of the findings, judgment, and order of deportation, and to enable the petitioner to remain within the United States, notwithstanding said order. From that judgment the petitioner appeals.

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

McGowan & Worley and Louis P. Boardman, for appellant.

Robt. T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). As this is a case of habeas corpus, all questions of fact upon the evidence are open to consideration on the appeal, and the findings of the court below are not conclusive upon us, as they would be on a judgment of deportation. Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. The finding, however, should not be set aside, unless the evidence in the record is such as to convince this court that it was erroneous. Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501. Upon a careful consideration of the testimony, we are not convinced that the court below erred in finding that the marriage was not entered into in good faith, and that it was a mere sham, pretense, and form for the purpose of evading the judgment of deportation.

There are many circumstances and features of the testimony to support that conclusion. Wong Heung testified to the marriage; but he did not testify that it had been followed by cohabitation. Although he denied that he was aware of the judgment of deportation before the marriage, his conduct, as detailed by himself, points to the conclusion that he knew it, and that he, or the person who planned the scheme, deemed it necessary to observe some degree of secrecy. He and the appellant were at that time residents of San Francisco, but he took the appellant to Oakland to be married. The reason why he did so, he first testified, was that he particularly desired to secure the services of the interpreter there with whom he was acquainted. But he admitted that there was no difficulty in obtaining interpreters in San Francisco. But later, on being interrogated by the court, he said that the reason why he went to Oakland to get married was that it was because he knew a lawyer over there, a Mr. Walsh, and that he wanted the lawyer as a witness. But he admitted that he knew that any witness would do as well. Jee Cam, the interpreter, testified that he was present at the marriage ceremony in pursuance of a request which Mr. Walsh sent him, and that before the marriage ceremony he never had seen either of the contracting parties. Mr. Walsh did not deny that he sent for the interpreter; but the reading of his testimony conveys the impression that the interpreter was present, not at his instance, but at the instance of Wong Heung.

The appellant testified that she first met Wong Heung about a month before the marriage; that she was then living on Dupont street; and from her testimony, and from her refusal to answer certain questions, it is fairly inferable that she was then engaged in the occupation of a prostitute, as she had been engaged at the time of her arrest for deportation. She testified that she made the proposal of marriage to Wong Heung, but that she did not know why she was taken to Oakland to be married. She testified that since the marriage she had lived with Wong Heung on Sacramento street, San Francisco; but she did

not mention the place of their residence. It requires credulity to believe that Wong Heung married the appellant in ignorance of the fact that she was under judgment of deportation. Wong Heung was himself a Chinese laborer, a laundryman, and he testified that sometimes he worked and sometimes he did not. It does not appear that he had any fixed place of abode; but it does appear that he had been in trouble, charged with breaches of the law. Among the badges of fraud is the fact that Wong Heung found it necessary to attach to the marriage license and certificate of marriage photographs of himself and the appellant. Another is that, in applying for the marriage license, he falsely stated that he and the appellant were residents of Oakland. It is evident, we think, that the appellant took advantage of her admission to bail to return to her former occupation, and that by going through the form of a marriage to a citizen of the United States, pending her appeal to this court, she, or more probably, some other person, whose mind conceived the design, hoped to oppose an effectual bar to deportation in case the judgment of this court should be adverse to her.

The judgment is affirmed.

HALLIGAN, Warden, v. WAYNE.

Ex parte WAYNE.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1910.)

No. 1,785.

CRIMINAL LAW (§ 984*)—SENTENCE ON CONVICTION ON DIFFERENT COUNTS—INDICTMENT CHARGING BURGLARY AND LARCENY.

One accused of burglary with intent to commit larceny may in a second count of the same indictment be charged with the larceny, and on such an indictment may be convicted and punished for either offense, but not for both; and where there is a general verdict of guilty he may be sentenced for the burglary only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2504–2508; Dec. Dig. § 984.*]

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

Petition by Frank Wayne against O. P. Halligan, Warden of the United States Penitentiary on McNeil's Island, Wash., for a writ of habeas corpus. From an order allowing the writ, defendant appeals. Affirmed.

The appellee was indicted in the District Court of the United States for the District of Oregon under five counts. The first count charged burglary, in that he broke into and entered a United States post office with intent to commit larceny therein, by stealing and taking away postage stamps and moneys of the United States; the second count charged him with the larceny of postage stamps of the value of $22, committed on the same date and in the same post office; the third count charged him with the larceny of $3 on the same date from the same post office; the fourth charged him with receiving, concealing, and retaining in his possession, with intent to convert to his own use, the postage stamps, of the value of $22, which he had already feloniously taken from the said post office; and the fifth count contained a

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

like charge of receiving, concealing, and retaining in his possession, with intent to convert to his own use, the said sum of $3 alleged to have been stolen from the post office. Upon his plea of guilty to the indictment, he was sentenced to be imprisoned for the term of three years for the offense charged in the first count, for a further term of two years for the offense charged in the second count, for the term of two years for the offense charged in the third count, for the term of one year for the offense charged in the fourth count, and for the term of one year for that which was charged in the fifth count. After having served the three-year sentence imposed under the first count, the appellee filed his petition in the District Court of the United States for the Western District of Washington, in which district he was confined, praying for a writ of habeas corpus, and for his discharge from the imprisonment. Upon the hearing on an order to show cause, the writ was allowed, and the appellee was discharged. The appeal raises the question whether the appellee could lawfully be sentenced separately for the burglary and the larceny charged in the indictment.

Elmer E. Todd, U. S. Atty., for appellant.

R. L. Blewett and D. V. Halverstadt, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is well settled, except in jurisdictions where it is otherwise provided by statute, that one accused of burglary with intent to commit larceny may, in a second count, be charged with the larceny. It is also well settled that upon such an indictment the accused may be convicted of either of the offenses charged. But the question which the case now before us presents is whether one thus accused of burglary and larceny may be convicted and punished for both offenses. Upon this proposition there is conflict of authority. In Ex parte Peters (C. C.) 12 Fed. 461, it was said:

"According to the great weight of authority, it may be regarded as settled that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offenses or one, at the election of the power prosecuting him."

And the court cited Josslyn v. Commonwealth, 6 Metc. (Mass.) 236, State v. Ridley, 48 Iowa, 370, Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340, and Wilson v. State, 24 Conn. 57.

On examining those cases it will be found that none but the last fully sustains the doctrine so announced. In Josslyn v. Commonwealth, Chief Justice Shaw said that, where burglary and larceny "are averred in distinct counts as distinct substantive offenses not alleged to have been committed at the same time, and as one continued act, * * * the defendant may be convicted on both, and a judgment rendered founded on both." The inference from this language is that, if the offenses were alleged to have been committed at the same time, but one crime would be charged, and but one penalty could be imposed. That this is so is made clear by the opinion of the same judge in Kite v. Commonwealth, 11 Metc. (Mass.) 581, where he said:

"If the larceny charged in the second count appears, in proof, to have been committed at the time of the breaking and entering, then it is merged, and the conviction is properly for burglary, and the sentence must be accordingly. But if a breaking and entering with intent to steal be proved, and a different larceny done at a different time be also proved, then the sentence may properly be awarded as for both offenses."

State v. Ridley is authority only for the proposition that under an indictment charging three offenses, as burglary, larceny in a store in the nighttime, and simple larceny, a verdict of guilty might be found upon any one of the crimes so charged. In Breese v. State, it was held that a count charging burglary might be united in an indictment with a count charging larceny, and that on a general verdict of guilty on such a count the accused might be sentenced for the burglary, but not for the larceny, and that upon a verdict of guilty of the burglary as charged the court might legally proceed to sentence for that crime, without waiting a response to the charge of larceny.

In line with the doctrine of Ex parte Peters, however, are Speers v. Commonwealth, 17 Grat. (Va.) 570, Wilson v. State, 24 Conn. 57, State v. Warner, 14 Ind. 572, and Dodd v. State, 33 Ark. 517. In Bishop's New Criminal Law, § 1062, the doctrine of the decisions last cited is declared to be in accordance with the weight of authority; but the author adds, adopting the language of the dissenting opinion of Waite, C. J., in Wilson v. State:

"Still to make a burglary thus double, and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law, and we have cases which refuse this double punishment. They proceed on the highly reasonable ground that where a criminal act has been committed, every part of which may be alleged in a single count in an indictment and proved under it, the act cannot be split into several distinct crimes, and a several indictment sustained upon each."

In 3 Enc. of Pl. & Pr. 785, it is said:

"But the verdict and the conviction in such a case cannot be for both the burglary and the larceny, though they may be for either offense singly. When both offenses are united in one indictment, it is permissible to convict for either offense without the other."

On page 791 the same authority says:

"But there cannot be a conviction for both offenses. There may, however, under such an indictment, be found a general verdict of guilty; but on this verdict there can be but one sentence, that for the burglary alone, and not for both burglary and larceny."

These views are, we think, sustained by the weight of reason and authority. State v. McClung, 35 W. Va. 280, 13 S. E. 654; Yarborough v. State, 86 Ga. 396, 12 S. E. 650; Commonwealth v. Birdsall, 69 Pa. 482, 8 Am. Rep. 283; Roberts v. State, 55 Miss. 421; Triplett v. Commonwealth, 84 Ky. 193, 1 S. W. 84, 8 Ky. Law Rep. 67; Lyons v. People, 68 Ill. 271; Jennings v. Commonwealth, 105 Mass. 586; Commonwealth v. Lowery, 149 Mass. 67, 20 N. E. 697; State v. Nicholls, 37 La. Ann. 779; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

The judgment is affirmed.

VIRTUE et al. v. CREAMERY PACKAGE MFG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1910.)

No. 3,167.

1. MONOPOLIES (§ 17*)—CONTRACTS IN RESTRAINT OF TRADE—FEDERAL ANTI-TRUST LAW.

A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), as in restraint of interstate trade and commerce; its effect on such commerce, if any, being indirect and incidental.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 17.*]

2. MONOPOLIES (§ 21*)—SUIT FOR INFRINGEMENT—RIGHT TO MAINTAIN.

That the owner of a patent is a party to an illegal combination in restraint of trade does not deprive him of the right to sue for infringement of his patent.

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

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

3. MONOPOLIES (§ 28*)—COMBINATIONS IN RESTRAINT OF TRADE—ACTION FOR DAMAGES.

Evidence *held* insufficient to establish a combination or conspiracy in restraint of interstate trade or commerce between two defendants, each of whom brought a suit against plaintiff for infringement of a different patent, which would sustain an action by plaintiff for treble damages under Sherman Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202).

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

4. LIBEL AND SLANDER (§ 132*)—TITLE—THREATENING SUITS FOR INFRINGEMENT OF PATENT.

The owner of a patent may lawfully notify infringers, or persons believed to be such, of his claims, and warn them that suit will be brought to protect his legal rights, where he acts in good faith.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 132.*]

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

Action by Dennis E. Virtue and the Owatonna Fanning Mill Company against the Creamery Package Manufacturing Company, the Owatonna Manufacturing Company, and Frank La Bare. Judgment for defendants, and plaintiffs bring error. Affirmed.

Harlan E. Leach (Charles I. Reigard and James F. Williamson, on the brief), for plaintiffs in error.

Emanuel Cohen (John B. Atwater and Frank W. Shaw, on the brief), for defendant in error Creamery Package Mfg. Co.

A. C. Paul (W. A. Sperry, on the brief), for defendants in error Owatonna Mfg. Co. and La Bare.

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

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

RINER, District Judge. The plaintiffs in error were plaintiffs in the Circuit Court, the defendants in error were defendants in the Circuit Court, and will be hereafter referred to as plaintiffs and defendants, respectively. This was an action at law to recover treble damages under the seventh section of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3202). The court below directed the jury to return a verdict in favor of the defendants, for the reason that the damages alleged in the complaint were not such damages as were contemplated by the act of Congress just mentioned.

The plaintiffs were engaged in the business of manufacturing combined churns and butter workers at Owatonna, Minn., and from there shipping and selling them in Minnesota and in other states. The defendant the Creamery Package Manufacturing Company, a corporation organized under the laws of Illinois, was also engaged in manufacturing and selling throughout the United States all kinds of dairy and creamery supplies and installing in creameries complete creamery outfits. The defendant the Owatonna Manufacturing Company, a corporation organized under the laws of Minnesota, was engaged in the manufacture of combined churns and butter workers. The defendant La Bare was president of the last-named corporation. The product of its plant was sold throughout the different states of the United States by the defendant the Creamery Package Manufacturing Company, pursuant to a contract hereafter referred to.

The record discloses that on the 2d of October, 1893, by an instrument in writing, Reuben B. Disbrow and Darius W. Payne, then owners of letters patent numbered 490,105, for a consideration, assigned said patent and the exclusive right to manufacture and sell throughout the United States and territories the Disbrow combined churn and butter worker covered by the patent, and also "all subsequent patents for improvements that may be made to it to the Owatonna Manufacturing Company"; that thereafter the Disbrow Manufacturing Company, a corporation organized under the laws of Minnesota, Reuben B. Disbrow being its president and Darius W. Payne its secretary, began the manufacture of certain churns called the Winner or New Disbrow. The defendant the Owatonna Manufacturing Company claimed that this churn was being manufactured under improvements which were patented by Reuben B. Disbrow after the 1893 agreement, and therefore belonged to the Owatonna Company as subsequent patents for improvements. At this time the defendant the Creamery Company had a contract, made in October, 1896, with the Disbrow Company for the sale of the Winner churn. It had also advanced money to the Disbrow Company and held a mortgage upon its plant for $800.

Litigation arose with respect to the rights of the parties under the agreement of 1893, and several suits were pending in relation thereto, when, in April, 1897, a settlement was effected by the execution of four instruments. One was a contract between the Disbrow Manufacturing Company and the Owatonna Manufacturing Company, in and by which the rights of all parties under the October, 1893, agreement were mutually released, the suits were settled, and the Disbrows sold their patents, machines, tools, and patterns to the Owatonna Manufacturing Company, and retired from the churn business during the life of the

patents. Another was an assignment of the Disbrow patents. A third was a contract between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, by which the Creamery Package Manufacturing Company was made sales agent for all the churns manufactured by the Owatonna Manufacturing Company. The fourth was a contract between the Disbrow Manufacturing Company and the Creamery Package Manufacturing Company, whereby the agreement of October, 1896, between these parties was released and discharged and the mortgage on the plant of the Disbrow Manufacturing Company was satisfied, the Creamery Package Manufacturing Company agreeing to pay to the Disbrows royalties thereafter falling due from the Owatonna Manufacturing Company. These four contracts were executed at the same time, and, as shown by the recitals, were part of a single transaction. The purpose of these instruments, as disclosed by the instruments themselves, was to settle pending litigation and all matters concerning which the parties were at variance, and to cause the Disbrow Company to discontinue the manufacture of churns under the patents, which the Owatonna Manufacturing Company insisted belonged to it.

February 24, 1898, the defendant the Creamery Package Manufacturing Company and its stockholders entered into an agreement with a number of other concerns and persons engaged in the business of manufacturing and selling combined churns and butter workers and other creamery supplies. The purpose of this agreement, as stated by counsel for the defendant the Creamery Package Manufacturing Company in their brief, "was to advance the business interests of the different parties by settling and avoiding litigation pending and apprehended and by terminating unreasonable and ruinous competition." The defendant the Owatonna Manufacturing Company was not a party to this agreement, and, so far as the record shows, was not responsible for any act of the Creamery Package Manufacturing Company in carrying out its provisions. The only connection it had with the Creamery Package Manufacturing Company was by virtue of the provisions of its contract of April 19, 1897, with that company. That contract was not a contract in restraint of trade, nor was it an attempt to create a monopoly. As suggested by the trial court:

"It was merely a contract making the Creamery Package Manufacturing Company the sales agent of the Owatonna Manufacturing Company."

Even if it can be said that it incidentally or indirectly tended to restrain competition by giving the Creamery Package Manufacturing Company the exclusive right to sell its product, it would not violate the statute. As said by Judge Sanborn in Union Pacific Coal Company v. United States, 173 Fed. 737, 97 C. C. A. 581:

"If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law." Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Company v. United States, 175 U. S.

211, 20 Sup. Ct. 96, 44 L. Ed. 136; Whitwell v. Continental Tobacco Company, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, and cases there cited.

The record shows that the Creamery Package Manufacturing Company was the assignee of three certain patents, numbered respectively 539,571, 565,720, and 600,168; that the Owatonna Manufacturing Company was the owner of another patent, numbered 585,100, for new and useful improvements in combined churns and butter workers; that on the 16th of July, 1904, these two defendants brought independent suits against the plaintiffs for infringements of their patents. In the case of the Owatonna Manufacturing Company's patent, the patent was decreed to be void for lack of invention in view of the prior art. In the case of the Creamery Package Manufacturing Company's patents it was decreed that it was the owner of the patents sued on, and that the patents had been infringed by the plaintiffs, an injunction was issued, and the case referred to a master for an accounting. It is upon the prosecution of these two patent suits that the plaintiffs base their right of action. They insist that their business and the property used in connection therewith was injured, and their interstate trade and commerce destroyed, first, by the prosecution by the two defendants against the plaintiffs of these two separate patent infringement suits; and, second, by the defendants circulating among the agents, users, purchasers, and prospective purchasers of their product, located in different states, reports and statements to the effect that the combined churns and butter workers were infringements of patents owned and controlled by the defendants.

As already indicated, we do not think the contract between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, giving the Creamery Company the exclusive sale of the Manufacturing Company's output, tended to suppress competition. The Manufacturing Company had the right to select its customers, and to sell and to refuse to sell to whomsoever it chose (Whitwell v. Continental Tobacco Company, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689), and the provision making the Creamery Company its sole sales agent was a usual and reasonable method of providing for the disposition of its product. The effect of this contract, if, indeed, it had any effect, upon interstate or international commerce, was only incidental and indirect. The sole purpose of the contract, as we view it, was to settle pending and threatened litigation, and to secure to the Owatonna Manufacturing Company the right to manufacture and dispose of its product under certain patents, and to foster its trade and increase its business. In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce. Cincinnati, etc., Packet Company v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428. The same is true of the agreement between the same parties of June 4, 1898, which was an agreement for the settlement of certain litigation, and provided that the Owatonna Manufacturing Company should have the right to manufacture 55 per cent. of the total yearly sales made by the Creamery Company or be compensated in damages. This contract was merely supplemental to the contract of April 19, 1897, which contained no provision as to the amount of sales of the

Owatonna Manufacturing Company's product should be made by the Creamery Company, and this omission was supplied by this contract. Its only effect was to foster the interests of the Owatonna Manufacturing Company, and did not affect competition.

It is not necessary in the disposition of this case to determine the question whether or not the contract of February 24, 1898, between the Creamery Manufacturing Company and other concerns and individuals, to which the Owatonna Manufacturing Company was not a party, violated the provisions of the act of Congress. We may assume, however, for the purposes of this case, without deciding the question, that it was a contract in violation of the statute. We then have a case where two suits are brought, one by a party to a lawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them respectively, and where both parties were doing nothing more than exercising their legal rights. The mere fact that the Creamery Package Manufacturing Company was a party to an unlawful combination would not deprive it of the right to sue and recover damages against an infringer of patents owned by it, or to bring suit if it believed the patents were being infringed. As was said in Strait v. National Harrow Company (C. C.) 51 Fed. 819, the owner of a patent having a right to bring suit for its infringement:

"The motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights." Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and cases there cited.

As suggested by the Circuit Court:

"There is no evidence which would justify a jury in finding that the Owatonna Manufacturing Company entered into any agreement or contract with any one that was in violation of either section 1 or section 2 of the act, so that the Creamery Package Manufacturing Company cannot be held responsible for the failure of the Owatonna Manufacturing Company to maintain its action, and it cannot be held responsible, although it may have entered into an unlawful conspiracy with other persons, for it has not entered into any such conspiracy with the Owatonna Manufacturing Company."

The contract of February 24, 1898, between the Creamery Company and other concerns and individuals, contained no provision for the bringing of actions against alleged infringers of its patents for the purpose of driving them out of business, and there was certainly nothing of the kind in any of the contracts made and entered into between the defendants. The mere fact that the two infringement suits were brought upon the same day and the defendants were represented by the same counsel does not show, or even tend to show, that they were brought for any purpose other than the enforcement of the legal rights of the owners of the patents. It falls far short, it seems to us, of establishing an agreement or conspiracy between the defendants to bring these suits at the same time for the purpose of driving the plaintiffs out of business, and after a patient and thorough examination of the record we think the Circuit Court was fully justified in holding that there was no evidence offered at the trial "which would warrant the jury in finding that any agreement of that kind existed."

As a second basis for the recovery of damages, the plaintiffs contend that the defendants circulated among the agents, users, purchasers, and prospective purchasers of the churns of the plaintiffs, located in different states, reports and statements that the combined churns and butter workers sold by the plaintiffs were infringements of the Disbrow patents owned or controlled by the defendants, and that they threatened to bring suits against the users of the plaintiffs' churn. That the owner of a patent may notify infringers of his claims, and warn them that, unless they desist, suits will be brought to protect him in his legal rights, is sustained by numerous decisions. Kelley v. Ypsilanti Dress Stay Manufacturing Co. (C. C.) 44 Fed. 19, 10 L. R. A. 686; Computing Scale Company v. National Computing Scale Company (C. C.) 79 Fed. 962; Farquhar Company v. National Harrow Company, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; Adriance, Platt & Co. v. National Harrow Company, 121 Fed. 827, 58 C. C. A. 163; Warren Featherbone Company v. Landauer (C. C.) 151 Fed. 130; Mitchell v. International, etc., Company (C. C.) 169 Fed. 145; 30 Cyc. 1054.

The only limitation on the right to issue such warnings is the requirement of good faith. There is nothing in the warnings given in this case to show that the letters or notices were false, malicious, offensive, or opprobrious, or that they were used for the willful purpose of inflicting injury. In such a case it was said, in Kelley v. Ypsilanti, supra:

"It would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others. Chase v. Tuttle [C. C.] 27 Fed. 110; Boston Diatite Company v. Florence Manufacturing Company, 114 Mass. 69 [19 Am. Rep. 310]; Kidd v. Horry, 28 Fed. 773."

There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution of the infringement suits. In issuing notices and warnings we think the defendants were acting within their legal rights. If they had the right to bring the suits, they had the right to issue the warnings. It may be, and probably is, true that the pendency of these suits resulted in some damage to the plaintiffs by lessening the sale of the challenged device; but such damage was an incident of the suits, and cannot be made the basis of a recovery.

The conclusion reached is that the Circuit Court properly directed the jury to return a verdict for the defendants, and the judgment is affirmed.

SOUTHERN CAR MFG. SUPPLY CO. v. LAYNE.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1910.)

No. 1,963.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRE-WINDING MACHINE. The Layne patent, No. 820,507, for a wire-winding machine, *held* valid and infringed as to claims 11 to 17, inclusive.

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

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

In Equity. Suit by Mahlon E. Layne against the Southern Car Manufacturing Supply Company. Decree for complainant, and defendant appeals. Affirmed.

The following is the decree of the Circuit Court, entered by Bryant, District Judge:

On January 25, A. D. 1909, came on to be heard the above entitled and numbered cause at Sherman, Tex., by agreement of counsel, the complainant appearing by his attorneys of record, Paul Synnestvedt and Andrews, Ball & Streetman, and the defendant appearing by its attorneys of record, William H. Babcock and Carlton & Townes, and both parties having announced ready, and the court having heard the pleadings of the respective parties read, the evidence introduced, and argument of counsel, and having taken said cause under advisement until this the 21st day of April, A. D. 1909; and, the court being fully advised in the premises, it is now ordered, adjudged, and decreed as follows:

First. That the letters patent of the United States issued to Mahlon E. Layne on the 15th day of May, 1906, for wire-winding machines and for improvements in wire-winding machines, the number of the letters patent being 820,507, are good and valid as to claims 11 to 17, inclusive, thereof, which are as follows, and no adjudication is made as to the validity of the other claims:

(a) "Claim 11: In a wire-winding machine, a feed guide for placing the wire upon the support comprising a jaw having rollers to engage the wire, and said rollers being mounted so that they may be laterally rotated in its supporting socket in order to twist and place the wire upon the support in any desired angular position, substantially as described."

(b) "Claim 12: The combination, with a rocking carriage, of a series of tension rolls thereon and a feeding guide pivotally mounted and having means to rotate it in a plane parallel with the axis of the helix of wire, whereby to twist the wire as it is fed to the support of helix, substantially as described."

(c) "Claim 13: In a wire-winding machine, the feeding guide, 21, pivotally mounted upon its support and having means to rotate it in its support for twisting the wire to direct it upon its support, substantially as described."

(d) "Claim 14: In a wire-winding machine, the feeding guide, 21, having grooved rollers in its jaws to engage the wire and being mounted for vertical oscillation, and capable of adjustment in a rotary direction around the axis of the wire as it is being fed upon its support, substantially as described."

(e) "Claim 15: In a wire-winding machine, the combination with a vertically adjustable feeding guide and a spacer engaging the previously wound turns of the helix of wire adapted to advance said guide with the mean position of several turns of wire, substantially as described."

(f) "Claim 16: The combination in a wire-winding machine of rolls having means for punching and spreading spacing spurs upon the wire, substantially as described."

(g) "Claim 17: In a wire-winding machine, the combination with means for forming lateral spurs upon the side of the wire as it is being fed to its support, and a guide to advance the carriage along the helix adapted to engage the wire upon several of its turns and advance the machine by the mean position of said turns, substantially as described."

Second. That the said Mahlon E. Layne was the first, true, and original inventor of the inventions and improvements described and claimed in said letters patent, and particularly recited in claims 11 to 17, inclusive, thereof.

Third. That the complainant, Mahlon E. Layne, is the lawful owner of said letters patent.

Fourth. That the defendant, Southern Car Manufacturing Supply Company, has infringed upon the said eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth claims of the letters patent of complainant, and upon the exclusive right of the complainant under the same. That the complainant, Mahlon E. Layne, has not proved infringement of claims 1

to 10, inclusive, or of claims 18 to 21, inclusive, of said letters patent; and it is ordered that judgment be here entered for defendant on the question of infringement as to said claims 1 to 10, inclusive, of the patent in suit.

Fifth. That complainant, Mahlon E. Layne, do have and recover of the defendant, Southern Car Manufacturing Supply Company, the profits which the said defendant has derived, received, or made since the 15th day of May, 1906, by reason of said infringement of said claims 11 to 17, inclusive, of said letters patent, and that the complainant do receive of the said defendant any and all damages which the complainant has sustained since said date, by reason of said infringement by said defendant.

Sixth. And it is hereby referred to H. P. Barry, as a master of this court, who is hereby appointed pro hac vice to take and state the account of said profits, and to assess such damages as complainant has to same, and to report thereon with all convenient speed, and the defendant, its directors, officers, attorneys, clerks, and employés, are hereby directed and required to attend the hearings before the aforesaid master from time to time as required, and to produce before him such books, papers, vouchers, and documents, and to submit such oral examination as the master may require.

Seventh. That the said defendant, Southern Car Manufacturing Supply Company, its directors, officers, attorneys, agents, and employés, be and they are hereby enjoined and restrained from directly or indirectly making or causing to be made, using or causing to be used, or selling or vending to others to be used, in any manner, any articles, devices, appliances, or apparatus for wire-winding machines containing, embodying, or employing the said inventions and improvements contained and covered by claims 11 to 17, inclusive, of said letters patent, or any other articles, devices, or apparatus which, being combined or used, produce an infringement of said claims 11 to 17, inclusive, of said letters patent, or from infringing upon or violating the said letters patent in any way whatsoever.

Eighth. That a writ for a perpetual injunction issue out of and under the seal of this court, directed to the said defendant, Southern Car Manufacturing Supply Company, directors, officers, attorneys, agents, and employés, enjoining and restraining them and each of them from directly or indirectly making or causing to be made, using or causing to be used, or selling or vending to others to be used, in any manner, any articles, devices, appliances, or apparatus for wire-winding machines containing, embodying, or employing the said inventions and improvements contained and covered by claims 11 to 17, inclusive, of said letters patent, or any articles, devices, or apparatus capable of being combined or adapted to be used in infringement of said claims 11 to 17, inclusive, of said letters patent, or from infringing upon or violating the said letters patent in any way whatsoever.

Ninth. That the question of costs herein is passed for future adjudication of this court on final hearing.

To all of which defendant then in open court excepted and is allowed 30 days in which to apply for an appeal.

E. E. Townes and Ernest Wilkinson, for appellant.

Frank Andrews, Paul Synnestvedt, Coke K. Burns, and James C. Bradley, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the patent sued on is valid, and that the defendant below, appellant here, has infringed the same in the respects pointed out in the decree appealed from.

It is ordered that the decree of the Circuit Court be affirmed.

THE GENERAL DE SONIS.

(District Court, W. D. Washington, N. D. April 11, 1910.)

No. 3,410.

1. SHIPPING (§ 84*)—MASTER'S LIABILITY FOR INJURY TO THIRD PERSON BY NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT.

The second mate of a vessel, in volunteering to assist the employés of a stevedore in replacing a hatch cover, which was the duty of the stevedore's men, was not acting as representative of the ship's owner or master, having authority to fasten responsibility on them under the rule of respondeat superior, and they cannot be held liable for an injury to one of the men through the mate's negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

2. SHIPPING (§ 87*)—LIABILITY OF VESSEL FOR TORT—NEGLIGENCE OF MASTER OR CREW.

By the maritime law a ship in commission and her officers and crew are unified, so far that for maritime torts, whether the ship is the instrument by which an injury is inflicted, or the injury is the consequence of a negligent or mischievous act of her captain or any member of her crew, a maritime lien attaches to the ship, which entitles the injured to recover compensation by a suit in rem.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 340; Dec. Dig. § 87.*]

3. SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR TORT—NEGLIGENCE OF MATE—CONTRIBUTORY NEGLIGENCE—DIVISION OF DAMAGES.

Libelant, with other employés of a stevedore, were engaged in replacing a hatch cover on a vessel, when a mate volunteered to assist, and through his negligence and that of libelant the hatch cover was caused to fall with them, and libelant was injured. *Held*, that the ship was liable for the negligence of the mate, and that libelant was entitled to recover half damages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

4. NEGLIGENCE (§ 1*)—NATURE AND ELEMENTS—DEGREES.

The degree of negligence necessary to fasten liability upon a person is that degree which is equivalent to lack of such care and prudence as ordinary men habitually exercise for their own personal safety.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

In Admiralty. Suit by John Neiger against the ship General De Sonis, her owner, Société Nouvelle d'Armement, and her master, R. Consinet, by a longshoreman, to recover damages for a personal injury suffered while libelant was assisting in covering a hatchway on the ship, caused by the collapsing of the hatch structure. Decree that the libelant take nothing by his suit in personam, and recover half his damages, with interest, against the ship, with a division of costs.

J. L. Waller and Z. B. Rawson, for libelant.
Bogle, Hardin & Spooner and Ira A. Campbell, for respondents.

HANFORD, District Judge. The libelant was employed by a firm of stevedores having a contract to discharge the cargo of the ship General De Sonis. At the end of a day's work the men who were doing the

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

work, as employés of said firm, left the ship without having replaced the covers on one of the hatchways, and by direction of their foreman several of the men, including the libelant, returned to the ship to close the hatchway, and while performing that service the libelant was precipitated through the hatchway into the hold of the ship and badly injured. He prosecutes this suit, in rem and in personam, against her master and owner, to recover damages on the alleged ground that the accident happened as a consequence of faulty construction of the frame and covering of the hatchway and carelessness and misconduct on the part of an officer of the ship in jumping upon one section of the hatch covers to force it into position. The owner's claim and a bond for release of the ship having been filed, the claimant and the master jointly answered an amended libel, contesting any liability.

The facts proved are that the coaming of the hatch is 3 feet 4 inches high above the deck, and made of steel a little more than one-third of an inch in thickness, secured to the deck by angle plates fastened to the steel deck and lugs fastened to the deck beams, and reinforced at the top by a half round steel molding. The strong-backs and fore-and-afters, which with the coaming constitute the framework of the hatch, were also made of thin steel. The covering is timber in sections, and made to fit snugly, so as to completely close the opening. Additional means of strengthening the union of parts is provided, consisting of a rod in two parts, joined together by a turn-buckle reaching across the opening, and through the forward and aft coamings, and through the strong-backs. In use when the hatch is closed with the rod in place, the opposite coamings are drawn tight on the fore-and-afters by screwing the turn-buckle. The evidence proves that at the time of opening the hatch, when the rod was removed, the coamings spread half an inch and released the fore-and-afters, so that they were easily removed. The stevedores opened the hatch, and it was their duty to close it. On the occasion referred to, the libelant and his associates had so nearly completed their task that only two sections of the covering timbers remained to be fitted into their places. These seemed to be wider or longer than the space for them, and the men were about to leave the job unfinished, when the second mate of the ship came to their assistance, and an attempt was made to force the covers into position by elevating the overlapping edges and placing them against each other, so as to secure the advantage of a leverage with pressure forcing them down. The rod and turn-buckle had not been placed. The libelant was standing on the hatch with one foot placed to exert pressure downward on one of the sections when the second mate jumped upon the other section, to force it down, with the unexpected result that all, or a considerable part, of the hatch covering, with both men, fell down into the hold of the ship.

The evidence proves that no part of the structure was broken or bent, and all of it was subsequently used without any alteration or repair, and was serviceable as before the happening. Expert witnesses, who have had years of experience in surveying vessels for owners and underwriters, gave testimony approving the construction of the hatch, and according to their statement the ship throughout was constructed and kept in condition to be entitled to the highest rating as a carrier

and subject for insurance. It would appear from their evidence that such an accident could not possibly have happened, and I find that the evidence in its entirety fails to give an intelligent explanation of the occurrence. The hatch covering did collapse, however, and the accident cannot be explained upon any other theory than that, owing to the springiness of the metal in the absence of the rod and turn-buckle, the strong-backs and fore-and-afters must have been displaced by the jar and concussion caused by the efforts of the libelant and the second mate to force the last two sections into position.

The degree of negligence necessary to fasten liability upon either the ship, her master, or owner is that degree which is equivalent to lack of such care and prudence as ordinary men habitually exercise for their own personal safety. This hatchway having been approved by the builders and insurer of the ship, and having served the purpose for which it was constructed before and after the accident, cannot be regarded as so faulty as to justify condemnation of the ship for unseaworthiness, nor a finding that the owner or captain were guilty of that degree of neglect which amounts to a tort in permitting stevedores to work around it. Competent seamen and stevedores could have covered the hatch without risk of injury to any one. Therefore the accident must be attributed to carelessness or lack of skill on the part of the libelant, his associates, and the second mate of the ship.

The questions as to the right of the libelant to maintain the suit in personam against the owner and master, and as to the liability of the ship, will be separated, and I will first consider the case as if it were a suit in personam only. There is a conflict in the evidence as to whether the second mate acted upon his own initiative in assisting to close the hatch, or whether the libelant called him to assist; but, whatever the fact may be in that respect, the respondents are not personally liable for his error. This is so for the reason that the contracting stevedores were responsible for closing the hatch, their employés were sent to perform that service, and the second mate, in the manual handling of the hatch covers and jumping upon them, was a mere volunteer, assisting the stevedores in the performance of their duties. In doing the stevedores' work, he was not a representative of the ship's owner or master, having authority to fasten responsibility upon them by application of the rule of respondeat superior.

The Supreme Court in the case of Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, cited by the libelant's proctors, affirmed a judgment for damages in favor of an injured workman against the employer of another workman. The individuals involved were the plaintiff, his employer, a master stevedore, who had a contract for loading a ship, the defendant, a corporation, and a winchman in the general service of the defendant. The operation of loading was managed by the contractor. The motive power was a steam winch, owned by the defendant and operated by the winchman, whose negligence caused the accident. The action was founded upon the rule of respondeat superior, and the only question presented was "whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore." The controlling fact in the case was that the winchman was at the time "engaged in the work of the

defendant, under its rightful control." The opinion of the court discusses general principles and affirms that:

"The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work, or that of some other, the master is not answerable for his negligence in the performance of it."

In reaching the conclusion that the winchman was not a fellow servant of the injured longshoreman, the opinion states that:

"In order to relieve the defendant from the results of the legal relation of master and servant, it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created."

The opinion is instructive, but differences in the facts make it inapplicable to this case as an authority in point. The perplexing question in this case would not exist if the second mate had merely, in the exercise of his authority, exacted performance of the duty of the stevedore's men to close the hatchway properly, without himself participating in the doing of their work; for, if the accident had resulted solely from their lack of skill, it could not be justly attributed to any fault of the respondents. There is a rule well established by adjudged cases that a vice principal, who causes an injury to a workman in the voluntary performance of a workman's act, is regarded in law as a fellow servant of the injured workman, and no liability attaches to the common employer for the injury so caused. The Miami, 93 Fed. 218, 35 C. C. A. 281. And it is the opinion of the court that by analogy the relation of master and servant is suspended when a representative of one employer volunteers to assist the servants of a different master in the performance of manual labor. Guided by that rule, the test applied by the Supreme Court in the case of Standard Oil Co. v. Anderson, applied to this case, leads to the conclusion that the respondents are not liable to the libelant, although the relation of master and servant between the second mate of the ship and the contracting stevedores did not exist.

Liability of the Ship.

The other branch of the case requires application of the maritime law, instead of common-law rules. The court holds that the act of the second mate in jumping on the hatch cover was a maritime tort, because it was a wrongful act by an officer of the ship, and it caused an injury on board the ship to a man at the time engaged in the performance of a service to the ship. By the maritime law a ship, in commission, and her officers and crew, are unified, so far that for maritime torts, whether the ship is the instrument by which an injury is inflicted, or the injury is the consequence of a negligent or mischievous act of her captain, or any member of her crew, a maritime lien attaches to the ship, which entitles the injured to recover compensation by a suit in rem. 19 Am. & Eng. Enc. of Law (2d Ed.) 1117; 1 Enc. L. & P. 1245, 1285; The Anaces, 93 Fed. 240, 34 C. C. A. 558; The Homer, 99 Fed. 795, s. c. 109 Fed. 572, 48 C. C. A. 465; The Troop, 118 Fed. 769, s. c. 128 Fed. 856, 63 C. C. A. 584.

The libelant's injuries were painful and serious, and the pecuniary loss, including deprivation of earnings while he was incapacitated for

work, amounts to a considerable sum. It is the opinion of the court that $3,000 would be reasonable compensation if the libelant's own carelessness in standing upon the hatch had not been a contributing cause of the accident. In view of all the circumstances, the case is one for a division of the damages. The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; The City of Seattle, 150 Fed. 537, 80 C. C. A. 279, 10 L. R. A. (N. S.) 969.

The court directs the entry of a decree that the libelant take nothing by his suit in personam, and awarding damages in the sum of $1,500, with interest from the date of the commencement of the suit at 6 per cent. per annum, recoverable from the obligees on the bond for the release of the ship, and that the costs be equally divided between the libelant and claimant.

STATE OF MARYLAND, to Use of KAUPP et al., v. ELLICOTT et al.

(District Court, D. Maryland. April 28, 1910.)

(Syllabus by the Court.)

SEAMEN (§ 29*)—INJURIES TO SEAMEN—SEAWORTHINESS OF VESSEL.

The owners of a dredge built in the United States for use on the Panama Canal are not under obligation to seamen employed on such dredge while being towed to the Isthmus of Panama to make such a dredge as seaworthy for such voyage as they would be required to make an ordinary ship. All they are required to do is to make the dredge as fit for such voyage as such a dredge can be reasonably made.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186–194; Dec. Dig. § 29;* Master and Servant, Cent. Dig. § 211.]

In Admiralty. Libel by the State of Maryland, to the Use of Copeland G. Kaupp and others, against Charles E. Ellicott and others. Decree for defendants.

This is a libel in personam, in the name of the state of Maryland, for the use of the widow and children of Martin J. Kaupp, the engineer on board a certain steam dredge, known as "No. 4,300," and by Charles J. Meyd and John G. Duffy, late seamen on board of such dredge, against a copartnership known as the Ellicott Machine Company and the American Towing & Lightering Company, a corporation, owner of the steam tug Tormentor. The dredge, No. 4,300, was built in Baltimore by the Ellicott Machine Company under contract with the Isthmian Canal Commission. The contract price was to be $158,000, which was to be paid in instalments. Ninety per cent. of it was paid before the dredge left Baltimore; but by the contract all responsibility for the safe delivery of the dredge at Colon was assumed by the Ellicott Machine Company.

The dredge was prepared for its long voyage by erecting strong timber bulwarks outside of and around the house, so as to protect the house from the violence of any seas which might come aboard. The evidence showed that this method of protection was that usually employed and was approved by the marine underwriters. The dredge carried in all 7 men—a master, an engineer, and 5 seamen. By the contract it was to be equipped with a metal lifeboat weighing about 1,200 pounds and capable of carrying 25 men. Such boat was stowed on the after main deck. The testimony showed that it rested on blocks, and that coal in bags was stowed around the lifeboat. The testimony as to how this coal was stowed with reference to the lifeboat was conflicting; the witnesses for the libelants claiming that it was wedged tightly in and about the lifeboat in such manner as to make it difficult or impossible promptly

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

to launch the boat. The witnesses for the respondent, on the other hand, claimed that the coal was not so placed as to amount in fact to any obstruction to the launching of the boat.

The dredge left Baltimore on the forenoon of December 9, 1909, in tow of the tug Tormentor. It had good weather until the afternoon of Sunday, December 12th, when it had reached a point somewhat south of Cape Lookout. The wind then shifted to the south and southeast, and grew in force from the afternoon of Sunday, the 12th, until about 4 o'clock in the afternoon of Monday, the 13th. About 5:15 Monday morning, or somewhere like an hour or an hour and a half before daybreak, those on board the dredge heard a tremendous crash. They at once aroused the master, who went forward, and presently returned and called to the crew that the bulwarks had crashed in and that the house was smashed, and directed them all to run for the lifeboat. The survivors, who were examined, testified that the crew did run for the lifeboat; that all six got around it, cut its lashings, fitted it with a painter, and tried to launch it, but were unable on account of the coal to move it more than some six inches; that the master went to the upper deck, blew four long and four short blasts on the whistle, turned the searchlight vertically up, and waved a white light. While the men were around the lifeboat, the bow of the dredge went under water, and in an instant the stern followed. Two or more of the men jumped into the lifeboat as the dredge went down; but the lifeboat was caught, apparently, by the wire ropes which supported a portion of the dredging apparatus, and which ropes were 18 to 20 feet above the deck. One of these ropes cut the lifeboat nearly in two.

Those on the tug testified that, while they had been keeping close watch on the dredge, they saw no signals, and were not aware that anything had happened until the lights on the dredge suddenly disappeared, and then in a moment they found that the tug was acting as if anchored from the stern. On running back to the hawser, they found that the dredge had sunk. The hawser was at once cut, and the tug so manœuvered as to keep in the immediate vicinity until daylight. At daylight some of the crew of the dredge were discovered still floating on the wreckage, and between 6:45 and 8:15 a. m. three of them were picked off the wreckage, apparently not greatly the worse for their experience. The other four, including the master, the engineer and two of the seamen, were drowned.

The engineer was some 47 years of age, and had been for a number of years making from $65 to $80 a month. He gave to his wife, for the support of his family, all that he made except $10 a month. Since his death she has been compelled to obtain employment in a laundry at $5 a week.

George T. Mister, for libelants.

Carey, Piper & Hall, for respondent Ellicott Machine Co.

Robert H. Smith, for respondent American Towing & Lightering Co.

Before MORRIS and ROSE, District Judges.

MORRIS, District Judge (orally, after stating the facts as above). During the recess, my Brother ROSE and I have conferred in regard to this case, and we find that we need not call upon the respondents to reply. We have concluded that, so far as the tug Tormentor is concerned, no case at all has been made out against her. The only alleged fault which might be urged against her is the failure to observe the signals of distress from the dredge.

We do not think this alleged fault is sustained by proof. To our minds it is exceedingly doubtful whether the signals which are alleged to have been given were in fact given—at least, that they were given in such a way that they could be observed from the tug. A signal, by the whistle, if given, could hardly be heard, as the tug was about a quarter of a mile ahead of the dredge, and a very high wind was blow-

ing directly against the sound. The signal by the searchlight, which is spoken of as having been shown perpendicularly toward the sky, would not be very noticeable or very suggestive. And we cannot ignore the direct affirmative testimony that a diligent observation of the dredge was kept by those on the tug, and that no signal of any kind was observed. It must be taken into account, in considering the conflicting testimony, that the sea was running very high, and the night was very dark, which made it exceedingly difficult to observe the signals, if they were given. We conclude that no fault is proved against the tug.

Then, as to the dredge, for the purposes of this case we will take it to be the law that if the owners of the dredge sent her to sea to make this proposed voyage in an unfit condition, and her unfitness resulted in the disaster, then they are liable to the libelants. But a dredge is a very different character of vessel from an ordinary steamer or sailing vessel, and to put this loss upon the owners of the dredge the proof should be convincing, and not such as to leave the conclusion doubtful. The unseaworthiness complained of resolves itself into two allegations:

First. That the protecting woodwork, called by some the falsework and by some the bulwark, which was built up around the outside of the house to fortify it against the force of the waves, was unsafe. The sending of the dredge to be towed on the open sea was unusual and exceptional, and an extra hazard, and it was known to be so by every one concerned, and there can hardly be said to be any well-established standard, based upon experience, as to what protection is sufficient. The kind of protection put on this dredge had been in use for a number of years and had proved effective. It was thought to be sufficient by the builders, and by their experts, and we are not warranted in saying that it was manifestly insufficient.

Second. It is urged most earnestly that the lifeboat was stowed on the after main deck in a manner which prevented its use in an emergency. This is a question of fact of some difficulty. If the proof satisfied us that there was time to launch the lifeboat, and the boat was not launched because of the improper way in which it was placed, it might be taken to be the proximate cause of the drowning of the engineer. But the proof tends to show that there was no time to launch the boat, no matter how favorably it was placed, provided it was securely placed where it could be safely carried during the voyage. Indeed, the exact cause of the sudden sinking of the dredge is left in doubt. The only explanation, by those most competent to speak, is that during the storm a wave of extraordinary size struck the dredge and broke in the house, filling the hold of the dredge with water, so that with the pull on her by the hawser she did not rise on the waves, but went suddenly to the bottom; there being no time for the men to launch the boat, or save the seamen's effects, or do anything, except to seize upon pieces of the wreckage and try to save themselves.

We have no reason to think from the testimony that the captain of the dredge was incompetent, and he evidently risked his own life on the sufficiency of the equipment. We both feel very deeply the tragic nature of the deplorable disaster and the cruel misfortune that has

fallen on the wife and children of the engineer who lost his life, but we do not find that the facts proven justify a decree in their favor.

ROSE, District Judge. I concur fully with the conclusions announced by the Presiding Judge. To common knowledge such a dredge as that out of the loss of which this case arises cannot be made anything like as safe for a sea voyage as can a ship whether propelled by sails or steam. The standard of seaworthiness with reference to such a dredge is, therefore, very different from that required of a ship. The testimony of the insurance expert is to the effect that experience leads underwriters to charge from three to five times as much for insuring such a dredge on a sea voyage as they would charge for insuring a ship.

The law as it has been established for many years, and can be changed only by the Legislature, and not by the courts, says that where the risks of an employment are obvious to the employé when he enters into the employment he accepts the risk of the employment; that is to say, put in another way, he himself becomes his own insurer against those risks. If he is injured or killed as a result of those risks, neither he nor his have any claim upon his employer, unless the employer has in some way failed to do something which the employer ought to have done and the not doing of which has caused or contributed to the injury of the employé.

In this case, by its contract with the United States, the Ellicott Machine Company assumed the risk of delivering the property—that is to say, the dredge—safely at Colon. That property was worth $158,000. It doubtless protected itself against that risk by charging a price for the dredge as much in excess of the price at which it would have been willing to deliver the dredge at Baltimore as would compensate it for the actual outlay of towing the dredge from Baltimore to Colon and for insuring it against the risks to which the dredge would be exposed during the voyage. In part this protection was secured by insuring the dredge with the Marine Insurance Underwriters, and in part by itself becoming its own insurer.

The marine engineer, for the loss of whose life this libel in part is filed, put his life at the risk of the voyage. In dollars and cents that life was to his family worth somewhere from $5,000 to $10,000. Let us assume that it was worth $7,500. If the rate of insurance on life for such a voyage would have been as high as on property, the risk he was assuming would have been worth somewhere from $125 to $250. It appears from the testimony that the services of a competent marine engineer, without unusual risk, were worth $65 to $80 a month. The voyage to Colon and return would, perhaps, have taken something over a month. He was to receive $75 a month. On the legal assumption, binding on this court, that he with his eyes open assumed the risk of the employment, he for $100 gave his services and assumed an underwriter's risk, for which latter alone he ought to have received from $125 to $250.

Under such circumstances it is, of course, quite to be expected that those whose whole condition in life has been so greatly and disastrously

changed by his death should try to hold those who employed him to go on the voyage liable for the loss or some part of the loss they suffered. This, under the law, they can do if they can show that the employer failed in some duty that it owed the employé, and they cannot do it unless they can show such failure. This, as Judge Morris has pointed out, they have not done. Their husband and father lost his life, not because the Ellicott Machine Company or the American Towing Company were negligent or failed in any duty the law put upon them, or either of them, but because the work he assumed to do was a perilous work. Whether it would not be far better that the law should recognize that such loss of life is a part of the necessary cost of the business, and require it to be borne by the business, is a matter for the legislative, and not the judicial branch of the government.

In this as in most other such cases, the cost of the trial to the respondents, successful, as by the decree we will pass they will be, will doubtless exceed, perhaps considerably exceed, the cost of insuring all the men on the dredge against the risks of the voyage. In so saying I do not intend to suggest that the Ellicott Machine Company were, as the law is, under any moral, much less any legal obligation to have provided such insurance.

In re ROBERTSON.

(District Court, M. D. Pennsylvania. February 17, 1910.)

ALIENS (§ 64*)—NATURALIZATION—CHILDREN OF PERSON DYING AFTER DECLARATION—STEPCHILDREN.

Rev. St. § 2172 (U. S. Comp. St. 1901, p. 1334), provides that the children of persons who have been duly naturalized, being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as "citizens" thereof; and the naturalization law (Act June 29, 1906, c. 3592, § 4, cl. 6, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 480]) provides that, when any alien who has declared his intention to become a citizen dies before he is actually naturalized, the widow and minor children of such alien may, by complying with the other provisions of the statute, be naturalized without any declaration of intention. Applicant was born in England, where his father died, and his mother was again married to an alien, who emigrated to the United States when applicant was about four years of age. When the applicant was about 17 years old and residing with his stepfather as a member of his family, the stepfather made a declaration of intention, but died without having been naturalized. *Held*, that the applicant was entitled to naturalization on the strength of his stepfather's declaration.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 128; Dec. Dig. § 64.*

For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, pp. 7602, 7603.]

Application of James Robertson for naturalization. Petition sustained.

James McQuade, for applicant.
Mark J. Maloney, for the government.

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

ARCHBALD, District Judge. James Robertson, the applicant for naturalization, was born in England April 24, 1880, where his father died, and his mother was married again to one John Fenwick, who emigrated to the United States, where the family arrived September 30, 1884, when the applicant was some four and a half years old. On July 13, 1897, when he was a little over 17, and still residing with his stepfather as a member of his family, his stepfather made a declaration of his intention to become a citizen, but died November 1 following, without having been actually naturalized. The present application for naturalization is made on the strength of this declaration, and is opposed by the government, on the ground that it was not the declaration of the applicant's own father.

It is provided by Rev. St. § 2172 (U. S. Comp. St. 1901, p. 1334):

"The children of persons who have been duly naturalized under any law of the United States * * * being under the age of twenty-one years at the time of the naturalization of their parents shall, if dwelling in the United States, be considered as citizens thereof."

Also by the naturalization law now in force (Act June 29, 1906, c. 3592, § 4, cl. 6, 34 Stat. 596, 598 [U. S. Comp. St. Supp. 1909, p. 480]), as it was in substance by that before it, that:

"When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized, the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."

The applicant relies on the combined effect of these enactments.

It was held in United States v. Kellar (C. C.) 13 Fed. 82, that, upon the marriage of a resident alien woman with a citizen, her infant son, dwelling with her, also becomes naturalized by virtue of the citizenship which she so acquires. And in People v. Newell, 38 Hun, 78, that, where the mother of a minor alien marries a man who subsequently becomes naturalized, this not only naturalizes his wife, but also his minor stepchild; that is to say, that a stepson, who is a minor, and residing with his parents in this country, is naturalized by force of the naturalization of his stepfather. United States v. Rodgers (D. C.) 144 Fed. 711; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704. So an illegitimate child, who emigrates to this country as a member of the family of his reputed father, the wife being his mother, is held to become a citizen upon the subsequent naturalization of the father, while the child is still a minor. Dale v. Irwin, 78 Ill. 170.

Accepting these decisions as a correct exposition of the law, it is clear that, if the stepfather here had gone on and completed his naturalization within the minority of the present applicant, and while he was a member of the family, this would have had the effect of naturalizing the applicant also. It certainly would have naturalized the wife. Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268). And she, as mother, having become a citizen, this would have naturalized also her minor children. But by making a declaration of his intention the father, being the head of the family, took the first step provided by the law for the acquisition of citizenship, and this, according to the express provision of the statutes quoted, inured to the benefit of, and

gave an inchoate right to, all those who would be made citizens if he had gone on and concluded it. Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. At the time his stepfather died, the applicant, as we have seen, was between 17 and 18 years old, and was still living with him at Wilkes-Barre, Pa. The stepfather's declaration of intention was therefore the same in effect as if it had been the applicant's declaration, and he is now entitled to be made a citizen on the strength of it.

Petition sustained, and naturalization granted.

SOUTHERN COTTON OIL CO. v. MERCHANTS' & MINERS' TRANSP. CO.

(District Court, S. D. New York. April 19, 1910.)

1. SHIPPING (§ 108*)—MARINE INSURANCE—CONSTRUCTION OF CONTRACT.

Where a carrier by water already held policies insuring it against loss through liability to cargo owners, a provision in a bill of lading, in consideration of a higher freight rate, that the cargo therein specified "is covered by marine insurance while on board, * * * under and in accordance with and subject to the conditions and limitations of policies of marine insurance held by" the carrier, must be construed as an obligation on the part of the carrier to pay the shipper's loss under the same contingencies as permitted it, through its reinsurance, to throw the loss on its own insurers.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 108.*]

2. INSURANCE (§ 479*)—MARINE INSURANCE—INSURANCE BY CARRIER—CONSTRUCTION OF CONTRACT.

A shipowner carried five annual policies of insurance, aggregating $40,000 covering its loss through liability to cargo owners, each having a rider providing that "the amount hereby insured is to contribute pro rata with the whole amount of insurance on the merchandise at risk." The carrier contracted in a bill of lading issued to a shipper to insure the cargo covered thereby in terms which measured its liability by that of its own insurers. It also held an open policy, which by its terms covered only so much of any loss as was over $40,000. The shipper also held a policy on the property shipped, which contained provisions that it should be "null and void to the extent of any amount paid by or recoverable from any carrier and/or bailee," and that "this insurance shall not inure to the benefit of any lighterman or carrier whatsoever." *Held* that, as applying to the contract of the carrier with the shipper made by the bill of lading, the "whole amount of insurance on the merchandise at risk," within the meaning of the riders, and which was to be taken into contribution, did not include its open policy, which by its terms did not attach to the same risk as the annual policies, nor the shipper's policy, which was clearly limited not to come into any contribution with the carrier.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1244, 1245; Dec. Dig. § 479.*]

3. SHIPPING (§ 108*)—MARINE INSURANCE—CONTRACT OF INSURANCE BY CARRIER AGAINST FIRE—EFFECT.

In such case the contract of the carrier with the shipper had the effect of voluntarily restoring its common-law liability for loss by fire, abrogated by Rev. St. § 4282 (U. S. Comp. St. 1901, p. 2943), and having the right to recover on such liability, whether under or over the $40,000, to that extent the shipper could not recover on its own policy, which would make it inure directly to the benefit of the carrier, and the latter could

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

not for that reason invoke such policy to discharge or lessen its own liability.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 108.*]

In Admiralty. Suit by the Southern Cotton Oil Company against the Merchants' & Miners' Transportation Company. Decree for libelant.

The libelant on the 17th day of July, 1907, shipped on board the respondent's steamer Allegheny at Savannah, Ga., bound for Philadelphia, a quantity of cooking oil and lard compound, the value of which was $3,635. The goods were destroyed by fire en route without negligence upon the part of the respondent. The two bills of lading which covered the shipment limited the carrier's liability except in case of payment of a higher freight rate. The libelant paid the higher rate, and received bills of lading upon which the following was stamped: "Insured Rate. The freight mentioned in this bill of lading is covered by Marine Insurance while on board the steamers of the Merchants' & Miners' Transportation Company under and in accordance with and subject to the conditions and limitations of policies of marine insurance held by them."

At the time of the destruction of the libelant's goods, the respondent held six policies of marine insurance upon goods shipped in its steamers on northbound voyages. The total value of the cargo upon this voyage, all of which was shipped under similar bills of lading, not including the libelant's shipment, was $37,567.16, all of which was a total loss. The libelant at the time of the shipment and loss held an open marine policy in the London Assurance (Marine) dated November, 1901, and attaching when the goods were loaded at the inland town of Milhaven. This policy contained the "American Clause," and a warranty by the assured that the payment of any loss thereunder should not, directly nor indirectly, inure to the benefit of any carrier or bailee, and that the policy should be null and void to the extent of any amount paid by or recoverable from any carrier or bailee. After the loss the London Assurance Company paid to the libelant the amount of the loss, but upon the understanding that the said payment should be regarded as a loan, repayable to the insurer only to the extent that any recovery should be had from the carrier. Of the respondent's six policies, all of a later date than the libelant's, five were annual, aggregating $40,000, and the sixth an open policy from $40,000 to $100,000. Each attached on the cargo when laded. The five annual policies each contained the same "rider" to which reference is made in the opinion. The respondent insists, first, that the libelant has been paid in full; second, that the London Assurance Company must bear the loss; and third, that at most there must be contribution. The libelant insists that the respondent's liability is primary under the language of the several policies.

Kneeland & Harison, for libelant.
Carter, Ledyard & Milburn, for respondent.

HAND, District Judge (after stating the facts as above). It will be more simple to consider this case first, as though the shipper were himself suing for the loss and afterwards to see what difference it makes that he has been paid by the London company. There being no common-law liability under the circumstances (Rev. St. § 4282 [U. S. Comp. St. 1901, p. 2943]), the carrier is only responsible because of the obligation contained in the words stamped on the bill of lading. These may be considered in two ways: First, as a direct covenant of insurance; second, as an undertaking to procure insurance elsewhere, to collect it, and pay the proceeds to the shipper. Doubtless the sec-

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

ond is the more natural interpretation, and is that put upon similar words by Brown, J., in Gross v. N. Y. & T. S. S. Co. (D. C.) 107 Fed. 516. It is quite obvious, however, that the carrier's policies do not permit the interpretation of being direct insurance upon the goods. This is true because they are expressly limited (except the Atlantic policy) as reinsurance of the carrier's own risk. If the words on the bill of lading meant only that the carrier should procure direct insurance, he did not therefore perform the obligation, for he failed to procure such insurance. In view of these circumstances it would seem a more natural construction, in view of the fact that the carrier had already taken out these policies when he issued the bills of lading, to say that the obligation was to pay the shipper's loss under the same contingencies as permitted him through his own reinsurance to throw the loss upon his own insurers. This I do not think was ultra vires a carrying corporation, and did not constitute doing an independent insurance business. The terms of his liability are then to be sought in his own reinsuring policies, just as though he had issued a policy to the shippers in the same words, mutatis mutandis, as the companies issued policies to him. In the five closed policies occur these words, added by the printed "rider," presumably prepared and annexed by the carrier himself:

"The amount hereby insured is to contribute pro rata with the whole amount of insurance on the merchandise at risk."

These words I must regard as incorporated into the carrier's own obligation, and the question becomes, What is "the whole amount of the insurance on the merchandise at risk"? Does that amount include as well both the Atlantic and the London policies, or does it include only the London and the five closed policies, or does it include simply the five policies which amount to $40,000?

The "insurance," within the meaning of the "rider," did not include the Atlantic policy, which by its terms covered only so much of the loss as was over $40,000. If that policy were included in the total insurance which must contribute under the clause in the "rider," the result would be to leave the insured partially uncovered; because if the Atlantic policy did not attach till the loss was over $40,000, and if the five policies could limit their liability to a proportionate share of the loss based not only upon the five policies themselves, but also upon the Atlantic policy, a portion of the first $40,000 would be borne by the insured. Of course, nobody intended any such result, and it is obvious therefore that "the whole amount of insurance on the merchandise at risk" did not include the Atlantic policy, and that had it not been for the London policy the five annual policies would have borne between them the whole loss up to $40,000. The result of this reasoning may be shortly stated thus: That the "other insurance" contemplated by the "rider" did not include any which by its own terms was in effect limited not to share with annual policies themselves.

Coming, now, to the London policy, the respondent urges that it contains the American clause, and that both in day of date and in day of the attachment of the risk it was the earliest insurance of all. This is true, but the libelant answers that in spite of this it contained the words already mentioned:

"This policy shall be null and void to the extent of any amount paid by or recoverable from any carrier and/or bailee."

And also the words:

"This insurance shall not inure to the benefit of any lighterman or carrier whatsoever."

I agree that it would be an undue restriction of the words to limit them to the liability of the carrier as such. The contract was written in general words, and it should stand as it was written. It was not at all unreasonable, in view of section 4282, that the parties should contemplate just such a voluntary undertaking by the carrier against fire as arose in the case at bar. So construed, by voluntary agreement, the parties would supply to their relations that part of the original common-law liability which the statute had abrogated. The question, then, is of the meaning of the clauses, assuming that they apply to other insurance taken out by the carrier as well as to his common-law liability.

The precise question always remains, however, what was the meaning of the clause in the "rider," because it is only in accordance with the terms of his agreement that the carrier may be charged in respect of these policies. As I have shown above, the words in the "rider" could not have intended to include insurance upon which the shipper could not have recovered while the five policies remained unexhausted. Therefore, if the shipper should have settled with the five policies for less than the full amount, and because he supposed that he would retain rights against the London company, could he thereafter sue the London company for the balance? If he could do so, I believe that it is contributing insurance under the clause in the "rider"; if not, it is not. If he should try to do this, would he not be met at once by the plea that such a recovery against the London policy would make it inure directly to the benefit of the carrier's obligations? It is true that that clause more aptly includes the right of subrogation, but it is not quite clear that this result is precisely the equivalent of subrogation by the carrier to the shipper's claim against the London policy. No doubt the result arises in a different way, but it is just the same, and the London policy would inure to the benefit of the carrier and exonerate him, quite as completely as though he filed a bill for subrogation. I think, therefore, that the London company clearly meant not to come into any contribution with the carrier, and that therefore the carrier may not use it as contributing insurance under the clause in the "rider." The American clause in the London policy has, therefore, nothing to do with the question, for the whole policy was limited so as not to come into effect till the carrier's liabilities were exhausted.

In respect of the Atlantic policy the question is of the American clause in it as against the American clause in the London policy. Clause for clause the Atlantic policy must win, for it too was subsequent both as regards the respective rates when the risk attached and when the policies were issued. Brown, J., in Gross v. N. Y. & T. S. S. Co. (D. C.) 107 Fed. 516, 520, construes the words "shall have made any other assurance" as referring to the attachment of the risk, and in the case at bar the shipper had "made" no assurance with the Lon-

don company prior to the date of the Atlantic policy in this sense. On the other hand, the insurance "made" by the shipper by virtue of the bill of lading was after the date of the London policy which would make that company liable. However, I think it is not necessary to decide that question, because the construction of the clause in the London policy, adopted above, excludes as well the Atlantic policy as the five annual policies. If the London policy bears that part of the loss which the Atlantic policy otherwise would bear, it has "inured" to the benefit of the carrier quite as truly as it would "inure" to the benefit of the five policies. If the Atlantic company could urge its exemption under the American clause, and if the London company could insist upon exemption under its own peculiar clause, then the shipper was in part uninsured; which cannot be. One must yield, and I think it reasonable that the "assurance made," as referred to in the Atlantic policy, must be read as an assurance not so limited as to be null and void, if marshaled in a hotchpot along with the carrier's obligations.

Thus, even upon the assumption that the risk was the same, and the parties the same, in the carrier's insurance effected by the bill of lading and in the London policy, still, by the necessary intention of the parties, I think the carrier must be understood as having intended not to exempt from his insurance that much of the risk which another insurer expressly declined to assume.

The rights of the shipper being thus determined, the effect of the payment by the London company is exactly covered by the case of Bradley v. Lehigh Valley R. R. Co., 153 Fed. 350, 82 C. C. A. 426, and a decree is proper for the full amount of the loss against the respondent.

A decree to that effect may therefore be entered.

ORDER OF ST. BENEDICT OF NEW JERSEY v. STEINHAUSER.

(Circuit Court, D. Minnesota, Second Division. June 22, 1910.)

1. RELIGIOUS SOCIETIES (§ 18*)—RELIGIOUS CHARITABLE ORDER—CONTRACTS WITH MEMBERS—VOW OF POVERTY.

The Order of St. Benedict of New Jersey is a charitable corporation chartered by the state whose members are required by the charter to be members of the religious order of St. Benedict. All members of such religious order take the vow of poverty, by which they renounce the right to individual ownership of property. The constitution of the corporation provides that it is agreed upon that no member shall claim more that a decent support, but shall, as soon as possible, convey all property which he then holds or thereafter may hold to the corporation. It further provides that members may voluntarily leave the order. *Held*, that the contract between a member and the corporation with respect to property is not in violation of public policy, but is valid and binding so long as a member retains his membership, and that property held by a member who died in full fellowship at the time of his death, which was acquired with his earnings, belonged to the corporation and not to his heirs.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 18.*]

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

2. RELIGIOUS SOCIETIES (§ 18*)—RELIGIOUS CHARITABLE ORDER—CONTRACTS WITH MEMBERS—VOW OF POVERTY.

The fact that such member who was for some years before his death a resident of another state was permitted by the abbot to retain his earnings, and use the same for charitable purposes, did not release him from his vow of poverty, nor make such earnings his individual property, but merely constituted him agent of the order for its disbursement.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 18.*]

3. EXECUTORS AND ADMINISTRATORS (§ 225*)—CLAIMS AGAINST ESTATE—TIME FOR FILING.

The claim of a third person that he is the owner of property in the hands of an administrator is not a claim that is within the jurisdiction of the probate courts of Minnesota, and is not affected by Rev. Laws Minn. 1905, § 3730, requiring claims against estates to be presented to the probate court for allowance within the time fixed by order of such court nor is it within section 3733, limiting the time within which actions may be brought against an executor or administrator on provable claims.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 225.*]

4. LIMITATION OF ACTIONS (§ 60*)—ACCRUAL OF RIGHT OF ACTION—PRINCIPAL AND AGENT.

Where an agent was permitted to retain and use for certain purposes property belonging to his principal, which authority had not been withdrawn at the time of his death, limitations did not begin to run until that time against an action by the principal to recover the property unexpended.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 60.*]

5. COURTS (§ 489*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST ADMINISTRATOR.

While a federal court cannot interfere with property in the hands of an administrator, which is in the custody of the state probate court, it may adjudge the rights of parties before it in such property, and such adjudication will be binding on the administrator and may be enforced against him personally.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

In Equity. Suit by the Order of St. Benedict of New Jersey against Albert Steinhauser, administrator of Augustin Wirth, deceased. Decree for complainant.

Otto Kueffner and Albert Schaller, for complainant.
Pitzer & Hayward, for defendant.

WILLARD, District Judge. This case presents a controversy in which the complainant claims that the property left by Augustin Wirth at his death belonged to it, because he lived and died a member of the Order of St. Benedict. The defendant claims that for various reasons the property belongs to the heirs at law. That the documents offered in evidence to show that Wirth belonged to the Order of St. Benedict, and that he had transferred his stability to the plaintiff, the Order of St. Benedict of New Jersey, were duly executed by Wirth, was admitted at the argument. Even without this admission the authenticity of the documents was sufficiently proven. From them it appears that Wirth became a member of the Order of St. Benedict at the monastery of St. Vincent in Pennsylvania, on August 15, 1852, and on

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

May, 1887, being still a member of the order, he transferred his stability from the Abbey of St. Benedict in Kansas to the Abbey of St. Mary, Newark, N. J., and therefore to the Order of St. Benedict of New Jersey, the complainant in this cause. Wirth died at Springfield, Minn., December 19, 1901. Some suggestion was made during the taking of the evidence and in the briefs of the defendant to the effect that Wirth in moving to Minnesota ceased to be a member of the Order of St. Benedict, and ceased to belong to the complainant corporation. I find as a fact, however, that at the time of his death he still remained a member of the order. Hoerr, a witness for the defendant, testified (defendant's record, 149, 150) that he saw Wirth about a year before his death at Mankato, Minn., wearing the habit of the Order of St. Benedict. A receipt was introduced in evidence (defendant's record, p. 152), dated Springfield, Minn., January 2, 1900, signed by Father Wirth, and to his signature he added the letters O. S. B. He also made a financial report of the Church St. Raphael, Springfield, Minn., of which he was then in charge from January 1, 1900, to January 1, 1901, to which he signed his name as Augustin Wirth, O. S. B. There is nothing to contradict the almost conclusive evidence furnished by this testimony and these documents. Dying within the order, it follows that he was also a member of the complainant corporation, for there is nothing to show that he had transferred his stability from the Order of St. Benedict of New Jersey to any other monastery, although there was at the time in Minnesota a monastery of the order at St. Cloud.

The first question for consideration is this: What effect upon his rights to property was produced by his joining the Order of St. Benedict? When he joined that order he took the three vows of chastity, poverty, and obedience. The only one of these vows which it is necessary to consider in this case is the vow of poverty. The rule of St. Benedict which governed the order provided in its chapter 33, as follows:

"The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the Abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for any one to have anything which the Abbot did not give or permit him to have. Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if any one should be found to indulge this most baneful vice and having been admonished once and again, doth not amend, let him be subjected to punishment." (Complainant's record, p. 25.)

This rule was in force in New Jersey when Father Wirth became a member of the Order of St. Benedict of New Jersey. The Abbot of St. Mary's testifying with reference to this rule said on page 123 of complainant's record:

"They lived in common with each other, and whatever they had the community gave to the monastery, only claiming what they needed of necessity; they have always been taken care of like the children of a family."

And again on page 192:

"There is no member claims anything as his own, but getting all he needs from the common income that we have. No member can call anything strictly his own, but for subsistence and for all he needs, all necessary things, he depends upon the income of the community at large."

Father Engle, the Abbot of St. John's Abbey in Minnesota, testified as to the construction placed by the canon law upon the vow of poverty, and said on page 189 of defendant's record:

"A. As to vow of poverty when this is solemnly made in religious order it incapacitates such a member to possess or acquire property for himself and to make independent use of temporal things which can be valued in money."

And again on page 192:

"Q. You say that incapacitates members from possessing property or temporal things whose value can be measured in money. Is that a well-settled principle of your canon law? A. Yes, sir. Whatever a monk acquires he acquires for his monastery. Q. That, you say, incapacitates a member or monk from holding property? A. Yes; in his name and for himself."

The present Abbot of St. Mary's Abbey testified upon this subject as follows:

"Q. If a member subject to the dominion of the Abbot at Newark were to hold or obtain property of any description whatever in any state of the United States, would that property become the property of the order? A. It would. Q. And would it become such property of the order by virtue of the fact of vows which the possessor took? A. It would."

As a matter of history it is well known that the members of a religious order have no property of their own. This was so universally by the canon law, and it is declared to be the municipal law of Spain in the Seven Partidas, compiled and published in 1263. Laws 2, 14, and 22, title 7, Partida 1. Even if a monk did depart from the convent and had charge of a church, he still could acquire no property of his own. Law 26, title 7, Partida 1. How far the civil courts are bound by the canon law it is not necessary to inquire, nor is there here any question as to the effect of the judgment of an ecclesiastical tribunal, such as was presented in Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, cited by the defendant. Evidence as to the vows taken upon joining the order, and the testimony as to the effect of these vows is important only in the construction of the charter, constitution, and by-laws of the Order of St. Benedict of New Jersey.

The complainant here is not the Order of St. Benedict founded about the year 525, which is and always has been a religious order, but the orator in this case is a civil corporation chartered by the state of New Jersey, and known as the Order of St. Benedict of New Jersey. Father Wirth was a member not only of the religious society, but also of the civil society, and the civil society is the entity bringing this suit. Its rights must depend upon the construction given to its charter, constitution, and by-laws. If they differ from the rules governing the religious order, the latter must give way. That they do differ with regard to the matter of leaving the order will be seen later on in this decision.

What then do they provide? The act of the Legislature of New Jersey incorporating the Order of St. Benedict of New Jersey provides that certain persons named, "and their associate members of the society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth" be constituted a body politic under the name above mentioned. (Complainant's record, p. 128). The charter also provides that the corporation may "make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to, nor inconsistent with the Constitution of the United States or of this state." It also provides "that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof."

The constitution provides, among other things, as follows:

"Section 2. The object of this corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with principles and general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church."

"Section 10. To become and to be a member of this corporation it is absolutely necessary:

"1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

"To have made solemn vows in the said order and to have received the Order of Priesthood in the Roman Catholic Church.

"Section 12. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said order derive their support and the balance of which income and property should serve for the following up and carrying out of the charitable objects of the order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the charter of the Order of St. Benedict of New Jersey, and no further. And, moreover, that each member, individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

That the vow of poverty, as understood by the canon law, is clearly binding upon members of that civil corporation, appears first, in the charter itself, and in section 10 of the constitution, which provide that only members of the Order of St. Benedict can become members of the civil corporation; second, by section 2 of the constitution which declares that the object of the corporation shall be attained in conformity with the principles and disciplinary statutes of the Order of St. Benedict; and especially, third, by section 12 of the constitution above quoted. All of these provisions were in force when Wirth joined the Abbey of St. Mary's in 1887. By joining the Abbey at that time Wirth agreed to give to it everything which he then had, and everything which he might thereafter acquire. The defendant now claims that, if that is the proper construction of the contract

made between the orator and Wirth when the latter joined the order, such contract is void on the grounds of public policy.

In order to determine whether this objection to the contract can prevail in this particular suit, it is necessary to consider just how the question arises here. We have not here a case where a member has been expelled, or has voluntarily left the order and is attempting to recover something that he has paid in; nor is it a case where a member has voluntarily left the order, where his relations with it have been entirely terminated, and notwithstanding this termination the order is attempting to compel the member to account for his earnings received after such separation. On the contrary, we have here a case where Wirth lived and died a member of the order. We have here a case where that order and Wirth both considered the contract binding upon them up to the time of the death of the latter. I say this, for although there is evidence that the Abbot of St. Mary's and Wirth did not agree, and that Wirth had been reprimanded by Hildebrand of Rome, Abbot Primate, yet, the fact remains that, notwithstanding these differences, he did not separate himself nor attempt to separate himself from the order, but died within it. The order on its part had fulfilled all its obligations to Wirth. It is true that he did not live in the Abbey or in New Jersey during the last years of his life, nor did the complainant contribute anything to his support, for that was not necessary. As soon, however, as the Abbot of St. Mary's was informed of the sickness of Father Wirth he at once requested the Abbot of St. John's, St. Cloud, to give such assistance as was necessary, and the Abbot of St. John's sent a member of the order to Springfield, who reached there a few days before Father Wirth's death. He was buried by the order at St. John's Abbey in St. Cloud.

So far as the performance of the contract is concerned, this presents the case of an executed contract, and not a case of an executory contract. It is thus distinguished from the cases of Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1, and Bates Machine Co. v. Bates, 87 Ill. App. 225. The case is simply this: At the death of one who was at the time of such death a member of the order, there is found in his immediate possession and control certain property, which by the terms of the contract between the member and the order belonged to the order, but had not come into its possession; and the question is, does this property belong to the order, or to the heirs of the deceased member? Had such a case arisen in Spain after the promulgation of the Partidas, the monk would have been buried outside of the monastery in some dumping ground, and the money would have been buried with him. In later years, however, it was held that it was not necessary to bury all the money thus found, but it was sufficient to bury thirty denarii with him. Law 14, title 7, Partida 1. The claim of the defendant upon the facts hereinbefore set out is that the contract is void as against public policy. It is in effect a claim that had Wirth before his death paid over to the order what he received from the sale of his books or for his personal services, his administrator or his heirs could, nevertheless, after his death, have maintained an action to recover back the amount so paid and the value of his services.

The defendant says in his brief, page 64:

"That the alleged contract—the acknowledgment of the rule of St. Benedict, and the taking of the vow of poverty—incapacitates a member from holding property, and entitles the complainant to demand a recognition of that incapacity in a court of equity, in the United States in the twentieth century, is a startling proposition; in fact in the face of the principles underlying American institutions, of personal rights so jealously guarded in all our Constitutions, it is most astounding."

To me the astounding thing is, not that it should be claimed that such a contract executed as this was, was valid, but that it should be claimed that it was void. It would seem to be contrary to all sense of justice to say that after a person had joined such an order as this, had unselfishly devoted his life to the charitable purposes of its organization, had worked continually that the money derived from his labors might be used by the society for such purposes, and after it had been so used by it, and after the man had died in full communion with the order, that his heirs, his nephews and nieces, could maintain an action to recover from the order the value of the services of their ancestor. Yet that must be the result if the contract made between the orator and Wirth was contrary to public policy. That the purposes of the order are not contrary to public policy cannot for a moment be doubted. To doubt upon that point would be to doubt the doctrines of the Christian religion, and the teaching of the moralists of all ages. The defendant seizes hold of some statements made by the experts on canon law, to the effect that the vow of poverty incapacitates a man from holding property, and then says that the right to obtain and hold property cannot be divested any more than the right to his personal liberty. In this case we are not concerned with the question as to whether a person once a member of the Order of St. Benedict can ever be relieved from the vow which he took on becoming a member. It used to be said that not even the Pope himself could give him dispensation. Law 2, tit. 7, Partida 1. But this idea has for ages been abandoned, and that he can by the church be relieved from the vows is well settled. The witnesses on canonical law say that he could cease to be a member by secularization or expulsion, and that this takes place only with the consent of the order. It is thus seen that a person can be relieved from his vows even by the canon law. But the question is, as has been said before, not what were Wirth's relations to the Order of St. Benedict, but what were his relations to the Order of St. Benedict of New Jersey. It is distinctly provided in the constitution of the complainant that a member may voluntarily leave the order. Sec. 11 of the Constitution is as follows:

"Membership is lost at once: * * * (2) By voluntarily leaving the order for any purpose whatsoever."

Wirth could at any time have separated from the complainant. If he had done so, the complainant would have had no right to his future earnings. It cannot be said, then, that the contract entered into between the parties when Wirth became a member of the complainant forever deprived him of the right of acquiring property, and forever incapacitated him from owning property. He could resume his right to acquire property for himself at any time he chose. With this right of voluntary withdrawal, what ground can there be for saying that

the contract of 1887 was against public policy? On principle, it is very clear that it cannot be said to be so, and it is equally so on authority. The state of New Jersey having incorporated this society, one of the articles of which states that only members of the Order of St. Benedict can become members thereof, it cannot be said that such an organization as the complainant is contrary to the public policy of the state of New Jersey. The Legislature must have known what the religious order of St. Benedict was when it incorporated the Order of St. Benedict of New Jersey.

Cases very similar to the one at bar have been before the courts on several occasions. One of them is Goesele v. Bimeler, 14 How. 589, 604, 14 L. Ed. 554. In that case the court said:

"He then signed the first articles, which, like the amended articles, renounced individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance. All individual right of property became merged in the general right of the association. He had no individual right, and could transmit none to his heirs. It is strange that the complainants should ask a partition through their ancestor, when, by the terms of his contract, he could have no divisible interest. They who now enjoy the property, enjoy it under his express contract."

And again on page 605 of 14 How. (14 L. Ed. 554):

"What is there in either of these articles that is contrary to good morals, or that is opposed to the policy of the laws? An association of individuals is formed, under a religious influence, who are in a destitute condition, having little to rely on for their support but their industry, and they agree to labor in common for the good of the society, and a comfortable maintenance for each individual; and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the community, in sickness and in health, and under whatsoever misfortune may occur. And this is equal to the independence and comforts ordinarily enjoyed."

The same organization was before the court of Ohio in the case of Gasely v. Separatists Society of Zoar, 13 Ohio St. 144. The contract was held binding against one who having withdrawn sought a division of the property and an assignment to herself of her share.

Schriber v. Rapp, 5 Watts (Pa.) 351, 360, 30 Am. Dec. 327, had to do with the Harmony Society. The court said in that case:

"An association for the purposes expressed is prohibited neither by statute nor the common law, and it is clear that, except for the amount of its income, this society would be entitled to a charter by our statutes for self-incorporation. It may be true that the business and pursuits of the present day are incompatible with the customs of the primitive Christians; but that is a matter for the consideration of those who propose to live in conformity to them. Our laws presume not to meddle with spiritualities, and religious societies are regarded by them but with an eye to their temporal consequences. It has not been pretended that this society is detrimental to the public or its neighbors. It is an ecclesiastical community, performing with alacrity its duties to the laws, rendering unto Cæsar the things that are Cæsar's, and fashioning its municipal rules of property and government after the models of those Christian societies that existed in the days of the apostles. Its most peculiar features are submission to the will of its founder and an equal participation of property brought in the common stock by individuals, or produced by the labor of the whole."

In the case of Burt v. Oneida Community, 137 N. Y. 346, 353, 33 N. E. 307 (19 L. R. A. 297), the court stated the character of the society to be as follows:

"Necessarily the basic proposition of such a community was the absolute and complete surrender of the separate and individual rights of property of the persons entering it, the abandonment of all purely selfish pursuits, and the investiture of the title to their property and the fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn, except by unanimous consent. It was fashioned altogether according to the pentecostal ideal, that all who believed should be together and have all things common."

The court then said, page 354 of 137 N. Y., page 308 of 33 N. E. (19 L. R. A. 297):

"These were the main features of the organization to which the plaintiff voluntarily became a party. It is not shown or found that he was induced to enroll himself among its members by any fraud or duress; and, in viewing it solely as a business undertaking, it was not prohibited by any statute or in contravention of any law regulating the possession, ownership or tenure of property. It imposed no unlawful restraint upon the alienation of property, for the title to its real estate could be conveyed at any time by the united action of its members if they so willed it. It was a joint holding of property by the adult members of the community, with this qualification: That upon the death or withdrawal of a member no share of interest therein passed to him or his personal representatives, but they who survived or remained continued to hold jointly the entire property in solidum."

In the case of Waite v. Merrill, 4 Me. 102, 118, 16 Am. Dec. 238, the plaintiff withdrew from the community of Shakers, and attempted to recover the value of his services while such a member on the ground that his contract of membership was void. The court said:

"It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing, and protecting property. The answer to this objection is that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable, also, to partnerships of one description as well as another. It is said that the covenant or contract is contrary to the genius and principles of a free government, and therefore void. * * * In support of this objection, it is contended that the covenant is a contract for perpetual service and surrender of liberty. Without pausing to inquire whether a man may not legally contract with another to serve him for 10 years as well as 1, receiving an acceptable compensation for his services, we would observe that by the very terms of the fourth and fifth articles, a secession of members from the society is contemplated, and its consequences guarded against in the fifth by covenants never to make any claim for their services, against the society."

And again on page 120 of 4 Me. (16 Am. Dec. 238):

"Again it is urged that the covenant is void, because its consideration is illegal; that it is against good morals and the policy of the law. We apprehend that these objections cannot have any foundation in the covenant itself; for that is silent as to many particulars and peculiarities which the counsel for the plaintiff deems objectionable. The covenant only settles certain principles as to the admission of members; community of interest; mode of management and support; acquisition and use of the property; stipulation in respect to services and claims; professions of a general nature as to the faith of the society; and a solemn renewal of a former covenant and ap-

pointment of certain officers. * * * Now, what is there illegal in its consideration, or wherein is it against good morals or the policy of the law? It does not contain a fact or a principle which an honest man ought to condemn; but it does contain some provisions which all men ought to approve. It distinctly inculcates the duty of honest industry, contentment with competency, and charity to the poor and suffering."

The case of Gass & Bonta v. Wilhite, 2 Dana (Ky.) 170, 180, 26 Am. Dec. 446, had to do with another community of Shakers. It was held that seceding members had no right in or to the community property. The court said:

"So long as piety is recognized, by common assent, and by the Legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed, as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community. By the common assent of men in all time, it seems to be agreed that societies or communities of individuals, having its cultivation for their principal object, are necessary, or at least proper, auxiliaries to its support and propagation."

Schwartz v. Duss, 93 Fed. 529, decided by the Circuit Court for the Western district of Pennsylvania, involved the Harmony Society, the same organization which appeared in Schriber v. Rapp, supra, and in Baker v. Nachtrieb, 19 How. 126, 15 L. Ed. 528. In Schwartz v. Duss, the court said on page 530 of 93 Fed.:

"In view of the decision of the Supreme Court of Pennsylvania in Schriber v. Rapp, 5 Watts, 351 [30 Am. Dec. 327], and the decisions of the Supreme Court of the United States in Goesele v. Bimeler, 14 How. 589 [14 L. Ed. 554], and Baker v. Nachtrieb, 19 How. 126 [15 L. Ed. 528], it is clear that the above-recited articles of agreement are valid contracts, and that thereunder, upon the death of a member of the society in fellowship, no claim, enforceable against the society or its property, passes to his heirs or personal representatives, and that since 1836 no member voluntarily withdrawing from the society could acquire any such claim."

And speaking of persons who continued in the society until their death, as did Wirth in this case, the court also said on the same page:

"The other persons through whom the plaintiffs claimed remained with the society and died in fellowship. They thus received and enjoyed all the benefits secured to them by the recited articles of agreement, and therefore no rights, enforceable against the society, passed from them to their heirs or personal representatives."

The decree in that case was affirmed by the Circuit Court of Appeals of the Third circuit (103 Fed. 567, 43 C. C. A. 323), and by the Supreme Court in 187 U. S. 8, 26, 23 Sup. Ct. 4, 10, 47 L. Ed. 53. The Supreme Court, in affirming the judgment, said:

"That agreement was the affirmation and the continuation of the prior agreements, and they were held not to be offensive to the public policy of Pennsylvania, by the Supreme Court of that state in Schriber v. Rapp, 5 Watts, 351 [30 Am. Dec. 327]. The trial court in that case had instructed the jury that 'there is nothing in the articles of association (those of 1805, 1821, and 1827) given in evidence that renders the agreement unlawful or void; nothing in them inconsistent with constitutional rights, moral precepts, or public policy.' The Supreme Court observed that the point made against the articles as being against public policy was attended with no difficulty, and Chief Justice Gibson said for the court: 'An association for the purposes expressed is prohibited neither by statute nor the common law.' And it did not

occur to this court in Baker et al. v. Nachtrieb, 19 How. 126 [15 L. Ed. 528], to treat them as invalid contracts. See, also, Goesele v. Bimeler et al., 14 How. 589 [14 L. Ed. 554]; Speidel v. Henrici, 120 U. S. 377 [7 Sup. Ct. 610, 30 L. Ed. 718]."

Some of the questions here involved were before the Circuit Court of the Southern district of New York, where a demurrer to a bill very similar to the bill in this case was overruled. Benziger v. Steinhauser (C. C.) 154 Fed. 151.

No one of the cases cited by the defendant shows that the contract evidenced by the complainant's charter, constitution, and by-laws is contrary to public policy. The one that comes nearest to it is Baltimore Humane Society v. Pierce, 100 Md. 520, 60 Atl. 277, 70 L. R. A. 485. It was there held that the contract by which Pierce agreed on entering a Home for Aged Men to convey to the society all property which he might thereafter acquire by device or legacy was void as against public policy. Without passing upon the soundness of this decision, it is enough to say that it furnishes no support for the proposition that after Pierce's death his executor could have recovered from the home the value of the services which Pierce might have rendered to it in consideration for his support during his life.

I conclude that the contract here involved was not void as being against public policy, or for any other reason, and that it was binding on Wirth at his death and upon his heirs now, unless it was in some way modified in his lifetime. The claim of the defendant is that there was such modification.

Father Wirth was an author of some repute, and for a long time prior to his death published many of his works. He made a contract in 1897 with Benziger Bros., publishers, by which they agreed to publish his books and pay him a royalty thereon. Father Wirth procured in his own name copyrights on some of these books. It is proven beyond doubt that not only the money paid to Father Wirth by Benziger Bros., but also all which he received from the sale of his books, he kept and used during the latter years of his life, turning none of it over to St. Mary's Abbey. It is also proven that while the Abbot required Father Wirth to account for moneys which he received for his services in the different churches with which he was connected, the Abbot never required him to account for any of the money which he received from the sale of his books. It is also proven that the Abbot of St. Mary's knew of the contract between Benziger Bros. and Father Wirth, and knew also, that before that time Father Wirth had received and was receiving money from the books which he published. The testimony also shows, both that of the complainant and that of the defendant, that Wirth was given permission by the order to use the money which he received from his book. There is some controversy in the evidence, however, as to the precise terms of that permission. That it was oral is proven. The testimony of the complainant is that the permission was simply that Father Wirth might himself dispose of the money for charitable purposes, instead of turning it over to the Abbey. Of the witness for the defendant upon this point, only two need be considered—Rose Schneider and Elizabeth Wirth. The testimony of Florian Wirth, the husband of Elizabeth Wirth, one

of the heirs, upon this point is not entitled to any weight, for although he said in several places that Father Wirth told him that he had permission to use the money derived from his books for any purposes he saw fit, yet he said at two different places that Father Wirth never said anything to him about the disposition which should be made of this money. Rose Schneider testified that Father Wirth told her that whatever he earned with his pen was his own, and that he had received permission from the Abbot. Elizabeth Wirth testified that Father Wirth told her that he had permission from the Abbot to write books, and that he could do with the money what he liked. I find, however, as a fact, that the permission was to use the money only for charitable purposes. The evidence does not justify a finding that there was a permission that the money which he received from the sale of his books should belong to him as an individual. Such a permission would be entirely inconsistent with the vow of poverty, the fundamental idea of the order, and it would be beyond the power of the Abbot to give. There is nothing in the charter, constitution, or by-laws which authorizes the Abbot to single out one of the monks, and say to him that all or a part of what he earned might belong to himself. The effect of the permission that was given was to make Wirth the agent of the order in disposing of the money in charity, which agency terminated with his death. Whatever he had thus disposed of, the complainant would be estopped from recovering now. But the permission falls far short of an agreement that whatever he left should after his death belong to the heirs and not to the order. The permission being thus stated, namely, to use the money for charitable purposes, the argument of the defendant, based upon the practical construction of the contract by the parties, laches, and estoppel, loses its force. While it is proven that the Abbot knew that Wirth was receiving the money, and that he had invested it in his own name, yet there is nothing to show that he ever knew that Wirth claimed it as his own so that it would go to his heirs at his death. It is very apparent that Father Wirth was treated with a great deal of consideration by the Abbot and other members of the order. The explanation of this is found in his age, the state of his health, his ability, and the distinguished services which he had rendered to the order.

From what has been said it appears that the contract was valid, and that as made originally it continued until Wirth's death. By it, all that he acquired during his lifetime became the property of the order. Even that which he paid out he paid out, not as his own, but as the money of the order. When he died everything that he left belonged to the order, and though the title to it stood in his name, that fact did not make it the property of his heirs. It was the property of the order, and a court of equity could compel the heirs and administrator to account therefor.

Some objections to granting the complainant any relief are made by the defendant, based upon the statute of limitations and the probate law of Minnesota. One of these objections is that the complainant never presented its claim to the probate court.

Section 3730, Rev. Laws Minn. 1905, provides in part, as follows:

"All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred."

That the claim of the order was not a provable claim under this section is very clear. It does not claim damages for breach of a contract, but claims the property itself. It claims, for example, to be the equitable owner of the real estate situated in Minneapolis, and of the copyrights, and of the notes now in the possession of the administrator. The claim of a third person that he is the owner of property in the hands of an administrator is not a claim that is within the jurisdiction of the probate courts of Minnesota. Mousseau v. Mousseau, 40 Minn. 238, 41 N. W. 977. The case of Jorgenson v. Larson, 85 Minn. 134, 88 N. W. 439, cited by the defendant, was not an action for specific performance, but was a claim for damages. The plaintiff in that case by virtue of his executory contract signed only by the husband, was never the owner, legal or equitable, of the wife's one-third interest in the property. As the claim in this case was not a provable one, it is not necessary to consider the case of Security Trust Company v. Black River National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147, cited by the defendant, nor his argument based thereon, to the effect that the laws of Minnesota relating to proof of claims are binding upon the national courts sitting therein.

The defendant also relies upon section 3733 of the Revised Laws of Minnesota. That section is as follows:

"No action at law shall lie against an executor or administrator for the recovery of money upon any demand against the decedent allowable by the probate court, and no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received."

The claim here in question not being a provable claim, the first part of the section does not apply, nor does the last part of the section apply for the same reason. That part is not, as the defendant claims, entirely without limitation. It is qualified by the nature of the claim, for it assumes that it is a claim which may be allowed by the probate court. The section itself on its face, as well as its history, shows, too, that it contemplates a lien upon the estate by virtue of proceedings in the probate court, and not in courts of general jurisdiction.

The defendant also claims that the suit is barred by the general statutes of limitation of Minnesota. Section 4076, Revised Laws of Minnesota. The limitation is one of six years. Wirth died December 16, 1901. The bill was filed on August 19, 1907, and therefore within six years from his death.

As has been before said, the relations between Wirth and the order were such that all that he acquired belonged to the order. As agent of the order, he had a right to dispose of for charitable purposes the money which he derived from his books, but the part of his money which at the time of his death he had not disposed of then was, as it always had been, the property of the order. No cause of action there-

fore arose against Wirth during his life as to that property which he had not disposed of. This suit was commenced within six years after his death, when for the first time any cause of action as to the property so remaining arose. Section 4085 of the Revised Laws of Minnesota has no bearing upon this case. It was intended by this section to lengthen, not to shorten, the limitation provided for in the general law. Wilkinson v. Winne, 15 Minn. 159, 160 (Gil. 123).

The defendant finally says that there is a want of equity in the bill, and discusses it from the standpoint of a bill for specific performance, which in fact complainant himself calls it. It is of little importance what name is given to a suit. If it appears that the complainant is entitled to equitable relief, that relief should be given to it, regardless of the name that is given to the bill. The facts show that the complainant at the death of Wirth was the owner of all the property left by him. It was the legal owner of all the title to which did not stand in Wirth, and as to that which Wirth had in his name it was the equitable owner. The suit seems to be one to enforce the equitable ownership rather than one to compel specific performance.

A decree will be entered dismissing the cross-bill. As to the property not in the possession of or under the control of the administrator a decree will be entered substantially as prayed for in the bill. As to the property which is in the possession of the administrator other questions arise. Such property being in the possession of the administrator is in the possession of the probate court of Minnesota, and this court cannot interfere with the possession of that court. See cases cited in Pulver v. Leonard (C. C.) 176 Fed. 586–589; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 46, 30 Sup. Ct. 10, 13, 54 L. Ed. ——. In the case last cited it was said:

"The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to, determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in Payne v. Hook, 7 Wall. 425 [19 L. Ed. 260], and Ingersoll v. Coram, 211 U. S. 335 [29 Sup. Ct. 92, 53 L. Ed. 208], supra. It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the federal court. It has been frequently held in this court that a judgment of a federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of federal right which may be protected in this court."

A decree will therefore be entered declaring that the Order of St. Benedict of New Jersey is the sole owner of the amount of the residue of the property, as determined by the administration in the probate

court, in the hands of the administrator, and declaring that such residue be held in trust for the complainant.

The decree will also provide that when such residue is discharged from all claims of administration, and is ready for distribution to the persons thereto legally entitled, the administrator pay it to the complainant.

The decree will also enjoin the administrator from paying such residue to any of the heirs, or to any person other than the complainant.

Costs will be allowed to the complainant.

In re PITTSBURGH INDUSTRIAL IRON WORKS.

(District Court, W. D. Pennsylvania. April 16, 1910.)

No. 3,781.

1. SALES (§ 55*)—WHAT LAW GOVERNS—PLACE OF DELIVERY.
   A contract for the sale of goods is to be construed in accordance with the law of the place where delivery is to be made or the contract to be performed.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. § 55.*]
2. SALES (§ 201*)—DELIVERY TO CARRIER—VESTING OF TITLE.
   In general, in the absence of a stipulation, title vests in the buyer on delivery of the goods to the carrier for transportation.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 535; Dec. Dig. § 201.*]
3. SALES (§ 55*)—DELIVERY F. O. B.—WHAT LAW GOVERNS.
   Where a contract for the sale of goods provided for delivery f. o. b. cars at Detroit, Mich., and consigned to the buyer, the contract would be governed by the law of Michigan.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. § 55.*]
4. SALES (§ 82*)—TERMS—SALE FOR CASH.
   Unless time is stipulated in a contract of sale, the sale is for cash.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 230; Dec. Dig. § 82.*]
5. SALES (§ 469*)—CASH ON DELIVERY—RETENTION OF TITLE.
   Where goods were sold under a contract "price $1,160, f. o. b. cars, Detroit, Mich.," and there was nothing to show that any time for payment in the future was contemplated, but the invoice was marked "terms cash" and "title to the property in this invoice reserved in car company until full payment made," payment of the price was a condition precedent to the passing of title to the buyer unless waived.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 1357; Dec. Dig. § 469.*]
6. BANKRUPTCY (§ 140*)—BANKRUPT'S TRUSTEE—TITLE TO PROPERTY CONDITIONALLY SOLD.
   Under the rule that a bankrupt's trustee acquires only such title as the bankrupt had, the trustee acquired no title to property sold to the bankrupt under conditional sale reserving title until the price had been paid; the condition not having been complied with.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

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

7. SALES (§ 472*)—CONDITIONAL WILLS—TRANSFER OF PROPERTY—RIGHTS OF TRANSFEREE.

Where title to a derrick car sold under a conditional sale never passed to the buyer because of nonfulfillment of the condition, the buyer's transferee thereof, under the law of Michigan, acquired no right superior to the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1371; Dec. Dig. § 472.*]

8. PLEDGES (§ 2*)—CONTRACT—WHAT LAW GOVERNS.

A contract of pledge made in Pennsylvania must be construed according to the law of that state.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 2; Dec. Dig. § 2.*]

9. BANKRUPTCY (§ 188*)—PLEDGED PROPERTY—VALIDITY OF PLEDGE—POSSESSION.

Where, during the construction and equipment of a derrick car by the bankrupt, it assigned not only the account of the purchaser therefor but the car and equipment, to secure an advancement of the entire purchase price before delivery of the car to the buyer, by which it was subsequently refused for noncompliance with specifications, and the pledgee after bankruptcy acquired possession from the carrier in replevin, the pledge was not invalid under the Pennsylvania law, because possession was not delivered to the pledgee by the bankrupt as against the bankrupt's trustee who never acquired possession.

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

10. BANKRUPTCY (§ 188*)—ADMINISTRATION OF ESTATE—EQUITABLE LIENS.

A bankrupt, having obtained an order for a railroad derrick car, purchased the car from a foundry company under a conditional contract of sale. It obtained possession without making payment, and while engaged in equipping the car sold and assigned the account against the prospective purchaser, as well as the car, to a bank for an advancement of the full purchase price to enable, it to finance and complete the transaction; the purchaser having agreed to pay to the bank any amount that should be due the bankrupts pursuant to the sale. *Held* that, the car having been refused by the purchasers for alleged noncompliance with specifications, the bank was entitled to an equitable lien on the equipment to secure its advances, regardless of the validity of the pledge.

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

11. BANKRUPTCY (§ 188*)—EQUITABLE LIENS—VALIDITY.

An equitable lien, having been acquired more than four months before the filing of a bankruptcy petition, was not invalidated thereby.

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

In matter of bankruptcy proceeding against the Pittsburgh Industrial Iron Works. Proceedings for the determination of certain liens and the ownership of a derrick car as between the trustee, the First National Bank of Huntingdon, and the American Car & Foundry Company. Judgment for car and foundry company and the bank.

R. T. M. McCready, for trustee.

S. S. Mehard, for American Car & Foundry Co.

Lazear & Blaxter, for First Nat. Bank of Huntingdon.

YOUNG, District Judge. This case comes before us upon the pleadings and agreement of facts and stipulation of counsel for the parties interested, which appear from the record to be the Guaranty Title & Trust Company, trustee of the bankrupt; the First National

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

Bank of Huntingdon, which claims certain property set forth in the agreement as having been sold or pledged to it as security for its debt; and the American Car & Foundry Company, which claims certain property set forth in the agreement of facts as its property.

It appears by the agreement of facts that prior to January 1, 1907, the Pittsburgh Industrial Iron Works, the bankrupt, contracted with the Detroit River Tunnel Company to furnish it a certain steel flat derrick car and equipment, and that on or about March 26, 1907, while the bankrupt company was engaged in the manufacture and erection of the equipment for said derrick car, it procured the discount by the First National Bank of Huntingdon of its promissory note for $5,125, and received that sum as the proceeds thereof, and that, at the time of the discounting of that note, the bankrupt executed and delivered to the bank what it alleges is an assignment of the car and its equipment and of the money to be paid for the car and equipment by the tunnel company. That on March 6, 1907, the bankrupt, having arranged for the discounting of the note by the bank, gave the Detroit Company notice in writing to pay the sum of $5,125 to the bank instead of to the Pittsburgh Industrial Iron Works, and that the Detroit Company notified the bank that it would pay the money upon said contract to the bank. It also appears from the agreement of facts that on April 3d the derrick car and equipment were tendered to the Detroit Company, which refused to accept them because they were not satisfactory under the contract, the same being returned to the Industrial Company on May 17th, and that the car and equipment remained in the possession of the Industrial Company for alteration and testing until August 15, 1907, when the car and equipment were again shipped to the Detroit Company, and finally refused by the Detroit Company on October 28, 1907. It also appears that the Huntingdon Bank, on January 17, 1908, after the filing of the petition in bankruptcy, obtained possession of the car with its equipment upon a writ of replevin, and upon the filing of its bond in that action in the courts of Michigan.

It also appears from the agreement of facts that the American Car Company of St. Louis intervened in the replevin proceedings and claims to be the owner of the car apart from the equipment, by virtue of the following state of facts: The Industrial Iron Company, on September 4, 1906, by its letter requested the American Car & Foundry Company to build it a steel flat car therein described; these words being found in the order: "Price. Eleven hundred sixty ($1,160.00) dollars, f. o. b. cars, Detroit, Mich." That the order was accepted by the American Car & Foundry Company, the car constructed, and on March 13, 1907, shipped from the car company's plant at Detroit, consigned to the Industrial Company at Reynoldsville, Jefferson county, Pa. And that upon the same day an invoice in triplicate was made by the car company, which contains these words, among others: "Title to property in this invoice reserved in car company until full payment made." "Terms, cash." And upon March 22, 1907, mailed one of the invoices, with a letter, to the Industrial Iron Works. The Industrial Iron Works obtained possession of the car at Reynoldsville

without paying the price agreed upon therefor, to wit, $1,160, or any part thereof, and that the whole is still unpaid and owing by the Pittsburgh Industrial Iron Works to the American Car & Foundry Company.

It also appears from the agreement of facts that, after the delivery of the car to the Industrial Company, that company equipped the car with boilers, engines, and derrick, which was substantially completed on April 3, 1907. It also appears that the American Car & Foundry Company did not consent or in any way sanction the transaction between the Industrial Company and the National Bank of Huntingdon.

It appears from the record that a petition in involuntary bankruptcy was filed against the Pittsburgh Industrial Iron Works on November 9, 1907, and on November 14, 1907, J. M. Stoner, Jr., was appointed receiver of the estate.

Under this agreement of facts and the stipulation of counsel for these parties the court is asked to determine the following questions. What the rights of the several parties are: First, as to the car; second, as to the equipment thereof; third, as to each other; and, fourth, as to the estate of the bankrupt?

First, as to the car: The contract was made in Michigan, and the car was to be delivered f. o. b. cars at Detroit. The delivery was complete at Detroit. In Brown v. Hare, 3 H. & N. 484, Pollock, C. B., speaking for the court, said:

"In many mercantile contracts it is stipulated that the seller shall deliver the goods 'f. o. b.' The meaning of these words is that the seller is to put the goods on board at his own expense or on account of the person for whom they are shipped and the goods are at the risk of the buyer from the time they are so on board."

The general rule of contracts is that the law of the place where the delivery is to be made or performed must control. Benjamin on Sales (5th Ed.) 682; Phila. Ry. Co. v. Wireman, 88 Pa. 264; Johnson v. Stoddard, 100 Mass. 306.

In general, when goods are left with a carrier, in the absence of a stipulation, the title vests in the vendee upon delivery to the carrier. Schmertz v. Dwyer, 53 Pa. 335; Garbracht v. Commonwealth, 96 Pa. 449, 42 Am. Rep. 550; Carlisle & Finch Co. v. Sand Co., 20 Pa. Super. Ct. 378. It thus appears that the contract having been made by the vendor in the city of Detroit, and the goods having been delivered to the carrier f. o. b. cars Detroit, and consigned to the vendee, the law of the state of Michigan must govern the contract. Hartford Insurance Co. v. Railway, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

Under this contract, then, governed by the law of the state of Michigan, may the American Car & Foundry Company claim title against the Pittsburgh Industrial Iron Works? It appears, as we have seen, that the Industrial Iron Works, by its letter of September 4th, ordered the car from the American Car & Foundry Company, at the price of $1,160, f. o. b. cars, Detroit, Mich. So far as the record shows, this was the whole contract. The car company accepted the contract, and on March 13, 1907, as shown by its invoice, delivered the car f. o. b. its works, Peninsular Plant; the invoice showing terms cash, and

"title to the property in this invoice reserved in car company until full payment made."

There is nothing in the contract to show that the title to the car was reserved, unless the words in the contract, "Price eleven hundred sixty ($1,160.00) dollars, f. o. b. cars, Detroit, Mich.," are to be construed as meaning cash on delivery of car at Detroit to the carrier, and unless it follows from this inference that a sale for cash on delivery is a conditional sale; the title remaining in the vendor as against the vendee.

It is a familiar principle of law that, unless time is stipulated in a contract of sale, the sale is for cash. Benjamin on Sales, 320, note "d"; Ency. of Law (2d Ed.) vol. 6, p. 457, and cases in note; Whitcomb v. Whitney, 24 Mich. 486.

It is also an established principle of the law that, when goods are sold to be paid for in cash upon delivery, such payment is a condition precedent, and until it is made or waived no title passes to the vendee. Ency. of Law, vol. 6, p. 456; Benj. on Sales, 320, note "d"; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Beardsley v. Beardsley, 138 U. S. 262, 11 Sup. Ct. 318, 34 L. Ed. 928; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125; Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635; Couse v. Tregent, 11 Mich. 65, and the cases cited in Pettyplace v. Mfg. Co., 103 Mich. 155, 61 N. W. 266.

We must therefore determine from the facts as stipulated in this case whether the sale was for cash. The order which the Pittsburgh Industrial Iron Works sent to the American Car & Foundry Company, as set out in the twelfth stipulation of fact, shows that the price was to be $1,160, f. o. b. cars, Detroit, Mich. There is nothing to show that any time for payment in the future was contemplated, and the price, $1,160, f. o. b. cars, Detroit, Mich., easily and convincingly bears the interpretation that the price was to be paid on delivery of the goods sold to the carrier at Detroit. This is strengthened by the conduct of the vendor when the car was delivered to the carrier at Detroit, for at that time, March 13, 1907, they made the invoice in triplicate, one of which was mailed to the vendee, which invoice contains the words, as we have seen, "terms cash," and "title to the property in this invoice reserved in car company until full payment made." So we have not only the price stated payable at Detroit, the point of shipment, but that price stated to be cash at the time of delivery to the carrier, and title reserved until full payment is made. This, we think, shows conclusively that the sale was for cash, that the car was delivered with the express condition that the terms were cash, and that title would remain in the car company until the price was paid.

In our opinion the cases above referred to make the sale a conditional one, which under the law of Michigan, and under the decisions in the United States courts, left the title to the car in the vendor. This being true, the title never passed to the Pittsburgh Industrial Iron Works, the vendee. It necessarily follows that the trustee in bankruptcy could only take such title as the bankrupt had. He has no greater rights than the bankrupt. York v. Cassell, 201 U. S. 344, 26

Sup. Ct. 481, 50 L. Ed. 782; Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

While, therefore, the title to this property remains in the car company, so far as the bankrupt or his trustee is concerned, the question arises whether or not the First National Bank of Huntingdon, standing in the relation of an innocent third party, is entitled to have the car by virtue of its alleged assignment or pledge contained in Exhibit B attached to the petition.

As the title to the car never passed from the vendor, we are of opinion, under the law of Michigan, that the First National Bank of Huntingdon acquired no right superior to the vendor, and any rights he may have must be subject to the claims of the vendor. Pettyplace v. Mfg. Co., 103 Mich. 153, 61 N. W. 266, and cases there cited.

The First National Bank of Huntingdon, not only claims the car, but also its equipment by virtue of an alleged assignment or pledge of the car and its equipment to it, and we must now decide whether the First National Bank of Huntingdon may claim the car and equipment after satisfying the claim of the American Car & Foundry Company.

The contract of pledge, having been made by the parties in Pennsylvania, must be decided by the law of that state. Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117; Hartford Ins. Co. v. Railway, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

It appears from the agreement of facts in this case that the First National Bank of Huntingdon, on March 5, 1907, and more than four months before the filing of the petition in bankruptcy, which was filed on November 9, 1907, discounted for the Pittsburgh Industrial Iron Works, the bankrupt, its collateral promissory note for $5,125, and the same day paid to the bankrupt the sum of $5,125, taking at the same time the following writing:

Number D-5.

Dated Dec. 31st, 1906.
Due Date: Jan. 31st, 1907.
Net Amount: $5,125.00.

Pittsburgh, Penna.

This certifies that the Detroit River Tunnel Co., of Detroit, Michigan, is indebted to Pittsburg Industrial Iron Works, Pittsburg, Pa., for goods sold and delivered as stated below:

Shipped via P. R. R. Terms, 30 days.

To Mdse. as per invoice of this date hereto attached and made a part hereof.

The Pittsburg Industrial Iron Works, Pittsburg, Pa., sold to Detroit River Tunnel Company, Dec. 31, 06. Terms, 30 days.

1 structural steel travelling derrick mounted on type P. M. steel flat car with 8½x10 D. C. 3 drum. Hoisting Engine, traction gear and ¾ yd. Hayward Orange Peel Bucket Complete according to contract $5,125.00

Know all men by these presents, that we, Pittsburg Industrial Iron Works for value received have bargained, sold, assigned, transferred and set over and by these presents do bargain, sell, assign, transfer and set over unto the First National Bank of Huntingdon, Pa., its successors and assigns, the claim or account set forth or described in the above statement, and the goods covered by or described therein, and all moneys due or to grow due upon the same or sales therein set forth, and the sole right to collect the same, and we hereby constitute and appoint the said the First National Bank of Hunting-

-don, Pa., our true and lawful attorney, irrevocably for us and in our name and stead, but to its own use and benefit, to sell, assign, transfer, set over, compromise or discharge the whole or any part of the aforesaid claim or account, and for that purpose to do all acts and things necessary or proper in the premises, and one or more persons to substitute with like power hereby ratifying and confirming all that our said attorney or its substitutes shall lawfully do by virtue hereof.

We hereby guarantee and certify that this amount so assigned is bona fide sale and a correct account for goods actually sold and delivered and accepted, and that there is no set-off or counterclaim of any kind thereto, and we agree that any claim or deductions allowed will be refunded by us by allowing the same to be deducted from future advances or by payment of the amount of such deductions in cash at the option of the First National Bank of Huntingdon, Pa., and that any invoices or bills rendered by us for this account shall have the statement upon their face that they are payable only to the bank of deposit designated by the First National Bank of Huntingdon, Pa.

We hereby guarantee payment in full of the above account.

In witness whereof, we have hereunto set our hands and seals this fifth day of March, 1907. Pittsburg Industrial Iron Works,
By C. F. Dickinson, President.

$5,125.00 Pittsburg, Penn'a, Sept. 23, 1907.

Sixty days after date, for value received, we promise to pay to the order of the First National Bank of Huntingdon, Pa., fifty one hundred twenty-five and no/100 Dollars, with interest at the rate of 6 per cent. per annum, having deposited herewith as collateral security for payment of this or any other liability or liabilities of ours to the holder hereof, now due or to become due, or that may be hereafter contracted, the following property, viz.: Account #D-5 against the Detroit River Tunnel Co., Detroit, Michigan—the market value of which is now $5,125.00, with the further right to call for additional security in case there should be a decline in the market value thereof, and on failure to respond, this obligation shall be deemed to be due and payable without demand or notice, with full power and authority to the holder hereof to sell and assign and deliver the whole of the above mentioned security, or any part thereof, or any substitute thereof or any additions thereto, at any Brokers Board, or at public or private sale, at the option of the holder hereof on the nonperformance of this promise, or the nonpayment of any of the liabilities above mentioned, at any time or times hereafter, without demand, advertisement or notice, and with the right to purchase as any other bidder at any public sale thereof, held by virtue hereof. And after deducting all legal and other costs and expenses for collection, sale and delivery, to, apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said above mentioned liabilities, as the holder hereof shall deem proper, returning the overplus to the undersigned.

Payable at The First National Bank, Huntingdon, Pa.

Pittsburg Industrial Iron Works,
C. F. Dickinson, President,
J. S. Beckwith, Treas.

On March 6, 1907, the bankrupt notified the Detroit River Tunnel Company as follows:

Mar. 6, 1907.

Detroit River Tunnel Co., Detroit, Mich.—Gentlemen: For financial convenience we have arranged with the First National Bank, Huntingdon, Pa., to cash the invoice mailed to you, amounting to $5,125.00. Kindly make remittances to them. You understand your compliance incurs no liability whatever, you simply settle with bank instead of us.

We also inclose you form of reply, which please mail to them in stamped envelope herewith.

Thanking you in advance for the courtesy, we are,
Yours truly, President.

And the Detroit Company wrote the bank the following letter:

Detroit, Mich., March 20th, 1907.

First National Bank, Huntingdon, Pa.—Gentlemen: We have received a letter from the Pittsburg Industrial Iron Works, dated March 6th, and asking us to pay you what may be due them for a derrick car which they have been building for us. After the car has been received, tested and accepted, we will pay you whatever may be due them for it.

Yours truly, Benjamin Douglas.

On April 3, 1907, the car with its equipment was tendered to the Detroit Company by the bankrupt company and refused as not being in accordance with the specifications, and on May 17, 1907, the same was returned to the bankrupt and was in the possession of the bankrupt from May 17, 1907, until August 15, 1907, for alteration and testing, to make it conform to the contract, and on August 17, 1907, the car with its equipment was again tendered to the Detroit Company, and again refused as not being according to the contract, and the bankrupt again attempted to change it to meet the requirements of the contract, and the same was finally refused by the Detroit Company on October 28, 1907, by notice from the Detroit Company to the bankrupt.

The car at this time was in Detroit in the custody of the carrier who had carried it for delivery to the Detroit Company. The car with its equipment was there, on January 17, 1908, seized in an action of replevin upon the filing of a bond by the First National Bank of Huntingdon, and still remains in the custody of that bank by virtue of that pending proceeding.

It clearly was intended by the alleged assignment and collateral note to assign and transfer to the bank the account or money arising from the sale by the bankrupt to the Detroit Company of the car and its equipment. It was for the identical amount of the contract made by the bankrupt with the Detroit Company. It is recited in the alleged assignment that the car and its equipment had been sold and delivered to and accepted by the Detroit Company, and the transaction between the bank and the bankrupt shows on its face that it was the discounting or purchasing of the account for a present consideration of $5,125 then and there paid by the bankrupt.

But this assignment also, after reciting the assignment of the account, had these words, "and the goods covered by or described therein," which would be a good pledge of the car and its equipment between the pledgor and pledgee, and the question we are confronted with is whether, under the law of Pennsylvania, the place of the contract, this was a valid sale or pledge of the car and equipment, as to the trustee in bankruptcy, and, if not valid as a pledge, can the equities of the bank in the car and its equipment be preserved as an equitable lien?

The Supreme Court of Pennsylvania has often been called on to pass upon these questions. In Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346, that court, speaking by Justices Gibson and Duncan, decided that a sale or pledge of goods and possession retained by the vendor or pledgor was a fraud per se. But while that case is said, in McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 588, to be the magna charta of Pennsylvania on the subject of actual and legal fraud in the transfer

of chattels, both Judge Gibson and Judge Duncan recognized that there might be exceptions to the rule, for it is there said by Judge Gibson:

"The inclination of my mind is, to give the statute a liberal, perhaps an enlarged construction, by putting the rule requiring a change of possession, on grounds of public policy, and confining its exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by and which constituted the motive for entering into, the contract. Where possession has been withheld pursuant to the terms of the agreement, some good reason for the arrangement, beyond the convenience of the parties, should appear."

And in the same case Judge Duncan, in a concurring opinion, says:

"It therefore appears to me that by the principles of the common law, and the settled construction of the statutes of Elizabeth, to a mortgage of chattels, delivery is necessary; that every such mortgage, when the parties stand in the relation of debtor and creditor, unaccompanied with such possession as the subject-matter is capable of, is fraudulent and void against all other creditors, whether the debts were contracted antecedently or subsequently to the mortgage."

In McKibbin v. Martin, supra, we find that the court recognized that there were exceptions to the rule, for it is there said by Mr. Justice Sharswood:

"Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery. If there is any question upon the evidence as to the facts, or resting upon the credibility of witnesses, the determination of that must be referred of course to the jury. But, if not, it is incumbent upon the court to decide it, either by a judgment of nonsuit or a binding direction in the charge. Young v. McClure, 2 Watts & S. 147; McBride v. McClelland, 6 Watts & S. 94; Milne v. Henry, 4 Wright, 352; Dewart v. Clement, 12 Wright, 413. But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. Clow v. Woods, 5 Serg. & R. 275 [9 Am. Dec. 346]; Cadbury v. Nolen, 5 Barr. 320; Linton v. Butz, 7 Barr, 89 [47 Am. Dec. 501]; Haynes v. Hunsicker, 2 Casey, 58; Chase v. Ralston, 6 Casey, 539; Barr v. Reitz, 3 P. F. Smith, 256; Benford v. Schell, 5 P. F. Smith, 393. In such case it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership."

In Keystone Watch Case Co. v. Bank, 194 Pa. 535, 45 Atl. 328, Mr. Justice Dean, in commenting upon the case of Clow v. Woods, supra, says:

"In the 80 years that have elapsed since the decision of Clow v. Woods, 5 Serg. & R. 275 [9 Am. Dec. 346], the rigor of the rule laid down in that case, and it is the leading one in this state, has been greatly relaxed; nor, considering the progress in population and wealth, and the change in methods of conducting business, could it have been strictly adhered to, without great obstruction to business and hardship to individuals. Under that ruling the cases were rare, where, as to creditors, the ownership of chattels could be in one and the possession in another. In such circumstances, with few exceptions, the transaction was constructively fraudulent as to creditors. But,

in the long line of cases following it, step by step, the rule has been so softened that now, it may be said, with few exceptions, where the purpose of the contracting parties was, as between themselves, an honest one, and there was no concealment as to creditors of its true nature, the contract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps, constructively, if the contract, in view of its purpose, was actually an honest one."

It is said by Mr. Justice Fell in the case of Sholes v. Asphalt Company, 183 Pa. 528, 38 Atl. 1029:

"The rule is that delivery is essential to the contract of pledge. It is true that the rule has been relaxed in cases where, because of the nature of the thing pledged or for other reasons, the requirement of delivery would be such a hardship as to defeat the purpose of the contract; but the policy of the law is against such relaxation, and it has been mainly confined to cases in which the goods have remained in the possession of the pledgor as agent of the pledgee under an express agreement to that effect."

In the case at bar the car with its equipment was in process of manufacture by the Pittsburgh Industrial Iron Works, and was being manufactured under a contract of sale to the Detroit River Tunnel Company. The possession was necessarily retained by the Industrial Company, so that the chattels sold might be manufactured, and actual possession could not be delivered to the bank. Also, there had been an actual bargain for the sale of the car and its equipment to the Detroit Company, and that company as the vendee was entitled to possession when completed. This also prevented actual possession by the bank.

Under the Pennsylvania cases, therefore, and the facts of this case, the pledge of the car with its equipment was not fraudulent per se, for an honest and good reason existed for not delivering the possession to the pledgee.

But this case may fall under a different principle and one which arises out of the exception to the doctrine of fraudulent sales. Taking the whole transaction into consideration, it appears that the intention of the Industrial Company and the bank was that the goods described in the certificate were sold to the bank, it to receive the price to be paid by the Detroit Company, if that sale was completed, otherwise to have the goods described. Upon failure of the sale to the Detroit Company the goods would come into the possession of the vendor, but only as representing the pledgee. It was only as though they were in the hands of a bailee, and the bank would have the right to take possession of them. The case would therefore come under the principle of Caulfield v. Van Brunt, 173 Pa. 428, 34 Atl. 230, and Linton v. Butz, 7 Pa. 89, 47 Am. Dec. 501. The goods were finally refused by the Detroit Company on October 28, 1907, remaining in the custody of the railroad company. They never came into the actual possession of the bankrupt, but remained in the hands of the carrier charged with the delivery to the Detroit Company. The trustee never had possession of them; they remaining in the custody of the railroad company, charged, as we have said, with the delivery of them to the Detroit Company. Although the petition in bankruptcy was filed on November 7, 1907, the trustee did not take possession, and the bank

took them in January, 1908, by its writ of replevin from the railroad company, and thus gained possession under its assignment or sale.

But may not the claim of the bank be sustained as an equitable lien? As said by Judge Archbald in the case of Fourth St. Nat. Bank v. Millbourne Mills Co., 172 Fed. 177, 96 C. C. A. 629:

"This is not to say that an equitable lien, under some circumstances, may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice of it and is affected with it as a superior right, within which all the cases cited in support of it will be found to fall."

And again, in speaking of Hurley v. Railroad, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, the same learned judge said:

"True, an equitable right or lien was there recognized as against a trustee in bankruptcy, but upon materially different facts. The railroad there, in whose favor it was held to exist, was a party to the tripartite agreement by which the bankrupt acquired the right to mine the coal against which it was enforced, which he agreed to mine and deliver to the railroad at a certain price; the railroad on failure to comply having the right to enter and avoid the lease. It was with these relations to the property that the railroad, anticipating its payments, advanced money to the bankrupt for coal not yet mined, in order to enable the company to go on with its mining business; and it was in return for this that the delivery of a certain amount of coal was claimed and allowed. The transaction, as it was said, was not one of ordinary borrowing and lending on credit or security, but constituted, from an equitable standpoint, a pledge or hypothecation of the unmined coal to the extent of the advancements made, with which, in view of the reciprocal rights and relations of the parties, the trustee, equally with the bankrupt, was bound to comply."

The facts in the case at bar are quite as strong as the facts in the case of Hurley v. Railroad. The car and its equipment were in process of manufacture. To enable the bankrupt to proceed with its manufacture and comply with its contract of sale to the Detroit River Tunnel Company, the bank advanced the full price of the contract to the bankrupt; notice being given to the vendee by the bank and accepted by the vendee, the money advanced thus taking the place among the assets of the bankrupt of the car and its equipment. From that time until October 28, 1907, a few days before the filing of the petition, the bankrupt was endeavoring to comply with its contract and to satisfy the requirements of the Detroit River Tunnel Company, and the bank could not both by reason of the goods being in the hands of the manufacturer and in process of manufacture, and because the car had already been contracted for to be delivered to the Detroit Company, take possession of the chattels upon which it had advanced the money. It had the right to take that possession as soon as the Detroit Company refused to take the property. We have seen that its assignment entitled it to take possession of it. We have found that it did take possession of it before it ever actually came into the possession of the bankrupt or its trustee. Can it not be said, as was said of Hurley v. Railroad in Fourth St. Nat. Bank v. Millbourne Mills Co., supra:

"The transaction, as it was said, was not one of ordinary borrowing and lending on credit or security, but constituted, from an equitable standpoint, a pledge or hypothecation of the unmined coal to the extent of the advance-

ments made, with which, in view of the reciprocal rights and relations of the parties, the trustee, equally with the bankrupt, was bound to comply."

Nor does the decision that the bank's equities in this case may be construed to give it an equitable lien offend against the decision in Fourth St. Nat. Bank v. Millbourne Mills Co., supra, where it is said:

"It leaves no place, in our judgment, for the idea, which is now advanced, that any such claim can be asserted as to personal property ineffectually pledged to the detriment of general creditors acting through a trustee in bankruptcy or other representative taking title in their interest by operation of law."

In no sense was this transaction to the detriment of the creditors. The full cost of the manufacture and the added profits were presumably included in the contract price, and this amount was paid by the bank to the bankrupt and passed into its assets long before the contract was completed. It is only by straining the principle to the breaking point to say that, under the circumstances of this case, it was not a good pledge. It is only by disregarding the facts of this case that we can say that the possession of the bankrupt was a possession in its own right and not a possession as agent, representative, or factor, charged with the manufacture of the chattels in dispute, for the bank, because it clearly appears that the car and equipment were sold to the bank by the bankrupt, to be manufactured and delivered to the Detroit Company in accordance with its contract with that company.

The doctrine of equitable lien is not a new one. It is stated by Pomeroy's Equity, § 1235, as follows:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, * * * creates an equitable lien upon the property so indicated, which is enforceable. * * * In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness and intent that the property so described or rendered capable of identification is to be held, given, or transferred as security for the obligation."

It has been recognized in Pennsylvania. Collins' Appeal, 107 Pa. 605, 52 Am. Rep. 479.

This lien, having been acquired more than four months before the filing of the petition, would not be affected by the bankrupt act.

We are therefore of the opinion that, as to the car, the American Car & Foundry Company is entitled to have the car, or in lieu thereof the sum of $1,160, from the First National Bank of Huntingdon, and that upon the payment of that sum the First National Bank of Huntingdon may retain the car and its equipment.

Let an order be drawn accordingly.

MOREDOCK et al. v. MOREDOCK et al.

(Circuit Court, W. D. Pennsylvania. March 16, 1910.)

No. 2.

1. EQUITY (§ 163*)—PLEA—GROUNDS—PRIOR ADJUDICATION.
A plea setting up a prior adjudication of the same matters between the same parties is a good plea in equity.
[Ed. Note.—For other cases, see Equity, Dec. Dig. § 163.*]

2. WILLS (§ 501*)—CONSTRUCTION—"FAMILY."
The will of a testator made a bequest to a son for certain specific purposes, and provided that the balance, if any, and the son's share of the residuary estate, should be held in trust for the benefit of the son and "his family." *Held* that, unaided by the context, the words "his family" should be construed as "his children."
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1069; Dec. Dig. § 501.*
For other definitions, see Words and Phrases, vol. 3, pp. 2673–2691; vol. 8, p. 7661.]

3. JUDGMENT (§ 690*)—PERSONS CONCLUDED.
A will made a bequest in trust for the benefit of a son of the testator and "his family." Some years later the son filed a petition in a court of competent jurisdiction, and obtained a rule on the trustee for an accounting. After a hearing on the answer of the trustee stating his account of the fund, the rule was discharged. *Held*, that the adjudication was binding on the son, but not upon his children, who constituted "his family," and who were not in privity with him, since they did not claim through or under him by any mutual or successive relationship to the same rights but independently of him, and that it was not a bar to a subsequent suit by them against the trustee.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1213; Dec. Dig. § 690.*]

In Equity. Suit by Samuel Moredock and others against Steven A. Moredock and George B. Moredock, executors of the will of George Hicey Moredock, deceased. On plea. Overruled.

Charles F. C. Arensberg, for plaintiffs.
Thos. S. Crago and W. A. Hook, for defendants.

YOUNG, District Judge. This case was set down for argument upon the plea of the defendants setting up the judgment of a court of competent jurisdiction as being res adjudicata of the matters alleged in the bill of complaint. It is alleged in the bill of complaint that the plaintiffs are citizens of states other than Pennsylvania, and that the defendants are citizens of Pennsylvania and residents of this district, and that the amount involved exceeds the sum of $2,000.

It is further alleged in said bill, as follows:

"Third. And your orators further show that the said George Hicey Moredock, late of Jefferson, Greene county, Pa., as aforesaid, duly made and published his last will and testament in writing, bearing date on or about the third (3d) day of August, 1905, and appointed Steven A. Moredock and George B. Moredock, defendants above named, executors of his last will and testament as in and by the said will or the probate thereof (to which the plaintiffs crave leave to refer), when produced to this honorable court, will appear, and that the said George Hicey Moredock died on or about the twenty-third (23d)

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

day of May, 1907, and that the executors named in the will soon after the death of the said testator duly proved the said will in the proper court, and undertook the executorship thereof, and had issued to them letters testamentary on the estate of the said George Hicey Moredock, deceased, and have since possessed themselves of the personal estate and effects of the said testator, and have continued to hold them.

"Fourth. And your orators further show that Samuel Moredock, one of the plaintiffs, is the son of George Moredock, deceased, late of Jefferson, Greene county, and before his decease a citizen of the state of Pennsylvania. Said George Moredock, deceased, died on or about the fifteenth (15th) day of November, 1881, leaving a will dated on or about the twelfth (12th) day of November, 1881. The said will was duly proved on or about the third (3d) day of December, 1881, in the proper court, and on or about the same day letters testamentary were granted to Daniel Moredock and George Hicey Moredock, executors named in the said will.

"Fifth. And your orators further show that the twelfth (12th) provision of the said will of the said George Moredock, deceased, as in and by the said will or the probate thereof (to which the plaintiffs crave to refer) when produced to this honorable court will appear, was as follows: '12. To my son George Hicey Moredock I give and bequeath the sum of One Thousand Dollars, in trust for my son Samuel out of which he will pay any money for which my sons, Daniel, James, George H. and William Reynolds will be liable for as surety of Samuel and will have to pay after deducting the pro rata amount, from which the proceeds of his assignment for the benefit of his creditors, and the balance of said One Thousand Dollars if any and Samuel's share if any residuary fund, to be held by said George H. Moredock in trust for the sole and separate use of my son Samuel and his family and not to be liable in any manner by attachments or otherwise for his debts, now or hereafter to be contracted. The interest on said balance to be paid to him, or to amount of the principal as said trustee shall in his judgment deem necessary, leaving that to his own discretion.'

"Sixth. And your orators further show that the thirteenth (13th) provision of the said will of the said George Moredock, deceased, was, in part, as in and by the said will or the probate thereof when produced will appear, as follows: 'The residue of my estate, real, personal and mixed, after payment of debts, expenses and the foregoing legacies and devises is to be divided among the foregoing legatees and devisees in proportion to the sum given or devised to them especially Samuel's share in trust and John's share subject to the payment of the guardian money and expenses paid by George Hicey Moredock, as aforesaid.'

"Seventh. And your orators further show that the said George Hicey Moredock, deceased (whose executors the above named defendants are), was the said George Hicey Moredock named in the said will of George Moredock, deceased, and, pursuant to the said provisions contained in the will, he took possession of the said sum or fund of one thousand ($1000.00) dollars bequeathed to him in trust as aforesaid, and the further sum or fund (the amount of which your orators are ignorant) bequeathed to him in trust as aforesaid arising from the distribution of the residuary estate, purporting to take the same under and for the purposes of the trust.

"Eighth. And your orators further show upon information and belief that the said George Hicey Moredock, trustee as aforesaid, did not pay out any portion of the said $1,000 (nor under the terms of the trust was he required to pay out any portion of the said sum of $1,000) to pay any money for which the sons of the testator were liable for as surety of Samuel, and had to pay after deducting the pro rata amount distributed from the proceeds of the assignment for the benefit of creditors, made by your orator, Samuel Moredock.

"Ninth. And your orators further show that your orator Nancy J. Moredock is the wife of your orator Samuel Moredock, and as such resides with him and is a member of his family, and that your orators William H. Moredock, Olive B. Moredock, Nana Moredock, and Sydna Moredock and Mary R. Gillogly (a widow) are all children of the said Samuel Moredock and members of the said Samuel Moredock's family, residing with him, and that your orator George

R. Moredock is a son of the said Samuel Moredock and a member of his family, residing at another place as hereinbefore set forth.

"Tenth. And your orators further show that the said George Hicey Moredock, trustee as aforesaid, never during his lifetime paid any money from the said trust fund or the interest thereon for the sole and separate use of your orator Samuel Moredock and of his family, which is composed of your other orators, nor did the said George Hicey Moredock at any time during his lifetime render unto your orator Samuel Moredock any true and complete account whatsoever of his trust under the will of the said decedent as aforesaid, or render unto your other orators any account whatsoever of his trust under the will of the said decedent, as aforesaid, although requested so to do. * * *

"Twelfth. And your orators believe, and are informed, that upon the death of the said George Hicey Moredock the said trust fund or sum of money which was so held or should have been so held in trust as aforesaid passed into the hands of the above-named defendants as executors of the said decedent, and that the sum of money or trust fund is now in their hands.

"Thirteenth. And your orators further believe, and are informed, that, upon the death of the said George Hicey Moredock, it became the duty of the said Steven A. Moredock and George B. Moredock, executors of the said deceased trustee, to render a full, accurate, and complete account unto your orators of the said trust, as conducted and administered by the said George Hicey Moredock during his lifetime, and to pay over unto your orator Samuel Moredock the said trust fund or sum of money for the sole and separate use of the said Samuel Moredock, and of his family, which consists solely of your other orators."

The bill prays, first, for a writ of subpœna and that the defendants answer not under oath; second, that Steven A. Moredock and George B. Moredock, executors of said George Hicey Moredock, deceased, be ordered, directed, and decreed to render a full, accurate, and complete account unto your orators of said trust arising by and under the will of George Moredock, deceased, and the conduct and administration thereof during the lifetime of the said George Hicey Moredock, deceased, setting forth the amounts received under the said will of George Moredock, deceased, and when and in what amounts the interest on such trust fund was added to the principal thereof, and any and all other matters connected therewith; third, that the said Steven A. Moredock and George B. Moredock, executors as aforesaid, be ordered, directed, and decreed to pay over the said trust fund in the amount so found due and owing "to your orator Samuel Moredock on such terms and upon such conditions as shall seem right and proper to this honorable court, to protect and conserve the interest of your other orators in and to the said trust fund"; fourth, for general relief.

To the bill the defendants have pleaded in bar of said proceedings as follows:

"First. That on October 24, 1885, George Hicey Moredock, deceased, filed in the orphans' court of Greene county, Pa., a final account as executor of George Moredock, deceased, which account was never made the subject of exceptions by any of the above-named plaintiffs.

"Second. That at No. 39 June term, 1897, in the orphans' court of Greene county, Pa., Samuel Moredock, plaintiff above named, caused a citation to issue on the executor of George Moredock, deceased, and in his petition to the judges of said court asking for said citation he set forth the fact of the filing of the final account as aforesaid, and recited the different items in the will of George Moredock, deceased, referring to the distribution of the estate of the said George Moredock, deceased, and praying the court that the said George H. Moredock be required to file an account of his trust showing the amount of money belonging to him, the said Samuel Moredock, or held in trust for him

under the will of his father, George Moredock. That the issue and service of the said citation was waived by the said George H. Moredock on August 18, 1897, and that on October 4, 1897, George H. Moredock filed his answer to the petition for the citation as aforesaid, and on February 14, 1898, the rule for the said citation granted as aforesaid was discharged by the judge of the orphans' court of Greene county at the cost of the petitioner, which petition, rule, waiver of service, answer of George H. Moredock and decree of the court is a matter of record in the orphans' court of Greene county, Pa., at No. 39 June term, 1897, orphans' court Docket No. 17, p. 343, a copy of said petition, order of court, waiver of service, docket entries of answer of George H. Moredock, and the order discharging said rule at the costs of the petitioner are attached hereto and made a part of this demurrer, and marked 'Exhibit A,' a copy of the answer of the said George H. Moredock being hereto attached and made part of this proceeding, and marked 'Exhibit B.' The certificate of the clerk of the orphans' court of Greene county, Pa., that said exhibits are true and correct transcripts of the record of the proceeding at No. 39 June court, 1897, being hereto attached, and marked 'Exhibit C.'

"Third. That the proceeding at No. 39 June court, 1897, in the orphans' court of Greene county, Pa., having embraced the same matters complained of in the bill as filed in this present case, and the answer of George H. Moredock filed in that proceeding being a complete answer to all the allegations of plaintiffs therein, and this matter having been carried on to a final determination by the orphans' court of Greene county, Pa., the same would be a full, complete, and final adjudication of the matter at bar, and the plaintiffs named in the bill filed in this case would have no standing in this court, the said Samuel Moredock never having appealed from the decree of the orphans' court of Greene county, Pa., entered February 14, 1898.

"Wherefore your orators pray that the bill filed in this case may be dismissed at the costs of the plaintiffs, and that the demurrer or plea as filed in this case by your orators be sustained."

As the plaintiffs have not replied to this plea or taken issue upon it, but have set the same down for argument on the ground that the said plea does not furnish any sufficient defense to the bill, the plaintiffs have thereby admitted the truth of the facts pleaded therein. The whole case turns therefore on the sufficiency of this plea.

The principle is well settled that, if the same matters alleged in a bill of complaint have been adjudicated between the same parties or their privies, that judgment may be pleaded in bar. The principle is briefly and forcibly stated in Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193, by Mr. Justice Brewer:

"Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties."

That it is a good plea in equity is beyond question. Daniel's Chancery (6th Am. Ed.) 662. The bill in this case sets up a record and judgment of the orphans' court of the county of Greene in the state of Pennsylvania. It is unquestioned that this was a court of competent jurisdiction. The statutes and decisions of the courts of Pennsylvania establish this.

The only question remaining for our consideration is whether upon inspection the record pleaded shows a final adjudication upon the merits of the matters now set up in the bill of complaint between the same parties. The petition and answer and copy of the docket entries attached to the bill may be considered by us in determining those questions. The petition filed by Samuel Moredock, one of the orators, is as follows:

"That he is the son of George Moredock, late of Jefferson township, said state and county, who died testate on the 15th day of November, 1881, and whose will dated the 12th day of November, 1881, was probated on the 3d day of December, 1881, Will Book, No. 5, p. 325, on December 3, 1881, and the same day letters testamentary were granted to Daniel Moredock and George H. Moredock, his executors named in the will.

"That the said executors filed a final account of their trust to October court, 1895, on October 14, 1895, and which said account was confirmed absolutely, wherein they stated a balance of ten thousand, seven hundred, forty-six and 46/100 dollars ($10,746.46) was in their hands for distribution among the heirs and legatees of said decedent.

"That item 12 of the will of said decedent is as follows: '12. To my son, George Hicey Moredock I give and bequeath the sum of One Thousand Dollars, in trust for my son Samuel out of which he will pay any money for which my sons Daniel, James, George H. and William Reynolds will be liable for as surety of Samuel, and will have to pay after deducting the pro rata amount from which the proceeds of his assignment for the benefit of his creditors, and the balance of said One Thousand Dollars if any and Samuel's share if any residuary fund, to be held by said George H. Moredock in trust for the sole and separate use of my son Samuel and his family, and not to be liable in any manner by attachment or otherwise, for his debts, now or hereafter to be contracted. The interest on said balance to be paid to him, or to amount of the principal as said trustee shall in his judgment deem necessary, leaving that to his own discretion.'

"That the will aforesaid contains the following residuary clause: 'The residue of my estate, real, personal and mixed, after payment of debts, expenses and the foregoing legacies and devises is to be divided among the foregoing legatees and devisees in proportion to the sum given or devised to them especially Samuel's share in trust and John's share subject to the payment of the guardian money and expenses and paid by George H. Moredock as aforesaid.'

"That your petitioner has never been paid anything on account of said legacy or interest in the residuary estate of his father by the said George H. Moredock as trustee, or executor, or any one for him, and that the said George H. Moredock has never rendered to your petitioner any account whatever of his trust under the will of said decedent; that your petitioner believes that he is entitled to a fund, or the interest on a fund, amounting to quite a large sum under the will of his father, and for which he has no means of knowing the amount thereof.

"Your petitioner therefore prays the court that the said George H. Moredock, one of the executors of George Moredock, and trustee for petitioner, under the will of said George Moredock, be required to file an account of his trust showing the amount of money belonging to your petitioner or held in trust for him in his hands, and that a citation be issued by this court to the said George H. Moredock to that effect."

That petition was filed, and upon that petition the court made the following order:

"And now, August 16, 1897, upon consideration of the foregoing petition, it is ordered and directed that a citation issue to George H. Moredock, trustee under the will of George Moredock, commanding him to state an account of his trust as trustee of Samuel Moredock, on or before September 18, 1897, and file the same in the office of the register of wills of this county, or show cause why the same should not be filed."

Upon August 18, 1897, George H. Moredock waived the issue and service of a citation in the matter, and upon October 4, 1897, filed the following answer:

"That the statements in the first paragraph of said citation are true as he remembers them. As to the second paragraph he answers as follows: That

the entire receipts of the whole estate of George Moredock, deceased, was $15,208.60, of which $4,462.14 was applied by said executors to the payment of debts and expenses of settlement of said estate, leaving a balance of $10,746.46 to be distributed among the heirs and legatees, and, while the docket shows there was a balance on final account, that was the balance of both the partial and final accounts, and the docket entries show that the entire amount of said sum was paid out to the parties entitled thereto, and that these receipts show that a part of this balance was paid out to the heirs before the settlement of the final account. As to the twelfth paragraph of the will of said deceased and the fourth paragraph of said citation, your respondent also answers that they are true as he remembers them. Your respondent further answers, and says: The reason that no money has been paid out of the estate of George Moredock, deceased, by his executors to Samuel Moredock, was that the legacy left by said deceased to G. H. Moredock as trustee to Samuel Moredock to pay the amount of money paid by Daniel Moredock, James Moredock, William K. Reynolds, and your respondent, as bail for Samuel Moredock, including Samuel's share in the residuary fund of the estate of said deceased, was not sufficient to pay the debts of said Samuel Moredock for which Daniel Moredock, James Moredock, William K. Reynolds, and your respondent were bail, and that there was due and coming from the said Samuel Moredock to Daniel, James, and George H. Moredock and William K. Reynolds upon the settlement of the estate of George Moredock a certain sum of money which is yet due and unpaid, which amounts to $373.80. The amount of money paid by Daniel Moredock for Samuel was $542.28, by William K. Reynolds, $30.35, by James Moredock, $389.57, and the amount paid by your respondent was $520.26, aggregating the sum of $1,482.46. The amount received by your respondent as trustee of the legacy and of the residuary fund coming to the said Samuel Moredock, deceased, amounted to $1,108.66, leaving a deficit as aforesaid of $373.80 coming to Daniel, James, and Hicey Moredock and William K. Reynolds. Your respondent further says that the reason there was no account filed by him as trustee of Samuel Moredock was that there was not sufficient money coming into his hands as trustee of the said Samuel Moredock including the share of the residuary fund from the estate of George Moredock, deceased, to pay the debts of Samuel Moredock to Daniel Moredock, James Moredock, William K. Reynolds, and your respondent to the amount of $373.80, and therefore no funds to pay the costs of filing the account of your respondent as trustee of Samuel Moredock. Your respondent further answers, and says that he has receipts, the copies of which are hereto attached, for the amounts of money paid as aforesaid to Daniel, James, and Hicey Moredock and William K. Reynolds, amounting to $1,108.66, leaving a deficit of $373.80 of the amount paid by said parties for Samuel Moredock, which amount was $1,482.46, showing that every dollar received by him as trustee was again paid out, leaving not a penny as a compensation for his services. Further, the method of the settlement of the trust fund in his hands as aforesaid among the creditors of Samuel Moredock was advised and conducted by C. A. Black, Esq., deceased, as his counsel. The whole amount of the legacies under the will of George Moredock, deceased, was $9,700, which, taken from the balance of $10,746.46, leaves a residuary fund of $1,046.46, and Samuel's share of this residuary fund was $108.66, which with the legacy bequeathed to your respondent in trust for him by the aforesaid will, said legacy being $1,000, makes the $1,108.66 received as said trust fund, and every dollar of which was applied by me to the payment of his debts as directed by said will.

"Therefore your respondent prays that the citation issued in this matter be dismissed at the costs of the petitioner, and he will ever pray," etc.

"Copy of Receipts.

"Dec. 15, 1883.

"Received of G. H. Moredock one hundred eighty-seven and $^{95}/_{100}$ dollars on the amount of money that is in his hands to be paid to my losses on Samuel Moredock's estate.

"$187.95. James Moredock."

"April 1, 1885.

"Received of G. H. Moredock one hundred and six and $^{50}/_{100}$ dollars, on the amount of money in his hands to be paid to my losses on Samuel Moredock's estate.

"$106.50. James Moredock."

"May 29, 1886.

"Received of G. H. Moredock four and $^{17}/_{100}$ dollars on the money in his hands to be paid to my losses on Samuel Moredock's estate.

"$4.17. James Moredock."

"Dec. 15, 1883.

"Received of G. H. Moredock two hundred sixty-three and $^{9}/_{100}$ dollars on the amount in his hands to pay on my losses on Samuel Moredock's estate.

"$263.09. Daniel Moredock."

"April 1, 1885.

"Received of G. H. Moredock one hundred forty-nine and $^{7}/_{100}$ dollars on the amount in his hands to be paid on my losses on Samuel Moredock's estate.

"$149.07. Daniel Moredock."

"May 29, 1886.

"Received of G. H. Moredock five and $^{83}/_{100}$ dollars on the amount in his hands to be paid on my losses on Samuel Moredock's estate.

"$5.83. Daniel Moredock."

"April 4, 1885.

"Received of G. H. Moredock eight and $^{30}/_{100}$ dollars on the amount in his hands to be paid on my losses on Samuel Moredock's estate.

"$8.30. W. K. Reynolds."

"Received of G. H. Moredock fourteen and $^{64}/_{100}$ dollars on the amount in his hands to be paid on my losses on Samuel Moredock's estate.

"$14.64. W. K. Reynolds."

"May 29, 1886.

"Received of G. H. Moredock $^{30}/_{100}$ dollars on the money in his hands to be paid on my losses on Samuel Moredock's estate.

"$.30. Wm. K. Reynolds."

"April 1, 1885.

"Received of G. H. Moredock one hundred forty-two and $^{23}/_{100}$ dollars of money held in trust by him to be paid to G. H. Moredock, James Moredock, Daniel Moredock and W. K. Reynolds. G. H. Moredock."

"Dec. 1, 1883.

"Received of G. H. Moredock two hundred twenty and $^{2}/_{100}$ dollars of money in my hands held in trust to be paid to G. H. Moredock, James Moredock, Daniel Moredock and W. K. Reynolds.

"$220.02. G. H. Moredock."

"May 29, 1886.

"Received of G. H. Moredock five and $^{83}/_{100}$ dollars of money held in trust by him to be paid to G. H. Moredock, James Moredock, Daniel Moredock and W. K. Reynolds.

"$5.83. G. H. Moredock."

Thereupon the court made the following order:

"And now, February 14, 1898, rule discharged at the costs of the petitioner."

Were the matters set up in the petition and answer in the orphans' court of Greene county finally adjudged upon their merits by that court? The prayer of the petition was for a citation to compel George Hicey Moredock, as executor under the will of George Moredock, and as trustee for Samuel Moredock, to file an account of his trust showing the amount of money belonging to the petitioner or

held in trust for him in his hands. The answer to this petition, sworn to and filed by George Hicey Moredock, the respondent, contains a complete account of his conduct as executor under the will of George Moredock in his relation to the trust created for Samuel Moredock, the petitioner, and sets out a complete account for the purpose of showing that no moneys came into his hands for the purpose of the trust created under the will for Samuel Moredock, the petitioner. As the answer to the petition was not replied to, nor any question raised as to the truth of the facts alleged in it, the facts alleged would be taken by the court under any system of pleading as admitted.

It will be noted that the prayer of the petition was that the respondent, one of the executors of George Moredock and trustee for the petitioner under the will of said George Moredock, be required to file an account showing the amount of money belonging to your petitioner and held in trust for him in his hands, so that the court had before it everything necessary to decide the case upon its merits, whether involving the consideration of the will to determine what sort of a trust was created and its qualities, what sums of money should go into it and from what source, and what sums of money were in the hands or should be in the hands of George Hicey Moredock as executor, which should be part of the trust estate, and, in fine, every question relating to the creation and conduct of the trust. And these questions the court necessarily disposed of by making the order of February 14, 1898. That order reads: "And now, February 14, 1898, rule discharged at the costs of the petitioner." Here was an adjudication under the pleadings upon the merits of every question arising under the will in relation to the trust, so far as Samuel Moredock is concerned.

A comparison of the bill of complaint in the case at bar with the petition and answer in the record pleaded shows conclusively that the identical matters now sought to be litigated by the present bill were sought to be litigated, adjudged, and disposed of by the proceedings set out in the plea.

The further question, however, arises whether or not, inasmuch as the present bill includes as plaintiffs certain persons alleged to be members of the family of Samuel Moredock, the proceedings set out in the plea are conclusive as to them. The bill alleges in the thirteenth paragraph that it was the duty of the defendants, as executors of George Hicey Moredock, to render a full and complete account to the orators of the said trust as conducted and administered by the said George Hicey Moredock during his lifetime, and to pay over unto Samuel Moredock the said trust fund or sum of money for the sole and separate use of the said Samuel Moredock, and of his family, which consists solely of the other orators. It appears from the second and third prayers that the defendants are required to account to the orators for the conduct and administration of the trust by George Hicey Moredock, and to pay over the trust fund in the amount so found to be due and owing to Samuel Moredock, upon such terms and upon such conditions as shall seem right and proper to the court to protect and conserve the interests of your other orators in and to the said trust fund. It will thus be seen that the bill is filed for the pur-

pose of compelling an account and the payment over of the amount found to be due by such account to Samuel Moredock and the other plaintiffs.

Assuming then that the bill of complaint is filed for the purpose of having the rights of the other plaintiffs outside of Samuel Moredock determined, they not having been named as parties in the proceedings in the orphans' court, are they precluded as privies of Samuel Moredock by the former adjudication? This must be determined by interpreting the language of the will. The words of the will are:

"To my son George Hicey Moredock I give and bequeath the sum of One Thousand Dollars, in trust for my son Samuel, out of which he will pay, * * * and the balance of said One Thousand Dollars if any and Samuel's share if any residuary fund, to be held by said George H. Moredock in trust for the sole and separate use of my son Samuel and his family and not to be liable in any manner by attachments or otherwise for his debts, now or hereafter to be contracted. The interest on said balance to be paid to him, or to amount of the principal as said trustee shall in his judgment deem necessary, leaving that to his own discretion.

"The residue of my estate, real, personal and mixed, after payment of debts, expenses and the foregoing legacies and devises is to be divided among the foregoing legatees and devisees in proportion to the sum given or devised to them especially Samuel's share in trust and John's share subject to the payment of the guardian money and expenses paid by George Hicey Moredock, as aforesaid."

The contention turns upon the construction to be put upon the term "his family," as used in the sentence, "to be held by said George Hicey Moredock in trust for the sole and separate use of my son Samuel and his family." The word "family" in its common and primary meaning, as defined by lexicographers, is that collective body of persons who form one household, under one head or manager, including children and servants. Webster's Dictionary; Century Dictionary. And it has also been given that meaning by the law decisions of some of the states (Wood v. Wood, 63 Conn. 324, 28 Atl. 520; Hart v. Goldsmith, 51 Conn. 479; Spencer v. Spencer, 11 Paige [N. Y.] 159; Bradlee v. Andrews, 137 Mass. 50) and also by some federal courts (Poor v. Hudson Ins. Co. [C. C.] 2 Fed. 432). In a bequest or devise for one and his family it has been held that the word "family," prima facie, means children. Raynolds v. Hanna (C. C.) 55 Fed. 783, where Mr. Justice Jackson, then circuit judge for the Sixth circuit, in an exhaustive opinion holds that the primary meaning of "family" is children under the will then under consideration, but, as it is further said:

"Its proper interpretation in each case must depend upon and be determined by the context of the will, the circumstances in which the testator is placed, and the character and situation of those who may be presumed to be objects of his bounty. Story, Eq. Jur. §§ 1065b, 1071, and cases cited. In Pigg v. Clarke, 3 Ch. Div. 672, it was said by the Master of the Rolls that 'every word which has more than one meaning has a primary meaning, and, if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of "family"? It is "children." That is clear upon the authorities which have been cited, and, independently of them, I should have come to the same conclusion.' "

"The word 'family' admits of a still greater variety of applications. It may mean a man's household, consisting of himself, his wife, children and servants. It may mean his wife and children, or his children, excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters

or next of kin, or it may mean the genealogical stock from which he may have sprung." Story's Eq. Jur. § 1065b.

"In respect to certainty in the description of objects or persons in such recommendatory trusts, it may be proper to state that it is not indispensable that the persons should be described by their names. But more general descriptions will often amount to a sufficient designation of the persons to take, such, for example, as 'sons,' 'children,' 'family,' and 'relations,' if the context fixes the particular persons who are to take clearly and definitely. Thus a devise to the family of A. will often be a sufficient designation, and may be construed to mean the heir at law of A., or the children of A. or even the relations of A., according to the context. And, on the other hand, the language may be loosely and indeterminately used as not to amount to a clear designation of any persons, and thus the recommendation may fail to create a trust."

Finding the expression "his family" in this will, unaided by the context, we conclude that the meaning of "his family" is "his children." The devise in this will, then, as interpreted by us, was a devise in trust for Samuel Moredock and his children. The children do not take through Samuel Moredock, their father, but independently of him. To some extent their interest may be regarded as adverse to his. If this will be interpreted as meaning that the trust was for Samuel alone, because the words "his family" are too indefinite and uncertain to sustain a trust, his interest would be adverse because it would be to Samuel's interest to have it so interpreted. The children, therefore, were not in privity with their father, Samuel Moredock.

Mr. Chief Justice Waite, in Litchfield v. Goodnow, 123 U. S. 549, 550, 8 Sup. Ct. 210, 211, 31 L. Ed. 199, laid down the rule by which we are to determine what privity means. He says:

"Greenleaf, in his Treatise on the Law of Evidence (volume 1, § 523), states the rule applicable to this class of cases thus: 'Under the term "parties," in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right also involves the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term "privity" denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and, whenever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity.' The correctness of this statement has been often affirmed by this court (Lovejoy v. Murray, 3 Wall. 1, 19 [18 L. Ed. 129]; Robbins v. Chicago City, 4 Wall. 657, 673 [18 L. Ed. 427]), and the principle has been recognized in many cases. Indeed, it is elementary. Hale v. Finch, 104 U. S. 261, 265 [26 L. Ed. 732]; Railroad Company v. National Bank, 102 U. S. 14, 22 [26 L. Ed. 61]; Butterfield v. Smith, 101 U. S. 570 [25 L. Ed. 868]."

Measured by this rule, then, their interests were not a "mutual or successive relationship to the same rights of property," nor were they "identified with him in interest." They were not made parties to the proceeding now set up in bar. They had no notice of that proceeding so far as the record shows. As we have seen, they were not in privity with him and he could not represent them in the litigation.

We therefore conclude that, while Samuel Moredock might have been concluded by the proceedings in the orphans' court of Greene county, the remaining plaintiffs are not bound by that proceeding. Wherefore the plea is overruled, and the defendants ordered to answer within 30 days.

DONIPHAN v. LEHMAN et al.

(Circuit Court, D. Indiana. June 16, 1902.)

No. 9,867.

1. CONTEMPT (§ 2*)—ACTS CONSTITUTING CONTEMPT OF COURT—CONSPIRACY TO COMMIT CONTEMPT.

A conspiracy to commit a contempt of court is not in itself a punishable contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 5; Dec. Dig. § 2.*]

2. CONTEMPT (§ 13*)—ACTS CONSTITUTING "CONTEMPT" OF COURT—TAKING DEPOSITION.

Neither the taking of a deposition to be used in a federal court in another state, in pursuance of a conspiracy to impose upon the court, nor the filing and publication of such deposition, is a misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, punishable as a contempt under Rev. St. § 725 (U. S. Comp. St. 1901, p. 583); but to constitute such contempt the deposition must have been used or offered in evidence.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 32; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, pp. 1489–1492; vol. 8, p. 7614.]

Suit by John V. Doniphan against Abraham Lehman and others. On motion to quash information for contempt and to vacate rule to show cause. Motion sustained.

Winter & Winter and John R. Bennett, for complainant.

Banning & Banning, Offield, Towle & Linthicum, Miller, Elam & Fesler, A. C. Harris, R. S. Taylor, Milton Krauss and Loveland & Loveland, for defendants.

BAKER, Circuit Judge. This is a proceeding by affidavit and information against John V. Doniphan and Abraham Lehman, charging them with the commission of a contempt, and asking that they be ruled to show cause, if any they have, why they should not be punished therefor. The information charges in general terms:

(1) That a contempt of this court has been committed by the complainant, Doniphan, and the defendant Lehman, in that they have secretly, fraudulently, and collusively imposed upon the court by settling and compounding all causes and grounds of action forming in any way the subject-matter of the litigation, and have continued thereafter to prosecute this action and suit as if there were in reality and substance an existing contest or subject-matter in dispute.

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

(2) That the complainant, Doniphan, and the defendant Lehman have conspired together in this action, under and after such settlement as aforesaid, to use this court as a means and an end to destroy the business of the defendants Charles J. Kraus and Hannah Kraus, to obtain large money judgments against them for the benefit of the complainant, and to enjoin them from the conduct and carrying on of their said business, to the sole benefit and advantage of the complainant, Doniphan; the defendant Lehman receiving large sums of money for his aid and assistance to bring about such results, as appears by the deposition of the complainant, Doniphan, in the case and affidavits filed herewith.

The affidavits show that the conspiracy alleged was entered into between Doniphan and Lehman in the states of Kentucky and New York, and the overt acts in furtherance of the conspiracy were committed in those states. The acts committed in Kentucky consisted in the sale and delivery of property and in the payment of money, and it is not claimed that those acts, however reprehensible, constitute any contempt of court. The only acts in New York in furtherance of the conspiracy consist in the taking of a deposition by the complainant, Doniphan, before an officer selected by agreement of the parties and sending the same by mail to the clerk of the court at Indianapolis, Ind., who received and filed the same to be used on the trial of the suit. Since the deposition has been filed, it has been published; but at whose instance is not shown. Do these acts constitute a contempt of this court?

The whole power to punish contempts is found in section 725, Rev. St. (U. S. Comp. St. 1901, p. 583), which provides as follows:

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

This statute embraces three classes of cases in which the court is given jurisdiction to punish contempts: (1) Misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice; (2) misbehavior of the officers of the court in their official transactions; (3) disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the court. The facts set out clearly do not present a case of contempt under the second or third clauses of the above section. If a contempt is disclosed, it is under the first clause, making misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice a contempt. A conspiracy to misbehave in or near the presence of the court for the purpose of obstructing the administration of justice does not of itself constitute a punishable contempt. It is the act of misbehavior in or near the presence of the court, and not the conspiracy, which constitutes the contempt. If the complainant, Doniphan, and the defendant

Lehman formed the alleged conspiracy, they committed no contempt in so doing. And if they have committed overt acts in furtherance of the conspiracy, they have not made themselves amenable to punishment for contempt unless their acts constitute misbehavior in or so near the presence of the court as to obstruct the administration of justice. The taking of a deposition in New York for the purpose of furthering the conspiracy cannot be held to be misbehavior in or so near the presence of the court as to obstruct the administration of justice. The taking of such a deposition is not misbehavior in or near the presence of the court, nor does its mere taking tend to obstruct the administration of justice. Something more must be done than merely to take a deposition in New York in order to obstruct the administration of justice here. The misbehavior must be a hindrance or obstruction of justice; and, so long as the deposition is not used or offered to be used in court, it cannot be regarded as an obstruction to the administration of justice. It may never be used or offered for use in court. The filing of it in the clerk's office and its publication after such filing cannot of themselves be held to be misbehavior in or so near the presence of the court as to obstruct the administration of justice. It cannot be regarded an obstruction to the administration of justice so long as it is neither used nor offered for use in or near the presence of the court. Doubtless, if the deposition were used or offered for use in court, it would constitute a contempt. But until some use is made, or is sought to be made of it, having a tendency to obstruct the administration of justice, no contempt has been consummated.

The present proceeding is premature, and the information is quashed at the costs of the petitioners, and the rule to show cause is vacated. The petitioners Kraus and Kraus are given an exception.

WALTON v. SOUTHERN RY. CO.

(Circuit Court, N. D. Georgia. April 30, 1910.)

No. 116.

MASTER AND SERVANT (§ 256*)—FEDERAL EMPLOYER'S LIABILITY ACT—ACTION BY RAILROAD EMPLOYÉ—PLEADING.

In an action by an employé against a railroad company to recover for a personal injury, an allegation in the declaration that "at the time of the injuries hereinafter complained of your petitioner was engaged in the transportation of interstate commerce" is insufficient to state a cause of action under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), in the absence of any allegation that defendant was a common carrier engaged in interstate commerce by railroad.

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

Action by J. L. Walton against the Southern Railway Company. On motion to remand to state court. Motion denied.

Smith, Hastings & Ransom, for plaintiff.

Maddox, McCamy & Shumate and McDaniel, Alston & Black, for defendant.

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

NEWMAN, District Judge. This case was removed from the state court, and there is a motion to remand. The suit is for damages for personal injuries alleged to have been received by Walton, an employé of the defendant, while in the discharge of his duty as conductor of one of the defendant company's trains in Calhoun county, Ala.

The declaration contains four counts. The first two counts are based on the statutes of Alabama, the counts stating somewhat differently the way the accident occurred. The third and fourth counts may have been intended to bring the case within and under the employer's liability act of Congress. Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171). The only thing, however, in either of the counts (and it is the same in both) is this, "At the time of the injuries hereinafter complained of your petitioner was engaged in the transportation of interstate commerce," which is clearly an insufficient statement to make a case under that act. It should certainly be alleged that the defendant was a common carrier engaged in interstate commerce by railroad. The only statement about the defendant company anywhere in the declaration is that it was operating trains in Calhoun county, Ala.

The rights of the defendant on this motion to remand and the question as to the jurisdiction of this court would be entirely different if the case was based on the employer's liability act, or any of the counts clearly based on that act. Certainly a case should be made coming within the terms of the act before the court could apply the same to the plaintiff's rights on this motion or to the question of jurisdiction in the Circuit Court. It is true, also, as has been held here in a recent case, that, where the employer's liability act is properly invoked, it supersedes all other law as to the rights of injured persons who are employés of common carriers by railroad engaged in interstate commerce, while the person injured is engaged in such commerce. In order to hold these two counts in the declaration good counts under the employer's liability act of Congress, it would be necessary to depend upon the implication that, because the plaintiff was engaged in interstate commerce, the defendant company was so engaged, and I hardly think that would be justifiable.

The suit, then, remains one between the plaintiff, a citizen of Georgia and a resident of this district, and the defendant railway company, a Virginia corporation, so that it is clearly removable on the ground of diversity of citizenship. It is impossible, therefore, for the court to decide in this case the interesting questions which would exist if the declaration, or any of its counts were properly based on the act of Congress referred to.

The motion to remand must be denied.

ERICKSON v. HODGES, Sheriff.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1910.)

No. 1,819.

1. HABEAS CORPUS (§ 62*)—PROCEDURE—DISMISSAL OF PETITION.
Under Rev. St. § 755 (U. S. Comp. St. 1901, p. 593), which provides that on an application to a federal court for a writ of habeas corpus the court or judge shall forthwith award a writ, "unless it appears from the petition itself that the party is not entitled thereto," where it appears from the petition that the case is not one which would justify the exercise of federal authority, it may be dismissed, and the court is not required to either award a writ or issue an order to the respondent to show cause.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 55; Dec. Dig. § 62.*]

2. HABEAS CORPUS (§ 45*)—HEARING IN FEDERAL COURT—MATTERS CONCLUDED BY DETERMINATION OF STATE COURT.
In a criminal prosecution in a state court, where the statute creating the offense is not repugnant to the federal Constitution, and the court has jurisdiction, its determination with respect to the sufficiency of the charge is controlling in the federal courts on an application by the accused for a writ of habeas corpus after conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. § 45;* Courts, Cent. Dig. §§ 1376–1385.]

Jurisdiction of federal courts in habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.]

3. HABEAS CORPUS (§ 45*)—HEARING IN FEDERAL COURT—MATTERS CONCLUDED BY DETERMINATION OF STATE COURT.
The determination by the highest court of a state that the offense charged in an indictment is one punishable under the laws of the state is conclusive in a subsequent proceeding by the accused in a federal court for release on a writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. § 45;* Courts, Cent. Dig. §§ 1376–1385.]

4. STATUTES (§§ 118, 138*)—FORMAL REQUISITES—CONSTITUTIONAL PROVISIONS.
Laws Wash. 1891, c. 28, § 1 (Ballinger's Ann. Codes & St. § 6774 [Pierce's Code, § 1545]), amending section 782 of the territorial Code of 1881, relating to common-law offenses, is not in violation of Const. Wash. art. 2, § 27, as amending by mere reference to the title of the act amended, nor of section 19, as not expressing the subject of the act in the title, since it sets out the section as amended in compliance with the constitutional requirement, and also states in the title that it relates to the prosecution of public offenses, and gives the number of the section amended, which under the state decisions is sufficient.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160, 205, 206; Dec. Dig. §§ 118, 138.*]

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

Proceeding by A. Z. Erickson against Robert Hodges, Sheriff, for writ of habeas corpus. Judgment dismissing petition, and petitioner appeals. Affirmed.

Robert Welch and James L. Crotty, for appellant.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

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

WOLVERTON, District Judge. A. Z. Erickson, the appellant, was on May 29, 1908, in the superior court of King county, state of Washington, convicted of the crime of conspiracy, alleged to have been entered into between himself and others, to prevent free and open competition in selling milk in the city of Seattle, and unlawfully and improperly to fix and control the price thereof, and was adjudicated to pay a fine of $500 and to serve a term of 10 days in the King county jail. From this judgment he appealed to the Supreme Court of the state, and on November 5, 1909, the judgment was affirmed. A remittitur having been sent down to the superior court, a commitment was issued and delivered to Robert Hodges, sheriff of King county, the appellee herein, directing him to execute the judgment. Upon being taken into custody, appellant filed in the Circuit Court of the United States for the Western district of Washington a petition for a writ of habeas corpus. By his petition he sets out in much detail the facts that an information was preferred against him, that he was tried and convicted, that he appealed to the Supreme Court, that the judgment below was affirmed, that a remittitur was sent down to the superior court, and that he is in custody by virtue of a commitment issued under such affirmed judgment. When the petition was presented to the honorable judge of the Circuit Court, after due consideration it was dismissed without the issuance of an order to show cause or the awarding of a writ of habeas corpus. From that judgment the petitioner prosecutes his appeal to this court.

The first question urged is that the Circuit Court should have either awarded the writ of habeas corpus or issued an order to show cause, so that the petitioner might be advised from the return of the sheriff having him in custody by what right he is being restrained of his liberty. If there was error in the court's refusal to do either, it is hardly conceivable how the petitioner could have been injured, if in point of law his petition does not state a cause entitling him to the relief prayed. He ought not to hope that the return of his custodian would come to the aid of his petition. But to the inquiry.

Application for the writ is required to be made by complaint in writing, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. Thereupon it is prescribed that the court or judge before whom it is made "shall forthwith award a writ of habeas corpus unless it appears from the petition itself that the party is not entitled thereto." Sections 754, 755, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 593). And section 761 (page 594) further provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

As is said by Mr. Justice Miller in the case of In re Burrus, 136 U. S. 586, 591, 10 Sup. Ct. 850, 852, 34 L. Ed. 500, after a discussion as to when the federal courts will issue the writ of habeas corpus:

"It is not now the law, therefore, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of habeas corpus. In order to ob-

tain the benefit of this writ, and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws, or treaties of the United States."

To this case is subjoined a note giving the decision of Betts, District Judge, rendered in the Matter of Barry, where it appears that the court refused either to award the writ or to issue an order to show cause, but determined in the first instance whether the petitioner presented a case of which the court should take cognizance. The court there says:

"When the cause of imprisonment or detention shown by the petition satisfies the court that the prisoner would be remanded if brought up, the writ will not be awarded."

Again it is said by Taft, Circuit Judge, in Re Haskell (C. C.) 52 Fed. 795–797:

"It is apparent from section 755 that, if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ."

The practice is thus stated in Re Lewis (C. C.) 114 Fed. 963, 965:

"The usual course on the application for the writ of habeas corpus is to issue the writ, and, on its return, to hear and dispose of the case. But when, as in this case, the cause of the imprisonment fully appears by the petition and the exhibits thereto, the practice prevails for the court to determine whether, on the facts presented in the petition, the prisoner, if brought before the court, would be discharged. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. And where the hearing is had without issuing the writ an order may be made requiring the officer or person holding the prisoner to show cause why the writ should not issue. Ex parte Yarborough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. Where the return to the rule shows all the essential facts, the case may be disposed of as fully as if the writ had issued."

In the case of Ex parte Milligan, cited in the quotation, the cause was heard upon the petition alone, without an order to show cause or an awarding of the writ, and if we understand the procedure adopted in Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 28 L. Ed. 868, the same course was taken. So we are not without precedent for the course pursued in the case at bar. We do not understand that the petitioner was denied a hearing upon his petition. If not denied such hearing, it could make no difference to him that the order to show cause was not issued or the writ awarded. The petition was very full, and was designed no doubt to set forth the entire record under which he was arrested, tried, and convicted, and by virtue of which he is being held. Such being the case, there exists no good reason why the cause might not as well be determined upon the petition, and, if it appears therefrom that the petitioner would be remanded if brought before the court, the petition dismissed. The same result would have ensued if an order to show cause had been issued and a demurrer or other objection on account of insufficiency had been interposed, and the court had denied the petition. In such a case the custodian of the prisoner would not have been required to make further return. We take it that under the practice the judge may do either of three things,

when a petition for the writ is presented: First. If it appears therefrom that it does not state a cause for the issuance of the writ, and that the prisoner, if produced, would be remanded, he may dismiss it. Of course, the petitioner should have ample opportunity to be heard upon the sufficiency of his petition. Second. He may issue an order to show cause. Third. He may award the writ.

In this connection the language of Mr. Justice Brewer in the case of Storti v. Massachusetts, 183 U. S. 138, 143, 22 Sup. Ct. 72, 74, 46 L. Ed. 120, is not inapt. After referring to section 761 of the Revised Statutes, supra, he says:

"Proceedings in habeas corpus are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty, it may be given to him as speedily as possible; that, if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that, if further action is to be taken in the matter, it may be taken without delay. Especially is this true when the habeas corpus proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in federal courts, but is the general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both state and federal. The command of the section is 'to dispose of the party as law and justice require.' All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus."

It is next urged that the information upon which the petitioner was tried in the state court does not state an offense. This was a question for the state court to determine. Where the statute creating the offense is not repugnant to the federal Constitution, and the court has jurisdiction thereof, the determination of the state court touching the sufficiency of the charge is controlling in the federal courts, where the defendant seeks to be relieved upon habeas corpus. The cases are numerous to this effect. Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. Ed. 845; Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; Howard v. Fleming, 191 U. S. 216, 24 Sup. Ct. 49, 48 L. Ed. 121.

In this relation it is further urged by petitioner that the state court of Washington had no jurisdiction of the crime of conspiracy for which the petitioner was tried and convicted, for the reason that the offense of conspiracy at common law is not indictable or triable in that state. In Howard v. Fleming, supra, the case last cited, the identical question was presented to the Supreme Court. It arose also in the same way. The petitioner had been tried and convicted of a conspiracy at common law, had appealed to the Supreme Court of the state without success, and had gone further than here. He had sued out a writ of error to the Supreme Court of the United States, and while this was pending he petitioned the Circuit Court for a writ of habeas corpus. This proceeding was dismissed, and he appealed. The Supreme Court said:

"The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the federal Constitution was denied and the proper steps

taken to preserve for our consideration the question of that denial. The first contention demanding notice is that the indictment charged no crime. As found, it contained three counts; but the two latter were abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime; but the Supreme Court held that it was a common-law offense, and as such cognizable in the courts of the state. In other words, the Supreme Court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a federal question, and the decision of the Supreme Court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense."

The information upon which the petitioner here was convicted has been held by the Supreme Court of the state of Washington to be in all respects sufficient. State v. Erickson, 54 Wash. 472, 103 Pac. 796. While the state Supreme Court has not, so far as we are at present advised, explicitly passed upon the direct question whether the offense of conspiracy is cognizable in the state courts or not, it has previously entertained jurisdiction respecting the same. State v. Messner, 43 Wash. 206, 86 Pac. 636. The territorial Supreme Court, however, did determine, prior to the adoption of the state Constitution, that the common-law offense of conspiracy was indictable under section 782 of the territorial Code of 1881, which is the same in effect as the section under which the petitioner stands convicted. Under the Constitution (section 2, art. 27) this law was continued in full force with the weight of construction placed upon it by the territorial court, so that it may be said that the question has been determined in that jurisdiction.

But as the proposition is advanced that the act under which the petitioner was prosecuted is unconstitutional, measured by the state Constitution, it is without validity, and no law, and hence that a prosecution under it is not due process, and deprives the defendant of the equal protection of the law, contrary to the fourteenth amendment to the federal Constitution, we will examine further into the situation. Under the territorial Code before Washington was admitted as a state, section 782, relating to "Common-Law Offenses," provided as follows:

"All offenses at common law, which are not hereinafter defined by statute, are indictable and triable in the district courts of the territory."

In 1891 the Legislature of the state passed an act relative to prosecution of public offenses, and amending section 782, including other sections, section 1 of which reads as follows:

"Section 782 of the Code of Washington, of 1881, is amended to read as follows: 'For all offenses at common law, which are not hereinafter defined by statute, the offender may be tried in the superior courts of this state.'" Laws 1891, c. 28.

This section has become section 6774 of Ballinger's Annotated Codes & Statutes of Washington (Pierce's Code, § 1545) and is the section under which the petitioner was tried and convicted.

It is now claimed that this amendment is void, because not adopted in accordance with section 37, art. 2, of the Constitution of that state, which provides that "no act shall ever be revised or amended, by mere

reference to its title; but the act revised or the section amended shall be set forth at full length," and section 19, art. 2, providing that "no bill shall embrace more than one subject, and that shall be expressed in the title." It is perfectly manifest from a glance at the new act that there was here no attempt at amendment by mere reference to the title, for the section as amended is set forth at full length. The objection on this ground is therefore without merit.

The next objection is that the subject of the act is not expressed in the title, and more especially is it urged that it was not competent for the Legislature to amend by a simple reference to the section in the amendatory act. Counsel mistakes the true condition. The subject of the act relates to the prosecution of public offenses. Offenses at common law are very naturally embraced within the subject. So would other offenses be also embraced within the same subject, and there was not an attempt to amend by simple reference to the section. Both the subject was expressed in the title and the specific section was amended as falling within the subject, by setting it out in full as amended. It would seem that there could be no more exact compliance with the constitutional requirements than this.

But it has been held specifically by the state court that a section of the Code may be amended by an act under a title simply providing for the amendment of such section by its number, without any further designation of the subject-matter of the section to be amended. Marston v. Humes, 3 Wash. St. 267, 28 Pac. 520. This case specifically overrules the case of Harland v. Territory of Washington, 3 Wash. T. 131, 13 Pac. 453, relied upon by counsel, and the cases of State v. Halbert, 14 Wash. 308, 44 Pac. 538 and State v. Smith, 15 Wash. 698, 46 Pac. 1119, are distinguishable as relating to territorial acts, in effect declared invalid by the territorial court prior to the taking effect of the Constitution. Thus it would seem that by the holdings of the state court this amendment was regularly adopted and is valid.

This disposes of all the questions presented adversely to counsel's contention, and the judgment of the court below will therefore be affirmed.

SNOW et al. v. HAZLEWOOD et al.

MASTERSON et al. v. SNOW et al.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1910.)

Nos. 2,018, 2,030.

1. APPEAL AND ERROR (§ 162*)—WAIVER OF RIGHT OF APPEAL—ACCEPTANCE OF BENEFITS OF DECREE.

The withdrawal by a complainant from the registry of the court of sums on deposit therein awarded her by the decree does not bar her right of appeal from other portions of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 984–991; Dec. Dig. § 162.*]

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

2. JOINT-STOCK COMPANIES (§ 15*)—LIABILITY AS PARTNERS TO THIRD PERSONS.

Where a private association of persons having negotiable shares, which were transferred from time to time, purchased property as a partnership, on a cancellation of the deed to such property for fraud, and the direction of an accounting to the grantor for the proceeds of portions of the property sold, all members of the association at the times of such sales are liable as partners.

[Ed. Note.—For other cases, see Joint-Stock Companies, Dec. Dig. § 15.*]

3. BROKERS (§ 65*)—TRUSTS (§ 170*)—DEED VOIDABLE FOR FRAUD—ACCOUNTING BY GRANTEES AS TRUSTEES DE SON TORT.

One who made a fraudulent sale of his principal's property as agent, under a power of attorney which entitled him to a share of the proceeds, and who has a secret interest in the purchase, on the cancellation of the deed and direction of an accounting by the purchasers for the proceeds of portions resold by them, cannot take anything under the provisions of the power of attorney, nor are any of the purchasers so ordered to account entitled to compensation for services rendered in making such resales; their accounting being substantially, if not in terms, as trustees de son tort.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48–50; Dec. Dig. § 65;* Trusts, Cent. Dig. § 225; Dec. Dig. § 170.*]

4. APPEAL AND ERROR (§ 1194*)—EFFECT OF DECISION—QUESTIONS DETERMINED.

Where a deed was canceled for fraud by decree entered on a mandate of the Circuit Court of Appeals, which also directed an accounting by the defendants with respect to the property conveyed, each of defendants was precluded by such adjudication from claiming on the accounting that he was an innocent purchaser for value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648–4660; Dec. Dig. § 1194.*]

Appeal and Cross-Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Suit in equity by Annie E. Snow and others against R. R. Hazlewood and others. Decree for complainants, and all parties appeal. Reversed, and new decree directed.

See, also, 157 Fed. 898, 86 C. C. A. 226.

In No. 2,018:

W. D. Gordon, for appellants.

Horace Chilton and John Charles Harris, for appellees.

In No. 2,030:

John Charles Harris, John C. Matthews, J. A. L. Wolfe, Horace Chilton, and Presley K. Ewing, for appellants.

W. D. Gordon, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. A motion is made to dismiss the appeal in No. 2,018. The appellant, not satisfied with the relief granted in the Circuit Court, sued out this appeal, contesting certain credits allowed the appellees, and asking enlarged relief. Among other things the decree below contained the following:

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

"It is further ordered, adjudged, and decreed that said complainants are authorized to withdraw from the registry of the court said sum of ten thousand dollars ($10,000.00) deposited by them as aforesaid by way of tender. It is further ordered, adjudged, and decreed that said complainants are entitled to the sum of $2,812.50 out of the $3,750, which was paid into the registry of this court by the receivers of the Lone Star & Crescent Oil Company on the 23d day of January, 1905, and said complainants are authorized to withdraw said amount, to wit, $2,812.50."

Prior to the suing out of this appeal the appellants withdrew said sums from the registry of the court, and such withdrawal is the basis of the motion to dismiss.

We have carefully examined the authorities cited by appellees in support of their motion to dismiss and by the appellants contra. In United States v. Dashiel, 3 Wall. 688, 702, 18 L. Ed. 268, the Supreme Court said:

"Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was, a bar to a writ of error, where it appeared that the levy was made or the payment was received prior to the service of the writ, and there is no well-considered case which affords the slightest support to any such proposition. Subsequent payment, unless in full, would have no greater effect; but it is unnecessary to examine that point, as no such question is presented for decision. Where the alleged satisfaction is not in full, and was obtained prior to the allowance of the writ of error, the authorities are unanimous that it does not impair the right of the plaintiff to prosecute the writ, and it is only necessary to refer to a standard writer upon the subject to show that the rule as here stated has prevailed in the parent country from a very early period in the history of her jurisprudence to the present time."

This case was cited with approval and followed in Embrey v. Palmer, 107 U. S. 8, 2 Sup. Ct. 25, 27 L. Ed. 346, and Embrey v. Palmer was cited and followed in Reynes v. Dumont, 130 U. S. 394, 9 Sup. Ct. 486, 32 L. Ed. 934, and we think that these cases should control in the disposition of this motion, particularly as, from our examination of the record, we conclude that the items alleged to have been withdrawn from the registry of the court are not involved in the appeal.

The motion to dismiss is therefore denied.

When this case was before this court at a former term (157 Fed. 898, 86 C. C. A. 226) we held, and so instructed the Circuit Court, that:

"The decree of the Circuit Court should be reversed, and the complainants given relief canceling the deed to Casey of November, 1901, the power of attorney to Hazelwood, of date November 25, 1901, and the deed executed thereunder June 18, 1902, to Campbell and Swayne, trustees, and recorded in Jefferson county, Texas, vol. 65, pp. 62–64, except so far as the rights of innocent purchasers are concerned, and ordering an accounting of all sales and releases and settlements made by the defendants based on complainants' rights in the Veatch survey, and, on such accounting, that the complainants should have such relief against the several defendants as equity and good conscience may require—all conditioned upon the complainants' paying into court for the benefit of the Hogg-Swayne Syndicate the $10,000 as tendered in the twenty-fourth paragraph of the bill."

It is to be noticed that this covers the setting aside and canceling of certain deeds and a power of attorney, and also an accounting of all sales, releases, and settlements made by the defendants (who were

R. R. Hazlewood and the Hogg-Swayne Syndicate), based on Mrs. Snow's rights in the John A. Veatch survey. As to the cancellation, the rights of innocent third persons were to be protected; but there was no suggestion that the defendants named were, or in any sense could be, innocent third purchasers. After the mandate was filed in the Circuit Court, the court entered a decree in pursuance thereof, setting aside and canceling the deeds and the power of attorney in question, and ordering an accounting as to the defendants. The decree contained specific instructions to the master to find as to several matters extraneous of the record and not within the scope of a proper accounting between the complainants and defendants, and only concerning the rights of the defendants between themselves, and as to the good faith and expenses of all the defendants.

After hearing evidence and counsel, the special master reported, following the lines of the decree of reference. His report is very lengthy; but, as we view the case, it is not necessary to recite it. On the report coming in, the complainants below promptly filed specific and detailed exceptions, and thereafter H. Masterson, one of the members of the Hogg-Swayne Syndicate, and Sarah J. Campbell, individually, for herself and as widow in community of her deceased husband, W. T. Campbell, filed exceptions. Defendant R. R. Hazlewood also filed exceptions to the master's report, and still later the said Hazlewood filed amended objections and exceptions to the same.

The court, on hearing, rendered a final decree, in which he overruled all exceptions to the master's report and confirmed the same, except as to the amounts received respectively by the Hogg-Swayne Syndicate and R. R. Hazlewood, and except as to the settlement of the Snow claim with the Guffey Petroleum Company, and then the court decreed, on the report of the master and the evidence in the case, as to the amounts the complainants were to recover, and specifically as to the rights and liabilities of several of the defendants. From the final decree all parties have appealed, either separately or collectively.

Defendant Masterson, who bought into and became a member of the Hogg-Swayne Syndicate after the making, but prior to the delivery, of the deed of November 6, 1901, to the Hogg-Swayne Syndicate, appeals separately, and claims that he is an innocent purchaser as to Mrs. Snow's claim, and although as a member of the Syndicate he drew his share of the dividends of the Hogg-Swayne Syndicate, including amounts received from the Snow interest, he should be held to a different accounting than the other members of the Syndicate. The Hogg-Swayne Syndicate was a private association, whose members had negotiable shares and interests, varying as trades and purchases of respective interests took place; but as a partnership it bought and sold the Snow title, and all the members thereof, defendants herein, are liable as partners for the proceeds of the Snow interest coming to the hands of the Syndicate.

The defendant R. R. Hazlewood, acting under a power of attorney to Hazlewood, Gordon & Beatty, was the principal agent in obtaining the sale and transfer of Mrs. Snow's rights in the John A. Veatch survey in the Hogg-Swayne Syndicate, and it was his collu-

sion with Campbell, one of the members, and agent, of the Syndicate which made the sale and transfer fraudulent in law, if not in fact; and certainly Hazlewood can take nothing, either under the provision for a share to the attorneys in the power of attorney from Mrs. Snow or for services rendered in making sales and settlements, but he, like and with the members of the Syndicate, is liable and has to account "for all receipts from sales, releases, and settlements of the Snow interest in the John A. Veatch survey."

Defendant E. J. Marshall, who joins with his codefendants in the appeal, separately assigns error to the effect that as to his liability he should be held to be an innocent purchaser, and thus be relieved of the whole, or at least a part, of his liability to account to complainant Snow.

The errors assigned by the defendants jointly either relate to matters of jurisdiction or liability to account, all necessarily settled by our former decision, or else relate to the same matters assigned by the complainants on their appeal and to be hereafter considered.

When the deed of Mrs. Snow to Casey, trustee for the Hogg-Swayne Syndicate, was adjudged to be fraudulent and void, and an accounting was ordered against all the defendants "of all sales, releases, and settlements based on Mrs. Snow's interest in the John A. Veatch survey," it was in effect holding all the defendants liable as constructive trustees, and necessarily eliminated all question of any one of them being an innocent purchaser for value; and if thereby said defendants were not in terms adjudged trustees de son, tort, the responsibility to account is substantially the same. These conclusions dispose of all the material questions raised in the assignments of error, except those relating to the accounting, as to which all appellants complain.

The complainants contend that both the master and the court below erred in not taking as a basis for accounting the amounts charged in paragraph 21 of the original bill as received by the Hogg-Swayne Syndicate for the release of the Snow interest. It is claimed that the defendants, in their answers to the bill, admitted the receipts as charged, and that in our former decision the amount was practically adjudicated. The record shows that, as to the amounts charged as received in paragraph 21 of the complainants' bill, the defendants Campbell, Swayne, Marshall, Casey, and Harris Masterson made the following admission:

"And these defendants further say that since the execution of said deed by the complainants, by their attorneys, the claim of Annie E. Snow has, as alleged in said bill, been compromised and settled on and as to the tracts mentioned in paragraph 21 of said bill, and for the amount specified in said paragraph, except as to the Hogg-Swayne 15 acres, being the 15 acres owned by the Hogg-Swayne Syndicate, and as to this the defendants allege no such compromises or settlements were made, except as hereinbefore stated; that, as to the other amounts mentioned in said paragraph, one-half of the purchase or compromise price therein mentioned was paid to the said Hogg-Swayne Syndicate, one-sixth to the said Hazlewood, one-sixth to the said Gordon, and one-sixth to E. C. McLean, the solicitor for complainants herein, who had, prior to such payment, acquired the interest of said Beatty in said Snow claim; and, of the notes executed in part payment of said compromise and settlement mentioned in said paragraph 21, notes for one-half of the full

amount of all said notes were executed to or for the benefit of the Hogg-Swayne Syndicate, one-sixth thereof to said Hazlewood, one-sixth to said Gordon, and one-sixth to the said McLean; and these defendants now hold the notes of said Higgins Oil & Fuel Company for $7,500, paid by it on account of said Snow claim, and have never held any other notes of said company given on account of said claim, and for the balance of the sum of $15,000 for which notes were executed by said Higgins Oil & Fuel Company, the said Hazlewood, Gordon, and McLean each received, and now hold, notes for $2,500, payable to them respectively."

The defendant Hogg admitted as follows:

"Since the execution of said deed by complainants the claim of Annie E. Snow has, as alleged in said bill, been compromised and settled as to the tracts mentioned in paragraph 21 of said bill, and for the amount specified in said paragraph, except as to the Hogg-Swayne Syndicate 15 acres—that is, the 15 acres owned by the Hogg-Swayne Syndicate—and as to this defendant alleges no such compromise or settlements were made, except as hereinbefore stated."

The defendant Fisher, answering paragraph 21 of complainants' bill, says:

"That he is informed and believes, and so states, that none of the said money, notes, accounts, or credits mentioned in paragraph 21 of complainants' bill were received from the sale of any of said land prior to the time when he made his last sale to Harris Masterson, and if any such sales to other parties were made, and money, notes, accounts, and credits received by any person, it was after this defendant had fully parted with and lost all control of any interest in the said land; and he states and avers that he has never received, converted, or appropriated to his use any of said moneys, notes, accounts, or credits, and has no interest therein, and never had, as herein stated."

The defendant Hazlewood did not answer that part of paragraph 21 of complainants' bill now in question. In our former opinion we did not go into the question of admitted receipts by the defendants, but ordered an accounting against all the defendants for "all sales, releases, and settlements based on complainants' rights in the John A. Veatch survey." The decree of the Circuit Court directing a reference was specific in regard to the account, first, against the members of the Hogg-Swayne Syndicate; second, against R. R. Hazlewood, as to what each received and each was entitled to for services, costs, and expenses, etc., and therefore the master was constrained to rule and did rule against the complainants, leaving to the court to settle the matter.

The master reported as to the sums received by the Hogg-Swayne Syndicate a total of $15,053.50. Under the reference, with regard to the expenses for services to be allowed the Hogg-Swayne Syndicate, the master found the sum of $2,589.38, to wit: For costs advanced at the time of sale, $214.38; attorney's and surveyors' fees, $125; and amount paid J. O. Davis in the Guffey settlement, $2,250. The complainants excepted to this finding, and we think the exception well taken as to the amount paid J. O. Davis in the Guffey settlement and the attorney's and surveyors' fees, as the master reports no facts and we find no evidence warranting said allowances. The amount of $214.38 seems to have been for costs paid in the Snow suit, in which a receiver was appointed, and is a proper credit.

The master also found on the evidence, aided with the opinion of witnesses, that the services of the members of the Syndicate for time, management, and labor in making settlements and compromises increased the value of the results obtained from settlements to the extent of $15,000, and recommended an allowance of that amount. The court below sustained this finding of the master. The complainants assign error thereon.

It seems that the Hogg-Swayne Syndicate was carrying on a general speculating business in oil lands and rights, and dealing with other properties and interests, as well as with the Snow interest, after they took charge of the same; but the evidence does not show any facts or anything beyond opinion that the Syndicate rendered any service for which they are entitled to compensation in this case. The members of the Hogg-Swayne Syndicate were accounting as trustees for Mrs. Snow under a fraudulent conveyance, and, as said supra, "if they were not in terms adjudged trustees de son tort, the responsibility to account is substantially the same," and in such cases advantageous services, and even money expended, are not necessarily allowed. In this particular finding the result leaves a credit to the Syndicate.

The complainants' fifth assignment of error is well taken. As to Hazlewood, the master reported a total sum of receipts from the Snow interest of $12,553.50. The master found and the court below allowed Hazlewood $214.38 costs paid at the time of sale. We understand these were costs paid in the litigation instituted to protect Mrs. Snow's claim, in which a receiver was appointed, and the amount was properly allowed.

The master denied all other claims of Hazlewood for services and moneys expended in regard to the Snow interest, both before and after the sale of the Snow interest to the Hogg-Swayne Syndicate. This ruling is not attacked in any of the cross-appellants' assignments of error. Paragraph 21 of complainants' bill charges:

"That since the execution of said deed by complainants, the claim of said Annie E. Snow has been compromised and settled on about 65 acres out of said 300 acres of oil-producing land on said survey for an aggregate sum of $76,839, distributed as follows:

Settlement on	Hogg-Swayne 15 acres	$20,000 00
"	" Yellow Pine 1 acre	1,000 00
"	" Producers' Oil Co.	500 00
"	" San Jacinto Oil Co.	500 00
"	" Columbia Oil Co.	300 00
"	" Keith Ward Oil Co.	6,000 00
"	" Higgins Oil & Fuel Co. 27 acres	30,000 00
"	" Lone Star & Crescent Oil Co.	11,250 00
"	" Gober Oil Co.	300 00
"	" National Oil & P. L. Co. 10 acres	6,000 00
"	" A. R. Hare	300 00
"	" Southern Pacific agent	300 00
"	" Howeth & Brock, agents	189 00
Total		$76,639 00"

As shown above, the answers of the defendants, except Hogg and Hazlewood, admit this claim. The facts as shown by the evidence are that the charge is correct, except as to the settlement of the Hogg-

Swayne 15 acres, which was for $6,000, instead of $20,000, and therefore the above total should be reduced to $62,839.

The Lone Star & Crescent Oil Company settled for the sum of $11,250, one half of which was paid in cash and the other half pending this suit put into the registry of the court. If we deduct one-half of the above-mentioned sum of $11,250 from the total receipts above given, it leaves the sum of $57,214, one-half of which ($28,607) went to the Hogg-Swayne Syndicate and R. R. Hazlewood as owners of an undivided half of the Snow interest. Pending the suit a settlement releasing the Snow interest so far as the Syndicate and Hazlewood were concerned was made with the Guffey Petroleum Company on the basis of $50,000, of which $5,000 in cash was paid and a note given for $28,333, leaving the attorneys, Gordon and McLean, to be settled with for the two-sixths interest claimed by them. The note has since been paid into the hands of a trustee, and the proceeds await the disposition of this case. Of the $5,000 paid, the Hogg-Swayne Syndicate received $3,750 and Hazlewood received $1,250, presumably for his attorney's interest.

To the above sum of $28,607 should therefore be added the $3,750 received from the Guffey Company, making a total of $32,357, for which sum the members of the Hogg-Swayne Syndicate and Hazlewood should be held liable to complainants, subject, however, to a credit of $10,000, the amount paid to Mrs. Snow for the one undivided half interest in her claim in the Veatch survey, and also to a credit of $429.79 costs paid. Of the above-mentioned receipts, $28,607 went to and was received by Hazlewood, Gordon & Beatty as the attorneys under a power of attorney given to them by Mrs. Snow, and for one-third of such sum, to wit, $9,535.66, Hazlewood, on account of his collusion with the Hogg-Swayne Syndicate in the sale of the Snow interest in the Veatch survey, should be held as trustee for the complainants and liable to them for the same. To this sum so held as trustee should be added the sum of $1,250, received in the settlement with the Guffey Petroleum Company.

A release of the Snow interest was given the Keith Ward Company in exchange for one-sixteenth acre of land. The Syndicate sold its interest to Hazlewood for $1,500 cash, but nothing further was realized. For this $1,500 the Syndicate—but not Hazlewood—should account to complainants.

These conclusions leave the members of the Hogg-Swayne Syndicate and Hazlewood liable for $21,829.21, and Hazlewood additionally liable for $10,785.66, and the Syndicate additionally liable for $1,500. Legal interest should be allowed on these liabilities. To avoid a recommitment, and because the receipts ranged from December 4, 1901, to May 20, 1905, the bulk being prior to the filing of complainants' bill, up to which time the sale complained of by Mrs. Snow was subject to ratification, we fix the date from which interest should run at April 6, 1903. We allow no interest on the $10,000 paid into court by Mrs. Snow, because it was tendered in the bill and is herein allowed as a credit or offset of the date of filing the bill.

Our conclusion on the whole case is that the decree of the Circuit

Court should be reversed, and the cause remanded, with instructions to enter a decree as follows:

"This cause coming on to be heard, and this court being fully advised, it is ordered, adjudged, and decreed that the former decree of this court be vacated and annulled, and in lieu thereof it is now adjudged and decreed that the deed from said Annie E. Snow and her husband, G. H. Snow, to R. R. Hazlewood, dated November 25, 1901, and said deed in question herein made under said power of attorney by said R. R. Hazlewood to W. T. Campbell and Jas. W. Swayne, trustees, dated June 18, 1902, and recorded in the Deed Records of Jefferson county, Texas, in volume 65, pages 62–64, be and the same are hereby declared canceled, annulled, rescinded, and held to be utterly void and of no effect, except so far as the rights of innocent purchasers are concerned; but it is expressly adjudged that this decree of cancellation does not apply to the 15 acres of land conveyed by said R. R. Hazlewood as attorney in fact for complainants to Jas. W. Swayne, trustee, for the use and benefit of the Hogg-Swayne Syndicate on or about December 4, 1901, nor to that part of the complainants' interest in the Veatch survey conveyed by the deed from Harris Masterson to Frank Andrews on August 21, 1903, recorded in the Deed Records of Jefferson county, Texas, in volume 75, page 456, the said conveyance being the release of the Snow interest under what is known as the J. M. Guffey Petroleum Company settlement, the said settlement, though made by defendants since the institution of this suit, having been ratified by complainants and judgment asked for the proceeds thereof.

"And it is further ordered, adjudged, and decreed that the said R. R. Hazlewood, Jas. W. Swayne, R. E. Brooks, E. J. Marshall, W. F. Casey, A. S. Fisher, Sarah J. Campbell, as survivor in community of the estate of W. T. Campbell, deceased, Will C. Hogg and Ima Hogg, as independent executors of the estate of Jas. S. Hogg, deceased, and Harris Masterson, be and they are hereby held liable to complainants for the amounts received on sales, releases, and settlements made by the aforesaid defendants based on the complainants' right in the Veatch survey, and for such liability condemned to pay the complainants the sum of $21,827.21, with interest at 6 per cent. from April 6, 1903. And it is further adjudged and decreed that James W. Swayne, R. E. Brooks, E. J. Marshall, W. T. Casey, A. S. Fisher, Sarah J. Campbell, as survivor in community of the estate of W. T. Campbell, deceased, Will C. Hogg and Ima Hogg, as independent executors of the estate of Jas. S. Hogg, deceased, and Harris Masterson, be and they are condemned to pay the further sum of $1,500, with interest at 6 per cent. per annum from April 6, 1903.

"It is further adjudged and decreed that R. R. Hazlewood, for his liability to further account to the complainants, be condemned to further pay to them the sum of $10,785.66, with interest thereon at 6 per cent. per annum from April 6, 1903.

"It is further ordered, adjudged, and decreed that the said complainants are entitled to the note and the proceeds thereof executed by Frank Andrews to Harris Masterson on the 21st day of August, 1903, for $28,333.33, the amount of said note being part of the settlement made by Harris Masterson, acting for the Hogg-Swayne Syndicate, with the J. M. Guffey Petroleum Company; said settlement having been ratified by said complainants in the proceedings heretofore had in this case.

"Complainants in open court having shown that Rod Oliver, one of the original defendants is dead, and his estate is insolvent, and moved that the case be dismissed as to him, it is hereby decreed that as to the said Rod Oliver this case be dismissed.

"It is further adjudged and decreed that the decree in this case and the findings therein, whether by the special master or the court, shall be without prejudice to any of the defendants in any future contest between them, or any of them, concerning any equities or legal rights as between themselves, or any of them, for exoneration, contribution, or accounting or in any other respect.

"It is further ordered and decreed that the special master, John Broughton, be allowed the sum of $750 for his services in this case; that the fees

of the stenographers, amounting to $302.61, be also allowed; and that these items shall be taxed as against the defendants as a part of the costs recoverable herein.

"It is further ordered and decreed that the complainants recover of the above-named defendants all costs of this court, including the allowances to the master, etc., for which and all other sums decreed in this case execution may issue as in cases at law."

In the foregoing instructed decree no mention is made of the $10,000 deposited by Mr. and Mrs. Snow in the registry, nor of the deposit by the receivers of the Lone Star & Crescent Oil Company, because the record shows that such deposits have been drawn out by the complainants below and the same sanctioned by the Circuit Court.

The costs of appeal, including cost of transcripts, to be paid by all the appellees in No. 2,018, and by the appellants in No. 2,030.

Reversed.

KUHN v. FAIRMONT COAL CO.

(Circuit Court of Appeals, Fourth Circuit. May 20, 1910.)

No. 747.

1. MINES AND MINERALS (§ 55*)—GRANTS OF MINERALS AND MINING RIGHTS—CONSTRUCTION—RIGHTS TO SUBJACENT SUPPORT OF SURFACE.

A deed made by the owner in fee of a tract of land conveying "all the coal and mining privileges necessary and convenient for the removal of the same in, upon and under" said land, "together with the right to enter upon and under said land, and to mine, excavate and remove all of said coal," does not by implication reserve the right to subjacent support of the surface in its original condition, but, on the contrary, is a waiver or surrender of such right, and the grantor cannot recover damages for injury to the surface resulting from the removal of all the coal without leaving supports.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153–165; Dec. Dig. § 55.*]

2. COURTS (§ 367*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A federal court, although required to exercise an independent judgment as to the construction of a deed in the case in which the question is presented, will incline strongly to adopt the construction placed on a similar deed by the highest court of the state, where, under the ruling of the state courts, such construction becomes a rule of property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

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

Action by Barton W. Kuhn against the Fairmont Coal Company. Judgment for defendant (152 Fed. 1013), and plaintiff brings error. Affirmed.

Barton W. Kuhn, the plaintiff in error, instituted his action in the Circuit Court of the United States for the Northern District of West Virginia against the Fairmont Coal Company, alleging in substance that the plaintiff had sold to J. M. Camden the coal under a tract of land; that by conveyance from Camden the coal had become the property of the defendant, Fairmont Coal Company, and that in removing the coal the defendant had not left pillars to sustain the surface in its original position; and that by reason of its failure

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

to leave enough coal in the ground to support the surface the surface had subsided, and had been damaged by reason of the removal of the coal mentioned in the deed. The defendant craved oyer of the deed, and demurred to the declaration. After argument before the Circuit Court that court sustained the demurrer on the authority of the case of Griffin v. Fairmont Coal Company (decided by the Supreme Court of Appeals of West Virginia in November, 1905) 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115. From the decision of the Circuit Court in sustaining the demurrer and dismissing the plaintiff's declaration, a writ of error was sued out and brought to this court to review the judgment of the Circuit Court in sustaining the demurrer.

Homer W. Williams (Harvey W. Harmer, on the brief), for plaintiff in error.

John Bassel and Z. T. Vinson (Vinson & Thompson, Reese Blizzard, and Edward A. Brannon, on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge (after stating the facts as above). This case was heard at the November term, 1907, of this court, and, after argument, the court (in pursuance of section 6 of the act of March 3, 1891, establishing the Circuit Court of Appeals), on its own motion, certified to the Supreme Court the question as to whether this court is bound by the decision of the Supreme Court of Appeals of West Virginia in the case of Griffin v. Fairmont Coal Company, decided by that court at its November term, 1905, and reported in 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, in which it was held:

"(1) Deeds conveying coal with right of removal should be construed in the same way as other written instruments, and the intention of the parties, as manifest by the language used in the deed itself, should govern.

"(2) The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land, and to mine, excavate, and remove all of the coal purchased and paid for by him, and, if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof.

"(3) Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate, and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position."

The Supreme Court at its October term, 1909, passed upon the question certified. 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. ——. Justice Harlan, who rendered the opinion of the court, in passing upon the question certified, among other things, said:

"This case is here on a question propounded under the authority of the judiciary act of March 3, 1891, relating to the jurisdiction of the courts of the United States, 26 Stat. 826, c. 517, § 6 (U. S. Comp. St. 1901, p. 488). The facts out of which the question arises are substantially as will be now stated.

"On the 21st day of November, 1889, the plaintiff Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia of which he (Kuhn) was the owner in fee. The deed contained these clauses: 'The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, in, upon and under a certain tract or parcel of land situated in the county of Marion, on the waters of the West Fork river, bounded and described as follows, to wit: Together with the right

to enter upon and under said land and to mine, excavate and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market.'

"The present action of trespass on the case was brought January 18, 1906. The declaration alleged that the coal covered by the above deed passed to the defendant, the Fairmont Coal Company, a West Virginia corporation, on the ——— day of January, 1906; that the plaintiff, Kuhn, was entitled of the right to have all his surface and other strata overlying the coal supported in its natural state either by pillars or blocks of coal or by artificial support; that on the day named the defendant company mined and removed coal from under the land, leaving, however, large blocks or pillars of coal as a means of supporting the overlying surface; that the coal company, disregarding the plaintiff's rights, did knowingly, willfully, and negligently, without making any compensation therefor, or for the damage arising therefrom, mine and remove all of said blocks and pillars of coal so left, by reason whereof and because of the failure to provide any proper or sufficient artificial or other support for the overlying surface, the plaintiff's surface land, or a large portion thereof, was caused to fall; and that it was cracked, broken, and rent, causing large holes and fissues to appear upon the surface and destroying the water and water courses.

"The contract under which the title to the coal originally passed was executed in West Virginia and the plaintiff's cause of action arose in that state.

"A demurrer to the declaration was sustained by the Circuit Court, an elaborate opinion being delivered by Judge Dayton. Kuhn v. Fairmont Coal Company, 152 Fed. 1013. The case was then taken upon writ of error to the Circuit Court of Appeals.

"It appears from the statement of the case made by the Circuit Court of Appeals that in the year 1902, after Kuhn's deed to Camden, one Griffin brought, in a court of West Virginia, an action, similar in all respects to the present one, against the Fairmont Coal Company, the successor of Camden. His rights arose from a deed almost identical with that executed by Kuhn to Camden. That case was ruled in favor of the coal company, and, subsequently, was taken to the Supreme Court of West Virginia, which announced its opinion therein in November, 1905. A petition for rehearing having been filed, the judgment was stayed. But the petition was overruled March 27, 1906, on which day, after Kuhn's suit was brought, the decision previously announced in the Griffin Case became final under the rules of the Supreme Court of the state. Griffin v. Coal Co., 59 W. Va. 480 [53 S. E. 24, 2 L. R. A. (N. S.) 1115].'

"The contention by the coal company in the court below was that, as the decision in the Griffin Case covered substantially the same question as the one here involved, it was the duty of the federal court to accept that decision as controlling the rights of the present parties, whatever might be its own opinion as to the law applicable to this case. The contention of Kuhn was that the federal court was under a duty to determine the rights of the present parties upon its own independent judgment, giving to the decision in the state court only such weight as should be accorded to it according to the established principles in the law of contracts and of sound reasoning; also, that the federal court was not bound by a decision of the state court in an action of trespass on the case for a tort not involving the title to land.

"Such being the issue, the Circuit Court of Appeals, proceeding under the judiciary act of March 3, 1891, c. 517, have sent up the following question to be answered:

" 'Is this court bound by the decision of the Supreme Court in the case of Griffin v. Fairmont Coal Company, that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided after the contract upon which defendant relies was

executed, after the injury complained of was sustained, and after this action was instituted?'

"There is no room for doubt as to the scope of the decision in the Griffin Case. The syllabus—page 480 [of 59 W. Va., page 24 of 53 S. E. (2 L. R. A. [N. S.] 1115)], which in West Virginia is the law of the case, whatever may be the reasoning employed in the opinion of the court—is as follows: '1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. 2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and, if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof. 3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. 4. It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous. 5. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction, that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain.'

"Nor can it be doubted that the point decided in the Griffin Case had not been previously adjudged by the Supreme Court of that state. Counsel for the coal company expressly state that the question here involved was never before the Legislature or courts of West Virginia until the deed involved in the Griffin Case came before the Supreme Court of that state for construction; that 'until then there was no law and no local custom upon the subject in force in West Virginia'; and that 'only after the holding of the state court in the Griffin Case could it be said that the narrow question therein decided had become a rule of property in that state.'

"In this view of the case was not the federal court bound to determine the dispute between the parties according to its own independent judgment as to what rights were acquired by them under the contract relating to the coal? If the federal court was of opinion that the coal company was under a legal obligation while taking out the coal in question to use such precautions and to proceed in such way as not to destroy or materially injure the surface land, was it bound to adjudge the contrary simply because, in a single case, to which Kuhn was not a party and which was determined after the right of the present parties had accrued and become fixed under their contract, and after the injury complained of had occurred, the state court took a different view of the law? If, when the jurisdiction of the federal court was invoked, Kuhn, the citizen of Ohio, had, in its judgment a valid cause of action against the coal company for the injury of which he complained, was that court obliged to subordinate its views of the law to that expressed by the state court?

"In cases too numerous to be here cited the general subject suggested by these questions has been considered by this court. It will be both unnecessary and impracticable to enter upon an extended review of those cases. They are familiar to the profession. But in the course of this opinion we will refer to a few of them.

"The question as to the binding force of state decisions received very full consideration in Burgess v. Seligman, 107 U. S. 20, 33 [2 Sup. Ct. 10, 27 L. Ed. 359]. After judgment in that case by the United States Circuit Court, the Supreme Court of the state rendered two judgments, each of which was adverse to the grounds upon which the Circuit Court had proceeded, and the contention was that this court should follow those decisions of the state court and reverse the judgment of the Circuit Court. The opinion in that case states that in order to avoid misapprehension the court had given the subject special consideration, and the extended note at the close of that opinion shows that the prior cases were all closely scrutinized by the eminent justice who wrote the opinion. A conclusion was reached that received the approval of all the

members of the court. * * * In Bucher v. Cheshire Railroad Co., 125 U. S. 555, 584 [8 Sup. Ct. 974, 978, 31 L. Ed. 795], Mr. Justice Miller, speaking for the court, observed: 'It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess v. Seligman, 107 U. S. 20 [2 Sup. Ct. 10, 27 L. Ed. 359]. Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes also the law governing the courts of the United States sitting in that state.' See, also, Jackson v. Chew, 12 Wheat. 153 [6 L. Ed. 583].

"Up to the present time these principles have not been modified or disregarded by this court. On the contrary, they have been reaffirmed without substantial qualification in many subsequent cases, some of which are here cited. East Alabama Ry. Co. v. Doe, 114 U. S. 340 [5 Sup. Ct. 869, 29 L. Ed. 136]; Bucher v. Cheshire R. R. Co., 125 U. S. 555 [8 Sup. Ct. 974, 31 L. Ed. 795]; Gormley v. Clark, 134 U. S. 338 [10 Sup. Ct. 554, 33 L. Ed. 900]; B. & O. R. R. Co. v. Baugh, 149 U. S. 368 [13 Sup. Ct. 914, 37 L. Ed. 772]; Folsom v. Ninety-Six, 159 U. S. 611 [16 Sup. Ct. 174, 40 L. Ed. 278]; Barber v. Pittsburg, etc., Ry., 166 U. S. 83 [17 Sup. Ct. 488, 41 L. Ed. 925]; Stanley County v. Coler, 190 U. S. 437 [23 Sup. Ct. 811, 47 L. Ed. 1126]; Julian v. Central Trust Co., 193 U. S. 93 [24 Sup. Ct. 399, 48 L. Ed. 629]; Com'rs, etc., v. Bancroft, 203 U. S. 112 [27 Sup. Ct. 21, 51 L. Ed. 112]; Presidio County v. Noel-Young Bond Co., 212 U. S. 58 [29 Sup. Ct. 237, 53 L. Ed. 402].

"We take it, then, that it is no longer to be questioned that the federal courts in determining cas s before them are to be guided by the following rules: 1. When administering state laws and determining the rights accruing under those laws the jurisdiction of the federal court is an independent one not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. 2. Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. 3. But where the law of the state has not been thus settled, it is not only the right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or where there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt.

"The court took care, in Burgess v. Seligman, to say that the federal court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different states, if, while leaning to an agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications.

"It would seem that according to these principles, now firmly established, the duty was upon the federal court, in the present case, to exercise its independent judgment as to what were the relative rights and obligations of the parties under their written contract. The question before it was as to the liability of the coal company for an injury arising from the failure of that corporation, while mining and taking out the coal, to furnish sufficient support to the overlying or surface land. Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law within the province of the federal court to determine for itself, the fact exists that there had been no determination of the question by the state court

before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful. If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved, was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented.

"There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law touching which the federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts. Let us look at some of those cases. They may throw light upon the present discussion.

"In Chicago City v. Robbins, 2 Black, 418, 428 [17 L. Ed. 298], which was an action on the case for damages, the question was as to the right of the city of Chicago—which was under a duty to see that its streets were kept in safe condition for persons and property—to hold one Robbins liable in damages for so using his lot on a public street as to cause injury to a passer-by. The city was held liable to the latter and sued Robbins on that account. The state court, in a similar case, decided for the defendant, and it was contended that the federal court should accept the views of the local court as to the legal rights of the parties. But this court, speaking by Mr. Justice Davis, said: 'Where the rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the state courts. But where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions.'

"In Lane v. Vick, 3 How. 464, 472, 476 [11 L. Ed. 681], the nature of the controversy was such as to require a construction of a will, which, among other property, devised certain real estate which, at the time of suit, was within the limits of Vicksburg, Miss. There had been a construction of the will by the Supreme Court of the state, 1 How. (Miss.) 379 [31 Am. Dec. 167], and that construction, it was insisted, was binding on the federal court. But this court said: 'Every instrument of writing should be so construed so as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will. * * * The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this court does not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes. Where, as in the case of Jackson v. Chew, 12 Wheat. 167 [6 L. Ed. 583], the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of the statute of the state, constitute a rule of decision for the courts of the United States. In the case of Swift v. Tyson, 16 Pet. 1 [10 L. Ed. 865], the effect of section 34 of the judiciary act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject.'

"In Foxcroft v. Mallett, 14 How. 353, 379 [11 L. Ed. 1008], the object of the action was to recover certain land in Maine. The case turned in part on the

construction to be given to a mortgage of certain land to Williams College, and to local adjudications relating to those lands, which, it was contended, were conclusive on the parties. 'But,' this court said, 'on examining the particulars of the cases cited to govern this ([Williams College v. Mallett] 12 Me. 398; [Id.,] 16 Me. 84; [Randell v. Mallet] 14 Me. 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. [Williams v. Suffolk Ins. Co.] 3 Sumn. 270, 277 [Fed. Cas. No. 17,738].

"In Russell v. Southard, 12 How. 139, 147 [13 L. Ed. 927], the controlling question was whether in any case it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court speaking by Mr. Justice Curtis, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain states, said: 'It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles'—citing Robinson v. Campbell, 3 Wheat. 212 [4 L. Ed. 372]; United States v. Howland, 4 Wheat. 108 [4 L. Ed. 526]; Boyle v. Zacharie, 6 Pet. 635 [8 L. Ed. 527, Id., 6 Pet. 658, 8 L. Ed. 532]; Swift v. Tyson, 16 Pet. 1 [10 L. Ed. 865]; Foxcroft v. Mallett, 14 How. 353, 379 [11 L. Ed. 1008].

"In Yates v. Milwaukee, 10 Wall. 497, 506 [19 L. Ed. 984], the question was as to the nature and extent of the right of an owner of land in Wisconsin, bordering on a public navigable water, to make a landing, wharf, or pier for his own use or for the use of the public. There was a question in the case of dedication to public use, and the city of Milwaukee sought to change or remove the wharf erected by the riparian owner in front of his lot. The court, speaking by Mr. Justice Miller, said: 'The question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common-law principles to their acts. This does not depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except, perhaps, in a class of cases where the state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state.'

"In Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 300, 304 [22 C. C. A. 334, 338], which was a suit by a Kentucky corporation, it became necessary to determine the force and effect of a mortgage originating in a state statute of Ohio and certain municipal ordinances covering street easements in Cincinnati. The state court, in a suit to which the trustee in the mortgage was not a party, passed a decree declaring the scope, effect, and duration of contracts or ordinances under which the mortgage, easements, and franchises originated. It was insisted that the federal court was bound to accept the views of the state court. But the Circuit Court of Appeals, held by Judges Taft, Lurton, and Hammond, ruled otherwise. Judge Lurton, speaking for all the members of that court, made an extended review of the authorities, and observed that if the state decision was regarded as conclusive upon the parties, 'the constitutional right of the complainant, as a citizen of a state other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine these street contracts and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun *after its rights as mortgagee had accrued, and to which it was not a party*, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without

substance. The better forum for a suitor so situated would be a court of the state. * * * The validity, effect, and duration of the street easements granted or claimed under these laws and ordinances is a question which this complainant is entitled to have decided by the courts of the United States, and the opinion of the Supreme Court of Ohio, while entitled to the highest respect as a tribunal of exalted ability, can be given no greater weight or respect than its reasoning shall demand, where the contract rights of a citizen of another state are involved, who was neither a party nor privy to the suit in which that opinion was delivered. The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statute and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment.'

"Upon the general question as to the duty of the federal court to exercise its independent judgment where there had not been a decision of the state court, on the question involved, before the rights of the parties accrued, Carroll County v. Smith, 111 U. S. 556, 563 [4 Sup. Ct. 539, 542, 28 L. Ed. 517], and Great Southern Hotel Co. v. Jones, 193 U. S. 532, 548 [24 Sup. Ct. 576, 48 L. Ed. 778], are pertinent. In the first-named case the court was confronted with a question as to the validity under the state Constitution of a certain statute of the state. Mr. Justice Mathews, delivering the unanimous judgment of the court, said: 'It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which its rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal. Burgess v. Seligman, 107 U. S. 20, 33 [2 Sup. Ct. 10, 27 L. Ed. 359].' The other case—Great Southern Hotel Co. v. Jones—presented a controversy between citizens of different states. It was sought by the plaintiffs, citizens of Pennsylvania, to enforce a mechanic's lien upon certain real property in Ohio. The main question was as to the validity of a statute of Ohio under which the alleged lien arose. It was contended that a particular decision of the state court holding the statute to be a violation of the state Constitution was conclusive upon the federal court. But this court, following the rules announced in Burgess v. Seligman, rejected that view by a unanimous vote. It said (page 548 [of 193 U. S., page 580 of 24 Sup. Ct. (48 L. Ed. 778)]): 'If, prior to the making of the contracts between the plaintiffs and McClain, the state court had adjudged that the statute in question was in violation of the state Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been entered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the State."

This case was reargued at the February, 1910, term of this court, the Supreme Court having decided that the decision of the Supreme Court of Appeals of West Virginia is not a rule of property, and therefore not binding upon this court.

It now becomes our duty to determine as to whether, in passing upon the question presented, this court should in the exercise of its independent judgment, under the circumstances surrounding this proceeding, adopt the ruling announced by the Supreme Court of Appeals of West Virginia as the law in this case.

The Supreme Court of Appeals of West Virginia, in the case of Griffin v. Fairmont Coal Co., supra, considered this question at great length. Judge McWhorter, who delivered the opinion of the court, in referring to the concurring opinion of Judge Cox, said:

"The reasons for our decision in this case are more elaborately set out in an opinion filed by Judge Cox, which appears below, and in which all the members of the court concur, except Judge Poffenbarger, who dissents from the decision."

In view of this statement, we call attention to a portion of the opinion of Judge Cox, which clearly and concisely states the question at issue, and the reasons upon which the opinion of that court is based:

"I concur in the conclusion reached by this court in this case. I have no quarrel with the doctrine or right of subjacent support, when it has not been parted with, applicable where the surface and subjacent estate in the same land are owned by different persons. I do not condemn or question what I deem the best-considered cases and text-books expounding this doctrine. Owing to these facts, and to the very great importance of this case, I have concluded to prepare this opinion.

"This case is on a writ of error to the judgment of the Circuit Court, sustaining a demurrer to the declaration and dismissing the action. It appears from the averments of the declaration, which for the purposes of demurrer must be taken as true, that plaintiff, Griffin, being the owner in fee of 68.89 acres of land in Harrison county underlaid with coal, sold and conveyed the coal (except 3 acres thereof) to Camden, with the following mining rights and privileges: 'The party of the second part and his assigns is to have the right of way through said reservation for a road, air course and drainway necessary or convenient for the mining and removal of said coal and the coal under coterminous and neighboring lands, together with the right to enter upon and under said land and to mine, excavate and remove, all of said coal, and remove upon and under said land the coal from under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drainways, and openings necessary or convenient for the mining and removal of said coal, and the coal from coterminous and neighboring lands, to market.'

"The defendant company became the owner of said coal and mining rights and privileges conveyed to Camden. The defendant, having removed a part of said coal, leaving blocks or pillars thereof, afterwards removed the blocks or pillars, completing the removal of all the coal without leaving support for the surface, thus causing subsidence of the surface, as plaintiff avers, to his injury and damage.

"Plaintiff brings this action of trespass on the case for damages, not relying upon any express covenant or provision of the deed of conveyance, which constitutes the contract between the parties, but relying upon what is termed the doctrine or right of subjacent support. The only act complained of is the act of removing all the coal conveyed without leaving support. The manner of the removal is not complained of; and no negligence in the manner of removal is averred. The act of removal itself, and not the manner of doing the act, is averred to be negligent. This being the case, there is for determination the single question: Was the removal of all the coal conveyed without leaving support in violation of plaintiff's right?

"This leads us to a consideration of the doctrine or right of subjacent support. We are cited to no previous decisions in point in this state, or in the

state of Virginia before the formation of this state. We are cited to many decisions and text-books, both English and American, which are not said to be binding authority upon this court, but which may be termed persuasive reasoning. They appeal to us, and should govern us so far, and only so far, as they appear to us to be founded upon correct principles. We are seeking the right—the truth—and should accept it wherever found.

"In this investigation, we turn naturally to England, which I think may be termed the parent of the doctrine of subjacent support. The first cases were decided there.

"No case or text-book, either English or American, will be found which rests this doctrine or right of subjacent support upon more than two grounds, or, rather, which holds that the doctrine or right is composed of more than two ingredient propositions. They are: First, a presumptive or implied reservation to the surface owner of sufficient of the subjacent strata or estate to support the surface modo et forma. Second, the principle of law expressed in the Latin maxim, sic utere tuo ut alienum non lædas—literally construed, 'So use your own property as not to injure the property of another.' Many authorities rest the whole doctrine upon the last proposition only. The principle contained in the first proposition, when applied to a case where the fee owner has granted the surface and reserved the underlying strata or estate, would necessitate an implied additional grant of so much of the subjacent strata or estate as was necessary to support the surface, but we are not dealing with that case here.

"The first proposition was announced by Lord Campbell in Humphreys v. Brogdon, 12 Q. B. 739, decided in 1850, in which he used this language: 'If the surface and the minerals are vested in different owners without any deeds to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all of the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed.'

"This was not the first case in England upon the subject of subjacent support, as thought by some. Lord Campbell in that case also recognized the second proposition above mentioned, but reached his conclusion by analogy to the severance of the ownership of the different stories of a house, quoting Irskine's Inst. as follows: 'Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing the weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must hold that as a roof or cover to the lower.'

"Lord Campbell in that case was very guarded in holding that the law there laid down only applied where the surface belonged to one man and the minerals to another, and no evidence of title appeared to regulate or qualify their rights of enjoyment. The last clause of the opinion contains the following language: 'I need hardly say that we do not mean to lay down any rule applicable to a case where the prima facie rights and liabilities of the owners of the surface of the land and of the subjacent strata are varied by the production of title deeds, or by other evidence.'

"The earlier English case of Harris v. Ryding, 5 M. & W. Rep. 59, decided in 1839, held that the mining rights in the deed in question applied to acts to be done upon the surface of the land, and did not enlarge the rights of the owner of the minerals, under the ground, beyond what they were without the mining rights. Baron Park there reached his conclusion in this language: 'I do not mean to say that all the coal does not belong to the defendant, but that they cannot get it without leaving sufficient support.'

"Some English and American cases have followed the two English cases

cited, resting their decisions, at least in part, upon the theory of a presumptive or implied reservation of so much of the subjacent strata or estate as is necessary to support the surface. The case of Noonan v. Pardee, 200 Pa. 474 [50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722], carried that theory to its logical conclusion by holding: 'What the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land.'

"In Blanchard & Weeks' Note to the case of Jones v. Wagner, in Leading Cases on Mines, etc., p. 617, it is said: 'There is a prima facie inference at common law, upon every demise of minerals and other subjacent strata where the surface is retained by the lessor, that the lessor, is demising them in such a manner as is consistent with the retention by himself of his own right to support. The absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him modo et forma, and with the natural support which it possessed before the demise.'

"The theory of implied reservation or implied grants has been couched in different language in different cases. Some cases have said that the subjacent estate owes a servitude to the superincumbent surface. Others have said that the surface owner is entitled to an easement. Others have called the right of subjacent support ex jure naturæ; and still others have said that the right is a part of the surface, and as such may not pass except by express words. In whatever language the decisions referred to may be couched, in the last analysis they rest upon the authority of Humphreys v. Brogden, holding that there is a presumptive or implied reservation or an implied grant.

"The theory of an implied reservation is earnestly relied on by the learned attorneys for the plaintiff in their original brief. I quote therefrom as follows: 'In a grant like the one at bar, a reserve of the right of surface support is implied.' This proposition of the early English cases, of an implied reservation in the face of an express grant, has been much questioned and criticised in England, and, it seems to me, with great reason. I do not think that, in a case where the owner of the fee granted or conveyed the underlying strata or estate, the theory of implied reservation, amounting if necessary to the whole of the thing granted, could ever have been maintained upon sound reason. It seems to me that the first part of the statement above quoted from Lord Campbell in Humphreys v. Brogdon, viz., that the grantor in case of the reservation of the minerals cannot be presumed to have reserved to himself in derogation of his grant, the power of removing all the minerals without leaving a support for the surface, furnishes a conclusive reason for overthrowing the second part of his statement quoted, viz., that in case the owner of the entirety is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the mineral which it had ever before enjoyed. The latter part of the statement necessarily implies a reservation in derogation of the grant—the very thing condemned in the first part of the statement.

"I cannot see how, against every rule of construction, where a deed has been made by the owner of the fee, granting in express terms all the subjacent strata or estate, that the right of subjacent support may be based upon the ground that there is a presumptive or implied reservation by such a deed, in which there is no express limitation, reservation, or exception, and in derogation of the express terms of the grant, of so much of the subjacent strata or estate, to the extent of all, if necessary, to support the overlying surface. Such a proposition seems to me to be contrary to all principles of law. I am not, however, saying that the doctrine or right of subjacent support does not exist where it has not been parted with; but I do say that I cannot assent to the proposition that it emanates from a presumptive or implied reservation of so much of the estate granted as is necessary to support the surface.

"An inconsistency running through most of the cases holding to the theory of an implied reservation is they concede that after the grant the grantee is the owner of the thing granted.

"In the later case of Eadon v. Jeffcock, L. R. 7 Ex. 379, decided in 1872, the provisions of a lease of a bed of coal were involved; and the court

held that the intention of the parties was that all the coal should be removed, other than certain pillars specified by the terms of the lease, and that the lessees were not otherwise liable for failure to leave support for the surface. There is no difference in principle between a lease and a deed of conveyance. Davis v. Treharne, 6 App. Cas. 460. I do not find that this case of Eadon v. Jeffcock has been overruled. On the contrary, it is cited as late as 1902, as one of the leading English cases. It is true that in the case of Davis v. Treharne, supra, Lord Blackburn alone, of the three Lords, delivering opinions, including the Lord Chancellor, said: 'I cannot agree with what seems to have been said by Baron Cleasby in the case of Eadon v. Jeffcock.' The other Lords delivering opinions did not question that case; and it was not there overruled. In the case of Eadon v. Jeffcock, Baron Cleasby said in part: 'It appears to us that, outside of this contract, there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard, of course, as in all cases, to the subject-matter, arrive at the extent to which the owner authorizes the minerals to be removed.' He also quotes from Lord Wensleydale in Rowbotham v. Wilson, 8 H. L. C. 359, as follows: 'Whether the right to support given by the land below to the land of the owner of the surface, when the strata belong to different persons, properly is to be called an easement, as it is by Mr. Gale in his excellent treatise on Easements, "'a natural easement'" or, whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbor does him an injury, are questions immaterial to the decision of this case, though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in Bonomi v. Backhouse,' 9 H. L. C. 503.

"Baron Bramwell, delivering an opinion in the case of Eadon v. Jeffcock, said, in part: 'In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is called, but the word "lease" may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which, at the end of the term, is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house or a movable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal, or a grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee get it all within a certain time; and why should the grantor be at liberty to say: "Though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition." Why should not the argument be good, "'If you meant that exception you should have said so in words.'" Suppose a sale of brick, earth or gravel by metes and bounds, and suppose the vendee took it all, and suppose then, the soil of the vendor outside of the boundary crumble in for want of lateral support, would the vendee be liable to a claim in respect thereof by his vendor, and, if he would, why? With great respect, such a dealing with a seam of coal is more like selling the materials of an intermediate floor than letting or selling the floor. Suppose a man with a three-story house sold the materials of the second floor, would he have a right to say, "But you must leave enough to support my third story or you must prop it up?" It is true a lessee of a mine may take all the coal and artificially prop the surface; but, practically, this is impossible, owing to the expense; and the same argument applies, viz., why did not the grantor stipulate for it? It may be said that if this argument is true of a lease or grant of coal, to be taken in a certain time, it would be equally so of a grant to be taken whenever the grantee thought fit; if so, of all cases where the ownership of mines and surface was severed; and that the authorities are overwhelming the other way. But, in the first place, the argument is not so strongly applicable where the grant allows the grantee to take at any time, because the grantor may well allow his land to be let down provided it is to be down within a certain time, where he would object if he could not tell for all futurity when

it might happen. In the next place, where the terms of the severance are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case of ownership, not contract, as this is. Here the terms of the contract that gives the right to take the coal are known, and the question is, why does not the general principle apply, viz., look at what is said in the deed, and add nothing except from a necessity for doing so." Yet Baron Bramwell felt bound by the previous decisions of his own country, and doubted as to his decision.

"It is obvious that the English courts are no longer in sympathy with the theory of presumptive or implied reservation of so much of the thing granted as is necessary for support, as a basis for the right of support. Rowbotham v. Wilson, supra; Bonomi v. Backhouse, supra. Our statute, section 2, c. 72, Code, provides: 'Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor, in or to such lands.'

"Shall we still say that there is an implied reservation, in derogation of the express grant? The answer is apparent.

"What we have said does not dispose of the whole doctrine of subjacent support. What is the doctrine or right in this state, and upon what does it rest? It rests upon, and consists solely of, the second proposition above stated—the principle of law, 'sic utere tuo ut alienum non lædas.' This rule of law expresses all that there is of the doctrine. This position seems to be fully recognized by plaintiff's petition for a rehearing.

"It may be asked, what is the difference upon what ground the doctrine or right of subjacent support rests, so that it exists. The reply is that the difference is not so much in the existence as in the manner in which it may be parted with by the surface owner. If the right of support is a reservation of the subjacent estate, or a servitude upon it, or an easement in favor of the surface owner, or a part of the surface estate, there is more show of reason in saying that the right of support may not be parted with by implication or without express words, than there is when the right is considered to consist only of a rule of law commanding that you shall not use your own so as to injure that of another.

"This rule of law relates to the use and enjoyment of property, and not to the ownership of property. As a rule of law it is negative in its application, forbidding the use so as to injure that of another. It is not a servitude when applied between the owner of the surface and the owner of the subjacent strata of land, in the strict sense of that term, any more than it is a servitude upon all property. Likewise, it is not, strictly speaking, an easement in favor of one owner of property against another. It is no more a part of the surface than of the subjacent estate in land, although applicable to both. It has no more force when applied between the different owners of the surface and subjacent estates in land, than when applied between the different owners of property everywhere and of all kinds. As a rule of law, it must be always the same—constant, invariable, and immutable.

"By the side of this principle of law, and to be applied in harmony with it, there is another which must be considered. It is the proprietary right of the owner of property—the principle of absolute dominion where there is absolute ownership.

"Under the principle of law sic utere, etc., I think it is incontrovertible that where the surface and subjacent strata or estate in the same land are owned by different persons, and the right of support has not been parted with by the surface owner, the surface owner is entitled to subjacent support; or, as many of the authorities put it, the surface owner is entitled prima facie to support. All the authorities agree upon that proposition. Also, all of the authorities recognize the principle, sic utere, etc., as one ground of the doctrine of support. Why? Because when the ownership is severed, two separate estates are formed, and neither may be used by the owner to the injury of the other. The owner of the subjacent estate may not so use his own by removing all of it, as to injure the surface estate; but so long as the removal does not injure the surface estate, he may remove.

"Considering this rule of law as the doctrine of subjacent support in this state, how may the surface owner waive or exclude the right of support?

which is simply another form of asking how he may waive or exclude the benefit of the law mentioned. I would answer that he may waive or exclude the benefit of this rule of law in precisely the same way that he may waive or exclude it in relation to any other property owned by him, or any other rule of law the violation of which has caused or will cause him injury. It is now fully settled by the authorities, no matter upon what ground they base the right of support, that the surface owner may waive or exclude it by contract. 'The right to remove all the minerals in a certain strata, though the support of the superincumbent strata is destroyed thereby, may be created by apt words.' 6 Am. & Eng. Dec. Eq. 643, and English and American cases there cited.

"Great difficulty has been experienced by the courts, upon consideration of the several instruments before them, as to what words, or whether the particular words involved, evinced an intent to part with the right of support.

"It seems now to be fully settled that the right of subjacent support may be waived or excluded by plain implication.

"The principal controversy in this case resolves itself to this: Has the plaintiff waived or excluded the right of support, by the deed of conveyance mentioned in the declaration? Let us look at the cases claimed to construe instruments similar in language to that used in this contract. Let me say that none of them interpret language exactly like the contract here presented.

"The case chiefly relied upon by plaintiff is the English case of Harris v. Ryding, supra. As we have said, in that case it was expressly held that the mining rights related to acts to be exercised upon the surface of the land, and that they did not give additional rights to the owner of the minerals reserved, under the ground. Certain American cases are cited, such as Carlin & Co. v. Chappel, 101 Pa. 348 [47 Am. Rep. 722]; Burgner v. Humphreys, 41 Ohio St. 340; Livingstone v. Coal Co., 49 Iowa, 369 [31 Am. Rep. 150]; Williamson v. Hay, 120 Pa. 485 [14 Atl. 379, 6 Am. St. Rep. 716], and others. An examination of these cases will show that they adhere, in some form of expression, to the theory of implied reservation or implied grant as a ground of support, following in the footsteps of Humphreys v. Brogdon. So following, they in effect refuse to admit that the owner may waive the right of subjacent support by implication. I cannot pass this subject, however, without saying that I can in no sense agree with the two cases cited of Livingstone v. Coal Co. and Williamson v. Hay, upon the question of construction. The language of the instruments construed in those cases will be found in the reports thereof. It seems to me that the language used in those instruments was sufficient to waive and exclude the right of support, without considering whether that right rests upon one or both of the propositions first above mentioned. It was Judge Story who said: 'Where the language of an instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import, and is not to be warped from the ordinary meaning of its terms in order to harmonize it with uncertain suppositions, in regard either to the probable intention of the parties contracting or to the probable changes which they would have made in their contract had they forseen certain contingencies.' Those cases seem to me to do violence to the principles of law stated.

"In the Ohio case referred to, the agreement or lease was of the coal, with the right to remove the same. We are not construing that language here. It will be observed that the extent to which the coal might be removed, or the manner of its removal, are not expressed in that instrument. The mining right may not have amounted to more than the grantee or lessee would otherwise have been entitled to as a right of way of necessity, without words. As to that, I do not decide.

"In the work on Mines by Robert Foster McSwinney, of London, issued in 1884, all previous English cases are reviewed, and the rules governing the interpretation of instruments and contracts in relation to support obtaining in England are laid down. I quote from that work, p. 304, as follows: 'If apt words are used, whether in the instrument of severance itself; or in a contemporaneous, or a subsequent instrument; and whether in affirmative or negative terms and whether in express terms, or by plain implication; and whether the underlying mines are granted or excepted; and whether the instrument is voluntary or statutory; the right of support for land in its natural state may be effectually excluded'—citing Rowbotham v. Wilson, 6 E. & B.

593; Shafto v. Johnson, 8 B. & S. 252; Taylor v. Shafto, Id. 228; Murchie v. Black, 19 C. B. N. S. 207; Williams v. Bagnall, 15 W. R. 272; Buccleuch v. Wakefield, L. R. 4 H. L. 377; Smith v. Darby, L. R. 7 Q. B. 716; Eadon v. Jeffcock, L. R. 7 Exch. 379; Buchanan v. Andrew, L. R. 2 Sc. & D. 288; Aspden v. Sedden, 10 Ch. 396; Gill v. Dickinson, 5 Q. B. D. 159; Davis v. Treharne, 6 App. Cas. 466; Dalton v. Angus, Id. 809; Chapman v. Day, 47 L. T. 709; Mundy v. Rutland, 23 Ch. D. 81; Belt v. Love, 10 Q. B. D. 558. A number of cases are there cited in which the right of support was held to have been waived or excluded, either by the express terms of the contract or by plain implication.

"In Smith v. Darby, supra, decided in 1872, Lord Blackburn said: 'But does not this deed say, "You may take them absolutely, only making compensation afterwards"? I cannot agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is: What was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property? If the owner of a horse said: "You may take the horse," and the person to whom this was said had promised to give £20 for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and other sell the horse. So here the question is whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support.'

"In Aspden v. Sedden, supra, decided in 1875, Sir G. Mellish, L. J., in the opinion said: 'If it appears from any express words in the deed, or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the court is bound to hold that the plaintiffs have failed to make out their case.' Also, 'If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful.'

"In Buchanan v. Andrew, supra, decided in 1873, the Lord Chancellor said: 'My Lords, generally speaking, when a man grants the surface of land, detaining the minerals, he is guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and, as prevention is better than cure, the court would be justified in granting an interdict to prevent him from doing so. But on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and deliberately settle a contract they are at liberty to enter into such terms (not being contrary to the public law) as they may think fit; and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon. In such a case, therefore, the whole matter resolves itself into a mere question of construction. No views of a conjectural kind as to what is or what is not reasonable can be admitted, if the contract itself is plain and free from ambiguity.'

"In Davis v. Treharne, supra, Lord Blackburn said, in relation to the exclusion of the right of support: 'If Mr. Treharne, when he left the land, had by express words or by necessary implication, said, "You may take away all the minerals," or, "You must take away all the minerals, letting down the surface," he had a perfect right, at least before he had made the two building leases, to do so.'

"Other English cases might be cited on the question of the interpretation of instruments as to waiver or exclusion of the right of support. From them it is simply a question of intention, in the usual way, from the words used in the instrument.

"In McSwinney on Mines, this subject is treated under certain divisions. Under the division (d), the first case reviewed is Harris v. Ryding, supra, I quote from that work, on page 339, as follows: 'With respect generally to the various cases referred to in divisions (b), (g), (d), and (e) of the present subject, the following observations may be made. In the earlier cases the

courts, in construing the instruments before them, apparently adopted the curious mode, both in the case of land in its natural state, and of land in its nonnatural state, of assuming, in the first instance, the existence of an intention, that the right of support should not be disturbed; and of then proceeding to consider, whether the provisions used could not be reconciled with that intention. In the later cases, on the other hand, the courts seem to have assumed nothing; but to have proceeded at once to construe the instruments before them according to their literal and natural meaning. It is, in many respects, difficult to reconcile the earlier with the later cases; and, on these grounds, the difficulty seems capable of explanation. It need hardly be added that the later cases must, at the present day, be considered authoritative.

" 'Having regard to these circumstances, the following propositions may, as the result of the cases, in which the instrument of severance is producible, and in which some contract has been made, or is said to have been made, with respect to support, be considered as established:

" '(1) Instruments of severance are, at the present day, construed according to their literal and natural meaning, rather than according to preconceived assumptions of the existence of an intention in the parties, or in the Legislature, that the right of support should not be disturbed.

" '(2) Where it appears from the express words of such instruments, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention.

" '(3) Where the mineowner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation. But in other cases, the presence of a clause for compensating the surface owner, at all events if it refers to underground working, are material elements in ascertaining an intention to exclude the right.' * * *

" '(7) The common covenants to work in the usual and most approved mode, or the common clause in an inclosure act under which mines are reserved to the lord, of holding and enjoying them in as full, ample and beneficial a manner as if the act had not been made, or the common clauses giving full liberty of working and winning, are not, of themselves, sufficient to exclude the right.'

"Other propositions are deduced by the author, which I deem it unnecessary to repeat.

"From this it appears that the early English cases, such as Harris v. Ryding, are discredited in their own land upon the question of the construction of instruments relating to the waiver or exclusion of support, and are no longer considered as authority at home on that question. They are, however, relied on here as conclusive on that question. It seems to me that these early English cases would come with more force, as persuasive argument, if they had not been discredited in the land from which they come.

"It is hardly necessary to say that American cases which adhere to, and follow implicitly in the footsteps of, those early English cases, on the question of construction of instruments of severance, adopting the same 'curious mode' of construction, would be discredited in England, and it seems to me in reason should not be followed by us.

"In argument, much stress is laid upon the ability and learning of the English judges. I concede it all. I would detract nothing from their world-wide reputation for ability and learning in the law; but I do say that the trend of the English courts, with all their greatness, is toward, if indeed they have not already come to, the position, to which every other court it seems to me must finally come, of construing an instrument conveying coal or minerals under the ground in identically the same manner in which other written instruments are construed, and in the same manner as instruments conveying any other species of property, free from presumptions or implied reservations not applicable to other instruments of conveyance.

"This being the true rule, we seek the intention of the parties to the instrument involved in this case, as the paramount end to be attained. Certain rules of law applicable to contracts are referred to, all of which will simply aid us in ascertaining the intention of the parties. All the provisions of the contract must be considered together. Then resort must first be had to the language used by the parties therein. As has been said, the contract of the parties

is the law to them. The words are to be given their plain, ordinary, and popular meaning, unless they have acquired a peculiar sense in respect to the particular subject-matter, as by the known usage of trade or the like, or unless the context shows that the parties used them in some other and peculiar sense. 17 Am. & Eng. Enc. L. 11; Railroad v. Schutte, 103 U. S. 118 [26 L. Ed. 327]. When the contract is thus considered, and it appears to be free from uncertainty and ambiguity, and the intention of the parties is apparent, the task is at an end. Uhl v. Ohio R. Co., 51 W. Va. 106 [41 S. E. 340]; Story on Contracts, § 780; 9 Cyc. 587; Gibney v. Fitzsimmons, 45 W. Va. 334 [32 S. E. 189]; Devlin on Deeds, § 837; Salt Co. v. Campbell, 89 Va. 396 [16 S. E. 274].

"Before the deed in question was made, the plaintiff was the owner of the fee and everything in the land in question. He might have removed the subjacent estate, and permitted the surface to subside. He might have destroyed both, or used them at his pleasure, so long as he did not injure another. What he might have done himself, he might grant to another the right to do.

"For a valuable consideration, the plaintiff granted the coal under the land in question, which means all the coal, and he granted certain mining rights, and privileges, among which was the following: '*together with the right to enter upon and under said land and to mine, excavate and remove all of said coal.*' It will be observed that these words are not 'the common covenants of working in the usual and most approved mode,' or 'the common clauses giving full liberties of working and winning.' It cannot be said that the minds of the parties did not meet upon the removal of all the coal, when they so expressed it in the deed.

"If the right to support may be waived or excluded by contract, what kind of a contract is necessary for that purpose? The plaintiff granted all the coal, and the ownership of the surface and of the underlying coal was severed, creating a separate estate in each. If the deed said nothing more, the owner of each would be bound by the rule, sic utere, etc., if the deed said nothing more, I would without hesitation hold that the owner of the surface would be entitled to support, and that the owner of the coal could not so use it by removing all of it as to injure the surface. The deed does not stop with the grant of all the coal. It contains the express additional grant, on the part of the plaintiff, to the grantee, of the right to enter upon and under said land and to mine, excavate and remove all of said coal. It is contended that the conclusion reached in this case overlooks the fact that the law is a part of the contract so far as the parties have not otherwise contracted. I think it does not. I go further, and say that the parties to this contract are presumed to have known the law at the time they entered into it, and to have known that if the deed rested with the simple grant of all the coal and nothing more the grantor would then be entitled to support for his surface. Knowing the law, the parties undertook to further contract. The grantor being willing to give further privileges, and the grantee desiring further privileges, they placed in the deed a further provision granting the right to enter upon and under the land and to remove all of the coal conveyed. This intent gives effect to the additional grant; otherwise, it would seem to be meaningless, and not to grant more than a way of necessity, which the law would give without it. In fact, that is the position taken by the learned attorneys for the plaintiff. It is true that other mining rights are also granted, and the provisions granting them are not without meaning. But the particular grant of the right to enter upon and under the land, and mine and remove all of the coal, is virtually without meaning if it does not give to the grantee the right to remove all of the coal.

"I think there is a vast difference between a grant of all the coal simply and a grant of all the coal together with the right to enter upon and under the land and remove all of it. Without a right to remove all, the owner of the coal may not do so, if to do so would injure the surface.

"As to the waiver or exclusion of the benefit of the rule, sic utere, etc., upon which alone the right to support rests, I ask in what more effective way may it be waived or excluded by the surface owner, than by positively agreeing or assenting, for a valuable consideration, to the specific use complained of? The plaintiff complains of the use by the removal of all. He has by express, positive words, not by implication, agreed to the use of which

he complains. No claim is made that the words used have any technical meaning, as applied to the subject-matter of the deed. The words are intelligible to all. They mean the same to the linguist and the unlettered. If the English language were searched for words of consent or agreement to the removal of all the coal conveyed, I apprehend that none more appropriate could be found. Then, has the defendant so used its property as to damage the plaintiff? According to the averments of the declaration, it has; but we cannot stop there. Has not the plaintiff consented and agreed to that specific use by his solemn deed, and thus been barred of his right to complain? If the plaintiff is injured by the performance of the contract, is it not damnum absque injuria? I must answer in the affirmative. So long as the constitutional guaranty of the right to contract exists, a man may so contract, and the contract must be respected by the court. If a party chooses by a binding contract to agree to an act resulting in damage to his property, he has the right to do so. It is a proper subject of contract. Can the plaintiff say: I have agreed in unequivocal terms to the specific use of the defendant's property of which I now complain, but sic utere tuo ut alienum non lædas. I have agreed to the act, anticipated the injury, and received the compensation therefor. May I not sue and recover the compensation again? I answer, most certainly not. To answer in the affirmative would be to say that the principle, sic utere, etc., may be invoked to impair the obligation of a binding contract. No such application of this principle is authorized by law. It may not be used to perpetrate a fraud; neither may it be used against the express terms of a contract, or to impair or destroy its obligation.

" 'It is a general rule of law that no one can maintain an action for a wrong, where he has consented to the act which occasions his loss.' 8 Am. & Eng. Enc. L. 698; 1 Broom's Legal Maxims, 268, quoting Tindale, C. J.

"In other like cases, where a party has so contracted or consented, it would hardly be contended that he might, notwithstanding the contract, recover damages.

"If the owner of a building sell and convey the materials in a story of the building, together with the right to remove all of them, may he afterwards complain of the removal of what he sold? If one sitting on a chair in his own home, sells that chair together with the right to remove all of it, and it is removed under the contract, may he afterwards complain because he has not the support of the chair as he had before the sale and removal? If one agrees that another may do a particular act which otherwise would constitute a trespass to the former's property, and that act is done pursuant to the agreement, may he complain? It is hardly necessary to say that, in such cases, damages may not be recovered produced alone by the specific act agreed to, if there be no negligence or malice in the manner of doing the act. Illustrations might be multiplied indefinitely. The intention of the parties to the deed is apparent, certain and unambiguous, from the language used. The language of the deed gives the grantee the right to remove all the coal.

"It may be claimed that, although the grantee is given the right to remove all the coal, if he does so he should provide artificial support. As said by Baron Bramwell, this is impossible, owing to the expense. I doubt if it is possible to support a whole tract of land modo et forma by artificial means. It seems to me that there must be some subsidence, some settling, of the surface, if artificial support alone be resorted to. What has been said in relation to agreeing and consenting to the specific use, disposes of the question of artificial support as effectually as the question of natural support. Taking the deed as it is averred to be, we find no express covenant for artificial support. I do not think that artificial support was within the contemplation or intention of either of the parties when the deed was made. No language was used from which such intent may be implied. The court cannot make a contract for the parties, and cannot extend or enlarge one already made.

"Many of the English cases lay stress upon the fact that, under the particular instruments before them, the mining rights applied to acts to be done upon the surface of the land only. If anything were needed to show the contrary intent here, the word 'under,' when read with the rest of the deed, certainly performs that function. It cannot be said, if the word 'under' is to have effect, that it does not clearly mean that the rights granted may be

exercised under the land, and that the right of removal relates to the coal conveyed under the land. It may be claimed that the word 'under' should be excluded as repugnant. Why should it be excluded? The claim is that it is in conflict with the dominant and primary intent of the deed. Is this true? What is the primary or dominant intent of the deed? The primary or dominant intent is to convey the coal under the ground, and the right to remove all of it under the ground is not in conflict, but consistent with this dominant intent. It is argued that the dominant intent of the deed is to reserve the surface. I cannot agree with that. The plaintiff does not own the surface by virtue of this deed. He was the owner of it before this deed was made. He derived title to it, as well as to the coal conveyed, from some other source. He simply did not part with the surface by this deed, farther than therein specified.

"No reservation of surface is expressed in the deed. It was not necessary to do so. I must give meaning and effect to the word 'under,' because I believe it is rational and consistent with the residue of the deed to do so. 'Rules of construction are adopted with a view of ascertaining the intention of the parties, and are founded in experience and reason, and are not arbitrarily adopted. They are not intended to make terms for the contracting parties, but simply to ascertain what the language means which they have employed in their contracts.' 2 Devlin on Deeds, § 837.

"If, however, there were a doubt (which I do not concede), then the rule that the deed must be construed most strongly against the grantor is applicable. 'Where the grant shows the intention, even though ambiguously stated, following the rule that it is construed most strongly against the grantor, the right to surface support will be held not to exist.' Snyder on Mines, § 1032, and cases there cited. It is said that this rule, that a deed must be construed most strongly against the grantor, is the last rule to be resorted to, after everything else has failed, and for that reason it is inveighed against in argument. If it be the last, and there remains ambiguity after the others have been applied, it must certainly be applied before reaching a decision in favor of the grantor. It hardly seems fair to treat this rule so harshly, when we remember that we have a statute (section 2, c. 72, Code) designed at least to emphasize and carry it into effect. Mr. Minor in his Inst., vol. 2, page 918, speaking of the like statute in Virginia, says that it 'seems to be designed to carry this principle of the common law yet further, although there has been as yet with us no judicial determination as to its construction. The enactment is that every deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor, in or to such lands.'

"I think the language used in the deed under consideration, no matter what may be the ground upon which the right to subjacent support is thought to be based, is sufficient to exclude the right to support. I would apply here the same rules of construction applicable to other instruments of like character conveying other property; no stronger, no weaker, but with the same effect upon all. This is the trend of many of the late cases and authorities, and I feel that it is the true rule.

"Section 7, c. 79, Code, is cited as bearing upon this case. In my judgment, it has no application.

"It is contended that the court should look at the hardship of a decision in favor of the defendant. If the contract is binding, the court cannot relieve against it, because of hardship alone. It is claimed by each side that great hardship will result, in case of an adverse decision. This may be true; but if true, it is a hardship of their own making.

"According to the declaration, the plaintiff's surface has subsided, and damage resulted. If the plaintiff was required to leave, of the coal conveyed to it, enough to support the surface, which is estimated at from one-fourth to one-half of the whole, then the part so left would be of no value in place to the defendant. Under our law, the defendant, being the owner thereof, must pay taxes on the portion left, through all the years to come. It is persistently urged that the modern and best methods of mining require the removal of all the coal for the benefit of the surface; that to do so permits the surface to reform and the remaining strata to re-unite, thus preventing the

continuous draining of the water from the surface. This may or may not be true; I do not know. If true, the damage to plaintiff's surface may not be so great as it otherwise would be."

We are not unmindful of the fact that the decisions of the courts of England and many of the courts of this country as respects this question are not in harmony with the decisions of the courts of West Virginia. Nevertheless, we find ourselves impelled to the conclusion that this difference is on account of the peculiar facts involved in this case, and not because of the propositions of law announced by the courts to which we refer. It must be borne in mind that the decision of the West Virginia Court of Appeals will be held by the courts of that state to be a rule of property in that state in all suits that may be instituted between citizens of said state. If this court should decide otherwise, we would have a condition in that state, which would be without a parallel in judicial procedure. Under such circumstances, we would have one rule of property by which citizens of West Virginia would be governed and an entirely different rule of property where a suit was instituted by a nonresident of West Virginia in the Federal court. This would necessarily result in a great injustice and lead to interminable confusion; and, on that account, we would be inclined to adopt the rule of the West Virginia Supreme Court of Appeals, even if, in view of the peculiar provisions of the conveyance by which the land in controversy was transferred, we did not find ourselves in accord with that tribunal. For the reasons stated, we are of the opinion that the learned judge who heard this case was not in error in sustaining the demurrer filed therein. Therefore the judgment of the lower court is affirmed.

GOLD v. SOUTH SIDE TRUST CO.

(Circuit Court of Appeals, Third Circuit. May 5, 1910.)

No. 1,351.

1. BANKRUPTCY (§ 467*)—APPEAL—REVIEW—DISCRETIONARY RULINGS.
   A ruling, concurred in by both referee and District Judge in an administrative matter in bankruptcy, which is discretionary, will not be reversed by the appellate court, unless unmistakably wrong.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 467.*
   Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 467*)—SALE OF PROPERTY—PAYMENT OF BROKER'S COMMISSION—DISCRETION OF COURT.
   The action of a District Court, affirming that of a referee, in refusing to allow a commission to a broker for negotiating a sale of property of a bankrupt, will not be reversed on appeal, where there was no contract by the trustee to pay for the service, but, on the contrary, the trustee refused to make a contract, and told the broker that, if he desired a commission, he would have to present a petition to the referee or the court, which he did not do prior to the sale.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 467.*]
   Archbald, District Judge, dissenting.

*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 Pennsylvania.

In the matter of Frank Torchia, bankrupt. From an order of the District Court, refusing the petition of Jacob Gold, he appeals. Affirmed.

The following is the report and opinion of Blair, Referee:

On November 19, 1909, Jacob Gold filed his petition, setting forth that he "succeeded" in selling to A. Ricordino a certain lot of ground belonging to the bankrupt's estate in the city of Pittsburg, fronting 54 feet on the southerly side of Webster avenue, and running back 110 feet; that the highest price bid for said property at public sale was $17,000, and that petitioner succeeded in getting for the same the sum of $34,000, after working at the same for over three months—and asking the referee to award him 2 per cent. commission on said sum of $34,000. This the referee refused to do, and thereafter, on November 26, 1909, a petition for a certificate of said ruling of the referee was presented, and upon certain statements of counsel, made at the time of presenting the said petition for a review, the referee ordered a rehearing of the matter, and thereupon, on December 2, 1909, a hearing took place before the referee at his office in the city of Pittsburg, at which certain testimony and evidence, a true and correct transcript of which is herewith filed, was presented to the referee.

From the testimony and evidence in the case it appears that the petitioner, Jacob Gold, is a real estate broker in the city of Pittsburg. About four months ago, or some time in the last summer, he called upon Mr. Page, president of the South Side Trust Company, the trustee in the case, and he says that Mr. Page told him to sell the lot above mentioned, and that he would get a commission. He further states that the commission was then and there agreed upon as $680. He afterwards qualifies this, of course, by saying it was 2 per cent. He further testifies that he interested one Ricordino, the purchaser of the property, in the purchase thereof, and in this he is corroborated by Ricordino's bookkeeper, and to some extent by Mr. Page, the president of the South Side Trust Company, the trustee in this case. His testimony is to the effect that there was an agreement by Mr. Page that he should have a commission of 2 per cent.; but his own testimony as to this is by no means as clear as it ought to be, and hardly goes further than that his understanding was that he was to get 2 per cent. On the other hand, Mr. Page, who appeared as a witness before the referee, and who frankly stated that, if the petitioner were entitled to it, the trustee had no objection to his receiving it, says that when Mr. Gold came to him he told him distinctly that the trustee would not agree to pay him any commission whatever, and that if he wanted a commission he must apply to the court and obtain an order authorizing the payment of any such commission. This Gold did not do, but now comes on an implied contract or quantum meruit from this estate.

The weight of the testimony, as already stated, shows that there was no express contract on the part of the trustee to pay him a commission, and the question is whether, without such express contract, and without a previous order authorizing such commission, the petitioner is entitled to a commission on the sale of a bankrupt's real estate, which had been advertised for sale, and upon which bids had been publicly made to the trustee. The referee is of opinion that, upon sound principles, this claim must be refused. While it may be that in the given case the bankruptcy court would feel justified in employing an agent, sound policy forbids that claims of this kind, based upon services alleged to have been rendered in procuring purchasers, and brought to the attention of the court in the first instance after the sale, should be permitted. A bankrupt's property is always for sale, and, so far as the estate is concerned, the services of an agent ordinarily are in no way required, and the law designates the agent who shall make the sale, namely, the trustee of the estate. The opportunity which the recognition of such a claim as this would afford for fastening upon estates alleged claims of brokers and agents led the referee years ago to instruct trustees that they were to make no con-

tracts with agents for commissions in the sales of property of estates in their hands, and that, if they did so, they undertook a serious personal responsibility in making such contracts. If an agent is to be employed by a trustee, whose duty it is to make the sale, his employment should be approved by the court before the services are rendered. Even in the case of a private owner, an agent must show a contract, express or implied, with the owner, before he can recover. In this case it is difficult to see how the bankruptcy court would have authorized the commission claimed. The record in the case discloses that the real estate of the bankrupt is subject, in addition to specific liens on each property, to general liens of judgments, etc., to an amount approximating $100,000. Any commissions authorized would have to be paid out of the purchase money, which might be a great injury to lien creditors, or, if not, out of the general estate, an even greater injury to the unsecured creditors.

The referee is of opinion that the petition in this case should be refused.

Lowrie C. Barton, for appellant.

James L. Wehn, for appellee.

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

BUFFINGTON, Circuit Judge. This is an appeal by Jacob Gold from an order of the bankrupt court confirming a report of a referee which rejected a claim of said Gold. The case arose on a certified question, viz.:

"Whether, under the facts set forth in the petition of Jacob Gold, and the testimony and evidence thereunder, the petitioner is entitled to have allowed him the sum of $680 as commission on the sale of certain real estate."

The petition of Gold set forth that he was a licensed real estate broker; that the highest price bid for the bankrupt's property was $17,000; that "your petitioner succeeded in getting for the same the sum of $34,000, after working at the same for over three months." There was neither proof nor allegation of any contract to pay on the part of the trustee, or any application to the referee for allowance for prospective service. In the absence of such contract or allowance, was the court in error in sustaining the refusal of the referee to allow fees? Clearly not. No legal liability existed, and, while it may be that under the facts here disclosed the referee might have allowed compensation, such allowance would be an exercise of discretionary power, and not an enforcement of legal rights. Indeed, the counsel for the appellant conceded at the argument in this court that the allowance of this claim by the court and referee was discretionary. Such being the case, and although there may be merit in the appellant's contention, we are strongly averse, unless it clearly appears wrong was done, to reversing a ruling concurred in by both referee and District Judge in an administrative matter. If abuses threaten to creep into bankrupt procedure, those charged with local administration are in better position to prevent such abuses than are appellate tribunals. It follows, therefore, that in such matters the court's action should not be reversed, unless unmistakably wrong.

Now in this case the appellant had no one but himself to blame if he is not paid for services he rendered. In common with a large number of brokers in the city, he received from the trustee a circular

letter calling attention to this property. In response thereto he met the trustee, was encouraged to sell, and a commission of 2 per cent. was talked about; but, as he testifies, the trustee did not hire him to sell, and expressly told him that he "would have to present your petition to the referee, or the court, in case you wanted any commission in the matter." The testimony of the trustee's officer was:

"Q. What arrangements did you make with Mr. Gold, if any, with reference to this commission? A. I am not sure that anything was said about commission, but the first talk I told him we could and would not agree to pay him any commission—we could and would not pay any commission, but he would have to present a petition to the court; and I said, 'In the event, if you would get a commission, what commission would you want?' and he said, 'Two per cent.' We never made any agreement to pay him 2 per cent. or any amount, and I admit I think his efforts resulted in the sale; but I never agreed to pay him any commission, but he would present his petition here. As to whether he was to be paid, it was simply that the trustee would not pay; but, if the court would allow him a commission, he would ask for 2 per cent."

Had he made the application suggested, the lien creditors, who were entitled to the proceeds of the sale of this real estate, would have had notice, and all dispute and uncertainty avoided. But in spite of the warning, and without making the application suggested, the broker went ahead. He was not only a volunteer, but a volunteer with warning. If under such circumstances he had a right to collect for his services, or the bankrupt court should allow them, we can well see a dangerous precedent might be set. In view of that possibility, we think it unwise to disturb the joint action of judge and referee.

The appeal is therefore dismissed.

ARCHBALD, District Judge (dissenting). This is not, in my judgment, a matter of discretion. The petitioner has a valid claim against the bankrupt's estate for services performed as a duly licensed real estate broker, undertaken at the instance of the trustee, by which the estate was materially benefited; and the court was bound to recognize and allow it. After the property had been twice put up at public sale, at which $17,000 was the best bid that could be obtained, the trustee sent circular letters to a number of real estate brokers of Pittsburg, including the petitioner, soliciting their assistance in procuring a purchaser; and after several months' work the petitioner succeeded in interesting a responsible party and getting him to give the price which the trustee demanded, $34,000, at which the property eventually was sold to him. It was understood that the petitioner's claim for commissions would be 2 per cent. on the amount realized, which the trustee assented to as reasonable, provided the court approved it. It is no doubt true that the trustee did not bind himself to pay that amount, and, indeed, could not, except conditionally; the approval of the court, as in every case, being essential. But subject to this condition the validity of the claim was recognized, and the court in justice was bound to ratify it. The claim was called to the attention of the referee before the sale had been finally confirmed, and it is not, therefore, as though it came in afterwards in reduction of the price at which the sale was reported. If this was a case between individual

parties, there would be no question as to liability; and the bankruptcy court ought to be as ready and as much bound to recognize its obligations as an individual. The petitioner was not a volunteer. He acted by direct solicitation, the trustee seeking to avail itself of the facilities of the brokerage business in which he was engaged; and his efforts were most successful, the price obtained through his action being double that which had been bid at public sale, $17,000 additional—a very material advance—being secured by means of them.

The reasons given by the referee for rejecting the claim are far from satisfactory. He seems mainly to rely on the policy which he has adopted, and the rule which he has laid down in pursuance of it, by which he requires trustees to get authority in advance when the assistance of brokers is desired in making sales of real estate. No doubt the rule, as a rule, is a good one, and may properly be invoked to protect bankruptcy estates against inroads, to which they might otherwise be open. But judgment, after all, is to be exercised, and the rule is not to be applied indiscriminately to throw out claims of merit. A policy is not to be pursued as a hard and fast rule where it works injustice. It seems to be implied by the referee that, as trustees are the agents designated by the law to make sale of real estate, they are themselves to hunt up purchasers; but they are entitled to the assistance of counsel to guide them legally, and may employ an auctioneer to cry their sales without question; and why, then, may they not avail themselves in a proper case of the experience of real estate men to help dispose to advantage of the property? They certainly are not called upon to drum up bidders; and if they are not to be allowed to get such assistance, bankruptcy estates are likely to suffer, as would have been the case in this instance, rather than the opposite. Even, therefore, on the basis that the allowance of this claim is discretionary, the referee has practically refused to exercise his judgment with regard to it, disposing of it on immaterial issues, rather than a consideration of the merits.

To affirm this decree, in my judgment, would work an injustice in order to support a policy, and I therefore dissent from it.

SEEFELD v. DUFFER.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1910.)

No. 1,945.

1. COURTS (§ 359*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

In determining the title of real estate, the federal courts are governed by the law of the state as to transfers and alienation, and the effect of decrees and judgments of the state courts and as to the construction of its statutes are controlled by the decisions of its highest court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939, 943; Dec. Dig. § 359.*

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.]

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

2. COURTS (§ 374*)—FEDERAL COURTS—PROCEDURE OF STATE COURTS—EQUITABLE DEFENSES IN ACTIONS AT LAW.

The rule that equitable defenses cannot prevail against the legal title in the federal courts is not affected by the statutes of the state or the procedure of its courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 981; Dec. Dig. § 374.*]

3. PUBLIC LANDS (§ 172*)—TEXAS STATE LANDS—SALE OF HEADRIGHT CERTIFICATE BY ADMINISTRATOR—EFFECT OF PATENT TO HEIRS OF DECEDENT.

Where a headright certificate issued by the Board of Land Commissioners of Texas was sold and transferred by the administrator of the holder under an order of court, was located by the purchaser, and a patent issued in accordance with the usual practice to "the heirs" of the decedent, their heirs and assigns, the purchaser acquired only the equitable title to the land, the legal title passing to the heirs of the deceased.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 573; Dec. Dig. § 172.*]

4. JUDGMENT (§ 475*)—COLLATERAL ATTACK—PROBATE COURTS—GRANTING ADMINISTRATION.

Where a probate court, having jurisdiction, has determined that administration upon the estate of a decedent was proper, and has issued letters of administration and administered upon the property, no other court not exercising appellate jurisdiction can correct its errors of judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 910; Dec. Dig. § 475.*]

5. EXECUTORS AND ADMINISTRATORS (§ 29*)—ORDER OF APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.

If an order appointing an administrator is so written as to leave it doubtful in what estate the appointment is made, other parts of the probate record may be referred to for the purpose of removing the doubt, and where it appears that the administrator qualified and acted in a particular estate and made final report and settlement, under the law of Texas his authority cannot be questioned collaterally to invalidate a sale made by him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 178–182; Dec. Dig. § 29.*]

6. JUDGMENT (§ 497*)—COLLATERAL ATTACK—COURTS OF PROBATE JURISDICTION.

Where the record of a court of general jurisdiction in probate matters shows that the necessary steps were taken to invoke such jurisdiction in a given case, or when the record is silent on the subject, the decrees of the court are conclusive when collaterally called in question.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 937; Dec. Dig. § 497.*]

7. INJUNCTION (§ 26*)—RESTRAINING ACTION—TRESPASS TO TRY TITLE—EQUITABLE TITLE.

In 1850 a county court of Texas, which was a court of general jurisdiction in probate matters, appointed an administrator of the estate of a decedent, who under order of the court sold a land certificate which had been issued in favor of decedent, the sale was approved and a conveyance executed to the purchaser. He located the certificate and a patent was issued in favor of the heirs of the decedent, but was delivered to and recorded by the purchaser who with his grantees asserted ownership of the land, exercised control over it and paid the taxes thereon for more than 50 years, a part of the time being in open and notorious possession. By Laws 2d Leg. Tex. c. 157, in force at the time, the administrator's deed was prima facie evidence that all the requisites of the law had been complied with in making the sale. *Held*, that the heirs of the decedent

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

were not entitled after such lapse of time to assert the legal title as against such equitable title and that an action of trespass to try title brought by one of such heirs in a federal court would be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 54, 57, 58; Dec. Dig. § 26.*]

8. EQUITY (§ 86*)—LACHES—GROUNDS OF BAR—RECOGNITION OF RIGHT BY ADVERSE PARTY.

Laches cannot be imputed to one in possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title so long as there is no attempt to assert such title, and he has no reason to anticipate such an attempt.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 232; Dec. Dig. § 86.*]

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

In Equity. Suit by Herbert G. Seefeld against Mattie B. Duffer. Decree for defendant, and complainant appeals. Reversed.

C. L. Bates, Marshall Hicks, and Yale Hicks, for appellant.

F. Vandervoort, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit in equity to enjoin an action at law. The bill was filed by Herbert G. Seefeld, a citizen of Wisconsin, against Mattie B. Duffer, a citizen of Illinois. The subject of controversy is 640 acres of land situated in Dimmit county, formerly a part of Bexar county, Tex., and of value more than $2,000. The Circuit Court dismissed the bill, and the complainant appealed.

The action at law sought to be enjoined was trespass to try title brought by Mattie B. Duffer, the appellee, against Herbert G. Seefeld, the appellant. There is but little controversy as to the facts. Mrs. Duffer is an heir of John E. Jones, and claims the land as his heir. Seefeld's contention is that he has an equitable title to the land by virtue of proceedings in the probate court of Harris county, Tex., in the matter of the administration of John E. Jones' estate. Mrs. Duffer's contention is that the administration and the proceedings under which Seefeld claims are void. These contentions present the controlling question before us.

It is necessary to state the facts in detail in order to determine the law that should govern the case. On October 14, 1850, Jacob De Cordova presented his petition addressed to the Chief Justice of Harris county, praying for the appointment of an administrator of the estate of John E. Jones. The petition alleged that "John E. Jones, a citizen of Harris county, enlisted or joined the Mier expedition, and was killed in the assault upon the town of Mier; that he died without a will; * * * and that he is entitled to pay for services on said expedition." Notice of the application was given "as the law directs." The county court of Harris county, at the October term, 1850, granted the prayer of the petition by appointing Jacob De Cordova administrator. It was ordered at the same time that he file an inventory and

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

give bond in double the amount of the appraisement. The questions as to the form and validity of this order will be more fully stated and considered later. On December 9, 1850, an inventory and appraisement of the "effects of the estate of John E. Jones, deceased," was filed, embracing "headright certe. for 640 acres, issued by the Coms. of Harris County," valued at $50, and a claim for "pay for services on the Mier expedition" for $350, valued at $87.50. J. De Cordova made oath to the inventory—that it "comprises all the property of the estate of John E. Jones," etc.—and gave bond as the administrator of John E. Jones, deceased, the bond reciting that he had been duly appointed. On March 24, 1851, on his application, an unconditional land certificate, No. 1,035, for 640 acres was issued by the Board of Land Commissioners of Harris county, Tex., to Jacob De Cordova, administrator of John E. Jones, deceased. On April 21, 1851, the said administrator presented his petition to the county court of Harris county, Tex., in which he alleged "that accounts against said estate to amount to one hundred and twenty dollars have been presented, that costs of court have accrued to amount of forty dollars, and that he has not sufficient means wherewith to pay the claims. He further represents that there remains to said estate headright claim of the decd. for 640 acres, 2nd class, issued by the Board of Land Coms. of Harrisburg, Harris county; the condl. certe. No. 985, dated Oct. 11, 1838; the unconditional No. 1035, dated 24 March, 1851." The petition concludes with a prayer "for an order to sell said headright, as also the land upon which the same may be located, as well as all grants for land to be made by virtue of said certificate of headright by the govt. of Texas to the said John E. Jones, or his heirs or legal representatives."

At the April Term, 1851, the court granted the order of sale as prayed for. On June 30, 1851, the said administrator made a report showing that, after giving proper notice, he had made the sale on June 3, 1851, pursuant to the order of the court, and that W. R. Baker was the highest bidder and purchaser at $20. The property sold is described as follows in the report of the sale:

"The conditional and unconditional headright certificate of John E. Jones, issued by the Board of Land Coms. of Harris (Harrisburg) county, for 640 acres, 2nd class; the condl. certe., dated Oct. 11, 1838, No. 985; the unconditional, dated March 24, 1851, No. 1,035; as also the land upon which the same has been located, as well as all grants of land to be made by the govt. of Texas by virtue of said headright to the said decedent, or his heirs or legal representatives."

The report of the sale was confirmed, and the administrator was directed to make conveyance to the purchaser, William R. Baker. On July 3, 1851, said administrator made deed in due form to William R. Baker, as directed by the court, which was recorded in Bexar county, Tex., on January 25, 1853. On November 5, 1851, said administrator filed his account for final settlement, which account was approved and the administration ended. After the purchase of the certificate by William R. Baker at the administrator's sale, as before stated, he had the land located under the certificate surveyed, and applied to the

state of Texas for, and obtained, a patent for the land. The patent was not issued to Baker as the transferee of the certificate, but was issued to "the heirs of John E. Jones, dec'd., their heirs or assigns," as was the usual practice of the Texas Land Office at that time. The patent was delivered to Baker and filed by him for record January 25, 1853, and was recorded June 22, 1853, in Bexar county, Tex., where the land was located. The patent was returned to Baker after it was recorded, and was held by him till his death, when it was found among his papers by his executors. On December 6, 1899, Baker's executors sold and conveyed the land to J. H. Burnett, and Burnett's heirs, he having died, sold and conveyed it to B. Vesper, and Vesper sold and conveyed it to Herbert G. Seefeld, the complainant. Mattie B. Duffer, relying on the legal title vested in her by the patent, she being an heir of John E. Jones, sued at law for the land. Herbert G. Seefeld, relying on his equitable title arising from his purchase of the certificate at the administrator's sale, and on the facts above stated, sues in equity to enjoin the action at law. The decree dismissing the bill is assigned as error.

1. In deciding this case, so far as it involves the construction of statutes of the state of Texas, we are controlled by the decisions of the court of last resort in that state; and we, of course, look to the law of the state in which the land is situated for the rules which govern its transfer and alienation, and the effect to be given decrees and judgments affecting titles. Simpson County v. Wisner-Cox Lumber & Mnfg. Co., 170 Fed. 52, 95 C. C. A. 227. But, so far as the practice or procedure in equity is concerned, the case is not controlled by the rules of the Texas courts. The distinction in procedure between actions at law and cases in equity being abolished in Texas does not affect the rule that equitable defenses cannot prevail against the legal title in an action at law in the federal courts held in Texas. This made it necessary for the complainant to resort to equity. 1 Bates on Federal Equity Procedure, § 20.

2. The land certificate was transferred to Baker before its location. It was subsequently located by Baker, but the patent was issued, as before stated, to the heirs of John E. Jones, deceased. Assuming, for the present, that the administrator's sale of the certificate was valid, Baker obtained only an equitable title to the land, the legal title passing by the patent from the state of Texas to the heirs of John E. Jones. Thompson v. Langdon, 87 Tex. 254, 28 S. W. 931; Abernathy v. Stone, 81 Tex. 430, 16 S. W. 1102.

3. The Texas statutes in force when the letters of administration were granted conferred jurisdiction on the county court to grant letters in the county where the deceased had resided, or in the county where his principal property was at the time of his death, or in the county where he died. Laws 2d Legislature of Texas, vol. 2, c. 157, p. 235. No criticism is made as to the petition for letters of administration filed by De Cordova, except it is claimed that "the petition disclosed no other assets for administration than a claim against the state of Texas, invalid by terms of the law." We do not deem it incumbent on us to consider the question whether or not the claim re-

ferred to in De Cordova's petition was valid or invalid. The allegation was made that decedent "was entitled to pay for his services in said expedition," referring to the Mier expedition. The court, in granting the letters of administration, held that he was so entitled, or, at least, that an administration was necessary or proper. If the jurisdiction of the court to grant the letters was dependent on there being assets of the estate of John E. Jones, it is upheld, so far as assets are concerned, by the record. It appears from the inventory and appraisement, and from the final settlement of the estate, that assets of the estate were received by De Cordova as administrator, and that $140 of the assets was realized from a sale of a certificate of public debt of Texas granted to the deceased for his services. The record is quite sufficient to show that there were assets belonging to the estate. It is true that there were circumstances connected with this administration that should have made the probate court scrutinize the application, and it may be that the grant of letters should have been refused; but after that court has determined that administration was proper, no other court not exercising appellate jurisdiction can correct its errors of judgment. Martin v. Robinson, 67 Tex. 368, 3 S. W. 550.

4. The main defense presented to the bill is an attack upon the validity of the decrees of the probate court. It is not a direct attack, instituted for the purpose of correcting, vacating or enjoining those decrees. The attack is indirect or collateral, by way of defense—an attempt to avoid the binding force of the decrees in a proceeding not instituted for that purpose. The decrees of the court granting letters, ordering the sale, and confirming the sale, cannot be successfully attacked collaterally upon any evidence or suggestion outside of the record. The only relief permitted against the erroneous or improper determination of the questions settled by the decrees is found in a direct attack on them in a proceeding brought for that purpose. Crawford v. McDonald, 88 Tex. 632, 33 S. W. 325. If the decrees are not merely erroneous and voidable, but absolutely void, they would be subject to collateral attack, and they could not be held to be the basis of legal rights.

5. The printed record before us shows that the transcript of proceedings in the administration of John E. Jones' estate was taken from two books of the probate records. The practice was to enter the decrees as they were made in the estates administered in a minute book; and after each estate was settled, all the decrees relating to that estate were entered together in a record book. The complainant exhibited with his bill a transcript from the record book which showed the orders in the administration of the estate of John E. Jones separately, and they therefore appeared as relating to his estate alone. The defendant, in her answer to the bill, presented a transcript from the minute book, showing that the orders were there entered in a manner that apparently made them relate to several estates. The order, taken from the minute book, appointing De Cordova administrator, is as follows:

"County Court Oct. Term, October 28, 1850.

"Est. Amos Eadron.
" James Robertson.
" John E. Jones.
" Cyrus T. Ward.
" Thos. L. Jones.
" Jno. D. McAllister.
" Geo. Alexander.
" James D. Cocke.
" Wm. M. Watrous.
" George Mason.
" Dennis Sullivan.

"The petition of Jacob De Cordova for administration of this estate coming up for consideration, and it appearing to the court that legal notice of this application has been given as the law directs, and no one appearing to contest or oppose the same, it is ordered, adjudged and decreed by the court that Jacob De Cordova be and he is hereby appointed administrator of this estate with full power as such subject to the orders and decrees of the court.

"It is further ordered that he file an inventory of the property belonging to said estate duly valued under oath by who are hereby appointed appraisers for the purpose. It is ordered that he file a bond in double the amount of the appraisement with securities to be approved by the court. It is further ordered that thereupon letters of administration issue, and further ordered that the business of this estate be continued."

The contention of the appellee is that this order is void and subject to collateral attack, because it purports to appoint De Cordova administrator of one estate out of eleven, without stating which estate. The appellee relies on the case of Harwood v. Wylie, 70 Tex. 543, 7 S. W. 789, to sustain this contention. The court, in effect, said in that case that an order of the probate court granting letters of administration upon one estate out of a number, without stating which one, will apply to none of them. The decree was held subject to collateral attack. But there were other grounds upon which the conclusion was reached. The administration was not taken out in the county where the statute declared it should be, but in a remote county where the parties interested in the estate had no reason to expect it. An examination of the case will show many irregularities in the procedure of the probate court, which led the commission of appeals to the conclusion that the decrees in that case were open to collateral attack. In a later case—Grant v. Hill, 44 S. W. 1027—the Court of Civil Appeals of Texas had under consideration orders of the probate court granting letters of administration, ordering a sale of the headright of deceased, and confirming the sale. Each order had at its head or commencement the names of from two to ten different estates, and in the application for the order of sale, the name of the estate in question appeared in the center of the list of estates. The orders were held valid. The Supreme Court of Texas, without a written opinion, refused to grant a writ of error.

In Templeton v. Ferguson, 89 Tex. 56, 33 S. W. 333, it was contended that the lower court erred in not holding the administration void because "the application was made for administration on three estates in one petition and granted in one order." The court, by Denman, J., said:

"This was a mere error in procedure, which cannot affect the validity of the proceedings in this collateral attack. It is well settled that where a court of general jurisdiction, in the exercise of its ordinary judicial functions, renders a judgment in a cause of which it has jurisdiction, such judgment is never void, no matter how erroneous it may appear from the face of the record or otherwise to be."

If the order granting letters is so written as to make it doubtful whether De Cordova was appointed administrator of the estate of John E. Jones, it is permissible to refer to other parts of the probate records to remove the doubt. Crawford v. McDonald, supra. The record shows that he qualified and gave bond as administrator of the estate of John E. Jones, returned an inventory and appraisement of the property of the estate, made reports, and performed all the usual duties incumbent on an administrator, including a final settlement of the administration. After the probate court had so recognized one as administrator, it has been held by the Court of Civil Appeals of Texas that, even if he had not been appointed, his authority could not be called in question collaterally to invalidate a sale made by him. Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984, 987.

The record shows without dispute that more than half a century ago Baker obtained the equitable title to the land; that under his claim of title he asserted ownership and exercised control over the land, and paid regularly all state and county taxes levied on it till his death; and that thereafter it was assessed to his lawful representatives till it was sold to Burnett, who paid the taxes till his death, and that it was assessed to his legal representatives till they sold it to Vesper, when it stood assessed in his name till conveyed to the complainant. The tenants of Baker's heirs held the land under fence for about six years. During all this time—a period of more than half a century—Baker's muniments of title were of record, and the records of the probate court showing the administration and the sale of the headright stood unattacked. The purchaser having complied with the terms of the sale, the deed made by De Cordova, as administrator, to Baker on July 3, 1851, was, by law in force at the time, made prima facie evidence that all the requisites of the law had been complied with in making the sale. Laws 2d Legislature of Texas, p. 257. The court granting the letters and ordering the sale had jurisdiction over all matters relating to the administration of the estates of decedents. As to such matters, it was a court of general jurisdiction. When it assumes to exercise it in a given case, all presumptions are in favor of the validity of its proceedings. When the record shows that the steps necessary to clothe the court with power to act in the given case were taken, or when the record is silent on the subject, the decrees of the court must be held conclusive when collaterally called in question. Martin v. Robinson, supra. This is a rule of public policy necessary to protect the interests of those relying on judicial proceedings. There is certainly no reason for relaxing the rule or refusing to observe it in this case when the complainant and those under whom he claims have relied on the decrees without interruption for more than 50 years.

6. The appellee contends that the appellant was not entitled to relief because of laches; that Baker and those claiming under him asserted ownership under his muniments of title for more than 50 years; and that no reason is shown why a suit was not sooner brought asserting the equitable title and seeking to obtain the appellee's legal title. Whether the lapse of time is sufficient to bar relief in equity is dependent on the facts of each particular case. Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383. So far as the record shows, Baker's claim to the land was not disputed in his lifetime, nor was the right of his executors, or their vendee. No objection was made to their possession of the land, which, for a period of several years, was open and notorious. The first intimation of a claim on the part of the heirs of Jones that the administrator's sale was invalid was when the action at law was brought by the appellee for the land January 16, 1897. It does not appear when process was served in this action on the appellant, but he filed his bill to enjoin the action at law on February 17, 1909. Laches cannot be imputed to one in possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title. The bill was filed when notice was given of the appellee's adverse claim by the suit at law. That was sufficient to protect the appellant against the plea of laches, as expressly ruled in Ruckman v. Corey, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728, and Brainard v. Buck, 184 U. S. 99, 109, 22 Sup. Ct. 458, 46 L. Ed. 449.

A decree will be entered here, perpetually enjoining the action at law, and vesting the legal title to the land in the complainant.

Reversed.

In re STEWART.

(Circuit Court of Appeals, Sixth Circuit. May 3, 1910.)

No. 2,007.

1. BANKRUPTCY (§ 293*)—JURISDICTION OF COURT—ACCOUNTING BY ASSIGNEE FOR BENEFIT OF CREDITORS—POWER TO MAKE SUMMARY ORDER FOR SURRENDER OF PROPERTY.

A general assignment for the benefit of creditors under a state law does not constitute the grantee an assignee for value, but merely makes him the agent of the assignor for the distribution of the proceeds of the property, and being such agent his possession is that of his principal, and, as to property or its proceeds remaining in his possession after the bankruptcy of the assignor, he does not hold adversely to the latter's trustee by the mere fact of such possession; and where he voluntarily, or in obedience to an order of the state court without objection, submits his account to the bankruptcy court, such court has jurisdiction to settle his accounts and to make a summary order requiring him to turn over such property or funds to the trustee, notwithstanding his claim to credits on account of commissions, extra services, and bills for legal services and expenses incurred but not paid. As to sums which have been actually paid out by him, however, the court may properly remit the trustee to a plenary action for their recovery.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 293.*]

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

2. BANKRUPTCY (§ 484*)—ASSIGNEE FOR BENEFIT OF CREDITORS—SERVICES AND EXPENSES INCURRED AFTER BANKRUPTCY.

Where an assignee for the benefit of creditors retained possession of the property for some years after the filing of a petition in bankruptcy against the assignor and until final adjudication and the appointment of a trustee, no receiver having been appointed, he may not improperly be treated as to the settlement of his accounts as a quasi receiver and allowed compensation for such services and disbursements as benefited the estate, but his right to commissions should be determined by the bankruptcy act rather than the state statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 484.*]

3. BANKRUPTCY (§ 446*)—PROCEEDINGS TO REVISE—MATTERS REVIEWABLE.

In a proceeding to revise under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the Circuit Court of Appeals is limited to a review in matter of law and cannot determine questions of fact involved in the finding or order sought to be reviewed, where there is any evidence to support such finding or order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

4. BANKRUPTCY (§ 471*)—ASSIGNEE FOR BENEFIT OF CREDITORS—EXPENSES INCURRED IN RESISTING ADJUDICATION.

An assignee for the benefit of creditors, on an accounting after his assignor has been adjudicated a bankrupt, is not entitled to an allowance from the funds in his hands for expenses incurred in resisting the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 471.*]

Petition to Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Ohio, in Bankruptcy.

In the matter of Otho L. Hays, bankrupt. Petition by Gilbert H. Stewart to revise an order of the District Court. Affirmed.

G. H. Stewart, for petitioner.

J. N. Van Deman, for respondent.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. This is a proceeding under section 24b of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) to revise an order of the District Court affirming the order of the referee in bankruptcy stating the account of petitioner, as assignee under the Ohio state law of the bankrupt Otho L. Hays, and requiring petitioner to pay over to the trustee in bankruptcy the sum of $4,086.61, found by the referee to be in petitioner's possession and belonging to the estate of the bankrupt. The facts are these: The assignment from Hays to petitioner was made April 29, 1904. The assignee entered at once upon the performance of his duties under the assignment. Petition in bankruptcy was filed July 16, 1904, and thus less than three months after the assignment, the act of bankruptcy alleged being the assignment in question. The assignee resisted the petition for the adjudication in bankruptcy, carrying the contest through the District Court and into this court, where the decision of the District Court adjudicating Hays a bankrupt was affirmed. Hays v. Wagner, 150 Fed. 533, 80 C. C. A. 275. The ad-

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

judication in bankruptcy was first entered as of July 14, 1905. It was later entered as of December 26, 1905. Final adjudication was made March 15, 1907, under order of affirmance made by this court. A trustee was thereupon appointed. Meanwhile, there had been no receivership in the bankruptcy proceedings, the assignee being allowed to remain in possession of the assets. The assignee not having filed in the state court any account or report of his doings as assignee, that court, upon application of the trustee, ordered the petitioner to file his account in the District Court. The latter court, upon the application of the assignee, made an order to the same effect. Petitioner then filed his account in the District Court, showing receipts amounting to $18,131.17 (about two-thirds of which was for rentals collected through an agent), and claiming credits amounting to $12,409.72. The surplus of receipts over claimed credits, viz., $5,721.45, was, in connection with the filing of the account, turned over to the trustee. The items of the claimed credits were these: (1) Disbursements from April 30, 1904, to June 8, 1907, consisting largely of repairs, insurance, taxes, and commissions paid for collecting rents on real estate, together with $737.40 on account of the dower interest of the bankrupt's wife all amounting to $6,657.03. This item was allowed by the referee in full. (2) Disbursements consisting largely of expenses directly connected with the administration of the trust, amounting to $618.24. This item was allowed in full by the referee. (3) A claim for commissions of the assignee upon moneys received and disbursed by him, computed according to the Ohio assignment statute, amounting to $483.25. This item was allowed by the referee at $321.64 (the amount provided by the bankrupt act), being a reduction of $161.61. (4) The bill of the law firm of Stewart & Stewart, of which firm petitioner was the senior member, for attorney's fees connected with the administration under the assignment, amounting to $370. This item was allowed in full. (5) The bill of said law firm of Stewart & Stewart for further legal services in proceedings under the assignment, the largest item being in connection with the sale of real estate and the report and confirmation of the same. This bill amounted to $360. This item was allowed at $185, being a reduction of $175. (6) The bill of Stewart & Stewart for professional services and advice in resisting the proceedings for adjudication in bankruptcy, $250. This item was entirely disallowed as a lien or preferred claim. (7) Expenses and disbursements of Stewart & Stewart in defending against said adjudication in bankruptcy, $270.92. This item was disallowed in toto. (8) The claim of the assignee for extra compensation for extraordinary services in administering the assignment, $3,500. This claim was disallowed in toto. The disallowed items of claimed credits amounted to $4,086.61, exclusive of the $270.92 actually disbursed by the assignee in connection with the resistance to the bankruptcy proceedings. The referee found that the assignee had in his hands this amount of $4,086.61 belonging to the estate of the bankrupt, and ordered its payment to the trustee in bankruptcy, directing the trustee to institute plenary suit for the $270.92, as not in the hands of the assignee. It is the affirmance of this order which the assignee seeks to have reviewed. The trustee also asks a review of certain items in

the assignee's account, which were allowed by the referee against the trustee's objection.

The assignee contends in this court that the referee in bankruptcy had no jurisdiction by summary proceeding to direct an assignee appointed under the state law to turn over to the trustee in bankruptcy the funds to which he claims the right to credit, on account of commissions, compensation for extra services, and bills for legal services and expenses. This contention rests upon the proposition that the claim of the assignee is adverse to the estate of the bankrupt. There is no doubt that if the claim presented by the assignee is an adverse claim within the meaning of the decisions, the District Court had no jurisdiction by summary proceeding to require the turning over of the moneys to the estate of the bankrupt as against the assignee's objection to the jurisdiction of the bankruptcy court. Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. But in our opinion, upon the case presented on this review, the District Court had jurisdiction to make the order complained of. The assignment by Hays to Stewart did not constitute the latter an assignee for value, but simply made him the agent of Hays for the distribution of the proceeds of the property among the latter's creditors. Being such agent his possession was that of the principal, and he therefore did not hold adversely to the bankrupt or to the latter's trustee by the mere fact that he held in his hands funds received by him under the assignment. Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 1, 17, 22 Sup. Ct. 269, 46 L. Ed. 406. The assignee contends that this case is ruled by Louisville Trust Co. v. Comingor, supra, in which, under the facts there presented, the bankruptcy court was held to have no jurisdiction to make an order for the surrender by an assignee of moneys which had been received by him under the assignment. The Comingor Case differs from the case before us in these respects: In that case the assignee denied the jurisdiction of the bankruptcy court, and showed in defense to the proceeding to require him to pay over the moneys in question that previous to the commencement of the bankruptcy proceedings he had actually disbursed the entire amount by way of commissions retained by him as compensation and through payments to his attorneys, and that he was utterly unable to recover or repay any part of such moneys. He therefore could not comply with an order for surrender, and as pointed out by this court in the opinion of Judge Severens, imprisonment must inevitably follow the order for surrender. Ex parte Comingor, 107 Fed. 898, 907, 47 C. C. A. 51. As stated by Mr. Chief Justice Fuller:

"He (Comingor) was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter, that is, jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In the case we are considering, of the $18,000 and upwards received by the assignee there came into his hands previous to the proceedings

in bankruptcy but $808.12. The accounts presented by him show that he had disbursed previous to the bankruptcy proceedings but $166. We find no assertion in the record that he has ever paid the claims of Stewart & Stewart for legal services (except the sum of $99.72, not in controversy) or any of the claims in controversy here except the expenses (as distinguished from legal services) connected with the resistance to the bankruptcy proceedings. The record is express that upon the proceedings for the settlement of his accounts before the referee, the assignee stated in open court, that the entire receipts, less certain disbursements which were allowed by the referee "should be treated as cash now in the hands of the assignee." The order of the referee is for the surrender to the trustee by the assignee of the "sum of four thousand eighty-six and sixty-one one-hundredths dollars ($4,086.61) so as aforesaid in his possession and belonging to said estate." Under the facts presented on this record the assignee must be held to have expressly consented to the jurisdiction of the bankruptcy court. The probate court, which before the bankruptcy would have had jurisdiction of the accounting by the assignee, upon adjudication in bankruptcy being made, and on the application of the trustee, had directed the assignee to render his accounting to the bankruptcy court. The assignee, in his brief in this court, says:

"Thereafter said petitioner (the assignee) in pursuance to said order, and of the order of the District Court made at the request of the assignee did file his final account in said District Court," etc.

The referee's order recites that the details of the trust are found at the request of the said Gilbert H. Stewart, and the certificate of the referee to the District Court speaks of the assignee's final account as prepared and filed in accordance with the order of the probate court in pursuance of the motion filed in said court by the trustee, and "of the orders of this court made at the request of the assignee." The record thus not only indicates that the assignee did not object to the jurisdiction of the bankruptcy court, but that he expressly consented thereto, and even finally invoked its aid. We find nothing in the record indicating any dissent from the jurisdiction of the bankruptcy court until after the order of surrender was made. It is true that the assignee did not consent to the order of surrender. But unless the balance, if any, actually found in the assignee's hands to belong to the bankrupt's estate was to be treated as subject to the orders of the bankruptcy court, the accounting was an idle ceremony. The manifest object of the accounting was to require the surrender by the assignee of such sums as should be found in his hands belonging to the bankrupt's estate.

The Comingor Case is cited as deciding that assent alone cannot confer jurisdiction to entertain summary proceedings. In that case Mr. Chief Justice Fuller said that so far as the petitioner's implied consent to the proceedings had against him—

"rested on the contention that as Comingor was joined with the bankrupts in the petition for adjudication, he therefore continued to be subject to the orders of the court without other process, we agree with the Circuit Court of Appeals that it cannot be sustained."

On the other hand in Bryan v. Bernheimer, supra, the purchaser under the assignee's sale, who was summoned to propound his claim to the property in question, came in and propounded his claim asking for such orders as might be necessary for his protection. Mr. Justice Gray there said:

"Moreover, the consent of the proposed defendant Bernheimer to this mode of proceeding is shown by the terms of his claim, in which no protest against the jurisdiction of the court of bankruptcy is made. He expressly submitted his claim to that court and asked for such orders as might be necessary for his protection."

The relation of the assignee to the estate of the bankrupt made it manifestly proper that he render his account to the bankruptcy court, and have there determined the questions of his compensation and disbursements in executing the trust. We have no doubt that the action taken by the assignee was fully tantamount to an express consent to the jurisdiction of the bankruptcy court, and that that court had ample authority in the premises. In re Murray (2d Cir.) 128 Fed. 575, 576, 63 C. C. A. 217 (see Murray v. Wilson, 194 U. S. 632, 24 Sup. Ct. 856, 48 L. Ed. 1159); In re Hecox (8th Cir.) 164 Fed. 823, 826, 90 C. C. A. 627. See, also, Wallace v. Jefferson County Savings Bank (5th Cir.) 157 Fed. 838, 85 C. C. A. 202. This brings us to the question whether the court below reached a correct conclusion as to the several items of claims for services and disbursements in question. And first as to the items whose reduction is complained of by the assignee. The referee took the view that under the decision in Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, the assignee was entitled to compensation for such services and disbursements as he had made which benefited the estate. In view of the relations of the assignee to the estate subsequent to the filing of the petition in bankruptcy, he included in the same rule the services and disbursements up to the time of the appointment of the trustee in bankruptcy. In our opinion the referee took the right view. It is true that after the filing of the petition in bankruptcy the assignee took the risk of having his proceedings under the assignment set aside, but as no application for receivership was made, the assignee may not improperly be treated (with respect to the settlement of his accounts) as a quasi receiver during the pendency of the proceeding for adjudication in bankruptcy. The referee took the view, and we think correctly, that the right to commissions under the Ohio statute, rather than under the bankruptcy act, was not a matter of fixed legal right, inasmuch as the assignment had never been completed and had in fact existed but a short time previous to the institution of the bankruptcy proceedings. The referee made carefully prepared findings of fact and of law accompanied by a summary of the evidence. In his findings of fact and opinion the referee says:

"It is hard to find any extraordinary services performed by the assignee. Indeed, the evidence is wholly devoid of any fact of extraordinary services."

And again with reference to the same claim:

"The court finds that there were no such services rendered by said assignee, and no services rendered that have not been fully compensated in the

allowance heretofore made herein, and the same is therefore wholly rejected and disallowed."

The district judge, in his opinion upon review of the referee's order, used this language:

"My general observation as to the finding of the referee is that he was most generous to the assignee, and that he strained the law to the utmost, if, indeed, he did not exceed the legal proprieties of the case in making the allowances which were by him made. In view of my knowledge of this case which, in some of its phases was presented to me, especially in the hearing on the question of the right to adjudicate Hays a bankrupt, I am disinclined to find fault with the amount which he referee allowed. I think that the result which he arrived at, after a most careful and painstaking hearing and review of the case, ought to be sustained."

The order of the District Court expressly affirmed the findings of the referee. We are urged to reverse these findings and to determine the questions of the assignee's right to further compensation and to the disbursements in question in accordance with the assignee's contentions. But in a proceeding to revise under section 24b this court is limited to a review in matter of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed. We call attention to the following decisions of this court and of the Supreme Court: Journal Printing Co. v. Brewing Co., 101 Fed. 699, 703, 41 C. C. A. 614; In re Taft, 133 Fed. 511, 513, 66 C. C. A. 385; In re Throckmorton, 149 Fed. 145, 146, 79 C. C. A. 15; Mueller v. Nugent, 184 U. S. 1, 9, 22 Sup. Ct. 269, 46 L. Ed. 405; First Nat. Bank v. Title & T. Co., 198 U. S. 280, 291, 292, 25 Sup. Ct. 693, 49 L. Ed. 1051.

There is testimony supporting the findings of the referee as to the facts on which he based his conclusions of law. We therefore cannot consider the question of the assignee's right to compensation for alleged unusual services, nor the propriety of reducing the amount claimed by the bills of Stewart & Stewart. The only legal question undisposed of by what we have already said relates to the assignee's claim for credit on account of expenses and disbursements in resisting the adjudication in bankruptcy. We think it clear that the assignee has no lien upon the funds by way of a preferred claim for expenses for resisting this adjudication. Randolph v. Scruggs, supra; Pratt v. Bothe (6th Cir.) 130 Fed. 670, 675, 65 C. C. A. 48. The exceptions of the trustee relate to (1) a premium of $50 paid upon the assignee's bond after the adjudication in bankruptcy; (2) certain of the attorney's fees of Stewart & Stewart allowed by the referee; (3) the allowance of any commission, and (4) the contention that the assignee should be compelled in this proceeding to repay to the trustee the disbursements which were made in resisting the adjudication in bankruptcy. What we have already said sufficiently disposes of the first three items. As to the fourth item, it is enough to say that the trustee is by the order complained of given an ample remedy for its recovery; and there is no occasion for modifying the order in this respect.

The order of the District Court is affirmed.

BURDETTE v. JACKSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1910.)

No. 951.

BANKRUPTCY (§ 396*)—EXEMPTIONS—CEMETERY LOTS.

Code Pub. Gen. Laws Md. 1904, art. 23, § 134, which provides that every burial lot sold or conveyed in a cemetery shall be held for the "sole purpose of sepulture and none other," and shall not be subject to attachment or execution, nor affected by the insolvent laws, exempts only such lots as are held by the owner for purposes of sepulture, and a bankrupt owning a number of such lots, only one of which is so held, is not entitled to claim exemption in any of the others.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

Petition to Superintend and Revise in Matter of Law Proceedings of the District Court of the United States for the District of Maryland, at Baltimore, in Bankruptcy.

In the matter of Charles B. Burdette, bankrupt. On petition by bankrupt to revise order of District Court. Affirmed.

On the 25th of November, 1908, the petitioner by voluntary proceedings, was adjudged a bankrupt, and in due course a discharge followed. Almost a year afterward petitioner filed an amended Schedule B, by which he added ten (10) lots in Lorraine Cemetery, near Baltimore city, state of Maryland, which lots are numbered, respectively, 314, 360, 313, 391, 421, 363, 390, 311, 308, and 331, and which he classed as exempt, claiming that his trustees should set them apart, so that they could be retained by him as his own property. These lots were separate and segregated, and nine of them the trustees refused to relinquish, and allotted to the bankrupt one burial lot, No. 331, which was the only one that the bankrupt held and used for purposes of sepulture for himself and family. In addition to this one lot, the bankrupt was also allotted his cash exemption of $100, allowed under the Maryland laws. Thereupon an order was procured requiring the trustees to show cause why they should not set over to the bankrupt as his exempted property the nine lots. An answer on the part of the trustees was filed thereto, and upon the hearing the lower court decided that the trustees were vested with a beneficial interest in the nine of said several lots, and accordingly the bankrupt was ordered to assign the certificates of ownership in the same to the purchasers from his trustees. The case comes here on a petition to superintend and revise.

Richard S. Culbreth and George C. Thomas (J. J. McNamara, on the brief), for petitioner.

F. W. Feldner, for respondents.

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

PRITCHARD, Circuit Judge (after stating the facts as above). It is contended by the petitioner that these lots are not subject to attachment or execution, or affected by the insolvent laws of Maryland, and this contention is based upon section 134, art. 23, of the Public Laws of Maryland, which reads as follows:

"Every burial lot sold or conveyed in said cemetery shall be held by the proprietors thereof for the sole purpose of sepulture, and none other, and shall not in any manner be subject to attachment or execution or affected by the insolvent laws of this state; but the estate of the owner or owners in their

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

respective lots shall descend as real estate to heirs, may be devised by will, or may be disposed of by the owners by sale with the approval of the president and managers of the corporation."

The final resting place of the dead has in all ages been properly regarded as sacred ground, and it was in recognition of this fact that the Legislature of Maryland enacted this statute. Under its provisions, one holding a cemetery lot for burial purposes in the state of Maryland cannot be deprived of the same by attachment or execution, nor is same affected by the insolvent laws of that state. It was manifestly the purpose of the Legislature to protect a proprietor owning a lot of this character from the annoyance and humiliation incident to having the same subjected to court process. That this statute was intended to apply only to such lots as might be held for the personal use of the proprietor, clearly appears from the provision in the statute to the effect that:

"Every burial lot sold or conveyed shall be held by the proprietors thereof for the sole purpose of sepulture, and none other. * * *"

It plainly appears from the record that only one of these lots was bought for sepulture purposes. The petitioner, among other things, says:

"That the lot which your petitioner has used as a place of sepulcher for his family is No. 331."

He then gives the numbers of each of the other lots, amounting in all to nine, and these numbers show that they are scattered about in various parts of the cemetery; there being only two that are contiguous. The location of these lots, and the numbers, clearly indicate that it was not the purpose of the petitioner, in purchasing the same, to use them for burial purposes within the meaning of the Maryland law, under which the petitioner now seeks to have them exempted from being sold as a part of his assets.

By virtue of the provisions of this statute a sufficient amount of land may be held by an individual for burial purposes—whether it be one or two lots—provided it is held for such purposes only. But in this instance only one lot is claimed by the petitioner to be held for such purposes, and there is no intimation that any of the other lots are needed for the personal use of the petitioner in that respect. The amount of land held for such purposes would depend upon the size of one's family, and it might, in some instances, be necessary for an individual to hold more than one lot for such purposes; and in that event we think that any reasonable amount of land dedicated and held for the personal use of the owner thereof for burial purposes only, would come within the purview of the statute.

It cannot be reasonably contended that, under the provisions of this statute, one may hold a number of lots, and hold them purely for speculative purposes, and thus be enabled to evade the insolvent laws of that state. Under the laws of Maryland, the petitioner is undoubtedly entitled to hold the lot which he has selected for burial purposes, and this right guarantees to himself and family decent interment, and is in the nature of an assurance that he and those who may come after

him may hold and retain this spot as a last resting place, notwithstanding the petitioner may be unable to meet his financial obligations.

In the case of Gill v. Cacy, 49 Md. 243, the Court of Appeals of that state, in referring to the proper interpretation to be placed upon a statute, said:

"The intention of the Legislature is to be carried out, and that intention is to be collected from the words of the statute, by considering every part of it, as well as the cause or necessity of making the act or from foreign circumstances."

Applying this rule, we find that the purpose of the statute is to exempt from attachment, execution, or the insolvent laws of the state, a lot to be held by the individual "for the sole purpose of sepulture, and none other." This is the entire scope of the statute, and in determining the questions involved in this controversy, keeping in mind the legislative intent, we are necessarily forced to the conclusion that only the portion of land, or, as in this instance, the lot, set aside by the petitioner for burial purposes, is exempted from the operation of the provisions of the law designed for the enforcement of the collection of debts.

Under the provisions of section 217, art. 23, of the Maryland Code, all money or other benefit and relief to be paid by any fraternal organization is exempt from seizure under any process; also under section 8 of article 83, $100 worth of property, as well as all money payable in the nature of insurance benefit or relief, is exempted. Section 11, art. 83, exempts all wearing apparel, mechanical text-books, books of professional men, tools and other mechanical instruments and appliances moved or worked by hand, necesssary to the practice of any trade or profession and used in the practice thereof.

Thus it will be seen that ample provision is made for the protection of those who may be in financial distress, and these provisions are independent of the one which relates to property held for burial purposes, and it is under them, and them alone, that the citizen of Maryland can claim exemption for property which he owns, other than land for burial purposes.

For the reasons stated, the judgment of the court below is affirmed.

JOHNSON v. COLUMBIA COTTON OIL MILL MFG. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1910.)

No. 2,045.

PATENTS (§ 328*)—INVENTION—PROCESS FOR EXTRACTION OF COTTON SEED OIL. The Johnson patent, No. 691,342, for a process for the extraction of oil from cotton seed by using a mixture in stated proportions of cotton seed bran with the cotton seed meats, is void for lack of invention; it being shown that in the process previously used a mixture of hulls and meats occurred through the inability of the machinery used to wholly separate them.

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

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

Suit in equity by Edwin Lehman Johnson against the Columbia Cotton Oil Mill Manufacturing Company, Limited. Decree for defendant, and complainant appeals. Affirmed.

Lamar C. Quintero, Philip S. Gidiere, and Melville Church, for appellant.

J. R. Beckwith and Max Dindelspeil, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit on a patent for a process. The process claimed is the use in the extraction of oil from cotton seed of the mixture of cotton seed bran with the cotton seed meats in proportion of 2½ per cent. to 30 per cent. The proof shows that prior to the alleged invention a mixture of cotton seed hulls with the meats occurred in the process of preparing seed before compressing the oil, because the machinery used for preparing the seed for the press was inefficient to separate entirely the hulls from the meats, and the hulls in part went into the same mass with the meats.

It seems to make no difference whether the hulls go into the mass necessarily from the inability to prevent them or purposely by being placed there. We do not think there is such difference between cotton seed hulls and cotton seed bran as to make patentee's process new or patentable. Both cotton seed hulls and cotton seed bran are from the outside covering or husk of the cotton seed. The claim that the "cotton seed bran" is the hull of the cotton seed with all the fiber removed is a distinction too fine to give validity to the patent.

The decree of the Circuit Court is affirmed.

WEED CHAIN TIRE GRIP CO. et al. v. EXCELSIOR SUPPLY CO. et al.

(Circuit Court, N. D. Illinois, E. D. May 20, 1910.)

1. PATENTS (§ 40*)—VALIDITY—FUNCTIONAL CLAIMS.
   Claims of a patent for means for, or mechanism adapted to, a certain result, and, like functional claims, are not objectionable if limited to the invention shown by the specification and drawings.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 47; Dec. Dig. § 40.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN TIRE GRIP.
   The Parsons patent, No. 723,299, for a chain tire grip, was not anticipated, and is not for a function, but discloses an operative and useful device, basic to a large extent which required invention; also *held* infringed.

In Equity. Suit by the Weed Chain Tire Grip Company, Harry D. Weed, and the Parsons Non-Skid Company, Limited, against the

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

Excelsior Supply Company and the Motor Appliances Company. Decree for complainants.

Duncan & Duncan and Victor Elting, for complainants.
Sheridan, Wilkinson & Scott, for defendants.

SANBORN, District Judge. Infringement suit based on the Parsons patent, No. 723,299, issued March 24, 1903, for a chain tire grip. Complainants are, respectively, assignees or interested in the patent. One of defendants sells a similar device, and the other manufactures it.

The patentee's description of his invention, and two of his claims, are as follows:

"It has been proposed to guard against slipping and puncturing by incorporating an antislipping or antipuncturing device in the tire itself, which has the effect of slowing it considerably or causing disintegration and having other objectionable features. According to my invention I overcome these objections by providing a separate construction, giving, in effect, a nonslipping medium between the surfaces in contact, and merely suspending on or engaging with the wheel, but not fixed thereto, and it is therefore free to travel around the wheel by the action of rolling contact.

"The device constituting my invention consists of a network of rings or strips of metal or other suitable material or a series of small chains or bands fitting loosely over the periphery of the wheel or passing from side to side across the tire—that is, not incorporated with it—and prevented from coming off by two rings, hoops, or their equivalent, preferably of wire or other suitable material, such rings or the like, or one of them, being provided, if desired, with means of attachment and detachment, such as a right and left hand screw-thread and nut, and the said rings or the like being smaller in diameter than the periphery of the wheel they cannot come off accidentally.

"Antislipping or protecting means for the peripheries of wheels, pulleys or the like, comprising attaching elements at opposite sides of the wheel, and an antislipping or protective medium secured to the attaching elements and extending across and around the periphery of the wheel, said parts being disconnected from though retained on the wheel whereby the antislipping or protective medium is free to move or shift its position around the periphery thereof.

"Antislipping or protective means for the peripheries of wheels, pulleys or the like, comprising two rings or annuli at opposite sides of the wheel, and an antislipping or protective medium consisting of a chain or chains secured to the rings and extending across and around the periphery of the wheel, said parts being disconnected from but retained on the wheel whereby the antislipping or protective medium is free to move or shift its position around the periphery thereof."

Advantages claimed for the device are thus stated by counsel:

"The construction of the device by which it is loose on the wheel and free to travel circumferentially around it when in action gives several important results referred to in the patent. In the first place, the 'freedom to travel' adds very materially to the antislipping qualities of the device, in effect continuously laying down on the ground in front of the tire 'a nonslipping medium,' consisting of a series of loose cross chains, under conditions affording a maximum of traction result. In the next place, it prevents the disintegration of the rubber tire, which, as suggested in the patent, in all other proposed constructions had proved a fatal obstacle to the use of a metal traction device on a rubber tire. Again, it prevents the inevitable and objectionable 'slowing' of the tire in action, which occurs where metal traction plates or similar parts are incorporated in the tire."

It is also essential in a practical device that it must be securely maintained on the tire against coming off, particularly at times of greatest strain when the machine is skidding. While the device is simple, a complicated problem is involved, which had to be comprehended by the inventor, and must be understood in order that the full scope of the invention can be comprehended. The elements of the problem are that by all prior inventors it was supposed to be necessary to fasten the device rigidly upon the tire, or incorporate it with it, instead of being left loose or flexible. Such devices proved failures for a number of reasons. They wore out the tire by abrasion at the point of contact, "slowed" it by destroying resiliency, wore themselves out by friction, and were difficult to keep on. These objections were to a great degree overcome by the patent grip. It lessens wear by stopping the slipping, is easy to put on and take off, distributes and lessens wear of the tire by its circumferential travel, and has proved a great commercial success, superseding all other forms.

This changing of the universal idea that an antiskid device must be securely fastened to the tire required invention, and the device described by the patentee, with such improved construction as experience and mechanical skill suggested, is fully capable of carrying out the inventive idea. There is an operative device, utility, a greatly improved result, commercial success, and the supplanting of all other like devices.

It is true, and clearly disclosed by the evidence, that circumferential creeping, or what Parsons calls traveling around the wheel by the action of rolling contact, was not new with him as a practical result, but he was the first to claim and fully utilize it, and understand its significance in the art. It is the inevitable law of the rolling wheel. It is even difficult to keep the tire itself from creeping forward on the rim. This tendency has been well understood from the time of the bicycle. And, when an antislipping device is put on the tire, however firmly, it will travel around it. All other inventors, however, conceived the notion that this circumferential creeping was a detriment, and must be prevented in order to get traction and prevent slipping. Parsons was the first to understand that this motion was beneficial, that the best traction would be given by utilizing it, as well as the best form of antiskidding. He therefore reversed the prevailing idea that this motion must be prevented as much as possible, and specified a loose grip, "merely suspended on or engaging with the wheel, but not fixed thereto—free to travel around it." He also contrived a novel means of carrying his idea into practical application; that is, by a loose grip, held upon the tire by side members of sufficiently less diameter than the tire to securely retain the device in place. Neither of these things had been done before. This is not an attempt to patent a function, result, idea, or abstraction, but a new conception and new embodiment of that conception, producing an improved result, useful in itself, and commercially successful. It is entitled to liberal treatment, both as to anticipation and infringement.

To the objection that the claims are functional, it may be said that claims for means for, or mechanism adapted to a certain result, and,

like functional claims, are not objectionable if limited to the invention shown by the specification and drawings. So narrowed, they are valid. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. Moreover, some of the claims, like the last one quoted, read directly on the illustrated construction.

Another objection, that the disclosure is not complete, may be answered by saying that no one has found any difficulty in building the devices, nor is it thought that even a workman unskilled in the art, after reading the patent, could not properly construct it. Even functions not specified, where means to secure them are claimed, but not fully explained, have not been so construed as to avoid the patent. In the rubber tire wheel cases, the important side-tipping function, all there was to distinguish prior art, was not clearly claimed, nor was the proper tension on the securing wires, by which such function was secured, even suggested, but the patent was sustained everywhere except in the Sixth Circuit. Consolidated Tire Co. v. Firestone Tire Co., 151 Fed. 237, 80 C. C. A. 589; Rubber Tire Wheel Co. v. Milwaukee, etc., Co., 154 Fed. 358, 83 C. C. A. 336. This was for the reason that the side-tipping function of the tire was universally found on the wheels, built by workmen everywhere.

Anticipation is asserted through a number of patent antiskidding devices, but they were all designed on the rigidly attachable notion, with that relation of the parts to each other which distinguishes the Parsons device, entirely wanting. Those most relied on are the Giffard British patent and the Clark-Wertheim-Rosenberg patents, all of which were abandoned by the patentees, no doubt partly because too early in the art, but also partly for the reason that they were all of the rigidly attached kind. Giffard says that his invention consists in combining metal with the outer part of elastic tired wheels to prevent slipping and grip the road. The first eight of his figures show devices either going through the tire or sunk into it. The tenth and eleventh figures show a metal chain ladder, "secured to the periphery of an elastic tire." It is perfectly manifest that he never thought of a loose grip, free to travel on a tire. It is easy enough at this day, after Parsons has shown the way, to convert his metal ladder into a perfect Parsons grip. This is a common method of showing anticipation, but is not often a successful one. The Giffard disclosure is also too vague and incomplete to constitute an anticipation.

The Clark-Wertheim-Rosenberg patents represent the same invention patented in different countries. In the specification of each and all of them it is said that the device (which was made for bicycle tires) is so embedded in the rubber of the tire casing that it cannot change its position as a whole. By making some changes disclosed by the Parsons invention, it is now possible to obtain fair results from its use, although it rapidly wears out. The Clark invention was for a different combination and though not entirely inoperative, possesses little utility.

What prevents these prior patents being anticipations is chiefly this: That the relation of parts which makes Parsons novel and useful is absent. If the Giffard chain ladder be used, and the inevitable ten-

dency toward travel around the tire results from such use, the device falls off. Or, if the side members be put far enough down to prevent this at first, then as soon as one of the cross-members breaks, off goes the whole device again. Giffard came nowhere near discovering the proper relation of parts. The Parsons invention is a new mechanical combination, with appropriate location and length (shortness) of the side members, and appropriate length of cross-members, which, by their combined operation, each modifying the other, looseness, circumferential travel, and secureness, make a practical and successful whole.

I think the patent fully operative, useful, not for a function, not anticipated, basic to a large extent, fully valid and infringed.

Defendants' zig-zag grip is almost identical. The Victor grip, formerly made or sold by defendants, was stated by defendants' expert to be an infringement if the patent was valid. He did not explain its function nor mode of operation, nor was any model of the device offered in evidence, although cuts representing this form of grip appear in the advertisements in evidence. While the argument did not particularly mention the Victor grip, the record clearly shows it to be an infringement. On further consideration, I am thoroughly convinced that it infringes complainants' patent, but the question has not had that full consideration which should require any other court to decline to consider that question for itself.

Complainants are entitled to the relief asked.

UNITED STATES v. FREED. SAME v. HELLER. SAME v. GERCHIKOFF.

(Circuit Court, S. D. New York. April 23, 1910.)

1. BANKRUPTCY (§ 91*)—CORPORATIONS—NATURE OF BUSINESS—PRESUMPTIONS.

Where the name of an alleged bankrupt corporation was the "Suffolk Boarding & Livery Stable," there was no presumption that the corporation's corporate name denoted the business in which it was engaged principally, and that it was not, therefore, within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423) providing that any corporation "engaged principally" in trading or mercantile pursuits, etc., may be adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.*]

2. BANKRUPTCY (§ 494*)—INDICTMENT AND INFORMATION (§ 111*)—CRIMES—INDICTMENT.

An indictment for a crime alleged to have been committed in the course of bankruptcy proceedings against a corporation, alleging that the court was there concerned in adjudicating the corporation a bankrupt, was not objectionable for failure to negative the exceptions contained in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), specifying the corporations that may be declared bankrupts, nor for failure to allege that the corporation was in fact engaged principally in one of the occupations mentioned in that section.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 494;* Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111.*]

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

3. BANKRUPTCY (§ 100*)—JURISDICTION—COLLATERAL ATTACK.
Jurisdiction of a federal District Court in bankruptcy proceedings cannot be collaterally attacked in a criminal prosecution for an offense committed therein.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 100.*]

4. PERJURY (§ 26*)—INDICTMENT—REQUISITES.
It is sufficient that an indictment for perjury allege that defendant's testimony was false, and that he believed it to be false, without alleging the actual facts.
[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90–94; Dec. Dig. § 26.*]

5. BANKRUPTCY (§ 492*)—CORPORATIONS—CONCEALMENT OF ASSETS.
A bankrupt corporation may be guilty of concealing assets, and the president may be indicted for that offense, if he participated therein.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

Max Freed was indicted for causing the bankrupt, Suffolk Boarding & Livery Stable, of which he was president, to fraudulently conceal from its trustees various sums of money and other assets, and Freed, David Heller, and Hyman Gerchikoff were each also indicted for a false oath alleged to have been committed by them while witnesses before Nathanial S. Smith, referee in bankruptcy, in the matter of the Suffolk Boarding & Livery Stable. Defendants pleaded not guilty, demurred to the indictments, and moved to quash the same. Demurrers overruled, and motion to quash denied.

Henry Wise, for the United States.
Samuel Markewich, for defendant Freed.
L. B. Treadwell, for defendants Heller and Gerchikoff.

HAND, District Judge. This being upon demurrer and motion to quash, I may consider only the indictment. The allegation is that a petition was filed against "a corporation created by and existing under the laws of the state of New York," whose name is stated to have been "Suffolk Boarding & Livery Stable." There is no judicial presumption that the corporate name of a corporation denotes what is the business in which it is "engaged principally." Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423). For aught that appears, the corporation may have been engaged principally in selling horses, and have done a livery stable business as a mere incident. Such a possibility is not even unlikely in fact.

Thus nothing contradicts the jurisdiction of the District Court. On the other hand, there is no necessity, in order to show the jurisdiction of the District Court, that the record should negative the exceptions of the statute, alleging that the corporation was in fact engaged principally in one of the occupations mentioned in section 4b. It was enough that the District Court, being a court of limited, but not inferior, jurisdiction, was there concerned "to adjudicate persons bankrupts." Section 2, subd. 1. That gave it jurisdiction, which cannot be attacked collaterally. Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236.

It is not necessary, therefore, to decide upon the point of the jurisdiction of the District Court in case it should on the trial appear that

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

the petition in bankruptcy actually alleged that the corporation was principally engaged in keeping a livery stable.

As to the failure to allege the actual facts, and not merely that the defendants' testimony in the perjury indictments was false, and that they believed it to be false, there is doubtless authority for the rule which would make the indictments invalid. The practice in this district has been the other way, and on principle it is clear enough that the practice is right, for the requirement is of the allegation of evidence. If the practice is to be changed, the Circuit Court of Appeals must change it.

The other points are not good. The examination was pertinent to the inquiries, and was so alleged. The crime of concealing assets could be committed by a corporation, and Freed could be indicted for the offense, if he participated in its commission. Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113; U. S. v. Young & Holland Co. (C. C.) 170 Fed. 110. Those were cases of conspiracy; but, if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard Field v. U. S., 137 Fed. 6, 69 C. C. A. 568, as binding, after Cohen v. U. S., supra.

Demurrers overruled, and motions denied.

PACIFIC IMPROVEMENT CO. v. CHATTANOOGA SOUTHERN R. CO.

(Circuit Court, N. D. Georgia. May 2, 1910.)

No. 18.

RAILROADS (§ 194*)—RIGHT OF WAY FOR SPUR TRACKS—LICENSE—RIGHTS OF PURCHASER.

Where a commissioner under a judicial decree sold the property of a railroad company, expressly enumerating in the deed certain spur tracks, constructed on the land of an iron company under a verbal license and then in use by the railroad company, the iron company cannot assert an exclusive right to the use of such tracks for individual purposes as against the purchaser, which, without notice of such claim, has expended money in making extensive repairs and improvements thereon, and especially where such tracks are situated in Georgia, in view of Code Ga. 1895, § 3069, which provides that "a parol license * * * is not revocable when the licensee has executed it, and in so doing has incurred expense. In such case it becomes an easement running with the land."

Ed. Note.—For other cases, see Railroads, Cent. Dig. § 649; Dec. Dig. § 194.*]

In Equity. Suit by the Pacific Improvement Company against the Chattanooga Southern Railroad Company. On exceptions to master's report on intervention of Kensington Iron & Coal Company. Exceptions overruled, and intervention dismissed.

W. S. McKenry, for Kensington Iron & Coal Co.

Pritchard & Sizer and R. M. W. Glenn, for Chattanooga Southern Railroad Co. and receivers.

PARDEE, Circuit Judge. In the order of reference the whole case upon the intervention of the Kensington Iron & Coal Company

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

was referred to a special master, who has reported on the facts as found by him, and also has given his conclusions of law based on the facts found. To this report the Kensington Iron Company filed exceptions. The exceptions all relate to and object to the conclusions of the master on the facts, and therefore I have read all the evidence with care, and given particular attention to the specific objections of the intervener. My conclusion is that none of the exceptions are well taken; all of the master's findings being fully supported by the preponderance of evidence in relation thereto.

Considering that the case shows that in February, 1905, the spur tracks, the use of which is in controversy, were all on the ground and in use and occupancy of the Chattanooga Southern Railway Company, and that on that day the commissioner, under judicial decree, after due notice and advertisement, sold all the property of the Chattanooga Southern Railway Company, main and spur tracks, etc., to Henry A. V. Post and others, purchasing committee, and by deed of that date conveyed all and singular of every description all the property of the Southern Railway Company, particularly therein describing and specifying "the spur tracks on the property of the Kensington Iron Company in Walker county, Georgia, being three different spurs, about 3½ miles in all, leading to the iron ore mines of the Kensington Iron Company, only the steel rails upon which belong to the Chattanooga Southern Railway Company, from the receiver thereof, except the spur track to what is known as 'Owl Hollow,' being about one-half a mile long, and the cross-ties and rails upon which belong to and are owned by the Chattanooga Southern Railway Company or its receiver;" that this sale conveyed no notice to the purchasers aforesaid that the spur tracks then in use by and for the Southern Railway Company were in any wise limited to special or exclusive use; that soon after the said purchasing committee conveyed the said property, all as above described, to the Chattanooga Southern Railroad Company, who entered into possession of the same; that up to the time of this intervention neither the Chattanooga Southern Railroad Company, nor its predecessor, nor its present receivers, received any notice of the claims of the Kensington Iron Company to an exclusive use of said tracks for individual purposes, all of which are based upon alleged oral understanding and agreement entered into with the Chattanooga Southern Railway Company and Joseph W. Burke, its receiver—I concur with the master in his conclusions of law, to wit:

"From the foregoing facts I find that the Chattanooga Southern Railroad Company have acquired an easement over the lands of the Kensington Iron & Coal Company to the extent that said railroad company and its receivers have the right to operate its engines and cars over the said Owl Hollow branch for the purpose of hauling freight for any parties who may desire to ship over the line of said railroad company; that the Chattanooga Southern Railroad Company has no title to the lands over which said Owl Hollow branch is laid through the lands of the Kensington Iron & Coal Company, but their rights thereover are as licensees; and in view of the fact that extensive improvements and expenditures have been made by said railroad company and its receivers in repairing, maintaining, and extending said track, the Kensington Iron & Coal Company would not have the right at this time to revoke the right of such user of said railroad company and its receivers.

"In support of this finding I call attention to the provisions of section 3069 of the Code of Georgia (1895), which is as follows: 'A parol license is primarily revocable at any time if its revocation does no harm to the person to whom it has been granted; but it is not revocable when the licensee has executed it, and in so doing has incurred expense. In such case it becomes an easement running with the land.' In the case of Hiers v. Mill Haven Company, 113 Ga. 1002, 39 S. E. 444, the court say: 'After a person has made improvements or invested capital, which must necessarily have preceded the enjoyment of the license granted to him, it becomes an agreement for a valuable consideration, and the licensee a purchaser for value. While such a license is executory, as a general rule it is revocable; but not after it is executed.'

"I therefore find that the injunction as prayed for by the intervener be denied, and that the order passed by his honor, William T. Newman, United States Judge, on January 28, 1908, be now set aside and revoked."

A decree will be entered overruling the exceptions to the master's report and confirming the said report, revoking order made at chambers of the Circuit and District Judges February 17, 1908, which stayed operations of receivers under the previous order of court of January 28, 1908, and dismissing the intervention of the Kensington Iron Company, with costs.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. April 9, 1910.)

Nos. 2—9, 2—33, 2—149, 3—37.

STREET RAILROADS (§ 58*)—RECEIVERS—PETITION FOR INSTRUCTIONS TO RECEIVERS.

A petition for instructions to the receivers for an extensive street railway system by the lessor of one of the constituent lines, not filed until a few weeks prior to the date of the advertised sale of the property, considered and denied.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

In Equity. Suits by the Pennsylvania Steel Company and another against the New York City Railway Company and others, by the Morton Trust Company against the Metropolitan Street Railway Company and others, by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others, and by the Morton Trust Company against the Metropolitan Street Railway Company and others. On petition by the Twenty-Third Street Railway Company for instructions to receivers. Petition denied.

Byrne & Cutcheon, for Pennsylvania Steel Co.
Jas. L. Quackenbush, for New York City Ry. Co.
Dexter, Osborn & Fleming, for receiver of New York City Ry. Co.
Bronson Winthrop, for Morton Trust Co.
J. Parker Kirlin, for Metropolitan St. Ry. Co.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Davies, Stone & Auerbach, for Guaranty Trust Co.
Parker, Hatch & Sheehan, for Twenty-Third St. Ry. Co.

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

LACOMBE, Circuit Judge. This is a petition by the Twenty-Third Street Railway Company, asking that certain instructions be given to receivers of the Metropolitan Street Railway Company. Petitioner's road was leased to the Houston, West Street & Pavonia Ferry Railroad Company (which was subsequently merged with other corporations into the Metropolitan) on April 25, 1893. The lease provided that lessee should pay all taxes, assessments, water rents, and charges which might be lawfully imposed on the demised property, and also an annual rental of 18 per cent. on the par value of petitioner's stock. It further provided that, in the event of betterments being made on the railroad or a change of motive power effected, the expenditure therefor should be paid in the first instance by the lessee, and the lessor should execute and deliver to the lessee negotiable bonds in the usual form for the amounts of such expenditure; also that the principal and interest thereof shall be included among the obligations which the lessee should provide for and pay. Since September, 1907, the road has been operated by the receivers, who have regularly paid the rental of 18 per cent.

Referring to the petition, we find that it asks instructions to be given in three particulars, which may be separately considered and disposed of:

(1) That defendants pay from the funds now in their hands the special franchise taxes due upon petitioner's property.

This whole matter of special franchise tax was considered a few weeks ago, and disposed of in the manner indicated in opinion filed February 18, 1910. 176 Fed. 471. There is no good reason for discriminating in favor of petitioner.

(2) That the surplus earnings from the operation of petitioner's road by receivers be applied to the payment of the interest on a note and certain bonds, or impounded and reserved to make such payments.

The note is the one which was referred to in the opinion recently filed in Twenty-Third Street Railway Co. v. Metropolitan Street Railway Co. and Mercantile Trust Co. (March 21, 1910) 177 Fed. 477. The bonds apparently were executed and delivered under the provisions for expenditures for betterments above quoted. Petitioner has a suit pending to cancel these bonds.

Receivers dispute the proposition that there were surplus earnings from the operation of petitioner's roads during the period of receivership. The fact can only be determined upon an accounting, and it does not seem that such accounting should be now ordered. Within five weeks the property covered by the first mortgage, substantially the entire system, will be sold under foreclosure, and it may fairly be assumed that foreclosure sale under the second mortgage of the parcels of real estate and various items of personal property not covered by the first mortgage will follow not long afterwards. Then the final accounting of all interests will be taken up and pushed to a conclusion. It is difficult to see how any prejudice can result to complainant from waiting until that time. The questions as to income and expenditure on any fragment of this intricate system are so complicated that, if the master should begin investigating the statistics of the Twenty-Third Street line to-morrow, all the property would be

out of the hands of the court long before any substantial progress could possibly be made in such investigation. Moreover, this court and the Circuit Court of Appeals have so provided in the decree of foreclosure for cash deposits and reserved liens that there will be ample security for the payment of any sums which upon final accounting it may be held the receivers should have paid or should pay.

(3) That receivers keep separate accounts of the earnings and operating expenses of petitioner's railroad.

This matter of separate accounts, more detailed and specific than those which have always been kept, has been several times considered. It is sufficient to refer to opinions on Petition of Eighth Ave. and Ninth Ave. Companies (C. C.) 165 Fed. 468, and Guaranty Trust Co. v. Metropolitan Street Railway Co. (C. C.) 171 Fed. 1015. Had the present application been made sooner, the court would have disposed of it, by inviting the proposal of modifications in the present method. This was done in the case of Eighth Avenue and Ninth Avenue roads; but no specific proposed modifications were ever submitted. Now, however, when application is made, after operation of the road by receivers has continued for two years and a half, the court is not inclined to direct them to change their whole system of bookkeeping for the few weeks, or possibly months, during which their operation may continue.

Petition denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.

(Circuit Court, S. D. New York. April 25, 1910.)

No. 2—9.

STREET RAILROADS (§ 55*)—INSOLVENCY PROCEEDINGS—DISTRIBUTION OF FUND. Where the decree of sale in consolidated suits against the lessees of an extensive street railway system creates a consolidated fund, to be distributed among all parties interested in accordance with their respective rights and priorities as thereafter determined by the court, all claims against any part of the fund will be left for consideration together in a single proceeding.

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

In Equity. Suit by the Pennsylvania Steel Company and the Degnon Contracting Company against the New York City Railway Company. On motion for order of reference. Motion denied.

Byrne & Cutcheon, for complainants.

James Q. Quackenbush, for defendant.

Dexter, Osborn & Fleming, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. Application has been made for an order referring the cross-bill of Charles Benner and others, committee of tort creditors, to the special master to take proof under the issues thereby presented. The Circuit Court of Appeals, in its recent decision in the foreclosure suit of Guaranty Trust Company v. Metropolitan Street

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

Railway Co. et al., 177 Fed. 925, has amended the decree of foreclosure by inserting the following paragraph:

"Further ordered, adjudged, and decreed (3) that the balance of the fund arising from the sale of the properties hereinabove described, and by this decree directed to be sold, shall be distributed, together with the proceeds of the sale of all the remaining property of the Metropolitan Street Railway Company, and the property of the New York City Railway Company, now in the possession of the court, or hereafter to come into such possession, including any balance of the funds in the possession of the receivers of either or both of said companies, which may be available for such distribution among all creditors, claimants, and persons interested therein, including the officers of this court, their counsel, and the counsel of all parties interested in the said fund, proceeds, and property for distribution, or any part thereof, in accordance with their respective rights and priorities to be hereafter determined by the court, upon such notice to the respective parties in interest as the court may direct."

It is thought that this was done to avoid the necessity of trying out the issues raised by the several cross-bills in all these various suits affecting the property of both roads which came into possession of the court under the receiverships, and to provide a simple and expeditious method to determine as to all claims and priorities.

The present motion is therefore denied. Petitioner can obtain full relief in the proceeding against the consolidated fund created by the terms of the amended decree.

OMAHA & C. B. ST. RY. CO. et al. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, D. Nebraska. April 25, 1910.)

CARRIERS (§ 24*)—INTERSTATE CARRIERS—REGULATION OF STREET RAILROADS. Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), being acts to regulate commerce, do not apply to street railway companies engaged in the transportation of passengers between cities in different states.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 24.*]

In Equity. Suit by the Omaha & Council Bluffs Street Railway Company and another against the Interstate Commerce Commission. Motion for a preliminary injunction granted.

John Lee Webster, for complainants.

P. J. Farrell and Charles A. Goss, for defendant.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

PER CURIAM. Whereas, the complainants are street railway companies engaged in operating street cars for the transportation of passengers on the streets of Omaha and Council Bluffs, and are not commercial railroad companies engaged in the general transportation of freight and passengers, and the Interstate Commerce Commission by its order dated November 27, 1909, required them to cease demanding or receiving their fares of 15 cents per passenger for the transportation

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

of passengers from Council Bluffs, not including Courtland Beach, Iowa, to points on complainants' lines in Omaha, Neb., or from points on complainants' lines in Omaha, Nebraska, to Council Bluffs, Iowa, not including Courtland Beach, Iowa, and also required them to establish and to maintain for two years a less rate,

And, whereas, the judges are of the opinion that the Congress never intended that the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [3 U. S. Comp. St. 1901, p. 3154]), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), should apply to, and they are of the opinion that they do not apply to such street railway companies, that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies, and that the order of the Interstate Commerce Commission was beyond its powers, and ought not to be enforced during the pendency of this suit. Louisville & Portland Ry. Co. v. Louisville City Ry. Co., 2 Duv. (63 Ky.) 175, 178; Funk v. St. Paul Ry. Co., 61 Minn. 435, 437, 441, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; State v. Duluth Gas & Water Co., 76 Minn. 96, 108, 78 N. W. 1032, 57 L. R. A. 63; Manhattan Trust Company v. Sioux City Cable Ry. Co. (C. C.) 68 Fed. 82, 86 Congressional Record, vol. 17, part 4, p. 3472; Railroad Commissioners v. Market Street R. R. Co., 132 Cal. 677, 678, 679, 682, 683, 64 Pac. 1065; Gyger v. West Philadelphia Ry. Co., 136 Pa. 96, 108, 20 Atl. 399; State of Kansas v. Grant Cain, 69 Kan. 186, 189, 190, 76 Pac. 443; Railroad Company v. Railroad Commissioners, 73 Kan. 168, 169, 173, 84 Pac. 755; Sams v. St. Louis, etc., Ry. Co., 174 Mo. 53, 64, 69, 74–77, 81, 73 S. W. 686, 61 L. R. A. 475; Thompson Houston, etc., Co. v. Simon, 20 Or. 60, 75, 25 Pac. 147, 149, 10 L. R. A. 251, 23 Am. St. Rep. 86; Front Street Cable Ry. Co. v. Johnson, 2 Wash. St. 112, 25 Pac. 1084, 1085, 11 L. R. A. 693; Riley v. Galveston City R. R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826, 827.

It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended, and the Commission, its attorney, agents, and employés, are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court.

This order shall take effect upon the filing with the clerk of this court of a bond in the sum of $10,000, approved by one of the judges of this court, and conditioned that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained.

LADEW et al. v. TENNESSEE COPPER CO. et al.

(Circuit Court, S. D. Tennessee, E. D. February 15, 1910.)

No. 1,012.

1. DISMISSAL AND NONSUIT (§ 55*)—FEDERAL COURTS—DETERMINATION OF QUESTION OF JURISDICTION.

Want of jurisdiction of a federal court, apparent on the face of a bill, may be taken advantage of by a motion to dismiss.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 116; Dec. Dig. § 55.*]

2. COURTS (§ 269*)—JURISDICTION OF FEDERAL COURTS—LOCAL ACTIONS.

When the requisite diversity of citizenship between the parties exists to give a federal court jurisdiction, a suit to establish a lien or claim on property within the provisions of section 8 of the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), may be maintained in the district where the property is situated although neither the plaintiff nor defendant is a resident of such district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

3. COURTS (§ 269*)—JURISDICTION OF FEDERAL COURTS—LOCAL ACTIONS.

Section 8 of the federal judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), which authorizes suits "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property" to be brought in the district where the property is situated, does not extend to all suits of a local nature nor to all local actions in rem but is definitely limited to suits brought to enforce the rights specified, and cannot be extended beyond them by construction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

4. COURTS (§ 269*)—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE—"CLAIM TO PROPERTY."

The words "claim to * * * property" as used in section 8 of the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), authorizing suits to enforce such claims to be brought in the district where the property is situated, relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest or other direct right or claim to the property itself, and do not include a suit which merely seeks to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use to avoid injury to other property, as one to abate or enjoin a nuisance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

5. STATUTES (§§ 174, 175*)—RULES OF CONSTRUCTION.

The construction and interpretation of statutes cannot extend to amendment or legislation, nor can considerations of apparent hardship justify a strained construction of the law as written.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 254; Dec. Dig. §§ 174, 175.*]

6. COURTS (§ 269*)—FEDERAL COURTS—SUITS FOR ABATEMENT OR INJUNCTION—VENUE.

While an action to abate or restrain a nuisance is of a local nature, and can only be maintained in a court having the proper territorial juris-

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

diction, the venue of such action is in the district where the nuisance itself is located.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

7. NUISANCE (§ 84*)—SUITS TO ENJOIN—PARTIES.

In a suit to abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations, whose effect mingles and combines in contributing to the injury to the plaintiff's property, may properly be joined as defendants, although each transacts his own business separately and independently from the others.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 84.*]

8. COURTS (§ 318*)—JURISDICTION OF FEDERAL COURTS—EFFECT OF DISMISSAL AS TO ONE DEFENDANT.

The dismissal without prejudice of a suit in a federal court as to one of several defendants who might be sued either separately or jointly, either on his objection to the local jurisdiction on the ground that neither he nor plaintiff is a resident of the district, or on the ground that he and plaintiff are both residents of the same state, where he is not an indispensable party, does not necessitate a dismissal as to other defendants properly before the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. § 318.*]

9. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST CITIZEN AND ALIEN.

A suit brought by a citizen of one state against a citizen of another state and an alien, as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.*

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

In Equity. Suit by J. Harvey Ladew and others against the Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company, Limited. On separate motions by defendants to dismiss. Sustained as to the Tennessee Copper Company, and overruled as to the Ducktown Sulphur, Copper & Iron Company, Limited.

Chas. Seymour, for complainants.

Cornick, Wright & Frantz and W. B. Miller, for defendants.

SANFORD, District Judge. This bill was filed by the complainants, citizens and residents of the states of New York and West Virginia, against the Tennessee Copper Company, a corporation of the state of New Jersey, and the Ducktown Sulphur, Copper & Iron Company, Limited, a corporation of the kingdom of Great Britain, each having its main office and business in Polk county, Tenn., within this judicial district.

The bill alleges that the complainants are the joint owners of certain tracts of forest lands and timber rights in the state of Georgia containing altogether 24,000 acres, and timber aggregating in value many thousands of dollars; that the defendants are engaged in mining and manufacturing sulphur and copper ores in Polk county,

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

Tenn., near the Georgia state line, within a short distance of complainants' property, and have erected and are operating furnaces, smelters, and ovens for roasting and reducing such ores, in close proximity to one another, upon lands in Polk county, Tenn., owned or leased by them, respectively; that, "by reason of their ownership of the lands and forests aforesaid," complainants "both in law and equity are possessed of a right and claim in, to, and against the lands and tenements of the defendants in the nature of an easement thereupon that same shall not be used in a manner to injure or destroy the said lands and forests of your orators adjacent thereto as aforesaid"; that the defendants by means of said furnaces, smelters, and ovens, and in other ways generate vast quantities of smoke and fumes which inextricably mingle a short distance from their works and are together discharged upon complainants' lands and forests, and have destroyed much of complainants' forests and inflicted great damage; that the zone of destruction is constantly increasing, and the defendants' operations, if permitted to continue, will destroy all of complainants' forests and timber, and all other forms of plant and tree life, and render their lands barren, unfit for occupation, and valueless; that it is impossible to calculate or approximate the damage threatened, and the complainants are without remedy in a court of law, and unless relief is granted, will suffer irreparable injury; and that "an injunction to prevent the perpetration of said wrongs is the only adequate relief that complainants can secure." And "to the end that" the aforesaid right and claim of complainants to and upon the properties of the defendants, that the same shall not be used in a manner to destroy or injure the lands and forests of complainants, may be declared and enforced, and that the nuisance maintained upon said properties may be abated by and under the direction of the court, through its own officers or otherwise, and that such changes be made by and under its direction in and to the defendants' properties as shall prevent the discharge therefrom upon complainants' lands and forests of the aforesaid deleterious substances, and that the defendants may be restrained by injunction from doing or causing the acts complained of, or their continuance, the complainants pray that writs of injunction be granted restraining and enjoining the defendants, their officers, agents, and servants, from maintaining or operating upon their premises any oven, furnace, or appliance giving forth any of the smoke and fumes complained of, or otherwise producing or causing any noxious or injurious smoke or fumes upon the complainants' lands, and commanding them to desist and refrain from using, maintaining, or operating, any furnace or other appliance or copper reducing method giving off or discharging any noxious smoke or fumes upon the complainants' lands; and they further pray for general relief.

By an amendment to the bill, made by leave of the court, complainants further allege that the properties and operations of each defendant constituting the nuisance sought to be abated are of greater value than $5,000; that the injury which will be done to complainants' lands by each of the defendants unless the nuisance is abated, exceeds in value $5,000; and that the matter in controversy exclusive of interest and cost exceeds $5,000. Subpœnas to answer were issued, as

prayed in the bill, and served upon the highest officer of each of the defendants to be found within this district.

Motion of the Tennessee Copper Company.

The Tennessee Copper Company, having entered a special appearance for the sole purpose of objecting to the jurisdiction of the court, moved to dismiss the bill on the ground that as it appears upon its face that the complainants are citizens and residents of New York and West Virginia, and said defendant a citizen and resident of New Jersey, and that neither the complainants nor said defendant are citizens or residents of the Eastern District of Tennessee, this court has no jurisdiction.

It is well settled that a want of jurisdiction apparent on the face of the bill may be taken advantage of by motion to dismiss. Coal Company v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Central Trust Co. v. McGeorge, 151 U. S. 129, 132, 14 Sup. Ct. 286, 38 L. Ed. 98; Connor v. Vicksburg & M. R. Co. (C. C.) 36 Fed. 273, 1 L. R. A. 331; Municipal Inv. Co. v. Gardiner (C. C.) 62 Fed. 954; Stichtenoth v. Central Exchange (C. C.) 99 Fed. 1.

It is also clear, as is conceded by the complainants, that as Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), provides that when the jurisdiction of the Circuit Court is founded only on the fact that the parties are citizens of different states, suit shall be brought only in the district where either the plaintiff or defendant resides, and as neither the complainants nor the Tennessee Copper Company, a New Jersey corporation, are residents of this district, if jurisdiction of this case depends upon diverse citizenship alone the Circuit Court of this particular district is without jurisdiction, and such want of local jurisdiction not having been waived by said defendant, the suit as to it must be dismissed. Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; Western Loan Co. v. Mining Co., 211 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

The complainants contend, however, that jurisdiction of this suit does not depend upon diverse citizenship alone, but that it is an action relating to property which may be brought against said defendant in this district under Act March 3, 1875, c. 137, § 8, 18 Stat. 472, which provides that "when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real and personal property within the district where such suit is brought," any of the defendants shall not be an inhabitant of, or found within said district, or voluntarily appear, an order directing such absent defendant to appear and make defense may be served on him personally, wherever found, or when this is impracticable, by publication, and that in default of such appearance, the court may "entertain jurisdiction, and proceed to the hearing and adjudication of such suit; * * * but said adjudication shall, as regards said absent defendant

* * * without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

This section of the Act of 1875 was not repealed by the Act of 1888, and remains in full force. Mellen v. Moline Wks., 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; Jellenik v. Huron Copper Co., 177 U. S. 1, 10, 20 Sup. Ct. 559, 44 L. Ed. 647; Citizens' Saving Co. v. Ill. C. R. Co., 205 U. S. 46, 54, 27 Sup. Ct. 425, 51 L. Ed. 703. And when the requisite diversity of citizenship exists to give the Circuit Court jurisdiction, a suit embraced within the provisions of this section may be brought within the district in which the property is situated, although neither the plaintiff nor defendant is a resident of such district. Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Citizens' Saving Co. v. Ill. C. R. Co., supra; Single v. Paper Mfg. Co. (C. C.) 55 Fed. 553; Spencer v. Stockyards Co. (C. C.) 56 Fed. 741.

The present suit does not, however, in my opinion come within the provisions of section 8 of the act of 1875.

First. It clearly cannot be held to be within the provisions of this section under the broad theory upon which complainants rely that it is purely a local action in rem to abate a nuisance, wherein relief may be given without a judgment in personam against the defendants, through process of the court, executed by its officers and operating directly on the res, and hence as such local action in rem is necessarily included within the provisions of said section 8.

In the first place, as the bill does not allege that either of the plants of the defendants, or any particular structures or appliances therein, constitutes a nuisance per se, which should be abated or destroyed under process of the court, but, in effect, merely complains generally of an unlawful use of the defendants' properties by methods of operating their plants, which generate and diffuse noxious fumes and smoke over the complainants' properties, and, while it contains an incidental reference to an abatement of the nuisance by officers of the court, on the other hand avers specifically that an injunction to prevent the perpetration of the wrongs is the only adequate relief that complainants can secure, and prays for no specific relief other than an injunction operating upon the defendants in personam and restraining them from an improper use of their property, the suit, evidently, is not, under the pleadings, purely an action in rem to abate a nuisance, but is, on the contrary, primarily and essentially an action to restrain a nuisance by injunctive relief operating in personam upon the defendants. Thus considered, it would follow that if the doctrine of York County Savings Bank v. Abbot (C. C.) 139 Fed. 988, 994, a case upon which complainants rely, that no jurisdiction is conferred upon the Circuit Court under section 8 of the act of 1875 in an action where complete relief cannot be given according to the terms of the bill without a judgment in personam against an absent defendant, be correct, the court would clearly be without jurisdiction of the case.

And, if jurisdiction under section 8 of the act depended upon whether the proceedings were essentially in rem or in personam, it might well be doubted whether the specific prayer for injunctive relief

against the defendants could be disregarded, and the bill treated for jurisdictional purposes, under its broad averments and prayer for general relief, as merely one to abate a nuisance by process operating in rem as distinguished from a suit to restrain the nuisance by process in personam. See Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Van Bergen v. Van Bergen, 2 Johns. Ch. (N. Y.) 272; Carlisle v. Cooper, 18 N. J. Eq. 241; Ramsay v. Chandler, 3 Cal. 90; Lassater v. Garrett, 4 Baxt. (Tenn.) 369; 1 Am. & Eng. Enc. of Law (2d Ed.) 64; 29 Cyc. 1209, 1252; 14 Enc. Pl. & Pr. 1146, 1147.

It is, however, unnecessary to determine this question, since even if the suit could thus be considered, in the aspect both favorable to the defendants, as an action to abate a nuisance under direct process of the court, and hence as purely a local action in rem or in the nature of a proceeding in rem this would not suffice to bring it within the provisions of section 8 of the act of 1875.

It is clear that this section does not extend either to all suits of a local nature or to all local actions in rem or in the nature of proceedings in rem, but is definitely limited to suits brought for the enforcement of certain specific rights. The suits which it includes are not described by reference to their general character, but by reference to their object. It contains no general descriptive phrase such as "suits of a local nature," used in sections 741 and 742, Rev. St. (U. S. Comp. St. 1901, p. 588), in regard to suits brought in a state having more than one judicial district, or "proceedings in rem" or other like phrase; on the contrary it definitely enumerates the suits to which it relates, namely, those brought "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property." In view of this specific enumeration of the suits to which it relates, and the absence of any general phrase extending its provisions to any other action, local or otherwise, its scope cannot be extended by any process of construction, there being nothing in its language upon which such extension can be based.

Where a "statute specifies certain classes of cases which may be brought against nonresidents, such specification, doubtless, operates as a restriction and limitation upon the power of the court." Roller v. Holly, 176 U. S. 398, 406, 20 Sup. Ct. 410, 413 (44 L. Ed. 520).

Second. The question then arises whether, as the complainants further contend, this suit comes within the specific provisions of section 8 of the act of 1875, as a suit brought to enforce a "claim to * * * property" of the defendants, within the meaning of this section, there being obviously no other class of suits enumerated in this section in which it can be included.

The suit clearly does not come within this provision merely because the complainants allege in their bill that by reason of the ownership of their lands they are "possessed of a right and claim in, to, and against the lands and tenements of the defendants in the nature of an easement thereupon," this being the mere assertion of the legal conclusion which the complainants seek to draw from the fact of their ownership of the lands in Georgia; and it cannot be held to come within this provision unless, upon the facts alleged in the bill, the complainants are seeking to enforce a right which, within the meaning of

the act, may properly be termed a "claim to property" within this district.

The theory of the complainants is, that attached to all property is a claim, based upon natural right, held by those who occupy any relation with respect thereto, that it shall not be used in such way as to injure or damage such other persons; and that the duty under which the defendants' property rests creates in favor of the complainants a right to and a claim against such property, which "may be called a negative right or easement upon land based upon the maxim of sic utere tuo ut alienum non lædas" and is the basis of the present action.

There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute. The statement in Shainwald v. Lewis (D. C.) 5 Fed. 310, 317, that by the words "legal or equitable lien or claim against real or personal property" Congress "intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity" which is cited in 1 Rose's Code, Fed. Pro. § 856, note C, as authority for a similar statement, was purely obiter; the only point involved in the case being that Rev. St. § 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word "claim" given by Mr. Justice Story in Prigg v. Pennsylvania, 16 Pet. 536, 615, 10 L. Ed. 1060, as "a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty," this definition being given in a case involving the construction of a statute providing that slaves should be delivered up "on claim of the party" to whom their service was due; the meaning of the word "claim" as used in a statute of this character in reference to the "claim of" one person upon another to do a certain thing, being manifestly different from its meaning as used in the act of 1875 in reference to the claim of one person "to" the property of another. Evidently its meaning as used in the act of 1875 in the phrase a "claim to * * * property" is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in Stowel v. Zouch, 1 Plowd. 359, that:

"A claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

On the whole, I am of the opinion that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the "subject," and as the words "claim to * * * property" are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership

of an undivided interest in the property upon which a suit for partition may be based (Greely v. Lowe, 155 U. S. 58–74, 15 Sup. Ct. 24, 39 L. Ed. 69), and do not include the assertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use; and, therefore, that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendants' property within the meaning of the statute.

"A nuisance is literally an annoyance and signifies in law such a use of property or such a course of conduct as * * * transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 Am. & Eng. Enc. of Law (2d Ed.) 682.

The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property, or of any proprietary interest therein, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; a breach of duty which may be punished by indictment where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restrictions which the law imposes upon him in the use of his property and prevent misuse, cannot, in my opinion, be regarded in any just sense as the assertion on the part of the neighbor of a claim to the property itself within the meaning of the statute.

Nor can this result be changed by reason of the fact that as a suit for the abatement of a nuisance is a local action which can only be brought in the district where the nuisance is located (Mississippi & M. R. R. Co. v. Ward, supra), in such a suit between citizens of different states, where neither of the parties reside in the district where the nuisance is located, the action not being maintainable under section 8 of the act of 1875, there is no jurisdiction in any Circuit Court of the United States except upon a waiver by the defendant of the want of jurisdiction in the particular district.

The construction and interpretation of statutes cannot extend to amendment or legislation. U. S. v. Fisk, 3 Wall. 445, 448, 18 L. Ed. 243; Petri v. Creelman Lumber Co., 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. Nor can considerations of apparent hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. v. U. S., 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. "The remedy," if any be required, "is in Congress." Ex parte Girard, 3 Wall. Jr. 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457.

Furthermore the complainants are not on that account remediless, since in this case, as well as in the many other controversies between citizens of different states which Congress has not deemed proper to include within the jurisdiction of the Circuit Courts of the United

States, the parties may always rely for the enforcement of their rights upon the state courts having the necessary local jurisdiction.

It results, therefore, that the motion of the Tennessee Copper Company must be granted and the bill dismissed as to it, for want of jurisdiction over the person of the defendant, but without prejudice. Macon Grocery Company v. Atlantic C. L. R. Co. (U. S. Sup. Ct., January 17, 1910) 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. ——; York County Savings Bank v. Abbot (C. C.) 139 Fed. 988.

Motion of the Ducktown Sulphur, Copper & Iron Company.

The Ducktown Sulphur, Copper & Iron Co., hereinafter called the Ducktown Company, having also entered a special appearance, moved to dismiss the complainants' bill, for want of jurisdiction and misjoinder of the parties defendant.

It is well settled, and is not disputed, that the requirement of section 1 of the Acts of 1875, as amended by the Acts of 1888, that suits in a Circuit Court based upon diverse citizenship alone shall be brought within a district in which either the plaintiff or the defendant resides, has no application to suits brought against aliens, and that if jurisdiction otherwise exists in the Circuit Court, an alien corporation may be sued in any district in which valid service may be made upon it. In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

The Ducktown Company urges, however, that there is nevertheless a want of jurisdiction in this court and misjoinder of the defendants upon various grounds set forth in its motion to dismiss. None of these grounds are, however, in my opinion, well taken.

1. The fact that this bill is filed for the purpose of abating or restraining a nuisance affecting lands which lie wholly in the state of Georgia, does not require the action to be brought in the district where the injured property lies, and thereby deprive this court of jurisdiction of the subject-matter of the suit. While an action to abate or restrain a nuisance is of a local nature and can only be maintained in a district having the proper territorial jurisdiction, the venue of such action is in the district where the nuisance itself is located. 29 Cyc. 1237; 14 Enc. Pl. & Pr. 1106, and cases cited.

In Mississippi & M. R. R. Co. v. Ward, 2 Black, 485, 495, 17 L. Ed. 311, it was held, under a bill filed by a steamboat owner in the district court of Iowa to abate a bridge across the Mississippi river constituting an obstruction to navigation, that as to so much of the bridge as lay beyond the middle of the river and outside of the district of Iowa the court "had no power over the local object inflicting the injury" and was without jurisdiction. And in Horne v. City of Buffalo, 49 Hun, 76, 1 N. Y. Supp. 801, it was held, under a statute providing that certain actions, including those for a nuisance, must be tried in the county where the cause of action, or some part thereof, arose, that a suit against a city to abate a nuisance caused by the dumping of street sweepings and other foul matter into the river in the county where the city was located, which injured residents in a village below in another county, should be tried in the county in which the dumping was done,

as being the county in which the cause of action arose. In this case the court said:

"By the common law an action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the county where the nuisance is situated."

It was also held in People v. St. Louis, 10 Ill. 352, 48 Am. Dec. 339, and Morris v. Remington, 1 Pars. Eq. Cas. (Pa.) 387, that the venue under a bill to restrain a nuisance by injunction is in the jurisdiction in which the nuisance is located; a result which would also seem to follow from the doctrine of Northern Ind. R. R. Co. v. Michigan Central R. R. Co., 15 How. 232, 242, 14 L. Ed. 674, that wherever the subject-matter of a controversy is local, no jurisdiction attaches to a Circuit Court beyond the limit of the district in which the property is situated, and no injunction can be granted affecting such property, except in cases of contract, fraud, or trust, where relief may be given by a decree in personam.

While none of these cases, except the Horne Case, presented the precise situation in the present case, where the property constituting the nuisance lies in one district and the injured property in another, the reasoning in the Ward Case that, where the court "had no power over the local object inflicting the injury," its abatement was beyond the jurisdiction of the court, shows conclusively that the test of local jurisdiction in an action to abate a nuisance is the situs of the object inflicting the injury and not that of the object injured.

The various cases which hold that an action of tort seeking merely to recover damages caused by a nuisance will lie in the jurisdiction where the injury is inflicted, although the object from which the injury proceeds is located elsewhere—there being, however, much conflict of authority even on this point, as shown by the cases collated in 14 Enc. Pl. & Pr. 1106, notes 2 and 3—clearly involve an entirely different question from that in reference to the venue of an action to abate the nuisance itself. The "power over the local object inflicting the injury," which is requisite in an action to abate the nuisance, is wholly unnecessary in an action merely to recover damages, whose result cannot in any way affect the maintenance of the nuisance itself; and the cases holding that in an action of tort for damages alone the venue should be laid where the injured object is located, may, it seems, be well sustained by analogy to the rule stated in Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co., supra, that an action of trespass quare clausum fregit cannot be prosecuted where the act complained of was not done in the district.

2. The fact that, so far as the bill shows, the defendants are separate and independent concerns, conducting each its own separate affairs, does not prevent the bringing of a joint action against them, or create a misjoinder of the Ducktown Company with its codefendant.

Without determining whether, in accordance with the broad statement in 2 Street's Fed. Eq. Prac. § 1344, p. 815, the defense of misjoinder of defendants can be made by motion to dismiss, as well as by demurrer, in accordance with the usual practice, I think that the sound rule established by the great weight of authority is, that, in a suit to

abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations whose effect mingles and combines in contributing to the injury to the plaintiff's property, may be properly joined as defendants, although each transacts his own business separately and independently from the others. The Débris Cases (C. C.) 16 Fed. 25; Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579, 6 L. R. A. (N. S.) 1149; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14; People v. Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419.

In People v. Oakland Water Front Co., 118 Cal. 234, 248, 50 Pac. 305, in which it was held that a demurrer would lie for misjoinder, the structures maintained by the different defendants which it was sought to abate as an obstruction to navigation were not only entirely separate and independently maintained, but had obviously no joint or combined effect upon the navigation, the effect of each being entirely separate and distinct from that of the others.

3. The fact that the Tennessee Copper Company is not suable in this case, over its objection, does not require the dismissal of the suit as to the Ducktown Company.

It is well settled by the weight of authority that when jurisdiction otherwise exists in a Circuit Court in a suit against several defendants, who might be sued either separately or jointly, the right of one of the defendants to object to the local jurisdiction of the court on the ground that it is brought in a district in which neither he nor the plaintiff resides, is a privilege personal to himself, which he alone can raise, and in his behalf only, and that upon the dismissal of the suit, as to him, upon his motion, where he is not an indispensable party to the suit, it will not be dismissed as to the remaining defendants properly before the court. Bensinger Cash Reg. Co. v. National Cash Reg. Co. (C. C.) 42 Fed. 81; Smith v. Atchison, T. & S. F. R. Co. (C. C.) 64 Fed. 1; Dominion National Bank v. Cotton Mills (C. C.) 128 Fed. 181; Schiffer v. Anderson (C. C. A., 8th Circuit) 146 Fed. 457, 76 C. C. A. 667.

And jurisdiction of the suit will likewise be retained when, although one of the defendants is a citizen of the same state with the plaintiff, whose presence would destroy the requisite diversity of citizenship, the suit has been dismissed as to him without prejudice (Smith v. Cotton Oil Co. [C. C. A., 5th Circuit] 86 Fed. 359, 30 C. C. A. 103), or he has neither been served with process nor appeared (Doremas v. Bennett, 4 McLean, 224, 7 Fed. Cas. 916, Fed. Cas. No. 4,001). Nor can a defendant served with process avail himself of a want of jurisdiction as to another person named in the writ who is severed from him and no longer to be considered a defendant in the case. Craig v. Cummings, 2 Wash. C. C. 505, 6 Fed. Cas. 724, Fed. Cas. No. 3,331.

Therefore, since each of the defendants in the present suit might have been sued severally as well as jointly, People v. Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80, and under the averments of the bill the Tennessee Copper Company is clearly not an indispensable party to the relief prayed in reference to the nuisance alleged to exist upon the property of the Ducktown Company, the case may, under the

foregoing authorities, be proceeded with against the latter company alone, although dismissed as to the former.

4. The fact, urged in argument, although not set out as one of the grounds of the motion to dismiss, that the plaintiffs, being citizens of New York and West Virginia, have sued two defendants, one of whom is a citizen of New Jersey and the other an alien corporation, does not deprive this court of jurisdiction.

Section 1 of the act of 1875, as amended by section 1 of the act of 1888, confers jurisdiction upon the Circuit Courts in suits "in which there shall be a controversy between citizens of different states * * * or a controversy between citizens of a state and foreign * * * citizens." The plain object of this provision is to confer upon the Circuit Courts jurisdiction of all controversies between citizens of a state and citizens either of another state or a foreign nation in which the requisite jurisdictional amount is involved. And while it may be said from a somewhat metaphysical point of view, that in a suit brought by a citizen of one state against two defendants, one of whom is a citizen of another state, and the other an alien, the controversy, considered in its entirety, is neither wholly between citizens of different states nor between a citizen of a state and a foreign citizen, yet as such controversy in each and all of its elements as between the plaintiff and each of the defendants separately, clearly comes within the provisions of the act, the suit is not, under a just construction of the statute and in view of its plain intent, to be excluded from the jurisdiction of the Circuit Court merely because of the joinder of the two defendants in a single action. To hold otherwise would, I think, be to give the language of the statute a strained and narrow construction, not required by its letter, and defeating its manifest purpose of vesting in the Circuit Courts jurisdiction of controversies between these different classes of persons.

This view is in accordance with the clear weight of authority. In Ballin v. Lehr (C. C.) 24 Fed. 193, and Roberts v. Ry. & Nav. Co. (C. C.) 104 Fed. 577, affirmed in a carefully considered opinion in Roberts v. Ry. & Nav. Co. (9th Circuit) 121 Fed. 785, 58 C. C. A. 61, in each of which the underlying question involved in determining the right of removal to the Circuit Court was whether the entire suit was one of which the Circuit Courts were given jurisdiction by sections 1 of the acts of 1875 and 1888, it was held that a suit brought by a citizen of one state against two defendants, one of whom is a citizen of another state and the other an alien, is a suit of which the Circuit Courts are given jurisdiction and which, as such, is removable to the Circuit Court on petition of the defendants. See, also, Rateau v. Bernard, 3 Blatchf. 242, 20 Fed. Cas. 305, Fed. Cas. No. 11,579.

The case of Tracy v. Morel (C. C.) 88 Fed. 801, in which the statement of a contrary doctrine, appearing in Black's Dillon on the Removal of Causes (section 84, p. 131), which is not, however, found in the earlier editions of Dillon's Removal of Causes, is approved, without discussion, is clearly not supported by the cases of Hervey v. Illinois Mid. Ry. Co., 7 Biss. 103, 12 Fed. Cas. 60, Fed. Cas. No. 6,434, and King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60, which are cited as stating the same rule. The Hervey Case involved merely

the obvious proposition that a suit could not be removed under the act of 1875 on the ground of a separate controversy "wholly between citizens of different states" when it appeared that alien parties were also interested in the alleged separate controversy, there being, it is to be noted, no provision in that act for the removal of a suit on the ground of a separate controversy between citizens of a state and aliens; and in King v. Cornell, it was merely held that under the act of 1875 an alien had no right of removal on the ground of a separate controversy.

I therefore conclude, both upon principle and the weight of authority, that a suit brought by a citizen of one state against a citizen of another state and an alien as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States.

Furthermore, even if there had been originally a jurisdictional defect by reason of the joinder of the Tennessee Copper Company as a codefendant with the Ducktown Company, this objection would, it seems, be cured under the doctrine of Smith v. Cotton Oil Co., and other cases hereinabove cited, by the dismissal of the suit against the Tennessee Copper Co., leaving in the suit merely a controversy between citizens of New York and West Virginia as complainants and an alien corporation as defendant, of which a Circuit Court has undoubted jurisdiction.

5. The objection to the jurisdiction set out in the motion to dismiss in reference to the amount in controversy, has been cured by the amendments made in the bill.

No other objections being pointed out by the Ducktown Company's motion to dismiss, it results that the motion must be overruled.

An order will accordingly be entered dismissing the suit as to the Tennessee Copper Company in accordance with this opinion, and overruling the motion of the Ducktown Sulphur, Copper & Iron Company.

HARRIS-WOODBURY LUMBER CO. v. COFFIN et al.

(Circuit Court, W. D. North Carolina, at Asheville. April 28, 1910.)

1. QUIETING TITLE (§ 44*)—ACTIONS—BURDEN OF PROOF OF TITLE.
In suits in equity to quiet title or remove a cloud, the burden is upon the complainant to show that he is the lawful owner of the premises involved in the controversy.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 89; Dec. Dig. § 44.*]

2. CORPORATIONS (§ 630*)—EFFECT OF DISSOLUTION—NEW JERSEY STATUTE.
A New Jersey corporation, whose charter has been annulled by proclamation of the Governor for nonpayment of taxes, may thereafter sue or be sued in its corporate name in relation to any matter necessary or proper to the orderly settlement of its affairs, by virtue of Corporation Act N. J. (P. L. 1896, p. 295) §§ 53–55, which provide that all dissolved corporations shall be continued bodies corporate for the purpose of prosecuting and defending suits and of enabling them to settle and close their

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

affairs, and that the directors, who are constituted trustees for such purpose, may sue or be sued by the corporate name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482–2486; Dec. Dig. § 630.*]

3. CORPORATIONS (§ 691*)—POWERS—LAW GOVERNING.

The powers of a corporation, although doing business in a state other than that of its creation, are governed by the law of its domicile, and its power to sue or be sued after its former dissolution is determined by such law, and not by that of the state in which the suit is brought.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 691.*]

In Equity. Suit by the Harris-Woodbury Lumber Company against E. G. Coffin and D. Samuel White. On exceptions to report of special master. Exceptions overruled, and decree for complainant.

Merrimon & Merrimon and C. C. Cowan, for complainant.

R. C. Strudwick, Norwood & Norwood, Wm. P. Bynum, Jr., and Justice & Broadhurst, for defendants.

PRITCHARD, Circuit Judge. This is a bill in equity filed by the complainant for the purpose of removing a cloud upon its title. The complainant alleges that it is the owner in fee and in actual possession of a tract of mountain land containing 78,000 acres, and deraigns its title, showing grant from the state and various mesne conveyances down to a deed to the Foreign Hardwood Log Company in 1894, and then deed from the said company to the Tuckaseigee Timber Company in 1895, and deed from the Tuckaseigee Timber Company to the Whittier Lumber Company, a New Jersey corporation, in 1896, and deed to complainant in 1906 by a commissioner appointed by this court to sell said land pursuant to a decree rendered in a proceeding instituted in this court in 1906 to foreclose a mortgage executed by the Whittier Lumber Company. The complainant further alleges that in 1904 E. G. Coffin and F. M. McDonald, trading under the firm name of Coffin & McDonald, instituted a suit in the superior court of Swain county, N. C., against one Charles R. Flint, and caused an attachment to issue in their favor from said court against said Flint, and to be levied against said lands, pretending that he was the owner thereof, or had an interest therein, which suit was removed to this court, and in 1907 a judgment was rendered therein for $85,000 in favor of Coffin & McDonald, and that Coffin & McDonald, claiming that said judgment was a lien upon said lands because of said attachment, procured a writ of execution to issue from this court, and by virtue thereof the marshal sold at public auction on May 4, 1908, all the right, title, and interest of said Charles R. Flint in and to said lands to said E. G. Coffin, the last and highest bidder, for $100, and that said Coffin assigned his bid to the defendant D. Samuel White, to whom the marshal made a deed, which was filed and recorded in Swain county, N. C., where the land is situated. The complainant further alleges that the defendants, E. G. Coffin and D. Samuel White, claimed to be the owners of said lands, or to have an interest therein, because of said deed, and had repeatedly threatened to enter upon said lands under their purported claim and remove the timber therefrom, and to otherwise injure and

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

molest complainant, and the complainant prays for a decree quieting its title, canceling said deed to the defendant D. Samuel White, and perpetually enjoining the defendants from asserting or claiming any interest or estate in said lands by reason thereof.

The defendants in their answer admitted that the title had been properly deraigned by the complainant down to the deed to the Foreign Hardwood Log Company, but denied that the complainant was the owner of said lands, or had any right to the possession thereof. They allege: That Charles R. Flint furnished the money for the purchase of said lands, and had the title made to the Foreign Hardwood Log Company, a "dummy" corporation under his control, and that said corporation held the title in trust for Charles R. Flint, as resultant beneficiary and owner of the equitable estate therein, and that afterward, for the purpose of cheating and defrauding said E. G. Coffin and F. M. McDonald, Charles R. Flint caused the Foreign Hardwood Log Company to make a deed for said lands to the Tuckaseigee Timber Company, another "dummy" corporation controlled by him; but the defendants denied that any title passed by such deed, both because of its fraudulent purpose and because the Tuckaseigee Timber Company was never lawfully organized and was never capable of owning real estate or holding title thereto. That subsequently said Flint, still designing to cheat and defraud said Coffin and McDonald and his other creditors, caused the Tuckaseigee Timber Company to make a deed for said lands to another "dummy" corporation, the Whittier Lumber Company, formed by employés under his control, but that no title passed, because the Tuckaseigee Timber Company had no power to receive or convey the title, and because the Whittier Lumber Company was never properly organized, and never became a legal entity capable of holding title to real estate; but, if the Whittier Lumber Company did acquire any title by said conveyances, it held the same for the benefit of Coffin and McDonald and other creditors of Flint, because said conveyances were made for the purpose of cheating and defrauding said creditors. That the Whittier Lumber Company, or those who controlled it, for Flint, fraudulently pretended to execute a mortgage of said lands as security for an alleged issue of bonds, but that said bond issue was fraudulent, without consideration, and done to enable Flint to further incumber the title for the purpose of cheating his creditors, and said lands never passed into the hands of bona fide purchasers. That the complainant, with full knowledge of all these things, acquired possession of said lands, and fraudulently procured the institution of the suit to foreclose the mortgage executed by the Whittier Lumber Company, and misled the court by collusion with the Whittier Lumber Company, and procured a decree ordering sale of the lands, and at such sale pretended to become the purchaser of said lands, using said bonds in making payment. That there was an understanding with complainant and Flint whereby the actual payment for said lands depended upon the complainant's establishing title thereto by the conveyances set out in the complaint, and that this proceeding by the complainant is in furtherance of said nefarious scheme, and that complainant is not entitled to the aid of a court of equity in carrying it out. That the defendants were the real owners of said lands, having

acquired the title by the sale under the judgment against Charles R. Flint, who was the real owner; the title having been acquired and held in trust for him.

The matter was referred by consent to a special master, to hear and take the evidence and state his findings of fact and conclusions of law. After taking the testimony and hearing arguments thereon by counsel for the parties, the master filed his report on September 7, 1909, in which he found as facts, among other things: That the purchase money for the land when it was conveyed to the Foreign Hardwood Log Company was not furnished by Charles R. Flint, and that the title to the said lands was duly conveyed by the Hardwood Log Company to the Tuckaseigee Timber Company, and by the latter company to the Whittier Lumber Company, and that the Whittier Lumber Company duly issued its bonds and duly executed the mortgage on said lands as security therefor, and that all these things were done regularly and without fraudulent intent on the part of Charles R. Flint to hinder and delay or cheat and defraud E. G. Coffin and F. M. McDonald, or any other creditors. That the bonds by the Whittier Lumber Company, after having become widely scattered in the regular course of business, were assembled for and bought by Charles J. Harris, one of the incorporators of the complainant, the Harris-Woodbury Lumber Company, and that said Harris became the bona fide purchaser of said bonds for a valuable consideration, without collusion, conspiracy, or fraud on his part with Charles R. Flint or any other person, and without any knowledge or notice of any of the things done by the corporations which held the title to said lands, or by those interested in said corporations, except such as was given by the public records, and that there was not sufficient evidence in any of such records which had been introduced to put Charles J. Harris or any prudent man on notice of any fraud which may have been attempted or perpetrated by Charles R. Flint, or by said corporations which held the title to said lands, or by any of those interested in said corporations. That the suit to foreclose the mortgage executed by the Whittier Lumber Company was duly instituted in this court about April 16, 1906, and that after the bill was filed the Whittier Lumber Company, the defendant in that suit, in due time filed its duly verified answer, in its corporate name and under its corporate seal, by its president, confessing the allegations of said bill, and also appeared by attorney, and that a regular decree of foreclosure of said mortgage was made by this court on March 26, 1906, directing that the lands described in said mortgage, and which are the lands described in the bill of complaint filed in this suit, be sold at public auction, after due advertisement, and appointing a commissioner to conduct such sale. That the commissioner did sell said lands in pursuance to said decree and as therein directed, and that Charles J. Harris became the last and highest bidder therefor at the price of $449,024.05, and duly assigned his bid to the complainant herein, the Harris-Woodbury Lumber Company. That said sale was duly reported to and confirmed by this court, and the commissioner was ordered to make deed conveying the title in fee for said lands to the Harris-Woodbury Lumber Company, which was done, and that there was no collusion or fraud in any of these proceedings.

The special master also found as a fact that on May 2, 1900, the Governor of the state of New Jersey, in which state the Whittier Lumber Company had been incorporated, duly issued his proclamation declaring inoperative and void all corporate powers conferred by law upon the Whittier Lumber Company, because of its failure to make the required reports and to pay the taxes assessed against it by said state of New Jersey for the year 1897. The special master further found as a fact that the laws of the state of New Jersey which were in effect on May 2, 1900, and have been in effect ever since, provide as follows:

"53. Corporate Existence Continues.—All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established.

"54. Directors—Trustees on Dissolution.—Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property.

"55. Powers and Liabilities of Such Trustees.—The directors, constituted trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation, and shall be suable by the same name, or in their own names or individual capacities, for the debts owing by such corporation, and shall be jointly and severally responsible for such debts, to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees."

See P. L. 1896, p. 295.

The special master also found as a fact that E. G. Coffin and F. M. McDonald recovered a judgment for $85,000 in 1907 against Charles R. Flint in the suit instituted by them in 1904, and that all the right, title, and interest of said Flint in and to said lands was sold by the marshal of this court under execution issued on said judgment to said E. G. Coffin for $100, and that said Coffin assigned his bid to the other defendant, D. Samuel White, to whom the marshal made a deed on June 1, 1908, conveying to said D. Samuel White all the right, title, interest, and claim which said Charles R. Flint had in and to said lands, which deed was duly acknowledged and recorded in Swain county, N. C., on June 2, 1908. The special master also found that the Whittier Lumber Company, in its corporate name and by its president and under its corporate seal, executed a quitclaim deed whereby it conveyed all its right, title, and interest in said lands to the Harris-Woodbury Lumber Company on September 5, 1906.

The special master reported as his conclusions of law that there never was any resulting trust upon the said lands, or any title thereto, in favor of Charles R. Flint, and that said Flint never at any time owned said lands, or held title thereto, or had any interest therein which was subject to attachment or could be sold under execution, and that the Whittier Lumber Company was an existing corporation in

1906 for the purposes of prosecuting and defending suits, conveying its property, and winding up its affairs, and that it could appear, and properly did appear and answer, in its corporate name, by its officers, in the suit brought in 1906 to foreclose the mortgage executed by it, and that the complainant, Harris-Woodbury Lumber Company, is the owner and seised in fee and actually possessed of the lands described in the bill of complaint, and entitled to the quiet and peaceable possession thereof without cloud or adverse claim, and that the marshal's said deed to D. Samuel White was a cloud upon complainant's title, which should be removed, and that the complainant was entitled to the injunction prayed.

This being a reference by consent, the special master's findings of fact are conclusive. The defendants excepted to the special master's report, and strenuously insisted that he had erred in his conclusions of law, contending that the foreclosure suit against the Whittier Lumber Company was void, first, because that corporation had been dissolved by the proclamation of the Governor of New Jersey on May 2, 1900, and said foreclosure suit was not instituted until April 16, 1906, and, being instituted in the Circuit Court of the United States for the Western District of North Carolina, it is governed by the North Carolina statutes, which provide that dissolved corporations are continued bodies corporate for the term of three years after dissolution for the purpose of prosecuting and defending actions by or against them and to wind up their affairs (Revisal N. C. 1908, § 1200), and not the New Jersey statute, in which there is no time limit; second, even if the New Jersey statute governed, the foreclosure suit was brought against the Whittier Lumber Company in its corporate capacity, whereas it should have been brought against the directors as trustees, as provided by section 54 of the New Jersey statute, quoted by the special master in his findings of fact; and, third, that the deed to the Harris-Woodbury Lumber Company, made on September 5, 1906, by the Whittier Lumber Company in its corporate capacity, was void, because it should have been made, even if the New Jersey, and not the North Carolina, statute governs, by the directors of the dissolved Whittier Lumber Company as trustees—and, therefore, the Harris-Woodbury Lumber Company had no title, and, as it must establish its own title to entitle it to the aid of a court of equity to remove a cloud therefrom, it therefore has no standing in this court, and the bill should be dismissed.

In suits of this character, as well as in actions in ejectment, the burden is upon the complainant to show that he is the lawful owner of the premises involved in the controversy. In this instance the complainant, both by pleading and proof, has made out what constitutes a prima facie title in fee simple to the lands involved. However, as appears in the statement of the case, it is insisted by counsel for the defendants that the title under which the complainant holds these lands is defective, and is not sufficient to convey the lands described therein.

I shall now consider the questions which arise at the threshold of this controversy, to wit: (a) Whether the foreclosure proceeding, by virtue of which the complainant became the owner of these lands, was void on account of the fact that the Whittier Lumber Company, as a corporation, had been dissolved by the proclamation of the Governor

of New Jersey prior to the date of the institution of the said foreclosure suit; (b) whether, under these circumstances, the court is governed by the North Carolina statute, which provides that dissolved corporations are continued as bodies corporate for three years after dissolution for the purpose only of prosecuting cases by or against them and for the transaction of other business incidental to the winding up of their affairs; and (c) whether, if the New Jersey statute governs, the foreclosure suit should not have been brought against the directors as trustees of the Whittier Lumber Company, under section 54 of the New Jersey statute, to which reference is made by the special master. There are other questions, incidentally arising, which I shall discuss in their logical order.

Section 53 of the New Jersey statute for the year 1896, reads as follows:

"53. Corporate Existence Continues.—All corporations, whether they expire by their own limitation or be annulled by the Legisature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

Section 55 provides that the directors shall be constituted trustees, and that they shall have authority to sue for and recover debts and property by the name of the corporation, and "shall be suable by the same name, or in their own names or individual capacities. * * *" Under this provision, where a corporation is dissolved, suits may be instituted, property transferred, etc., by the trustees, in the name of the corporation, or the trustees may be sued, etc., as a body or individually, in any controversy that may arise. The section of the New Jersey statute which authorizes the Governor to issue his proclamation dissolving a corporation of that state, as well as the sections I have just cited, have been passed upon in numerous cases, in which it is held that, notwithstanding the proclamation of the Governor of New Jersey dissolving a New Jersey corporation for the nonpayment of taxes, the corporate existence of such corporation is continued for the purpose of suing and being sued, and that any suit against such corporation is properly brought against it in its corporate name. The following cases bear directly on this point: American Surety Co. et al. v. Great White Spirit Co. et al., 58 N. J. Eq. 526, 43 Atl. 579; Grey, Attorney General, v. Newark Plank Road Co., 65 N. J. Law, 603, 48 Atl. 557; Camp et al. v. Taylor et al. (N. J.) 19 Atl. 968, and cases there cited; White Mountain Paper Co. v. Morse & Co., 62 C. C. A. 369, 127 Fed. 643; In re Munger Vehicle Tire Co., 159 Fed. 901, 905, 87 C. C. A. 81; Folger et al. v. Chase et al., 18 Pick. (Mass.) 63; Hawkins v. Glenn, 131 U. S. 330, 331, 9 Sup. Ct. 739, 33 L. Ed. 184; and Glenn v. Liggett, 135 U. S. 542, 10 Sup. Ct. 867, 34 L. Ed. 262.

The case of American Surety Co. v. Great White Spirit Co. et al., supra, was a suit instituted upon a bill filed by the creditors of the Great White Spirit Company, a corporation of New Jersey, praying that a receiver be appointed. Upon the return to the rule, the matter was heard by the Vice Chancellor upon the bill and accompanying affi-

davits and the affidavits presented by respondents. In accordance with his advice the application for a receiver was refused, and the rule to show cause was discharged. The case was then carried to the Court of Errors and Appeals of New Jersey. That court, in passing upon the exact question involved here, said:

"The proclamation of the Governor heretofore stated conformed to the requirements of this act. This act and the corporation act of 1896 are plainly parts of a legislative scheme respecting corporations, and, being in pari materia, are to be construed together. So construed, I think it obvious that the prohibition against the use of corporate powers of proclaimed defaulted corporations did not extend to their use in winding up and settling the affairs of such corporations under the conditions contained in sections 53–60, inclusive, of the corporation act of 1896. This was the view taken by the learned Vice Chancellor in this case, and he probably held the respondent company, after default and proclamation, to be within the provisions of those sections. By those provisions the directors of a corporation dissolved in any manner are made trustees thereof, with full powers to settle up its affairs."

The New Jersey court, in the case just quoted, held that the proclamation of dissolution had the effect only of dissolving the corporate capacity to prevent the transaction of the business for which the company was chartered, but that, while this is true, nevertheless, the corporate existence continued for the purposes of suing and being sued, disposing of its corporate property, paying its debts, and any and all other things that were necessary in order to promote an orderly disposition of its affairs, and that the rights of creditors, stockholders, and other parties interested should be finally adjusted in accordance with the principles controlling in cases where a corporation may for any reason be dissolved. This is an exceedingly wise provision of the law, as anything short of it would result in interminable confusion, and, in many instances, work a great hardship and injustice to those interested as stockholders, creditors, or otherwise.

In the case of Grey, Attorney General, v. Newark Plank Road Co., supra, the court again passed upon this question. There the Attorney General had instituted quo warranto proceedings to dissolve the corporation on the ground that its charter had expired. The court below entered an order declaring that it was not entitled to further corporate existence. The case was then carried to the Court of Appeals, and that court reversed the court below, saying:

"We concur in the opinion of the Supreme Court, but think that the judgment entered was not thereby warranted. In its concluding sentence the opinion declares that the defendant company will still continue to be a body corporate for the purposes in section 59 of the act concerning corporations specified. The reference is to section 59 of the act of April 7, 1875, now section 53 of the act of 1896 (P. L. 1896, p. 277), which ordains 'that all corporations, whether they expire by their own limitations or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting or defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established.' In the face of this statute the judgment entered is 'that the said Newark Plank Road Company be, and they hereby are, ousted from exercising and enjoying the franchise of a body politic and corporate by the name and style of the Newark Plank Road Company.' This judgment should be reversed, and in its stead should be entered a judgment that the corporate existence of said company has terminated, ex-

cept so far as it is continued by the said section, and that the company be ousted from the exercise and enjoyment of all franchises, except such as are thereby conferred."

In this case it is held that under the New Jersey statute the corporate existence is continued, for the purposes to which I have referred, until the affairs of the corporation are finally settled and wound up. The only distinction between that case and the case at bar is that there it was sought by quo warranto proceedings to secure the dissolution of the corporation, and in this instance the corporation was dissolved by proclamation of the Governor of New Jersey. The facts involved in this proceeding are substantially the same as those in that case.

The case of Camp et al. v. Taylor et al., supra, was an action instituted by the stockholders of a dissolved corporation against its directors for the mismanagement of its affairs. Among other things the question was raised as to whether the corporation should be made a party to the suit; and that court, in a well-considered opinion, held that the corporation should be made a party, inasmuch as the corporation was endowed, by section 59, p. 187, of the Revision of New Jersey, with power to perform certain duties, among which were that it was capable of suing and being sued for the purpose of winding up and settling its affairs. The court, in discussing this point, said:

"Although it appears by the appeal that the said corporation was dissolved, and the certificate of such dissolution filed in the office of the Secretary of State, yet I think there is no escaping the conclusion that the corporation, as such, should be made a party to this suit. The fifty-ninth section of the corporation act expressly provides that, in cases of dissolution, such corporations shall be deemed to continue their existence for the purpose of suing and being sued, in order to wind up the business of such corporation. See Revision, p. 187, § 59. And such seems, also, to be not only the plain reason of the case, but the conclusion to which most eminent judges have come in the consideration of this very question, as will appear by the following references: Wilson v. Bellows, 30 N. J. Eq. 282, 284; Ackerman v. Halsey, 37 N. J. Eq. 356; Conway v. Halsey, 44 N. J. Law, 462; Davenport v. Dows, 18 Wall. 626 [21 L. Ed. 938] (decided in 1874); Robinson v. Smith, 3 Paige [N. Y.] 222 [24 Am. Dec. 212]; Cunningham v. Pell, 5 Paige [N. Y.] 607; Hersey v. Veazie, 24 Me. 9 [41 Am. Dec. 364]; Insurance Co. v. Sebring, 5 Rich. Eq. [S. C.] 342; Railroad Co. v. Nolan, 48 N. Y. 513; Bagshaw v. Railroad Co., 7 Hare, 114–131; Foster v. Bank, 16 Mass. 245 [8 Am. Dec. 135]; Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192 [32 L. Ed. 179]; 1 Daniell, Ch. Pr. (5th Ed.) 368; Gray v. Steamship Co., 3 Hun [N. Y.] 391, 5 Thomp. & C. 229; Luling v. Insurance Co., 30 How. Prac. [N. Y.] 75; Butts v. Wood, 38 Barb. [N. Y.] 189; Thornton v. Railroad Co., 123 Mass. 34."

From the foregoing cases it will be seen that the courts of other states, as well as the courts of the United States, have held that the sections of the New Jersey statutes to which I have referred provide that, notwithstanding the fact that the Governor has the right, by proclamation, to dissolve a corporation of that state, so as to render it incapable of performing those functions necessary to the further transaction of business in which such corporation may have been engaged, yet the corporation is still kept alive for the purpose of doing those things that are essential to the final winding up of its affairs, such as transferring property, suing, and being sued, etc. Figuratively speaking, the right hand of the corporation, by which it was enabled to carry on the business in which it was actively engaged, was paralyzed com-

pletely by the proclamation of the Governor; but its body was not affected thereby, in so far as the exercise of those functions necessary to the performance of the acts incident to closing out and winding up its affairs were concerned.

However, it is insisted by counsel for the defendants, as I have said, that these cases do not apply, and that this cause is governed by the statutes of North Carolina, which, as already stated, provide that dissolved corporations are continued as bodies corporate for a term of three years, and no longer, after dissolution, for the purposes of prosecuting and defending actions by or against them and winding up their affairs. The case of Boyd et al. v. Hankinson et al., 92 Fed. 49, 34 C. C. A. 197, decided by the Circuit Court of Appeals for this Circuit, is very much in point. In that case the corporation (as in this instance), which had forfeited its charter, was incorporated under the laws of New Jersey. Having failed to pay its New Jersey taxes, the Governor of that state issued his proclamation on the 4th of May, 1897, dissolving the corporation and declaring its charter forfeited, pursuant to the statutes of New Jersey. The Circuit Court of Appeals, in passing upon the question involved, held that the laws of New Jersey were controlling, and that the corporation's existence for certain purposes was continued. Judge Goff, in a very able and interesting opinion, in referring to the point involved, said:

"But, even if the charter was forfeited, the company, while it would not be able to continue the transaction of business, would still be authorized to close out its affairs and dispose of its property, in the interest of its creditors and stockholders. And this is true, independent of the New Jersey statute on that subject. * * *"

The case of L. Bucki & Son Lumber Co. v. Atlantic Lumber Company, 128 Fed. 332, 63 C. C. A. 62, decided by the Circuit Court of Appeals for the Fifth Circuit (Judge Pardee rendering the opinion), is also very much in point. The learned judge in that case said:

"It is suggested that, as the New Jersey proceedings dissolved the corporation, the present suit must abate, notwithstanding section 53, because it is a personal action for malicious prosecution, and therefore cannot survive dissolution. The first answer to this is that the New Jersey proceedings did not dissolve the corporation, quoad the prosecution of suits, and that statute is controlling in the matter. * * *"

A corporation, doing business in a state other than the one wherein it is created, can only exercise such powers and functions as may be conferred upon it by its charter, and the transaction of its affairs is limited strictly to the authority granted by the state of its creation. It is only by the rule of comity that it is permitted to do business in this state at all, and, when it does so, it necessarily carries with it all the powers granted in its charter. Moreover, when a question of power in a given instance is involved, such question must be determined by the laws of its domicile, and those who may have transactions with such corporation are subject to the limitations and powers contained in its charter.

In the case of Canada Southern Ry. Co. v. Gebhard et al., 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020, the court said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta v. Earle, 13 Pet. 588 [10 L. Ed. 274]), though it may do business in all places where its charter allows and the local laws do not forbid (Railroad v. Koontz, 104 U. S. 12 [26 L. Ed. 643]). But wherever it goes for business it carries its charter, as that is the law of its existence (Relfe v. Rundel, 103 U. S. 226 [26 L. Ed. 337]), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (Paul v. Virginia, 8 Wall. 168 [19 L. Ed. 357]); but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The following cases are also very much in point: Hudson River Pulp & Paper Co. v. Warner & Co., 99 Fed. 187, 39 C. C. A. 452; Coltrane v. Templeton, 106 Fed. 375, 45 C. C. A. 328; Electric Light Co. v. Citizens' Light Co. (C. C.) 123 Fed. 592; London, etc., Bank v. Aronstein, 117 Fed. 607, 54 C. C. A. 663.

The case of Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, was carried by appeal from the Eastern District of North Carolina to the Circuit Court of Appeals, and thence to the Supreme Court of the United States. In that case the question involved was whether the stockholders of the defendant corporation were entitled to become parties defendant on the ground that the corporation had been dissolved. In disposing of the matter the Supreme Court, among other things, said:

"In Hamilton v. Glenn [85 Va. 901, 9 S. E. 129], decided in the Court of Appeals of Virginia March 14, 1889, and not yet reported in the official series, the rejection by the circuit court of Henrico county, Va., to which the suit in the Richmond chancery court had been removed, of a petition of certain stockholders to be made parties, and for a rehearing of the cause, came under review in the Supreme Court of Appeals of Virginia, and that court, among other things, said: 'The first question raised in this court is that the appellants are entitled to be made parties to the suit of Glenn v. National Express & Transportation Company, because the relief sought is against them. The suit of Glenn v. National Express & Transportation Company is a creditors' suit against a corporation, and by the terms of its charter and the laws of this state applicable to said company it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit; the president and directors being by their selection their representatives for this purpose. The appellants admit this as to any live and going

corporation, and claim, as the corporation is dead, that by its deed of trust it assigned to trustees and ceased to exist; that in a suit by a creditor, or by creditors generally, the suit against the corporation is in fact one not against the corporation, but against them as stockholders, and they are not represented by the company nor by the trustees. By the law of this state (Code 1873, c. 56, § 31), "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts, among those entitled thereto." By which it is provided that, notwithsanding its death, it stands, for the purpose of being sued by creditors, just as it did while live and going, and may sue and be sued as before, and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties.'

"The section quoted from the Code of 1873 is identical with section 30 of chapter 56 of the Code of 1860; and as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired. We concur in the decision to this effect of the highest tribunal of the state where the corporation dwelt, in reference to whose laws the stockholders contracted (Canada Southern Railway v. Gebhard, 109 U. S. 527 [3 Sup. Ct. 363, 27 L. Ed. 1020]), and in whose courts the creditors were obliged to seek the remedy accorded (Barclay v. Jalman, 4 Edw. Ch. [N. Y.] 123; Bank of Virginia v. Adams, 1 Parsons, Sel. Cas. 534; Patterson v. Lynde, 112 Ill. 196).

"We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder.

"The decree of the Richmond chancery court determined the validity of the assessment, and that the lapse of time between the failure of the company and the date of the decree did not preclude relief, by creating a bar through statutes of limitation or the application of the doctrine of laches. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked collaterally, and, indeed, upon a direct attack, it was already been sustained by the Virginia Court of Appeals. Hamilton v. Glenn, supra."

However, it is insisted by counsel for defendants that Charles R. Flint furnished the money for the purchase of the lands involved in this controversy and caused the title to be made to the Foreign Hardwood Log Company, an alleged "dummy" corporation under his control; that the said corporation held the property in trust for him as resultant beneficiary and owner of the equitable estate therein; that afterwards, for the purpose of cheating and defrauding E. G. Coffin and F. M. McDonald, Charles R. Flint caused the Foreign Hardwood Log Company to make a deed for the said lands to the Tuckaseigee Timber Company, another alleged "dummy" corporation controlled by him, at the same time denying that any title passed by such deed, both because of its fraudulent purpose and because the Tuckaseigee Timber Company was never lawfully organized and was never capable of owning real estate or acquiring or holding title thereto. Counsel for defendants also contended that subsequently said Flint, still designing, as they averred, to cheat and defraud said Coffin and McDonald and his other creditors, caused the Tuckaseigee Timber

Company to make a deed for said lands to the Whittier Lumber Company, another alleged "dummy" corporation, composed of employés under his control, but claiming that no title passed, because the Tuckaseigee Timber Company had no power to receive or convey title, and because the Whittier Lumber Company was never properly organized and never became a legal corporation capable of holding title to real estate. They further averred that, if the Whittier Lumber Company did acquire any title by said conveyance, it held the same for the benefit of Coffin and McDonald and other creditors of Flint, for the alleged reasons that said conveyances were made for the purpose of cheating and defrauding said creditors; also that the complainant, with full knowledge of these things, acquired possession of the lands in question, and fraudulently procured the institution of the suit to foreclose the mortgage which had been executed by the Whittier Lumber Company to the State Trust Company of New York, and misled the court by collusion with the Whittier Lumber Company, thereby procuring a decree ordering a sale of the lands, and at such sale pretended to become the purchaser of said lands, using said bonds in making payment. They further contended that there was an understanding between complainant and Flint whereby the actual payment for said lands depended upon complainant's establishing title thereto by the conveyance set out in the complaint, and that this proceeding by the complainant is in furtherance of said nefarious scheme, and that, consequently, complainant is not entitled to the relief demanded.

As I have before stated, this was a consent reference, and the defendants are bound by the findings of fact; but, even if the defendants had not consented to the reference, the evidence is such as to fully sustain the findings of the special master. The thirty-first and thirty-second findings of fact by the master are in the following language:

"(31) There is not sufficient evidence that any of the things done by Charles R. Flint, or his agents, or representatives, or business associates, in connection with said lands, or the title thereto, or in connection with the corporations which successively held said title, were done for the purpose of hindering and delaying, or cheating and defrauding, any creditors of said Charles R. Flint, or that there was at any time any conspiracy, or collusion, or understanding between said Charles R. Flint, or his agents or representatives, and Charles J. Harris, or the Harris-Woodbury Lumber Company, for the purpose of hindering and delaying, or cheating and defrauding, any of the creditors of Charles R. Flint, and therefore I find that such is not a fact.

"(32) I find that there was no agreement, understanding, intent, or purpose on the part of Charles J. Harris, or the Harris-Woodbury Lumber Company, to cheat, defraud, hinder, or delay Coffin & McDonald, or either of them, or any other creditors of Charles R. Flint, or any other person, in purchasing said bonds or in procuring said foreclosure, or in buying said lands at said foreclosure sale, or in having title made to the Harris-Woodbury Lumber Company. And I find that Charles J. Harris acted in good faith and without fraud or collusion in the purchase of the bonds of the Whittier Lumber Company and paid a valuable consideration therefor, and that he acted in good faith and without fraud or collusion in procuring the Morton Trust Company to institute said foreclosure suit, and in buying the lands at the sale made under the decree entered in said suit, and in having title made to the Harris-Woodbury Lumber Company, and that said Morton Trust Company acted in good faith and without fraud or collusion in bringing and prosecuting said suit, and that neither said Charles J. Harris nor the Harris-Woodbury Lumber Company have done anything in connection with said lands, or conspired, or colluded, or agreed with Charles R. Flint, or any other person, with intent

and purpose to hinder and delay, or cheat and defraud, Coffin & McDonald, or E. G. Coffin, or D. Samuel White, or any other person."

From what appears it will be seen that the defendants have failed to sustain the averments contained in the answer, and the master not only finds that there is no evidence upon which to sustain the averments in the answer, but further finds as a fact from the evidence that the purchase money paid for the land when it was conveyed to the Foreign Hardwood Log Company was not furnished by Charles R. Flint; that the title to the said land was duly conveyed by the Foreign Hardwood Log Company to the Tuckaseigee Timber Company, and by the latter company to the Whittier Lumber Company; that the Whittier Lumber Company duly issued its bonds and duly executed a mortgage on said lands as security; and that these things were done regularly, without fraud or intent on the part of Charles R. Flint to cheat or defraud E. G. Coffin and F. M. McDonald and the other creditors.

As I have already stated, it is insisted by counsel for defendants that Charles R. Flint was the real owner of the premises in question, and that, while the title to the same was not in his name, there was nevertheless a resulting trust in said lands in his favor; but in view of the evidence, as well as the findings of fact by the special master, I am of the opinion that there never was any resulting trust in these lands or any equitable title thereto in favor of Charles R. Flint. This being the case, it necessarily follows that Charles R. Flint never owned these lands, or had any interest therein, legal or equitable, that would subject the same to the lien of a judgment, or sale under execution, as the property of the said Flint.

It is very properly insisted by counsel for complainant that, inasmuch as it is clear that Flint had no interest in the land subject to attachment, or, indeed, any interest of any kind whatever, the defendants in this action have no standing in this court upon any other questions raised and discussed; their entire claim being based upon the plea that they had acquired title at the foreclosure sale to what they alleged to be Flint's interest in the lands. I have carefully considered the authorities relied upon by counsel for the defendants, but am of the opinion that they do not apply to the case at bar, and are, therefore, not controlling.

From the master's report, it appears that the complainant is the owner, and seised in fee, and actually possessed of the lands described in the complaint; that the deed by the United States marshal to D. Samuel White, bearing date of June 1, 1908, and registered in the office of the register of deeds for Swain county, N. C., on June 2, 1908, is a cloud on complainant's title. Therefore a decree will be entered declaring the Harris-Woodbury Lumber Company to be the owner in fee of the premises in question and requiring the deed executed by the United States marshal to D. Samuel White, as hereinbefore stated, to be surrendered into this court in order that the same may be canceled; also that the defendants, their agents, servants, employés, and attorneys be restrained from further asserting or claiming any interest or estate in or to said lands, or any part thereof, by reason of the said deed to defendant D. Samuel White; that the master's report filed herein be confirmed in all respects.

BAKER v. HAMBURG-AMERICAN PACKET CO.

(District Court, D. Maryland. March 16, 1910.)

1. SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR INJURY TO STEVEDORE—DEFECTIVE CONDITION OF VESSEL.

A ship *held* liable for an injury to a stevedore, resulting from the giving way of a hatch cover on which he stood to remove another section, caused by the fact that the crossbeam on which the fore-and-after rested was sprung, increasing the distance to be reached by the fore-and-after, and allowing the end to slip off.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

2. DAMAGES (§ 132*)—PERSONAL INJURY.

An award of $4,500 made to a stevedore, 48 years old, for an injury which entirely disabled him for life, caused great suffering, and was probably of a progressive character.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

In Admiralty. Suit by Henry Baker against the Hamburg-American Packet Company. Decree for libelant.

George T. Mister and Daniel B. Chambers, for libelant.
A. Leonard Brougham and Paul Johannsen, for respondent.

MORRIS, District Judge (orally). This is one of those unfortunate accidents to stevedores which are far too common. Stevedores work under conditions of a good deal of danger at the best. They work at night as well as in the daytime; they work rapidly and with energy, and not always with the greatest care to their own safety; and it not infrequently happens that they are injured without the fault of anybody but themselves. But, if it is shown that through the negligence of the shipowners they are given an unsafe place in which to work, and the injury happens on that account, and without fault on the stevedores' part, then the ship should be held liable.

The sole question in this case is whether the injury is attributable to the fault of the ship. There is not a great deal of conflict in the testimony. The testimony is very clear that the crossbeam on which the fore-and-after rested was sprung out of its true line—that it was sprung aft—the result naturally being to shorten the space on which the fore-and-after rested and rendering it likely to fall. That was a very dangerous defect. The fore-and-afters must have sufficient resting space to make them secure. The consequence was that when this libelant, standing on one of the hatch covers, which rested on these fore-and-afters, stooped over to reach one of the hatch covers and pulled upon it to raise it, the whole thing came down, and he and the hatch cover and the fore-and-after were precipitated into the hold, about 35 feet below.

The proof is very convincing that the aft crossbeam was sprung, and this increased the distance to be reached by the fore-and-afters which sustained the section of the hatch cover on which the libelant was

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

standing. It is proven, not by mere preponderance of evidence, but to a demonstration, that the crossbeam was sprung aft. It is proven that the next day, when they attempted to put in the fore-and-afters of the next section, the crossbeam was so much sprung that they could not get them in. They could only do it by pounding with the hatch covers and forcing the fore-and-afters into place. This had the effect of driving the bend in the cross-section into place and correcting the fault, and that is probably the way it had been done before the ship came into port; that is to say, when the fore-and-afters of the aft section were forced into place, they pushed the bend in the crossbeam forward and straightened it, and then there was resting place enough for the fore-and-after of the next section to hold on.

That, I hold, was a very unsafe condition. It is well known that in order to handle the hatch covers the men must go upon the hatch, and therefore the hatch should be made reasonably safe to bear that weight and to hold their position under that strain, and if they are not, and that is a permanent condition of the hatch of the ship, it is the fault of the ship. In this case it has led to a disastrous result.

It is said that there were bolts to hold these fore-and-afters in place. That, in itself, shows that there was some special occasion for bolts, and a natural conclusion is that they were put in because of this bend in the after crossbeam. Now, without a special warning, and a very special warning, it would not be supposed by the stevedores that while in port these fore-and-afters would not be sufficient to bear a man's weight. At sea, where there is a great strain from the working of the ship, then they might have needed those bolts as a contrivance to help out the strain. Could it be anticipated that the hatch covers were so weakly supported that they would give way under the ordinary weight of a man? The fact that the bolts were used, I think, tends to show that there was a weakness intended to be overcome by this very unusual device. It could not be presupposed that these fore-and-afters should be bolted to make them safe to stand on.

I find that the libelant has made out a case which entitles him to damages. The amount of damages is a somewhat difficult question. This injured man is 48 years of age. He certainly had at least 10 years' expectancy of strength and vigor. He was a powerful man, had been foreman of the gang, and was a good workman, and he is entirely disabled for life. Vertebræ in his back are broken. He has suffered a great deal, and will continue to suffer, and the physicians say that his disability is probably of a progressive character. I do not think I can allow him less than $4,500, considering the character of the injury and the permanent disability which he has suffered.

WASKEY et al. v. HAMMER et al.

EADIE et al. v. CHAMBERS.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1910.)

Nos. 1,609, 1,595.

1. APPEAL AND ERROR (§ 1218*)—MANDATE—POWER TO RECALL.

The Circuit Court of Appeals has no power to entertain a motion to recall a mandate after the expiration of the term at which its judgment was rendered and the mandate issued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.*]

2. CERTIORARI (§ 47*)—SERVICE OF WRIT OR NOTICE OF PROCEEDINGS—EFFECT AS STAY.

A writ of certiorari issued to a subordinate court operates as a supersedeas from the time of its service or of formal notice of its issuance, suspending the power of the court to which it is issued to take further action in the case until it is finally disposed of by the reviewing court.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 121, 122; Dec. Dig. § 47.*]

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

Actions by Joseph Hammer and others against Frank H. Waskey and others, and by J. J. Chambers against Andrew Eadie and others. On motions to recall mandates. Overruled.

For former opinions, see 170 Fed. 31, 95 C. C. A. 305, and 172 Fed. 73, 96 C. C. A. 561.

F. E. Fuller, O. D. Cochran, Ira D. Orton, C. D. Murane, W. A. Gilmore, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. Mackenzie, for plaintiffs in error Waskey and others.

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

F. E. Fuller, O. D. Cochran, Ira D. Orton, Albert Fink, and William H. Metson, for plaintiffs in error Eadie and others.

William A. Gilmore, C. D. Murane, and Albert H. Elliot, for defendant in error Chambers.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The mandate of this court was issued to the District Court for Alaska in the first of the above-entitled cases on June 18, 1909, and in the second case on October 11, 1909. The petitioners now ask this court to recall both mandates, on the ground that in each case the Supreme Court on April 6, 1910, issued its writ of certiorari directing this court to certify its record to that court for its action thereon.

It is a conclusive answer to the petition in the first case to point to the fact that the term at which our mandate issued has long since expired. This court has no power to entertain a motion to recall its mandate after the expiration of the term at which its judgment was ren-

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

dered and its mandate was issued. In Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, the court declared it to be a rule well established:

"That after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them."

And the court added:

"So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court."

And in Reynolds v. Manhattan Trust Co., 109 Fed. 97, 48 C. C. A. 249, the Circuit Court of Appeals for the Eighth Circuit, applied this rule in a case where a motion was made to revoke the court's mandate after the expiration of the term at which the cause was determined and the mandate issued.

But aside from the want of power in this court to recall its mandate in the case first mentioned, it is an insuperable obstacle to the relief here sought in both cases that the Supreme Court has issued to this court its writs of certiorari. A certiorari to a subordinate court or tribunal operates as a stay of proceedings from the time of its service or of formal notice of its issuance, and if the court to which the writ is directed thereafter proceeds, it is a contempt, and its subsequent proceedings are void. 6 Cyc. 800, and cases there cited. The proceedings of this court are not reversed by the issuance of the writ and the stay resulting therefrom, but are merely suspended until the further action of the reviewing court. Ewing v. Thompson, 43 Pa. 372. In that case Judge Strong, afterwards a justice of the Supreme Court, said of the effect of a writ of certiorari:

"Very many English as well as American authorities are quoted in Patchin v. Mayo, etc., 13 Wend. [N. Y.] 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be in effect a supersedeas. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is stated to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it, that the judicial proceedings can proceed no farther in the lower court."

In State ex rel. Chicago & N. D. Ry. Co. v. Burnell, 102 Wis. 232, 78 N. W. 425, the court said:

"A writ of certiorari suspends the execution of the judgment or order challenged thereby. It does not vacate such judgment or order. Pending the hearing of such an order or judgment, it remains in full force, the same as in the case of an appeal, where the statute regarding a stay of proceedings has been complied with."

And the court added that the sole effect of the writ of certiorari "is to prevent any act being done to enforce the judgment or order affected by the stay."

In McWilliams v. King, 32 N. J. Law, 23, the court said:

"But it is to be remembered that the writ of certiorari is of itself and propria vigore a supersedeas."

In Louisville, N. A. & C. R. Co. v. Louisville Trust Co. (C. C.) 78 Fed. 659, Barr, District Judge, was of the opinion that the effect of certiorari awarded by the Supreme Court in a case decided by the Circuit Court of Appeals is to suspend any action that might be taken either by the Circuit Court of Appeals or by the trial court in obedience to its mandate. And the court in that case in support of its view adverted to the settled rule that the effect of the issuance of the writ of certiorari is to stay proceedings in the court to which it is directed, and cited some of the cases above referred to. It would seem upon principle, in view of the effect of the writ and the consequent stay, that all proceedings in this court, as well as in the District Court of Alaska to which the mandates of this court were issued, are stayed until the decision of the Supreme Court shall be rendered upon its review of the judgment of this court, and that notice of the issuance of the writ should be brought to the attention of the District Court, in order that it may direct a stay of further proceedings, and that this court is powerless to act in the premises.

The petitions are denied.

NORTHERN PAC. RY. CO. v. ALTIMUS.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1910.)

No. 1,793.

1. MASTER AND SERVANT (§§ 101, 102, 124*)—DUTY OF MASTER—TOOLS AND APPLIANCES—INSPECTION AND TESTS.

The master's duty to the servant requires the exercise of reasonable care and skill, not only in furnishing safe machinery and appliances, but in keeping them in a safe condition, and includes the duty of making inspection and tests at proper intervals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 180–184, 192, 235-242; Dec. Dig. §§ 101, 102, 124.*]

2. MASTER AND SERVANT (§ 205*)—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.

The servant has the right to assume that the master has exercised due care and diligence to provide suitable appliances, and does not assume the risk from the master's negligence in performing such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547–549; Dec. Dig. § 205.*

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

3. MASTER AND SERVANT (§§ 288, 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTIONS FOR JURY.

Plaintiff, who was helper for a boiler maker working for defendant railroad company, was injured by the breaking of a handle of an air motor which they were using on top of a boiler. The handle was not the kind usually used, but was a piece of pipe, which had been substituted, and was weakened by the deep cutting of the threads; but such defect was not observable, unless the handle was removed and inspected. *Held*, that plaintiff could not be said as matter of law to have assumed the

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

risk, or to be chargeable with contributory negligence, and that such questions were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1132; Dec. Dig. §§ 288, 289.*]

Ross, Circuit Judge, dissenting.

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

Action by Joseph C. Altimus against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Wallace, Jr., R. F. Gaines, and John G. Brown, for plaintiff in error.

Miller & O'Connor and Walsh & Nolan, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error received personal injuries from an accident while in the service of the plaintiff in error. He was a helper, working with one Andrews, a boiler maker, on the top of a boiler belonging to the plaintiff in error, tapping out stay bolts. He alleged in his complaint that the plaintiff in error furnished him and Andrews with a certain air motor with which to do the work, and that while he was assisting in the operation of the air motor, and doing the work required of him, it became and was necessary for him to hold a certain handle used in connection therewith, and that while he was holding the handle, and while the motor was in operation, the handle broke and was detached from the machine, causing him to fall violently from the top of the engine to the floor; that the air motor and the handle so furnished him to do the work, which work he was obliged to perform as a boiler maker's helper, were in a defective, unsafe, and insecure condition; that, in the preparation of the said handle for placing it in said motor, it was materially weakened by cutting a substantial portion of it, by reason whereof the accident happened, all of which the defendant knew, or should have known by the exercise of reasonable care. The plaintiff in error set up as a defense that the injuries sustained by the defendant in error were caused by his contributing fault and carelessness, and for a second defense that the injury was due to causes and risks which the defendant in error had assumed.

The assignment of error principally relied upon is that the court erred in overruling the motion, made at the close of the evidence, for a directed verdict in favor of the plaintiff in error. It was shown on the trial that the motor so used for tapping holes in the boilers, which are undergoing repairs, is a machine of considerable size, weighing 40 or 50 pounds; that it is supplied with two handles, one on each side, and so fixed to the machine that, while in operation, one of the handles is held by the boiler maker and the other is held by his helper, and pressure is exerted on the one handle to counterbalance the pressure exerted upon the other to hold the machine in position; that the operations are conducted under the control and direction of the boiler maker,

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

and that the motors, with the handles, are supplied from the factory. It was shown that sometimes, in order to secure greater leverage, the handles thus supplied were unscrewed from the motor, and others and longer ones were substituted therefor; that the tools were kept in a toolroom in charge of the foreman of the shop; that, when tools were required, application was made to him, and he either directed the applicant to the place where the tools could be obtained or he got them for him.

The defendant in error testified that he had assisted in this and similar work before the time of the accident; that on the day of the accident "the handles were not the same"; that the handle which the boiler maker held was a factory-made handle, while the one which he held was a piece of gas pipe; that he had never before seen a piece of pipe like this on one of those motors. He admitted that the machine was supplied with a regular handle for a helper, and that the one which he was using was not a regular handle; that it was lighter than the regular handle, and that he had never known one of the regular handles to break; that he never before had worked with one of these motors with anything else than the regular handle. He admitted that he had read and understood the rule of the company that employés "are required to see for themselves that the machinery or tools which they are expected to use are in proper condition for the service required, and, if not, to put them in proper condition, or to see that this is done before using them," and that he assented to this requirement before entering into the company's employment.

Andrews, the boiler maker, testified from his experience as a boiler maker that the pipe which the defendant in error used that day was not of sufficient strength to encounter the exertion required. "I say that because it broke. The man using the machine could not tell by looking at the pipe. He could only tell after it was broken or taken out. He could tell by taking it out and looking at it, but that was not done when Altimus was hurt. It was not customary to take handles out and look at the threads." Andrews also testified that the foreman sent him to work on this engine, and told him the tools were there on the boiler; that he went there, and found the air motor which was used; and that he never saw a handle like that one in a machine before, but that there was nothing about the handle to indicate that it was dangerous to use it. He testified he did not know who put the iron pipe handle in.

There was testimony that some of the employés of the plaintiff in error would at times substitute a piece of iron pipe for the regular handle in order to obtain greater leverage, and to render easier the task of holding the machine in position. There is no evidence, however, that the defendant in error knew of this practice, and he denied that he had ever seen or used an iron pipe handle prior to the day of the accident. If, as some of this testimony seems to indicate, it was a common practice thus to substitute an iron pipe handle for the regular handle, it behooved the company, in the exercise of its duty of inspection, to know of that practice, and either to prevent it or to warn its employés against the danger thereof. "The master's duty to the servant requires of the former reasonable care and skill in furnishing safe

machinery and appliances, and in keeping such machinery and appliances in a safe condition, including the duty of making inspection and tests at proper intervals." Comben v. Belleville Stone Co., 59 N. J. Law, 226, 36 Atl. 473; Labatt on Master and Servant, 154. Said the court in Brann v. Chicago, R. I. & P. R. Co., 53 Iowa, 595, 6 N. W. 5, 36 Am. Rep. 243:

"It will not do to say that, having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled and positively performed."

It is true that the master is not bound to anticipate injury from the use of simple appliances by an experienced workman, and it is held by many courts that the duty of inspection does not extend to the small and simple tools in everyday use, for the reason that the employé is supposed to be a competent judge of their fitness for use. Wachsmith v. Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497. But the appliance which was in use by the defendant in error was not a simple or ordinary tool. It was a machine composed of several parts; and its defects, if any there were, were not exposed to view. The defect which caused the accident was not so patent as to be readily observed. It was a concealed defect, a weakness resulting from the fact that the threads in the pipe handle whereby it was screwed into the machine were cut so deep as to leave the handle of insufficient strength to meet the pressure which was exerted upon it. This weakness might perhaps have been discovered by the defendant in error upon unscrewing the handle and inspecting it; but he was not required to do that. It was not his duty to dismember the machine and search for concealed defects. He had the right to assume, unless he knew the contrary, that the iron handle which he found in the machine, which, notwithstanding that it was not a regular handle, was in use, and to all appearance belonged to the machine, was there under the direction of his employer, and that it was adequate for the purpose for which it was in use. The instruction which he received from the foreman was to use the machine which was there. The fact that the handle was different from the regular handle would not necessarily suggest to him that it was unsafe or defective. On the contrary, the natural suggestion might be that the substitution had been made advisedly, and for the reason that it was better adapted to hold the machine in place than was the regular handle.

Much reliance is placed upon the rule of the company requiring employés to see for themselves that the machinery or tools were in proper condition; but that rule added nothing to the duty of the servant. In the absence of such a rule he is still required to make his own inspection of simple and ordinary tools, and the master cannot by such a rule shift to the servant his own responsibility of inspecting machines and complicated implements. When the whole of the evidence is considered, it is clear that it does not show conclusively that the defendant in error knew, or that a person of ordinary prudence in the exercise of reasonable care and diligence in the situation in which he was placed would have known, that the handle was of insufficient strength for the purpose for which it was used. There was no error, therefore,

in refusing to instruct the jury to return a verdict as requested, either on the ground that the defendant in error was guilty of contributory negligence in using the machine as he found it or on the ground that he assumed the risk thereof.

The foregoing considerations answer the contention of the plaintiff in error that the trial court erred in refusing certain requested instructions as to the relative duty of the master and the servant under the circumstances disclosed in the case. The court gave the jury full and proper instructions upon every branch of the law applicable to the issues. We find no merit in the contention that there was error in instructing the jury that the servant does not assume the risk of his master's negligence. What was said by the court upon that subject is amply sustained by the language of the court in Choctaw, Oklahoma & C. R. Co. v. McDade, 191 U. S. 68, 24 Sup. Ct. 25, 48 L. Ed. 96:

"The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation."

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). The action was for damages for personal injuries received by the defendant in error, who was the plaintiff in the court below, while working as a boiler maker's helper in the shops of the railway company at Livingston, Mont. The plaintiff had been so employed for a period of six months immediately preceding his injury; his duties being to work with the boiler maker with air motors, holding bars, hammers, etc., and, generally, in dismantling, repairing, and reassembling locomotive boilers.

The inside of the fire-box portion of the locomotive boiler, having an area of about 8 by 20 feet, is held to the outside portion of the boiler by a great number of stay bolts, screwed in stay-bolt holes. Being screwed into both the outside and inside iron sheets, it becomes necessary to tap out two holes for each stay bolt; the tap being an instrument used to cut the threading in the sides of the holes, and being turned by an air motor. The motors are made of iron and weigh between 40 and 50 pounds. The weight forces the tap downward, and the motor turns the tap in the hole, so that the work of the boiler maker and his helper is largely to steady the machine, so that the tap will cut straight. That they may do this the motors are fitted with two handles, one called the boiler maker's handle, and the other the helper's handle. The pressure exerted by the two men on their respective handles is in opposite directions, so that, when the tap strains or turns harder, it is not an easy matter to continue to hold it upright and steady. The handles are specially built for strength and steadiness, and come with the motor from the factories. They are of good steel and comparatively short, the helper's handle being about eight inches long, and having a bearing on the end that screws into the machine, which fits flush with the squared surface of a projection on the machine, thus preventing any play or movement of the handle alone.

The evidence is without substantial conflict. At the time of the plaintiff's injury he was helping a boiler maker, named Andrews, operate one of the motors. He had previously aided other boiler makers in the same shop in doing similar work, one time helping one named Moore for a period of eight days. At the time of his injury he had been working with Andrews about two days. The evidence shows without conflict that the shops were sufficiently equipped with the air motors and their regular handles, and that the men called upon to operate the motors were at liberty to go to the shops and get such handles and other tools as were needed for the work in hand. The plaintiff testified, among other things, as follows:

"There was quite a good deal of work in the shop then. It was pretty well crowded. I don't know how many men were employed there. I could not say. Yes; there was as many as 50. Our tools we got out of the tool room. Yes, sir; there is a foreman in charge of the shop. He tells you to get on the job, and you go to him for tools, and he tells you where to get the tools. If you don't get them, he gets them for you. * * * The handle that I had was a gas pipe with a cap on the end. The machine carries with it a regular handle for the helper. The one I was using was not the regular handle. The regular handle has a bearing at the base of the screw portion, while the gas pipe does not. You can't see the screw portion of the pipe. It was in the motor. There was a bend in that pipe. I can't just recall where, but there was a bend in it—a dent. This handle I used was just a piece of pipe with screws on both ends, one end being screwed into the motor, and the other had a cap on it to protect the hand. This handle that I used was different from the regular handle that goes with the machine. It is lighter than the regular handle; that is, it has less strength. This Defendant's Exhibit No. 2 that you hand me is a helper's handle. I never had one of those handles such as Exhibit No. 2 to break with me. I don't know whether the helper's handle is longer than the boiler maker's handle or not. I don't know whether the piece of pipe I had that day was longer or shorter than the regular handle. Did not take any particular notice; could not say. I don't know. I never worked with one of those motors with anything else than a common handle; but on the day I was hurt there was something else than a common handle on it. Yes, sir; Defendant's Exhibit No. 3 is a boiler maker's handle. Seeing the two together, I will say that it is longer than the helper's handle. The boilermaker also assists in holding the machine steady. Defendant's Exhibit No. 4 is about the same sort of piece of pipe as I had, except the one that I had was lighter and had a tap on one end of it. It screwed into the helper's side of the machine. I don't just remember the length of the one that I used."

Andrews testified, among other things, as follows:

"Altimus was working with me as helper on the day that he was hurt. We were sent on the job by the foreman. Q. Did he tell you anything about getting tools and where you would get them? A. No, sir; he just told me to go over and get to work on the job, and what to do. It was customary to have a motor on that kind of a job, and there was one there on the boiler that we went to work on. We were working on the fire-box portion of the boiler. It was turned up on the side and we were on the top side tapping out those holes to put in the stay bolts, putting in the threads to run the bolts through"—

when Altimus' handle broke, causing him to fall and sustain the injury for which he sued.

Testimony of the witnesses Moore and Wallace, who were also boiler makers employed in the company's shops at Livingston, is to the effect that, notwithstanding the regular handles sent from the factory with the air motors to be used in their operation were stronger

and better, yet the helpers would at times use in lieu of them pieces of gas pipe which were longer and afforded more leverage, thereby making the work easier. I extract from the testimony of the witness Wallace as follows:

"I am a boiler maker of 29 years' experience. Been in the Livingston shops 2½ years. Was employé there during the interval between January 22 and July 23, 1908. Mr. Altimus was also employed there as a helper. He acted as helper for me. He has assisted me with the use of an air motor as a helper. There was a toolroom in the Livingston shops at that time. It is a place to keep tools, keep them in repair. Every man can go in and ask for what he wants, and in a great many instances he can go in and select what he wants. These air motors are furnished with regular handles. There is considerable difference between a gas-pipe handle and a regular handle. The handle made for the motor has a shoulder, or bearing, to fit up against the motor, while the gas pipe has not. Then the regular handle is a heavier piece of metal; that is, heavier than the gas pipe. It is also shorter than the gas pipe. A longer handle gives you more leverage. All of these differences are easily discernible to an ordinary employé. As to the probability of their breaking, well, there would be danger of a pipe breaking before a regular handle would. You could get more leverage if you wanted it on the regular handle of the motor without removing it—two or three different ways of doing it. You could put a piece of pipe over the handle, or in the handle, or put a piece of wood in. A workman in the Livingston shops who finds a handle on a motor defective has the means at his own disposal of getting a regular handle by going to the toolroom. Helpers sometimes use pipe handles inside of the regular handle. The regular handle, though, is easily distinguishable from a pipe handle. We have no other use in the shops for these regular motor handles, other than in the motors. These motors, when they are first brought out, have the regular handles in them, and the changes from a regular handle to a pipe handle are made by the man using the motor."

On cross-examination this witness further testified, among other things, as follows:

"These machines and things are in the toolroom, with a man in charge. He sees that the tools are in repair and ready to be handed out. Yes, sir; it has been the practice in the Livingston toolroom for the men to go right in anywhere and pick up the tools or throw them down. A man could go in most of the time and select his own tools. Yes, sir; a number of tools are assigned to a particular place. No, sir; it is not a grab-bag proposition to pick up a tool. There are racks and receptacles made for certain tools. It is the duty of the toolroom man to keep things in order. Yes, sir; I think there were gas-pipe handles used before July, 1908. To get more pressure you would use a gas pipe or a stick. That would be one of the three ways that I know of of getting more leverage. No, sir; there is not always a demand for all of the leverage possible. There is some work that requires less power than other. Well, I could not say it is necessary to have greater power at all times or at any time. No; I didn't say that they all used these gas-pipe handles. No, sir; they don't do it for fun. It is to make it easier for themselves. If you get more leverage, you can hold the machine much easier. No, sir; I don't mean that the ease is because the regular handle is smooth and the gas pipe is rough. That does not make any difference. It would be less power that you would have to exert on the longer handle. Yes, sir; I mean that with the same pressure on a longer handle you could get a result with less exertion than with a shorter handle. As to the likelihood of being able to tell when a long handle is going to break, I don't know that a man could tell when anything is going to break. The same is true as to a shorter handle. The likelihood would be in favor of the longer handle breaking."

The testimony of the witness Moore, also a boiler maker, was to the same general effect, and, as has been before said, there was really no substantial conflict in the evidence.

It is thus seen that, although the company's shops were equipped with the regular and proper helpers' handles, longer pieces of gas pipe, but of less strength, were not infrequently used by the helpers because of the greater leverage and consequently less work. Who put the particular piece of gas pipe in the motor in question which proved of insufficient strength to do the required work does not appear; but it is clear, I think, that the law did not require the company to see that its employés did not use an improper handle, when it had performed its duty by furnishing suitable handles easily accessible to the employés. According to the plaintiff's own testimony, he was familiar with the motors and with the regular handles made for and supplied with them, yet he knowingly used instead thereof a piece of gas pipe, lighter and of less strength than the proper handle, although affording him greater leverage and consequently easier work.

I think the court below should have granted the defendant's motion to instruct the jury to render a verdict in its favor.

HILL v. KENNEDY.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 212.

CONTRACTS (§ 352*)—ACTION FOR BREACH—QUESTIONS FOR JURY.

A written promise by defendant to pay to plaintiff a stated sum in consideration of "services in securing" a theater *held* susceptible of a construction making it apply to services yet to be rendered, and to render it error to direct a verdict for plaintiff in an action to recover such sum for services alleged to have been previously rendered, where defendant gave evidence tending to show that the theater had not then been, and was not thereafter, secured within the meaning of the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 352.*]

Coxe, Circuit Judge, dissenting.

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

Action by Henry D. Kennedy against Gus Hill. Judgment for plaintiff, and defendant brings error. Reversed.

Leon Laski (G. E. Joseph, of counsel), for plaintiff in error.

J. L. Hill, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The complaint, after averments as to citizenship, alleged: (1) That between May 17 and June 5, 1905, at the request of defendant plaintiff performed labor and services, to wit, secured the Auditorium Theater of Philadelphia for [an association in which defendant was interested]; (2) that the reasonable value of such services was $5,000; (3) that on June 5, 1905, defendant promised to pay him for such services $5,000 on or before September 1, 1905 [or to give him, at his election, a half interest in a burlesque attraction].

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

Each of these allegations was squarely denied by the answer and the parties came into court to try the issues thereby raised. The plaintiff testified that in April, 1905, defendant asked him to go to Philadelphia and see if he could make arrangements with the owner of the theater for purchasing it; that he made several trips to Philadelphia, saw the owner, and obtained from him an agreement to sell the property conditioned on the owner being able by September 1st to get rid of a pending lease to one Lederer and his partners, which he expected to do through the tenants' defaulting on their rent; that he reported this to defendant, who made the agreement with the owner May 20th, paying $10,000 on account; that this came to nothing because "on or about September 1st Gilmore [the owner] was unable to give possession and the money was returned and the deal declared off"; that, while negotiations with Gilmore were pending, plaintiff on May 4th met Lederer, who offered to sell his lease to defendant; that he reported this to defendant, who said, "Let it drop;" that on May 17th defendant told him that he felt Gilmore would not be able to deliver the property on September 1st and that he must secure the theater, and asked plaintiff if he would not reopen negotiations with Lederer with a view to effecting some arrangement whereby he could feel sure of having the theater for the following season; that the subject of compensation was discussed and defendant said he would give either $5,000 or a half interest in a burlesque show, to which plaintiff agreed; that thereafter he reopened negotiations with Lederer, and by June 1st had secured an offer from the latter, which he submitted to defendant, whereupon both parties went to Lederer's office in Philadelphia on Sunday, June 4th, and after some further discussion terms were agreed upon and the use of the theater secured. The next day defendant saw plaintiff, referred to what he had accomplished, and asked him to reduce their understanding to writing, which was done; and the next day plaintiff went to Maine, where he remained some time. The following letter was then put in evidence:

"June 5, 1905.

"Mr. H. C. Kennedy, 216 Eighth Avenue, Brooklyn, N. Y.—Dear Kennedy: In consideration of your services in securing the Auditorium Theater, Philadelphia, Pa., for the Columbia Amusement Company & Traveling Manager's Association, I hereby agree to give you five thousand ($5,000) as payment for said services on or before September 1, 1905. Or, if you prefer it, I will give you, without cost to you, a full half interest in one of my burlesque attractions, or one of Mr. Sam Scribner's. I will name the attraction before the opening in ensuing season, and you can then elect to accept either the money or half interest as specified. Gus Hill."

The introduction of this particular piece of written evidence in no way changed the issues presented by the pleadings. It was open to defendant to dispute any of the averments on which plaintiff had chosen to found his prayer for relief. The case cited by plaintiff, McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696, is not applicable. There the complaint alleged that plaintiff did labor and service at defendant's request which was worth a certain specified sum. The answer consisted only of a general denial, and it was held that under such an answer defendant could not prove payment. No such matter

of avoidance is here relied upon. The contention of defendant is that under the pleadings he was entitled to offer evidence tending to show that plaintiff was not employed as averred in the complaint, that he did not render services, and that defendant did not promise to pay him. The trial judge held that:

"In the ordinary construction of the English language the letter of June 5, 1905, refers to services which have taken place up to that time, and it does not make any difference whether the services at that time have resulted in a complete making of the contract by which the Auditorium Theater has been secured; if there have been no effective services rendered, if anybody chooses to make such an agreement he could make it."

It does not seem to us that the contract is so specific. It refers to "services in securing the theater," and may fairly be construed as covering all such services, whether they were rendered prior or subsequent to June 5th. Plaintiff, however, has expressly confined his claim to services rendered between May 17th and June 5th. The letter also is ambiguous as to what constitutes "securing the theater," whether by purchase of the property, by lease, or by obtaining the right to exhibit plays. Plaintiff, however, made no claim for any services in connection with Gilmore, the owner, because all those terminated before the date named in the complaint.

The court directed a verdict for the plaintiff for the full amount $5,000 with interest. On the letter of June 5th and plaintiff's testimony this would have been a proper disposition of the case; but the defendant gave evidence which in our opinion should have sent the case to the jury. He testified: That he himself informed plaintiff about May 4th that he could buy the Auditorium Theater very reasonably, and asked him (plaintiff) if he would like to go in and buy it, to which the latter replied:

"All right; what is the matter with you and I and Scribner buying it?"

That thereupon plaintiff went over to Philadelphia, saw Gilmore, and on his return brought back the agreement to sell, which defendant signed, and that down to that time nothing was said between the parties as to any compensation. Gilmore had agreed in writing with Kennedy on May 10th to pay him $5,000 if the sale were effected. Defendant further testified that he never directed plaintiff to do anything with respect to obtaining any right to play in the Auditorium Theater at any time; that when he went over to Philadelphia to see Lederer and his partners on Sunday, June 4th, Kennedy invited himself, "asked if he couldn't go"; and that, after talking the matter over about playing the shows for a couple of hours, nothing came of it, "we [defendant and Lederer and his partners] could not come to any agreement or understanding"; but that later in June, in witness' own office in New York, he saw Lederer and his partners again, and after negotiations finally concluded an arrangement with them, and fixed the terms with which plaintiff had nothing at all to do.

As to the letter of June 5th defendant testified that he refused to sign the paper half a dozen times, and finally consented to do so only on plaintiff's assurance that he wanted it merely to show people, so they wouldn't laugh at him for not getting anything, and that he

would never use the paper in any shape, manner, or form, but would return it to plaintiff. We do not undertake to express any opinion of the weight to be given to this testimony of defendant as to the signing and delivery of the paper, nor, indeed, as to the other matters in controversy; but we are of the opinion that, upon the record as it stood when the case was closed, defendant was entitled to have it submitted to the jury.

Judgment reversed.

COXE, Circuit Judge (dissenting). In my opinion the Circuit Court reached the only result possible under the pleadings and proofs. The complaint alleges that between May 17 and June 5, 1905, the plaintiff performed services for the defendant, at his request, reasonably worth $5,000 and on the 5th day of June the defendant promised to pay therefor the said sum. The answer was a general denial.

The plaintiff proved his cause of action by the written agreement of June 5, 1905, quoted in the opinion of the court, which has the characteristics of a promissory note. It is not disputed that at the time this agreement was signed some services had been performed by the plaintiff and I agree with the trial judge in thinking that this writing stated the actual agreement between the parties. Judge Holt says:

"It is not contingent upon his successfully doing anything after that, and whether the price fixed was high or low, is not of any consequence."

The writing of June 5th was either a valid, binding contract or it was not. To my mind it is as clear as the English language can make it; but in any view its construction was for the court and not the jury.

The sole question was "whether the contract was performed" and on this question only did the defendant ask to go to the jury. Before the jury could pass upon any question of fact it was necessary for the court to hold that the defendant, after having promised in writing, to pay the plaintiff $5,000 for his services, might show, first, that the plaintiff performed no services, and, second, that if he did perform services they were not worth $5,000. There being no allegation or proof of fraud, misrepresentation or mistake, I fail to see how any question of fact is disclosed by the record. The defendant testified regarding the agreement of June 5th that the plaintiff said:

"I will never use that paper in any shape, manner or form. A lot of people said he was getting the laugh because he was not getting anything and I said, Harry, I will sign on that condition. I simply signed it and he told me he would return me that paper."

The character of the defense, if any, to be formulated from this testimony, it is not necessary to specify for the reason that it is not one which can be proved under a general denial. If the defendant intended to prove that the contract was signed not to be enforced but simply to enable the plaintiff to silence those who were inclined to laugh at him, it was, at least, his duty to inform the plaintiff by his answer that such was his intention.

In my opinion the judgment should be affirmed.

THE LA BRETAGNE.

(Circuit Court of Appeals, Second Circuit. May 9, 1910.)

No. 165.

1. COLLISION (§ 91*)—NAVIGATION RULES—NARROW CHANNEL RULE—APPLICATION TO NEW YORK BAY.

While the narrow channel rule (Act June 7, 1897, c. 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring vessels to keep to the right in narrow channels, does not apply to upper New York Bay, considered as a single body of water, it does apply to each of the well-recognized deep water channels which run in a generally parallel direction through the bay, including Main Ship Channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 187; Dec. Dig. § 91.*]

2. COLLISION (§ 102*)—CONTRIBUTORY FAULT—VIOLATION OF RULES.

The fact alone that one of two vessels at the time of a collision was on the wrong side of a channel in violation of the narrow channel rule, will not constitute a contributory fault where the collision occurred in the daytime on a clear day through the direct fault in navigation of the other vessel with nothing to obstruct her actions.

[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.

In Admiralty. Suit by the Baltimore & Ohio Railroad Company against the steamship La Bretagne, La Campagnie Générale Transatlantique, claimant. Decree for libelant (148 Fed. 477) for half damages, and libelant appeals. Reversed.

This cause comes here upon appeal from a decree of the District Court, Southern district of New York, awarding half damages to the libelant in respect of injuries received by its car float B. & O. No. 160 N. in consequence of a collision with the S. S. La Bretagne near Liberty Island, New York harbor. The car float was in tow of the steam tug Narragansett. The District Court held both steam vessels in fault, but because the tug and tow were both owned by libelant awarded half damages only. The opinion of the District Judge will be found in 148 Fed. 477, where the testimony is quite fully rehearsed.

Wallace, Butler & Brown (F. M. Brown, of counsel), for libelant.
Joseph P. Nolan (John M. Nolan, of counsel), for claimant.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. La Bretagne was coming down the Main Ship Channel bound for sea; the Narragansett with a car float on each side of her was proceeding up the same channel on a trip from St. George, Staten Island, to pier 32, North river. We concur in the conclusion of the District Judge that when navigation relative to each other began each vessel had the other on her starboard bow; that they were in a position to pass safely starboard to starboard, and that the Bretagne was in fault for undertaking to go to starboard and thus pass to the westward of the Narragansett, crossing the latter's bow in so

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

doing, instead of passing between the Narragansett and the Tice which was nearly 1,000 feet further to the eastward. The Narragansett was held in fault for violation of the narrow channel rule, and her counsel argues that this was error, contending that the place in question, being in the upper bay of New York, was not a narrow channel.

In The Bee, 138 Fed. 303, 70 C. C. A. 593, we were called upon to express an opinion on the proposition that the entire upper bay of New York was to be considered a narrow channel within rule 25 (Act June 7, 1897, c. 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]). If any such construction were adopted, an outward bound vessel navigating Bay Ridge Channel, and keeping carefully to the starboard side of mid-channel, might nevertheless be held in fault because she was not 2 or 3 miles further to the westward on the starboard side of the median line of the entire body of water. We did not accept such proposition, but held that:

"In the case of a bay, which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel within rule 25, where through such bay there have been designated a plurality of channels (i. e., more than one channel) running substantially parallel with each other and in the same general direction as the main flow of the tide or current."

In thus restricting our decision to the precise question before us, we did not hold that rule 25 would not apply to the designated channels which run through such a bay; on the contrary, we called attention to our former decision in The Sea King, 114 Fed. 535, 52 C. C. A. 349, where we held that rule 25 applied in the lower bay to a vessel navigating in the "Main Ship Channel," and said that the same rule would apply if she had been navigating in the Swash Channel or the East Channel. In The Benjamin Franklin, 145 Fed. 14, 76 C. C. A. 43, we held that the rule applied to the Hudson river between shores at Yonkers; again calling attention to the fact that elsewhere in the river there might be found two or more deep-water channels, running generally in the direction of the river's course, and separated by shoaler reaches of water. In The Islander, 152 Fed. 385, 81 C. C. A. 511, we held that the rule did not apply to the same river from Twenty-Third street to the Upper Bay; and in The No. 4, 161 Fed. 850, 88 C. C. A. 665, that it did not apply to the same river between Twenty-Ninth and Forty-Second streets.

Examination of these opinions will show that while holding that the rule does not apply to the waters of the upper bay or of the lower, considered each as a single body of water, it does apply to the well-recognized channels which are familiar to navigators in those bays. To the Swash, the Main Ship, the East, the Bay Ridge, and the Red Hook Channels we have already indicated that the rule applies. We see no reason for differentiating the Main Ship Channel which runs from the mouths of the two rivers, between Governor's Island on the east and Ellis and Liberty Islands on the west, across the Upper Bay to the Narrows. It is a well-known channel, charted and buoyed, and a steam vessel navigating it should follow the rule which requires her "when it is safe and practicable" to keep to that side of the fairway or mid-channel which lies on her starboard side. The circumstance

that there is a great deal of cross-travel in the upper bay itself does not seem a sufficient reason for abrogating the wholesome rule that vessels moving up or down some designated channel therein shall keep to the starboard side of it. Rule 25 is not to be construed as prohibiting vessels from crossing such channel at any convenient angle whenever the exigencies of their own navigation make it necessary or desirable for them to proceed from one to the other side of such channel; but when no such exigency exists they should keep to the proper side of the channel. We find the Narragansett in fault for navigating up the Main Ship Channel on the port side of mid-channel.

The only question remaining is whether this was a contributing fault. In The Benjamin Franklin, 145 Fed. 14, 76 C. C. A. 43, we said:

"The appellant contends further that, even if the Mead was in a part of the channel which was forbidden to her, her position was not the proximate cause of the collision, citing The Fanita, 8 Ben. 17 [Fed. Cas. No. 4,635]; The Maryland [D. C.] 19 Fed. 551; The E. A. Packer [D. C.] 20 Fed. 327; The Clara, 55 Fed. 1023 [5 C. C. A. 390]. Mere presence at the place of collision is not always enough to charge a vessel with fault, her presence must in some way contribute to the happening of the collision, as, for example, when a vessel in forbidden water has been concealed by fog or by some other vessel, and suddenly appears where she was not to be expected; or where the forbidden water is so restricted or already so incumbered with other craft that her presence embarrasses the navigation of the other vessel."

In The Clara and Reliance, 55 Fed. 1021, 5 C. C. A. 390, we said:

"Although the Clara was improperly beyond mid-river, she was not so near the shore as to embarrass the Reliance in rounding the Hook if the latter had been properly navigated. We do not overlook the rule that it is to be presumed against a vessel, which at the time of a collision is in violation of a statutory regulation intended to prevent collisions, that her fault was at least a contributing cause of the disaster, and that the burden rests upon her of showing not merely that it probably was not one of the causes, but that, under the circumstances, it unquestionably was not. * * * But the mere fact that the vessel is on the wrong side of the river does not make her liable if there was ample time and space for the vessels to avoid each other by the use of ordinary care. In such cases the cause of the collision is deemed not the simple presence of the vessel in one part of the river, rather than in another part, but the bad navigation of the vessel that, having ample time and space, might easily have avoided the collision, but did not do so."

And we relieved the Clara.

In the case at bar the collision took place between 10 and 11 a. m. on a bright clear day; no fog, nor any other vessel, nor any obstruction concealed the presence of the Narragansett. Both vessels saw each other in ample time. There were other craft in the channel, but not so many or so situated as to embarrass La Bretagne, which had abundant space to pass without difficulty between the Tice and the Narragansett. We are satisfied from the proofs that the presence of the Narragansett on the wrong side of the channel did not contribute to the collision. The case is closely parallel in that respect to that of the Clara and Reliance.

The decree is reversed, with costs to libelant, and cause remanded, with instructions to enter a decree for full damages against La Bretagne.

NEW YORK, N. H. & H. R. CO. v. DAILEY.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 206.

1. MASTER AND SERVANT (§ 97*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS STRUCTURES.

If a master provide structures which guard against all accidents which can reasonably be foreseen, he has done his duty in that respect to his employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

2. MASTER AND SERVANT (§§ 113, 198*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—PLACE TO WORK.

Plaintiff was employed as an engine hostler at defendant's roundhouse. A dead engine, with no air to operate the brakes, came in and was turned over to him, and a co-employé with another engine kicked it into the roundhouse from the turntable. It was given such speed that plaintiff was afraid it would go through the building, and started to jump off to block the wheels, when he struck the post between the stalls and was injured. There was a clearance between the engine and post of about 11 inches, which was greater than the average in roundhouses. The evidence showed that so far as known no similar accident had ever occurred; it being the duty of the hostler under ordinary circumstances to remain on the engine. *Held*, that defendant was not chargeable with negligence because the space was not greater, which rendered it liable for the injury, the construction being the usual one and safe for employés under any circumstances to be reasonably anticipated; nor was it liable for the negligent act of the man operating the other engine, which primarily brought about the situation, who was a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 224–227, 510–513; Dec. Dig. §§ 113, 198.*]

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

Action by Oliver Dailey against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff (167 Fed. 592), and defendant brings error. Reversed.

Chas. M. Sheafe, Jr. (Frederick J. Moses and Nathaniel S. Corwin, of counsel), for plaintiff in error.

Charles Morschauser (W. E. Hoysradt and Abram J. Rose, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The plaintiff was in the employ of the defendant as "hostler" at East Hartford, Conn. After an engine had come in from a run it was his duty to see that it was supplied with water, coal and sand and placed in a stall at the roundhouse until needed for the next run. The roundhouse was of the usual construction, built in a semicircle around a circular turntable, which, after the engine was placed upon it, was turned until the track on the turntable

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

registered with the track leading to the stall in the roundhouse where the engine was to be placed. The stalls were separated by posts which supported the roof and also supported swinging doors. The clearance between the engine and these posts was about 11 inches. The construction in this respect was similar to that of other roundhouses, the clearance varying in different structures from about 4 inches, which is the minimum clearance, to 13 inches, which is the maximum. The plaintiff was an experienced railroad man and for five years prior to the accident had acted as "hostler" in defendant's roundhouse at Hopewell. This roundhouse was similar in construction to the one at East Hartford where the accident happened. The evidence showed that the clearance was insufficient to enable a man to alight from an engine while it was passing through the entrance to the stall before the posts had been passed. Ordinarily the "hostler" has no occasion to alight at this point. His duty is to remain on the engine until it comes to a standstill. It also appeared that such an accident as happened to the plaintiff was unknown among railroad men. The combination of unusual circumstances which led to the accident in question was as follows: The engine came in from the road at about 5 a. m. It had not sufficient steam to move into the roundhouse and there was no air to operate the brakes; in short, the engine was "dead." This condition was reported to one Moriarity, who procured another locomotive and pushed the plaintiff's engine to the sand house, the water station, and, finally, onto the turntable. Subsequently, with still another locomotive, Moriarity backed up against the plaintiff's engine on the turntable and gave it a "kick" for the purpose of sending it into the stall. The plaintiff, fearing lest the engine might run into and, perhaps, through the rear wall of the roundhouse, and being unable to stop its momentum, attempted to alight at the moment the post was being passed, for the purpose of blocking the wheels. He was caught between the post and the tender and received the injuries complained of.

At the close of the testimony the defendant moved the court to dismiss the complaint and direct a verdict for the defendant on the following grounds: First, that no negligence had been proven against the defendant in the construction and maintenance of the roundhouse; second, that if the proximate cause of the accident was the action of Moriarity, it was the act of a fellow servant, for which the defendant is not responsible; third, that the plaintiff had full knowledge of the situation on the night of the accident and assumed the risk of the alleged defects in construction. This motion was denied and the defendant excepted.

It is clear that the accident was caused, primarily, by Moriarity, who was a fellow servant, in giving the "dead" engine upon which the plaintiff was stationed too vigorous a "kick" when it was helpless upon the turntable. Whether the plaintiff's action contributed to the accident it is unnecessary to decide. In order to sustain the verdict it must appear that the defendant was guilty of fault. If not guilty of fault, there can be no verdict against it. The only negligence alleged is in the construction of the roundhouse in question, which is said to be faulty for the reason that there was not a wider space between the en-

gines and the posts at the entrance to the stalls. It is shown that the construction in this regard was the usual one and that the spaces left were much wider than in the average roundhouse. Was the defendant bound to guard against the wholly abnormal and unusual combination of circumstances which caused the plaintiff's injuries? Is a master required to anticipate an accident which, so far as the evidence here is concerned, had never happened before and may never happen again? We think not. The authorities cited by the plaintiff are not, in our judgment, germane. They all relate to cases where the dangerous structures were allowed to remain where employés in the discharge of their duties might come in contact with them. For instance, it has frequently been held that a brakeman who is required to be on the roof of a car while passing a low bridge may recover, if no warning is given of the proximity of the dangerous structure. So, too, where telegraph poles or other structures are placed so near the moving trains that an employé in the discharge of his duty may come in contact with them. In fact, this court, in the case of the Boston & Maine Railway Company v. John N. Gokey, 149 Fed. 42, 79 C. C. A. 64, held that an employé who was required, while in the discharge of his duty, to be upon a moving train while passing a switch target which was placed so near the track as to strike him while on the ladder at the side of the car, might maintain an action against the railroad.

These cases rest upon the proposition that if it can be foreseen by the exercise of ordinary prudence that an employé may be injured by the machinery furnished for his use, it is the duty of the employer to minimize the danger as far as possible.

In the case at bar, under ordinary circumstances, the "hostler" is required to remain at his post on the engine until it is finally placed in the stall in the roundhouse. Ordinarily the engines are operated by their own steam and are stopped by their own brakes. Here the concurrence of the absence of steam and of insufficient air to operate the brakes made it necessary to call in the services of another engine. The defendant was not, however, required to guard against such an extraordinary combination of circumstances as produced the injury in question. The opening into the stalls of the roundhouse between the posts was ample for all ordinary conditions and, having provided such a structure, the defendant cannot be held responsible because the plaintiff saw fit to attempt to alight at the very moment when the engine was passing the posts. If the contention of the plaintiff be sustained by the courts, it necessarily follows that the owner of a stable who has provided ample room for his horses and carriages to enter can be held liable if his coachman loses control of the horses and receives injuries in an attempt to descend from the vehicle at the moment it is passing through the door. It will hardly be contended that the owner of a garage is required to provide an entrance wide enough not only to admit the motor car with perfect safety, but also sufficiently ample to enable the chauffeur, should the machine become unmanageable, to leap out while passing through the entrance.

We know of no rule holding a master to such extreme care. If he provides structures which guard against all accidents which can rea-

sonably be foreseen, he has done his duty to those whom he employs. We think the court should have granted the motion for the direction of a verdict for the defendant.

Judgment reversed.

EDSELL, Chinese Inspector, v. D. CHARLIE MARK.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1910.)

No. 1,673.

1. CITIZENS (§ 10*)—EVIDENCE OF CITIZENSHIP.

A passport issued to a Chinese person by the Secretary of State is not evidence of the citizenship of such person in the United States.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 17; Dec. Dig. § 10.*

Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

2. ALIENS (§ 32*)—CHINESE EXCLUSION ACT—REVIEW OF ORDER OF DEPORTATION—JURISDICTION OF COURTS.

A finding by the immigration officers against the right of a person of the Chinese race to enter the United States, which right was claimed on the ground that the applicant was a native-born citizen, is conclusive, and a court cannot entertain habeas corpus proceedings for his discharge, unless it is shown that he was not given a fair and impartial hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. § 32.*]

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

Proceeding by D. Charlie Mark against H. Edsell, Chinese Inspector in Charge of the Port of Sumas, for writ of habeas corpus. Judgment granting the writ, and defendant appeals. Reversed.

The appellee, D. Charlie Mark, a Chinese person, seeks admission to the United States as a returning native-born citizen. He was denied admission after the usual investigation by the appellant, the Chinese inspector in charge at Port Sumas, Wash. An appeal from the order of rejection was taken to the Secretary of Commerce and Labor, and after consideration the appeal was dismissed, and the order of rejection affirmed. While being detained at Sumas, Wash., awaiting deportation, in accordance with the order of the Secretary of Commerce and Labor, the appellee, through one Loon Kee, filed a petition in the United States District Court for the Western District of Washington, praying for a writ of habeas corpus, alleging, among other things, that the appellee was a native-born citizen of the United States, and was entitled to admission therein; that when seeking admission he was possessed of a passport duly and regularly issued by the Secretary of State of the United States, and that the same was presented to the officers of the Bureau of Immigration at the port of entry, but no consideration was given by the said officers to said passport; further, that he was not given a fair and impartial hearing on his application for admission to the United States by the officers of the Bureau of Immigration. Thereupon the writ as prayed for was granted by the District Court. Appellant objected to the taking of testimony in said cause, other than such as related to the question whether he had been given a fair and impartial hearing on his application for admission into the United States. The objection was overruled, and thereupon testi-

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

mony on the merits was taken and submitted to the District Court, which thereafter directed the discharge of the appellee from custody. From the order of discharge, the present appeal is taken.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty., for appellant.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The passport issued to the appellee by the Department of State was not evidence of his citizenship. Urtetiqui v. D'Arcy, 34 U. S. 692, 9 L. Ed. 276; In re Gee Hop (D. C.) 71 Fed. 274. With respect to the proceedings before the executive officers concerning the right of appellee to enter the United States on the ground that he was a citizen of the United States, we find nothing in the record indicating that he was deprived of a fair and impartial hearing.

Upon the authority of the case of United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and In re Tang Tun, 168 Fed. 488, 93 C. C. A. 644, the judgment of the court below is reversed, and the case remanded, with directions to dismiss the proceedings.

CORNELL STEAMBOAT CO. v. FALLON.

(Circuit Court of Appeals, Second Circuit. December 14, 1909. Rehearing Denied February 16, 1910.)

No. 53.

1. SEAMEN (§ 29*)—INJURY TO SEAMAN—EXTENT OF RECOVERY.

A seaman, who is injured in the service of the vessel, may only recover for his wages and the expenses of maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he or the shipowners were negligent or not, except that, if the seaman's injury is due to the personal negligence or default of the shipowners, he may recover full indemnity.

[Ed. Note:—For other cases, see Seamen, Cent. Dig. §§ 186–194; Dec. Dig. § 29.*]

2. DEATH (§ 85*)—SEAMEN—ACTION BY ADMINISTRATRIX—EXTENT OF RECOVERY.

Where plaintiff, as administratrix, sued for the death of a seaman under Code Civ. Proc. N. Y. § 1902, authorizing an action for wrongful death resulting from negligence, and decedent, had he lived, could have recovered in tort, the fact that he could not have recovered full indemnity did not preclude plaintiff, his administratrix, from recovering full compensation for the pecuniary injuries resulting to her from his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 111; Dec. Dig. § 85.*]

3. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—COLLATERAL ATTACK—APPOINTMENT OF ADMINISTRATOR—BONDS.

Where decedent, a resident of New Jersey, died in New York county, and had property in New York, viz., a cause of action for wrongful death,

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

the surrogate of New York county had jurisdiction to grant letters of administration, as provided by Code Civ. Proc. N. Y. 2476; and hence, there being no fraud or collusion alleged in obtaining such letters, the administratrix's appointment could not be collaterally attacked, in an action brought by her for decedent's wrongful death, because she was not required to give bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177–182; Dec. Dig. § 29.*]

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

Action by Annie V. Fallon, as administratrix, etc., against the Cornell Steamboat Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 162 Fed. 329.

Amos Van Etten, for plaintiff in error.

Hyland & Zabriskie (Nelson Zabriskie, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action at law, in which the plaintiff, as administratrix, has recovered a judgment against the defendant under section 1902 of the Code of Civil Procedure of New York because the death of her husband was caused by the defendant's neglect. The deceased was engineer of the tug Scott, and while acting in place of an absent fireman was drowned as the result of a collision between that tug and the tug Williams, also owned by the defendant. The testimony showing no act of God, sudden emergency, or anything to account for the collision other than the negligent navigation of one or both of the tugs, and also showing no negligence on the part of the decedent, the trial judge directed the jury to find a verdict for the plaintiff in such sum as would compensate the parties entitled under the statute for the pecuniary injuries resulting to them from the death of the decedent.

Following many cases decided before that of The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760 (1903), counsel have discussed the questions whether the decedent was a fellow servant of the master of the tug Scott, on which he was employed, or of the master of the Williams, the other tug in collision, or of both. These interesting inquiries seem to us irrelevant. The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty. A seaman injured in the service of the vessel has a right to recover against the vessel and her owners for his wages and the expenses of his maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of negligence or not. And this is the extent of his right to recover. There is an exception, apparently a departure from the maritime law, but established by so many decisions that the Supreme Court has declined to disturb it, viz., that if the seaman's injury is due to the personal negligence or default of the

shipowners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance he may recover full indemnity. The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955; The Osceola, supra; The Troop, 128 Fed. 856, 63 C. C. A. 584. As no personal negligence or default is imputed to the defendant, the decedent would not have had a right to full indemnity if he had lived, but only to his wages and the expense of his maintenance and cure.

Under the New York statute the plaintiff as administratrix has a right to recover if the decedent's death was caused by the defendant's negligence and he himself could have recovered had be lived. The trial judge correctly held that the decedent's death was due to the defendant's negligence. Manifestly he could have recovered if he had lived, and could have recovered in tort. The statutory conditions were, therefore, satisfied. The circumstance that the deceased could not have recovered full indemnity does not, in our opinion, limit the extent of the plaintiff's recovery. Her cause of action is statutory and entirely different from his had he lived, viz., compensation for the pecuniary injuries resulting from his death to the designated persons.

The defendant further objects that the plaintiff cannot recover because the surrogate issued letters to her without any bond being given, as required by section 2664 of the Code of Civil Procedure. The record in the Surrogate's Court shows that the decedent was a resident of the state of New Jersey, died within the county of New York, and had property within the state, viz., this cause of action. Accordingly the surrogate of New York county had jurisdiction to grant the letters under section 2476, which provides:

"Where the decedent not being a resident of the state died within that county leaving personal property within the state or leaving personal property which has since his death come into the state and remains unadministered."

No fault or collusion is alleged in obtaining the letters, as in Hoes v. New York, New Haven & Hartford Railroad Company, 173 N. Y. 435, 66 N. E. 119. Nor was there any failure to aver a jurisdictional fact, the existence of which was disproved at the trial, as in Coe Brass Manufacturing Company v. Savlik, 93 Fed. 519, 35 C. C. A. 390. If the surrogate should have required a bond under section 2664 of the Code, about which it is unnecessary to express an opinion, his omission to do so was not jurisdictional, but an irregularity which cannot be attacked collaterally. Sullivan v. Tioga Railroad Company, 44 Hun, 304; Code Civ. Proc. §§ 2591, 2473.

No other exception deserves consideration, and the judgment is affirmed.

COXE, Circuit Judge. I concur in the result, but prefer to rest my opinion upon the authority of The Hamilton and Saginaw, 146 Fed. 724, 77 C. C. A. 150, affirmed 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, which I think warrants an affirmance of the judgment upon the principles of the common law. The question presented by the opinion of the court is an interesting and novel one, but no allu-

sion is made to it in either brief and it was not mentioned at the argument.

Section 1902 of the New York Code provides, in substance, that the widow of a decedent may, as administratrix, maintain an action to recover damages for a wrongful act, neglect or default by which the decedent's death was caused, against a person or corporation which would be liable in an action in favor of the decedent by reason of such wrongful act, neglect or default if death had not ensued. Because the law maritime gave the decedent a right, had he lived, to recover, under his contract of employment, his wages and the expenses of his maintenance and cure, whether he or the owners were guilty of negligence or not, it is now asserted that the plaintiff can recover full damages under the state statute. In other words it is said that this action, which is ex delicto, can be maintained because the decedent, had he lived, might have recovered in an action ex contractu for his wages, etc. It follows, therefore, that if the decedent had a cause of action for one day's wages under his contract, the plaintiff, upon his death, may recover the full amount of damages resulting from his death.

The New York statute as interpreted by the courts of the state has heretofore been understood to mean that if injuries have been received by a person under such circumstances as will enable him to recover damages for those injuries, his personal representatives, upon his death, may recover their damages resulting from such injuries. It has never, so far as I am aware, been held that the administratrix can maintain such an action unless the decedent might have maintained it, viz.: an action based upon the defendant's negligence, and the decedent's freedom from negligence.

It seems to me that the proposition upon which the decision is based should not be definitely adopted until counsel have had an opportunity to examine and discuss it.

VROOMAN et al. v. PENHOLLOW et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1910.)

No. 2,013.

1. PATENTS (§ 172*)—SCOPE—RANK IN THE ART.

Whether an invention be a pioneer, or, being of small importance, is ranked at the foot of the line, the rule is that it shall be judged on its own merits; that is to say, according to the advance it has made in novelty and utility beyond the former art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. § 172.*]

2. PATENTS (§ 178*)—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.

The statutory requirement that an applicant for a patent shall explain the best mode in which he has contemplated applying the principle of his invention (Rev. St. § 4888 [U. S. Comp. St. 1901, p. 3383]), does not

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

preclude him from claiming any other mode which embodies his principle.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

5. PATENTS (§ 168*)—CONSTRUCTION AND SCOPE—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

It is of the essence of the rule whereby an inventor is estopped from claiming to the full of his invention as disclosed by his specification and claims in consequence of his concessions to meet the requirements of the Patent Office, and so obtain his patent, that the requirements which were conceded by him should concern the matter upon which the estoppel is raised, and whether the examiner states his objection, or contents himself with a reference, the estoppel does not extend to a matter not stated in the objection or disclosed by the reference.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

4. PATENTS (§ 178*)—CONSTRUCTION AND SCOPE—EQUIVALENT FORMS OF DEVICE.

Where a claim of a patent contains a description of only one form of a thing which would perform the same office in other forms, the court will apply the general rule that the description covers all equivalent forms, and the form described will be treated only as the one preferred.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

5. PATENTS (§§ 237, 328*)—CONSTRUCTION—INFRINGEMENT—ONION TOPPER.

The Vrooman & Vrooman patent, No. 580,742, for an onion topper, claim 5, which describes an inclined V-shaped trough having a longitudinal opening in the bottom directly above the space between two parallel rollers which engage and pull off the tops when they project through the opening, "by which trough the vegetables are held so that only their tops may engage the rollers," is not limited to a form of construction which does not expose the onions to contact with the rollers or either of them, and is infringed by a construction in which the onions come in contact, but not in engagement, with a portion of the surface of one of the rollers.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 237.*]

6. PATENTS (§§ 237, 328*)—CONSTRUCTION—INFRINGEMENT—VEGETABLE TOPPING MACHINE.

The Vrooman patent, No. 676,549, for a vegetable topping machine, claim 3, covering a machine having "a revoluble feeding cylinder, a revoluble bar presenting cutting edges, parallel to and in close proximity, to the perimeter of the cylinder, but of much smaller diameter," the vegetables being fed through the open bottom of a trough upon the upper surface of the cylinder, which carries them over to one side of the trough, by which they are held while the tops project through the space between such side and the cylinder, where they are caught and cut off by the cutting bar, is not limited with respect to the comparative diameters of the cutting bar and cylinder, which is merely a preferred form, and is infringed by a machine which differs only in that the cutting bar is of equal or greater diameter, which is an equivalent construction, operating on the same principle and within the invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 237.*]

7. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for the infringement of two patents is not multifarious, where one patent is merely for an improvement in one element of the combination of the other and both are infringed by the same machine.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

8. APPEAL AND ERROR (§ 209*)—OBJECTIONS BELOW—FAILURE TO OBJECT—EFFECT.

The objection that the proofs in a suit for infringement do not sustain the allegation of infringement as to one of the defendants cannot be raised for the first time in the appellate court, where there is some evidence to sustain the allegation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290–1303; Dec. Dig. § 209.*]

9. PATENTS (§ 92*)—JOINT INVENTION.

The fact that one of two joint patentees of a combination was the first to perceive the crude form of the elements and the possibility of their adaptation and composition to accomplish a useful result is not sufficient to overcome the presumption of joint invention arising from the granting of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

10. WORDS AND PHRASES—"ENGAGEMENT."

"Engagement," in its mechanical sense, means a seizure, a laying hold of, an active prehension, and does not include mere contiguity.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2394.]

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

Suit in equity by Warren F. Vrooman and Arba E. Vrooman against Grant S. Penhollow, Frank Penhollow, and Wallace L. Baker. Decree for defendants, and complainants appeal. Reversed.

Obed C. Billman (A. M. Allen, of counsel), for appellants.

A. L. Lawrence, for appellees.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this cause complains of the infringement of two patents, one granted April 19, 1897, to Vrooman & Vrooman, numbered 580,742, and the other to Arba Vrooman (who was one of the patentees in the former patent), dated June 18, 1901, and numbered 676,549. The patentee assigned a one-half interest in this patent to the other Vrooman. The patent of 1897 was for an "onion topper." The patent of 1901 was for a "vegetable topping machine." The machines, which were the subjects of these patents both related to the same art, and were designed to remove the tops from onions and other vegetables of similar forms, and both possessed similar characteristics.

The machine patented in 1897 was for a combination of elements, and consisted of a long inclined trough supported by a frame and extending downward from the hopper containing the onions to the exit where the onions were delivered topped. This trough was made of two straight flaring sides, opening at the top and converging at the bottom, in cross-section like the letter V. The lower edges did not meet, but there was left a long slot along the whole length of the trough through which the tops of the onions, as they rolled down the trough, would pass out of the trough in such a manner that they

would be gripped and removed by the rollers next to be described. Below this trough and of the same length with it and running parallel therewith and secured on the same frame with the trough were located two parallel rollers placed quite close together and turning over toward each other when in operation. The space between the rollers was arranged in such near proximity to the slot at the bottom of the trough that the protruding tops of the onions would be engaged by the rollers and would be pinched and pulled off. The onions after being disengaged from their tops would go on to their destination. The minor details of construction are not now important. This machine was the first of its kind adapted to perform the work of topping vegetables. It is claimed by the inventors to have been a pioneer in the art. This claim is denied by the defendants, who insist that it was merely the extension of older inventions of machines intended for a like purpose and they instance threshing machines, machines for husking corn, and machines for stripping grains from their vines, as peas and beans. On account of the existence of such machines, the court below was moved to think that the Vrooman machine had no claim to be ranked as a pioneer, but, on the contrary, was one standing on narrow ground. In this the court seems to have followed the idea of the examiner in the Patent Office, where the patentees had much trouble from references to husking machines and the like. We must say, in passing, that the classification of such machines as are here referred to with an onion topping machine seems to us a rather distant call. For there are few points of resemblance. But it is not worth while to spend much time in fixing the rank or classification of the machine. Whether an invention be a pioneer, or, being of small importance, is ranked at the foot of the line, the rule is that each shall be judged on its own merits; that is to say, according to the advance it has made in novelty and utility beyond the former art. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 41 C. C. A. 627; Penfield v. Chambers Bros. Co., 92 Fed. 639, 34 C. C. A. 579; Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. And in its own peculiar field it is not upon this record to be denied that this invention of the Vroomans' was the first, and for that reason and because it has proved useful to the public should be dealt with as one standing at the head of its line and entitled to be protected accordingly. But assuming all this to be so, in the absence of further defense, it is still contended with confidence that the pretensions made for this invention by the Vroomans were shorn away by the proceedings on their application at the Patent Office, to the extent that the patent is narrowed to a combination of the specially described elements of claim 5, which is the one mainly relied upon by the complainant at the hearing in this court. Claim 5 reads as follows:

"In a machine for topping vegetables a frame having two parallel rollers engaging the tops to pull them from the vegetables, and a trough running over the rollers, the trough having a longitudinal opening in its lower portion leading directly to the space between the rollers by which trough the vegetables are held so that only their tops may engage the rollers, substantially as described."

In this connection, we exhibit Figs. 1 and 2 of the drawings:

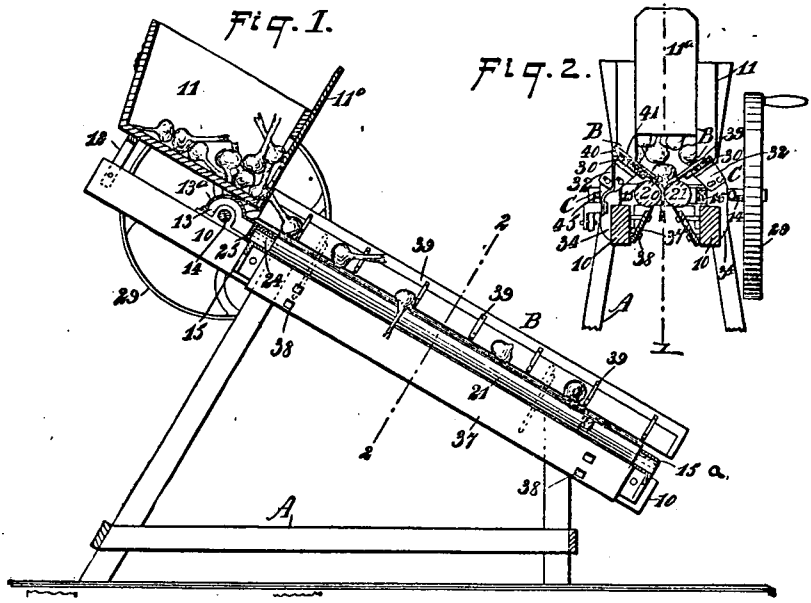
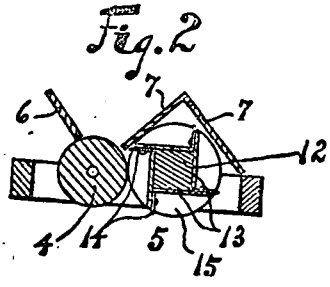


Fig. 2 is a cross-section of Fig. 1 on the line 2, 2. In Fig. 2 it is seen that the onions rest in the trough, and the tops of the onions are presented vertically downward therefrom into the space between the rollers and are engaged by the latter in that position; while in Fig. 1 the onions are resting partly on roller 21, which is the right-hand roller in Fig. 2. The left-hand roller, 20 of Fig. 2, is not shown in Fig. 1. It could not be without impairing the view of roller 21. The significance of what is shown by Fig. 1 will appear later. The defendants contend that claim 5 is limited to a trough which performs the whole function of supporting the onions and delivering the onion tops to the rollers, with which the onion bulbs do not come in contact. This is a vital matter for the defendants. For the defendants' machine is substantially a facsimile of the complainants' in all other respects than this. A cross-section of it is shown by Fig. 2 of an exhibit which is admitted to be a correct representation:



One round roller is shown, 4. 12 is not round, but is a revolving bar with sharp plates set out from the corners. The sharp plates almost touch the opposite roller. Both roll over toward each other, and the onion top is detached in like manner as in Vroomans' 1897 patent, except that it is cut off instead of being pinched off. This may be an improvement; but it is only an improvement, taken from the Vrooman patent of 1901, as we shall presently see. It is also seen

from the above Fig. 2, just shown, that a part of the surface of the roller, 4, supplies the place of the bottom of the trough. The onions coming down the trough plates 6, 7, and on the roller, 4, protrude their tops through the open space between the roller, 4, and the lower edge of the plate, 7, and become engaged between the roller, 4, and the sharp-edged plates of 12 and are cut off. These conditions establish the necessity upon the defendants of showing that the complainants' patent of 1897 does not cover a form of construction in which the onions come in contact with the rollers. And to aid in this contention they urge that the word "engage," in the next to the last line of claim 5 of the patent, includes also the idea of "coming in contact." But this conclusion is refuted by several reasons. The words themselves are not synonymous. There may be contact without engagement which means in its mechanical sense a seizure, a laying hold of, an active prehension, and does not include mere contiguity. And in this patent the words are used to signify different things. In the following claim (6) the word "contact" is used to signify another meaning than the word "engage" in the fifth claim. Stress is laid upon the following paragraph in the specifications:

"It will be seen that the purpose of the trough is to prevent the rolls from engaging the onions. If the rolls engage the onions, the onions will be bruised and peeled, but by resting them in the trough the tops only are permitted to engage the rolls."

But we think this does not aid the argument. It is the engagement of the onions between the rollers which is here meant. It is that which would bruise and peel the onions, and not the being carried along on a smooth roller so as to protrude their tops and be turned over into the opening, that would be likely to bruise and peel them. They have the same treatment in the Vrooman machine of 1901 and in the defendants'; and there does not appear to have been any trouble on that score. The gist of the controversy over the infringement of this patent depends upon this contention as to whether the patentees are limited to a form of construction which does not expose the onions to contact with the rollers or either of them. It is important to observe, in this connection, what has already been shown, that one of the forms shown in the drawings discloses the onions resting on, in contact with, a portion of the surface of one of the rollers.

We turn next to see whether the proceedings in the Patent Office require this limitation. In 1895 the Vroomans filed a caveat on their invention in the Patent Office in which they described their invention with a drawing to illustrate the form in which they proposed to embody it. They described a trough with an opening at the bottom and a pair of rollers "adapted to engage the tops of onions or other vegetables, so as to pull the tops from the vegetables and deposit the said tops beneath the machine, while the vegetables themselves roll down and are delivered at the lower end of the machine." And they showed one form in which the bottom of the trough was wide and a roller supplied the bottom of the trough, and apparently conveyed the onions to one side for engaging the tops between the rollers. The application for the patent was filed the following year. We have already refer-

red to the drawings as illustrating the forms which their invention might take, namely, one in which the onions were held out of contact with the rollers, and another in which they were in contact with a limited part of the surface of one of the rollers and the cutting off of the tops was done after the onion tops passed out of one side at the bottom of the trough, and there is nothing in the specifications to indicate that the inventors intended to limit themselves to one of these forms which varied only in a matter of detail; the main purpose of the invention being present in both. On presentation of the application, original claim 5 was rejected by the examiner on reference to corn huskers and threshers. It was canceled, and a substitute was tendered in the following form:

"5. In a machine for topping vegetables, parallel topping rollers, a trough located over the said topping rollers and having an opening over the space between said rollers, and mechanism for driving the rollers, substantially as described."

And we start with this to see what limitations the examiner proposed. He said "claim 5 is rejected upon reference to Fig. 3 of Partelow." He did not specify what his reference was intended to develop. But on turning to Fig. 3 of the Partelow patent, which is in the record, we find it indicates two parallel converging rollers and the sides of an open-bottomed trough the lower edges of which are just above the tops of the respective rollers. There is nothing to prevent the ears of corn falling between the rollers and being engaged by them. Looking at substituted claim 5, we see that in this respect it was like Partelow's Fig. 3. It had no provision for keeping the onions from being engaged by the rollers. The object of the reference is thus readily perceived. Thereupon the applicant canceled this substitute, and proposed another, which was allowed, and stands as claim 5 in the patent. If Fig. 2 of this patent had been the only diagrammatic representation of the invention, and even if the specifications themselves had only indicated this form, the result would be the same. The inventor is required by the statute to point out the best mode in which he has contemplated the application of the principle of his invention. But this does not preclude him from claiming any other mode which embodies his principle. Mr. Walker, in his work on Patents (4th Ed. § 115), in commenting on this provision of the statute, says:

"The second provision cannot mean that every inventor must infallibly judge which of several forms of his machine will eventually be found to work best, for, if it means that, it requires what is often impossible; requires the inventor to foresee the ultimate effects of new and comparative untried causes."

This is elementary. It is the foundation of the doctrine concerning equivalents. The case of Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, is a pertinent illustration. There the applicant had described his invention as being one of a body for a car and gave, as a form representing his invention, "the frustum of a cone," an inverted cone, and he assigned his reasons for adopting this form. He said that thereby "the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that

every part resists its equal proportion," etc. Notwithstanding he had represented his invention in this form and assigned his reasons for it, the court held that he was not restricted to this form, and that his patent covered any other form constructed substantially upon the principle of his invention, and upon this ground further held that car bodies constructed upon his principle, but varying therefrom in that, instead of employing the circular form of a cone, the car bodies were built in an octagonal or quadrilateral form, evidently did not possess in like extent the peculiar advantages which the inventor had contemplated. We postpone further consideration of this subject until we have examined the Vrooman patent of 1901. The description of the invention for which that patent was granted is facilitated by reference to our description of the invention in the patent of 1897. The "vegetable topper" of the later patent was constructed on the same lines in general as those of the former patent. It was an improvement upon that, and the improvement consisted in this: Instead of employing two circular rollers, the inventor inserted in place of one of them a revolving square bar having comparatively sharp right angled corners. Both revolved in the same way as the rollers of the former patent, and the only difference worth noting is that, in place of the round surface of a roller, the corners of a revolving bar co-operated in detaching the tops of the onions. As in the former patent, provision was made for withholding the onions themselves from being engaged by the detaching apparatus. Fig. IV of the drawings, here inserted, shows all that is necessary for the present purpose:

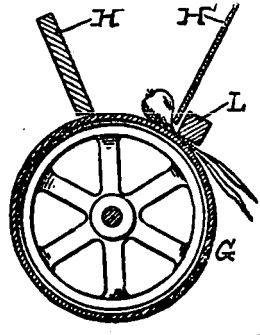


Fig. IV

The onions come along down the trough, H and H'. The roller, G, carries them over and feeds the tops through the opening at the base of the side H' of the trough. The roller, G, and the bar, L, rolling over toward each other, gripe the tops of the onions and detach them.

Counsel for the parties devoted their attention to claim 3, and we will do likewise. It reads as follows:

"The combination in a machine for topping vegetables, of a revoluble feeding cylinder, a revoluble bar presenting cutting edges parallel to and in close proximity to the perimeter of the cylinder, but of much smaller diameter; said bar being provided with collars having a diameter nearly equal to the greatest diameter of said bar, and means whereby the cylinder and cutter are caused to revolve toward each other."

The validity of this claim, so far as concerns the presence of invention, is not denied. The contention most vigorously pressed is that this claim was so dealt with in the Patent Office by the exaction of the examiner and the concessions of the patentee as to preclude the latter from claiming more for his patent than his original specification particularly described. The application the defendants make of the rule referred to in this case comes to this: That the patentee is restricted to a pair of rollers, one of which, the cutting roller, is of much smaller

diameter than the other. And they point to the fact that their cutting roller is as large as, if not larger, than the other. This is the ground on which they think they avoid the charge of infringement.

When Vrooman made his application for this patent, although the drawing (which is shown on a preceding page) showed a revolvable cutter bar of much smaller diameter than the other roller, the specifications themselves made no suggestion that it should be smaller and assigned no reason why it should be. Nor were the specifications changed in this regard during the pendency of the application. Nor did the original claim make any reference to the relative diameter of the rollers. Following claim 3 through the proceedings, we find that it was rejected on references to two patents to Rosenthal, one a threshing machine, the other a corn husker. There was nothing in the references which related to the relative sizes of the rollers. As the same references were made later on, we will postpone comment thereon to that place. The next occurrence was the presentation of an argument by the applicants' attorney against the relevancy of the references, above mentioned, to claim 3. The argument made no reference to any supposed requirement in respect to the diameter of the rollers, and, of course, no acceptance of a proposal on that subject. But the examiner again rejected claim 3 and other claims for reasons that seem trivial and inadequate, for they suggest nothing which a mechanic organizing the machine would not understand to be required, and would know how to provide for. But, at the close, the examiner says, "claims * * * 3 are rejected in view of the references of record," and particular reference is made to lines 45–48, page 3, of the specification on Rosenthal 621,505, and to lines 76–88, page 2, of 588,-184. In reference to his suggestion to "references of record," there had been no other references than those to Rosenthal which he repeats, as above stated. We must suppose that the "references of record" must have been some theretofore made in support of objections made to the other claims. As the object of the references is not disclosed, it is necessary to turn to the references themselves to find the point. The defendants have put in evidence the Rosenthal patent No. 621,-505 and we find therein at the place cited this language:

"The sharpened edge or point of the nippers then severs the stalks from the ears, and said stalks are carried between and below the rollers."

It is obvious that this has nothing to do with the comparative size of rollers. The other patent referred to, No. 588,184, is not found in the record, and we have no knowledge of its relevancy. If it contained anything profitable to defendants, we must suppose it would have been produced. On a later day the appellant amended all his claims, among them claim 3, but not in any respect involving the diameter of the rollers. Then followed the misadventure which the defendants think furnishes them a good defense. On the presentation of these amended claims, the examiner made reply (of which we quote so much as is relevant to claim 3):

"The wording of the claims is found to be faulty in several respects to be exemplified below; and while there is acknowledged to be patentable matter, the structural differences constituting the novelty are not expressed in the claims, notably the first and second.

"Claim 1 is somewhat inaccurate, as the cutter is expressly held out of contact with the cylinder. The claim does not formulate the complete operative device, and by no means distinguishes from Rosenthal, of record.

"The following revision is respectfully suggested:"

Then follow his suggestions about forming the claims. We need only to say that he advises forms for claims 1 and 2, in both of which the cutting roller is described as being "of much smaller diameter" than the other roller. He then proceeds to say:

"It is suggested that claim 3 be revised to read like suggested claim 1, excepting that before the words 'and means' there be inserted these words, 'said bar being provided with collars having a diameter equal to the greatest diameter of said bar.' "

And concludes by saying:

"It is thought that counsel for applicant will upon comparison of the original with the suggested claims see that the examiner has endeavored to preserve the intent of each, and has striven merely to relieve the claims of matter appropriate to, and already stated in the description, and to omit from them unnecessary limiting elements.

"In order to avoid confusion in view of former amendments the claims should be entirely rewritten."

The claims were all rewritten, and in every one of them the cutting bar was described as being "of much smaller diameter" than the other roller.

We will now take up the subject we postponed when we met these references at the former place. We have been at pains to develop the facts upon which the question arises, whether claim 3 is limited in respect to the diameter of the cutting roller when compared with the diameter of the other roller so as to exclude a form of cutting roller of equal or larger diameter than that of the other roller. At the hearing we were much impressed by what appeared to be a concession of the patentee to a requirement of the examiner, for we assumed that the references made by the examiner in support of his objection concerned the subject here in controversy. But it now appears that this was not the matter which the examiner had in mind, and that there was no concession on the part of the patentee unless it was made by adopting the form of claim suggested by the examiner. It is of the essence of the rule whereby the inventor is estopped from claiming to the full of his invention as disclosed by his specifications and claims in consequence of his concessions to meet the requirements of the Patent Office and so obtain his patent, that the requirements which were conceded by him should concern the matter upon which the estoppel is raised. The estoppel must rest upon a definite basis. If the examiner discloses his objection, we can see what it is, and know the consequence of a concession to it. If he does not do this, and contents himself with a reference, we look to the matter referred to, to ascertain his meaning. Either in the one way or the other the examiner must point out what his objection means. If his objection is not put upon the ground whereon the patentee is alleged to be estopped, it is obvious that the concession made to meet it would be a concession only of an entirely irrelevant matter. Mr. Justice Shiras, in delivering

the opinion of the Third Circuit Court of Appeals in Hillbone v. Hale, etc., Mfg. Co., 69 Fed. 958, 960, 16 C. C. A. 569, 571, said:

"It may well be that a patentee cannot be permitted to hold under his patent anything that he has clearly renounced and excluded from his inventions during the prosecution of his application. But surely it has never been held that mere changes of phraseology to suit the views of the examiner, and to distinguish the claims made from those contained in prior applications, to which reference has been made, can be held to defeat the patent, when granted. What is forbidden is the attempt, after a patent has been procured, surrendering or disavowing substantial claims or devices, to recover such renounced and abandoned claims by demanding a broad construction of those allowed."

A more definite and concrete statement of the principle was made by Judge Sanborn in delivering the opinion of the Eighth Circuit Court of Appeals in the case of J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561, where he said:

"If a patentee acquiesces in the rejection of his claim on reference, he may be estopped to maintain that an amended claim covers the combinations shown in those references, or that it has the breadth of the rejected claim, but he is not estopped from claiming and securing by the amended claim every improvement and combination which he has invented and which was not disclosed by those references."

We think this is a perfectly correct statement of the law, and would be equally so of a case where the objection is stated by the examiner without references and the objection is seen to have been leveled at another matter than that involved in the alleged estoppel. It is hardly to be believed that the examiner himself intended to cut off all other forms than such as should comply literally with the words of the claim. He had already pointed out to the applicants' attorney, as a ground for supporting another objection to words employed in describing the plates on the cutting roller as having "corners" and "projections," that they were mechanical equivalents, and that one of the words was sufficient, because, he said, "it is a well-settled principle in patent law that a claim for a mechanical device covers all obvious mechanical equivalents," and, quoting from Reid v. Roebuck, a decision of the Patent Office, "As an inventor is always entitled to equivalents, their introduction in a claim is an unnecessary intrusion." It seems probable that in suggesting these claims he took his cue from the drawing which showed the cutting roller as much smaller in diameter than the other roller. There is nothing to justify the belief that either the examiner or the applicant intended that the patent should be restricted to the forms described in the claim and have no range of equivalents. It was not a limitation which inhered in the invention, and it would expose his patent to such mere subterfuge as increasing the size of an element without any change in the mode of operation. But coming to the legal effect of these proceedings, we think the same result follows. The inventor on making his application is, as we pointed out in dealing with the patent of 1897, where the invention relates to machinery, bound to indicate his preferred form in which he would use it. He may amend his claims to promote that object, so long as he keeps within the bounds of his invention. His preferred form was to use a cutting roller having a much smaller di-

ameter than the other. His drawings showed such a form. He could have no objection to claiming his invention in that form, and he accordingly accepted the suggestion of the examiner. The examiner saw that this was the inventor's preferred form and recommended him to claim his invention in that form. We see nothing in these circumstances which would work a limitation any more than if he had originally so described his cutting roller. Suppose he had done so, and his invention as disclosed by his specifications did not require this relative size of rollers, and there was nothing in the character of the invention itself which required such a peculiarity; can it be that, by claiming it in his preferred form, he would lose the benefit of it when employed in equivalent forms? To so hold would be to deny a long-settled rule of law. Referring again to the case of Winans v. Denmead, the claim distinctly called for the form of the frustum of a cone, and this was emphasized by reciting the advantages of that form, and the court, if it had accepted the doctrine here contended for, must have held that the patentee was limited to that form, for it was the one specifically described in the claim. That case has always been recognized as authority for the doctrine it inculcates and has been cited and relied on in numerous cases. We do not doubt that where the thing described in a claim has been declared by the inventor to be the only one, or has treated it as the only one appropriate to represent his invention, or the character of the associated elements is such as necessarily to require that particular form, in all such cases the patentee will be bound by his description. But where there are no such considerations, and there is simply and only a description of one form of a thing which would perform the same office in other forms, the court will apply the general rule above stated and accord him his monopoly in all equivalent forms. In such a case the general rule prevails and there is no ground for treating the case as exceptional. The distinction and the reason for it were stated by Mr. Justice Miller in Werner v. King, 96 U. S. 218, at page 230, 24 L. Ed. 613. We think the third claim of this patent is also valid, and that it comprehends the defendants' machine.

The question of infringement is too clear to warrant further discussion. In addition to the case of Winans v. Denmead, we may venture to cite several of our own decisions where the infringement was much more obscure than in the case before us: King Ax Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423; Bundy Mfg. Co. v. Detroit Time Reg. Co., 94 Fed. 524, 36 C. C. A. 375; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 41 C. C. A. 627; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36.

Several minor points are made in defense. One is that the bill is multifarious in that it alleges infringement of two patents differing in their characteristics. This defense was not made by the answer nor made in or considered by the court. The only difference in the two patents consists in the fact that the invention of the patent of 1901 improved one of the elements of the combination of the earlier patent. The infringement was of both patents, by the same machine, and by the same parties. We think there could be no valid objection to the

joinder of the patents in one suit, and that it was warranted by the precedents. Walker on Patents, § 417, and cases cited.

Another point made is that it is not sufficiently proven that the defendant Wallace L. Baker participated in the infringement complained of, and that the bill of complaint as to him should be dismissed. We cannot discover that any objection was made by the defendants in the court below on this score. Still, if there is nothing at all in the record tending to show that this defendant was responsible for the infringement, the bill should be dismissed as to him. The evidence upon this point was scanty, and, if our decision rested alone upon that we should have much difficulty. But the answer hardly raises this issue. It puts the ground of defense in the allegation that the machine "which they (the defendants) may have used" was in accordance with rights secured by them under a patent to George A. Stevens, and in paragraph 8 they make the contention that the patent (of 1901) was restricted by the patentee pending his application in the Patent Office "to a machine wherein there is a revoluble feeding cylinder, and a parallel revoluble cutter-bar of much smaller diameter than the cylinder; all pursuant to the requirements of the Commissioner of Patents, and that said claims are so confined and limited that Vrooman, or his assigns cannot now seek for or obtain a construction thereof sufficiently broad to cover any constructions used by these defendants, or either of them." And, in paragraph 13, there is an implication from a negative pregnant that they in fact used the machine complained of though denying that it had the rollers of the complainants' patents. And this was the theory of the controversy as it was waged in the Circuit Court. We think the objection is not well taken on the appeal. It seems probable that the parties being engaged in the larger contest paid little attention to minor issues, which the complainants as well as the defendants overlooked. If more proof of the liability of Baker was required, it would have been competent for the complainants to have obtained leave to introduce further proof on this point. And in practice it is customary to grant it in the circumstances supposed.

Then it is contended that in the patent of 1897 there was no joint invention. The patent was for a combination, and while the evidence would justify a conclusion that one of the Vroomans only first perceived the crude form of the elements, and saw that by their adaptation and composition they might be made to accomplish a useful result, yet it only shows that one of the inventors, looking through a glass darkly, saw something of the elements which were finally composed and adapted to their places for their proper work. It would constantly be happening in the case of joint inventions that the illuminating idea was seen by one before it was seen by the other. But between that and the issuing of the patent there is in many instances a long stretch of time devoted to experiments and the consideration of the form or forms in which it may best be used. The law contemplates this and gives time for it. Without going into a detail of the evidence upon this point, we shall content ourselves with the statement that it falls far short of disproving, what the law presumes from the granting of the patent, that it was a joint invention.

The result is that the decree of the Circuit Court must be reversed,

with costs, and with directions to enter a decree for the plaintiffs granting an injunction, and an order of reference, if one be asked, for the ascertainment of profits and damages, and a further decree therefor if any are found.

BROWN et al. v. LANYON ZINC CO.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1910.)

No. 2,800.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1097*)—SECOND APPEAL—LAW OF THE CASE.
   Propositions of law once considered and decided by an appellate court in a given case are not open to reconsideration in that court upon a second appeal in the same case, and this although the first appeal was from an interlocutory decree.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

2. APPEAL AND ERROR (§ 1022*)—FINDINGS OF MASTER CONCURRED IN BY TRIAL COURT—REVIEW.
   Findings of a master concurred in by the trial court are regarded as presumptively correct, and must be permitted to stand, unless some obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. § 1022.*]

3. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE WHEN INVENTION IS MERE IMPROVEMENT.
   In an accounting for profits received by an infringer, where the infringement is not of an entire machine but only of an improved feature thereof, the recovery must be restricted to such portion of the profits derived from the entire machine as arose from the patented feature.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 572; Dec. Dig. § 318.*]

4. PATENTS (§ 318*)—INFRINGEMENT—ASCERTAINMENT OF PROFITS—STANDARD OF COMPARISON.
   In ascertaining or measuring the profits recoverable upon an accounting for an infringement, the true standard of comparison is that device or appliance which was open to the defendant, and, next to the plaintiff's invention, could have been most advantageously used in the place of that invention at the time of the infringement.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 570; Dec. Dig. § 318.*
   Accounting by infringer for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.]

Sanborn, Circuit Judge, dissenting.

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

Suit by Horace F. Brown and others against the Lanyon Zinc Company. Decree for defendant, and plaintiffs appeal. Affirmed.

Douglas Dyrenforth (William B. Davies and Lysander Hill, on the brief), for appellants.

John H. Atwood (C. E. Benton, on the brief), for appellee.

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

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

VAN DEVANTER, Circuit Judge. This suit is grounded upon the infringement by the appellee, the defendant in the Circuit Court of claim 1 of letters patent No. 471,264, granted to Horace F. Brown, March 22, 1892, upon an application filed August 14, 1891, for an improvement in ore-roasting furnaces, the improvement consisting of a supplemental chamber, at the side of the main roasting chamber and separated therefrom by a slotted wall, with mechanism in such supplemental chamber whereby the rabbles for stirring the ore in the main chamber can be operated through the slot in the separating wall without subjecting such operating mechanism to the direct action of the heat, dust, and fumes. The nature and history of the suit are shown with such fullness in the opinions of this court given on three prior appeals (Lanyon Zinc Co. v. Brown, 53 C. C. A. 354, 115 Fed. 150; 56 C. C. A. 448, 119 Fed. 918; 64 C. C. A. 344, 129 Fed. 912) that much that otherwise would need to be stated may be omitted. See, also, Metallic Extraction Co. v. Brown, 43 C. C. A. 568, 104 Fed. 345; Id., 49 C. C. A. 147, 110 Fed. 665. In these opinions the validity of the claim in suit was sustained. Such of the defendant's furnaces as were constructed according to letters patent No. 532,013 granted to Alfred Ropp, January 1, 1895, upon an application filed February 19, 1894—that is, with the supplemental chamber located underneath, instead of at the side of, the main roasting chamber—were held to infringe that claim, the difference in construction being held to be within the range of mechanical equivalents. Such of the defendant's furnaces as were constructed according to letters patent No. 691,112, granted to Joseph P. Cappeau, January 14, 1902, upon an application filed April 20, 1901—that is, with the operating mechanism located, not in an inclosing supplemental chamber but in an open or uninclosed space underneath the main roasting chamber—were held not to infringe, because the court was of opinion that the terms of the claim in suit were such as to make a supplemental chamber for housing the rabble operating mechanism an essential element of the invention; and the Circuit Court's decree permanently enjoining the defendant from continuing its infringement and ordering an accounting in respect thereof was affirmed. The present appeal is from the final decree entered upon the accounting.

We are requested to reconsider our prior ruling that no infringement resulted from the use of the Cappeau type of furnace, with the rabble operating mechanism in an open or uninclosed space underneath the main roasting chamber, but this we may not do. That ruling turned upon the interpretation of the claim in suit and is now a part of the law of the case, whether it was right or wrong. It was adhered to after due consideration of a timely petition for a rehearing, and the Circuit Court, as in duty bound, has respected and enforced it in the subsequent proceedings. True, it was made upon an appeal from an interlocutory decree granting an injunction, but that did not render it less obligatory upon the Circuit Court, and does not except it from the settled rule that propositions once decided by an appellate court are

not open to reconsideration in that court upon a subsequent appeal or writ of error. Smith v. Vulcan Iron Works, 165 U. S. 518, 525–526, 17 Sup. Ct. 407, 41 L. Ed. 810; In re Potts, 166 U. S. 263, 267, 17 Sup. Ct. 520, 41 L. Ed. 994; United States v. California, etc., Land Co., 148 U. S. 31, 38, 13 Sup. Ct. 458, 37 L. Ed. 354; In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 Sup. Ct. 291, 40 L. Ed. 414; Illinois v. Illinois Central R. R. Co., 184 U. S. 77, 90–93, 22 Sup. Ct. 300, 46 L. Ed. 440; Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 19 C. C. A. 25, 40, 72 Fed. 545, 560; Burns v. Cooper, 82 C. C. A. 300, 153 Fed. 148; Crotty v. Chicago Great Western Ry. Co., 95 C. C. A. 91, 169 Fed. 593; Messinger v. Anderson, 96 C. C. A. 445, 171 Fed. 785. If we were at liberty to entertain the present request, we equally would be at liberty to reconsider our ruling on the first appeal, in respect of the infringement by the use of the Ropp type of furnace, but that this may not be done was settled when the case was here on the second appeal.

Recognizing, however, that a proposition once decided is within the rule just stated only when the facts properly controlling its decision on the subsequent appeal or writ of error are substantially the same as before (Barney v. Winona, etc., R. R. Co., 117 U. S. 228, 231, 6 Sup. Ct. 654, 29 L. Ed. 858; Crotty v. Chicago Great Western Ry. Co., supra), we turn to another contention of the appellants, namely, that the present record, differing from the one before us at the time of the prior ruling, discloses that in the defendant's furnaces of the Cappeau type the operating mechanism is in what is virtually an inclosed supplemental chamber, and is not in an open or uninclosed space.

Subsequently to our prior ruling, and upon the complainants' application, the Circuit Court modified the order of reference to the master so as to require him, in the course of the accounting, to receive evidence as to whether or not, as was then charged by the complainants, the defendant's Cappeau furnaces were constructed with a cellar-like excavation thereunder, containing the rabble operating mechanism, and with walls of earth or masonry so surrounding the excavation as to make it substantially an inclosed supplemental chamber, and to receive evidence of the profits derived by the defendant from the use of any furnaces so constructed, and to report separately his conclusions thereon. It is upon the evidence so taken that the complainants ground their contention last stated. The master, however, reached the conclusion that the contention was not sustained by the evidence, and his conclusion was approved by the Circuit Court. Of course, these concurring findings are presumptively correct and must be permitted to stand, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. Moffat v. Blake, 75 C. C. A. 265, 145 Fed. 40; Houck v. Christy, 81 C. C. A. 602, 152 Fed. 612. The record does not disclose any such error or mistake. On the contrary, it shows that the facts relating to the cellar-like excavations are these: Furnaces of another type, set well into the ground, formerly occupied the places now occupied by those of the Cappeau type, and the excavations resulted from the removal of the former. Instead of filling the excavations, supporting posts of greater height than otherwise would

have been required were placed under the Cappeau furnaces. The excavations are both longer and wider than the furnaces and the floors or hearths of the latter are above the level of the walls of the excavations and the adjacent earth, enough so to permit the rabble operating carriages beneath the furnaces to move on rails actually placed above that level. In short, the rabble operating mechanism is above the excavation and in an open or uninclosed space which permits a free movement of the air and ready access to such mechanism. It therefore must be held that the facts relating to the use of the Cappeau furnaces are substantially the same on this appeal as on the prior one and that the ruling then made is controlling.

We now come to the accounting in respect of the infringement by the use of furnaces of the Ropp type between March 6, 1899, and September 7, 1902, when the defendant was enjoined from longer using them. The chief complaint directed against the accounting, and the only one which merits particular mention, is that an erroneous standard of comparison was used in measuring the profits realized by the defendant from this infringement.

At the outset it is well to observe that the invention in suit did not cover the entire furnace of the Ropp type, as used by the defendant, but only a part of it consisting of the supplemental chamber wherein the rabble operating mechanism was housed and protected from the direct action of the heat, dust, and fumes while it actuated the rabbles in the main chamber by means of an arm extended through a slot in the intervening wall or floor, and that, although the defendant's use of this improvement was a wrongful use of the plaintiffs' property, its use of other parts of the furnace was a lawful use of its own property; that is, of what was open to use by all alike. Therefore the plaintiffs' interest in the profits derived from the use of the entire furnace was confined to such as arose from the patented feature, the supplemental chamber, and the remaining profits rightfully belonged to the defendant. This is well settled. In McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 463, 12 Sup. Ct. 40, 42 (40 L. Ed. 35), it was said:

"There is no doubt of the general principle that in estimating the profits the defendant has made by the use of the plaintiff's device, where such device is a mere improvement upon what was known before, and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements. This is a familiar doctrine announced by this court in a number of cases. Seymour v. McCormick, 16 How. 480 [14 L. Ed. 1024]; Mowry v. Whitney, 14 Wall. 620 [20 L. Ed. 860]; Littlefield v. Perry, 21 Wall. 205 [22 L. Ed. 577]; Elizabeth v. Pavement Co., 97 U. S. 126 [24 L. Ed. 1000]; Garretson v. Clark, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371]."

In that case it was held that a device covered by an earlier patent owned by the plaintiff, but not then in suit, must be held open to the defendant in determining the profits recoverable by reason of the infringement of a later patent covering an improvement upon the subject of the prior one; in other words, that the device of the prior patent, so open to the defendant, constituted a proper standard of com-

parison in ascertaining the profits realized from the infringement of the later patent.

In Keystone Manufacturing Co. v. Adams, 151 U. S. 139, 146, 14 Sup. Ct. 295, 298 (38 L. Ed. 103), it also was said:

"While it is undoubtedly established law that complainants in patent cases may give evidence tending to show the profits realized by defendants from use of the patented devices, and thus enable the courts to assess the amounts which the complainants are entitled to recover, yet it is also true that great difficulty has always been found, in the adjudicated cases, in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover, and in defining the extent and limitations to which this rule is admittedly subject.

"Such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention; but when, as in the present case, the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise.

"It is unnecessary, in this opinion, to review the numerous cases, some at law, others in equity, wherein this court has considered various aspects of this question. It is sufficient to say that the conclusions reached may be briefly stated as follows: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burden of proof is on the plaintiff; that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only. Seymour v. McCormick, 16 How. 480 [14 L. Ed. 1024]; Rubber Co. v. Goodyear, 9 Wall. 788 [19 L. Ed. 566]; Mowry v. Whitney, 14 Wall. 620; Elizabeth v. Pavement Co., 97 U. S. 126 [24 L. Ed. 1000]."

And to the same effect are Warren v. Keep, 155 U. S. 265, 268, 15 Sup. Ct. 83, 39 L. Ed. 144; Lattimore v. Hardsocg Mfg. Co., 58 C. C. A. 287, 121 Fed. 986; Brickill v. Mayor, 50 C. C. A. 1, 112 Fed. 65.

As before indicated, the plaintiffs' patented supplemental chamber was not in itself an operative ore roasting furnace, but only an improved feature of one, and was not capable of beneficial use, save as a feature of that type of ore-roasting furnaces in which the ore was stirred by mechanically operated rabbles. Furnaces of that type were not unknown when this supplemental chamber was invented, but, on the contrary, were well known and in use, as is attested by the following extract from the testimony of one of the plaintiffs' principal witnesses:

"The invention forming the subject-matter of the patent related to improvements in ore-roasting furnaces of that class in which the ore, during the process of roasting, was continuously agitated and moved from end to end of the roasting hearth, by means of transverse rabbles actuated by endless chains passing over, and supported by, suitable operating wheels or drums; furnaces of this type being well known at the date of the invention in question, as is shown by four patents in the prior art."

Recognition of this is also found in the specification in the plaintiffs' letters patent where it is said:

"A serious objection to many of the furnaces of the type herein shown has been that the chains and their attachments were drawn through the center of the furnaces, and were thereby exposed to the destroying action of the

heat, dust, and fumes from the ore, and consequently these parts were soon destroyed. A second objection arose from the fact that the plows or stirrers traveled against the floor of the compartment, which, being usually made of brick, would not only soon be cut in channels and worn out, but the plows or stirrers themselves would also quickly be worn away. The essential part of my invention lies in constructing the furnaces so that these objectionable features are avoided, and the moving or carrying parts protected from the direct action of the heat, fumes, and dust."

The defendant's infringing furnaces, called the Ropp furnaces, were of this well-known mechanically rabbled type, but with the added feature of the patented supplemental chamber, which augmented the profits realized from their use. Hand-rabbled furnaces, of the type commonly used before the mechanically rabbled ones became known, were also used by the defendant, but no particular significance attaches to this, because, as stated by the master, these hand-rabbled furnaces were not constructed by the defendant, but were part of a plant purchased by it and were used in roasting inferior grades of ore, which constituted only a small portion of the ores treated by the defendant.

In substance, the master found that furnaces of the mechanically rabbled type, but without the supplemental chamber, had been employed successfully in roasting copper and other ores prior to the date of this invention, and to such an extent as to indicate that it was entirely practical to use them in roasting zinc ores, the kind treated by the defendant; that the supplemental chamber, although concededly advantageous, was not essential to the successful use of such furnaces; that hand-rabbled furnaces were not the only or the best type of furnace open to the defendant at the time of the infringement; and that the mechanically rabbled type, without the supplemental chamber, was then open and capable of a more advantageous use. Giving effect to these findings, the master rejected the hand-rabbled furnace as a standard of comparison, adopted the mechanically rabbled furnace without the patented supplemental chamber, and computed the profits recoverable by the plaintiffs accordingly. His action in so doing and the accuracy of his findings in that connection were challenged by exceptions to his report, but after a full hearing the Circuit Court overruled the exceptions and sustained the report, as is disclosed in a well-considered opinion set forth in the record.

It now is urged that the evidence, rightly considered, shows that the hand-rabbled furnace should have been adopted as a standard of comparison, but a patient examination of the evidence satisfies us that the master's findings, concurred in by the Circuit Court, as they were, ought not to be disturbed. We do not find that there was any serious or important mistake in considering the evidence, and we think the rule of law applied by the master was right, namely: The true standard of comparison in any given case is that device or appliance which was open to the defendant, and, next to the plaintiffs' invention, could have been most advantageously used in the place of that invention at the time of the infringement.

The decree must be affirmed, and it is so ordered.

SANBORN, Circuit Judge (dissenting). For the following reasons I am unable to concur in the result in this case: The end sought

by the use of the infringing device was the roasting of zinc blende by a mechanically rabbled furnace. The measure of complainants' right of recovery was the pecuniary advantage the defendant derived from the use of Brown's invention above that which the defendant would have derived from the use during the infringement of any other known machine open to the public that was not experimentally, but was actually in use and was effective to roast zinc blende by a mechanically rabbled furnace. Walker on Patents, §§ 724, 734; the authorities cited in the opinion of the majority; Mowry v. Whitney, 14 Wall. 651, 20 L. Ed. 860; Knox v. Great Western Quick Silver Mining Co., 14 Fed. Cas. 809, 812 (No. 7,907). The evidence in the case has convinced me that, while mechanically rabbled furnaces without Brown's improvement had been used to roast copper ore, none of them at the time of the infringement had been used successfully to roast zinc blende, a process which required a higher degree of heat, and that the hand-rabbled furnaces were the only ones then known that were open to the public and effective to accomplish this purpose by the use of the rabbles. This view of the evidence has forced my mind to the conclusion that there is an error in the accounting because the master did not take the hand-rabbled furnaces which the defendant was itself using by the side of the infringing furnaces as the standard of comparison.

Moreover, the evidence seems to me to prove that the entire efficiency of the mechanically rabbled furnaces during the infringement was the product of Brown's invention, that without that invention they would have been inefficient and less useful than the hand-rabbled furnaces, would have been discarded, and the hand-rabbled furnaces would have been installed in their places. My conviction that the evidence establishes this fact has led my mind to the conclusion that the accounting in this case should have been governed, not by the rule applicable to slight improvements in machines which were operative and efficient to accomplish the desired result before as well as after the improvement, as in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; Keystone Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103; Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024; Robertson v. Blake, 94 U. S. 728, 24 L. Ed. 245, and cases of that character, but by the rule that, where the complainant's patent secures a new combination or a new machine which accomplishes a result never attained before it was invented, the entire profits derived from the infringing device are recoverable and the defendant holds them as a trustee de son tort for the patentee or his assigns, and the burden is on the defendant to account for them as in Crosby Steam Valve Co. v. Safety Valve Co., 141 U. S. 441, 448, 449, 454, 12 Sup. Ct. 49, 35 L. Ed. 809; Brennan & Co. v. Dowagiac Mfg. Co., 162 Fed. 472, 475, 89 C. C. A. 392, 395; Dowagiac Mfg. Co. v. Superior Drill Co., 162 Fed. 479, 481, 89 C. C. A. 399; Elizabeth v. Pavement Company, 97 U. S. 126, 24 L. Ed. 1000; Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987; Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144; Ruggles v. Eddy, 20 Fed. Cas. 1316 (No. 12,116); Zane v. Peck (C. C.) 13 Fed. 475; Fifield v.

Whittemore (C. C.) 33 Fed. 835; Creamer v. Bowers (C. C.) 35 Fed. 206; Orr & Lockett Hdwe. Co. v. Murray, 163 Fed. 54, 56, 89 C. C. A. 492. The view of the law applicable to cases of accounting for infringement and some of the authorities may be found in my dissenting opinion in Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co., 173 Fed. 373–378, 97 C. C. A. 621.

UNITED STATES ex rel. MANSFIELD v. FLYNN, Superintendent of City Prison.

(District Court, S. D. New York. October 22, 1909.)

BANKRUPTCY (§ 392*)—PROTECTION OF BANKRUPT FROM ARREST—POWER OF COURT OF BANKRUPTCY.

Where a bankrupt, who resided in another state, on being required to appear to testify before a referee, was given an order of protection prohibiting any person from arresting him on civil process while in the state in attendance on the hearing and for a stated time thereafter, an arrest on such a process before the expiration of the time is a violation of such order, and he will be discharged by the court of bankruptcy on writ of habeas corpus, regardless of whether or not the claim on which he was arrested is dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 392.*]

Habeas Corpus. Application for the discharge from civil arrest of James H. Mansfield, bankrupt. Order of discharge granted.

James C. Lenney, for relator.

HAND, District Judge. The relator herein filed a voluntary petition in bankruptcy March 8, 1909, among the schedules of which he placed the claim of one Charles Smeiser for $3,773.53, which was the face of a judgment recovered by Smeiser against him in the Supreme Court of New York February 18, 1909. The judgment was for conversion of certain stocks of Smeiser which had been left in the relator's hands. On April 8, 1909, Judge Holt gave the usual stay protecting the relator from all proceedings on the part of Smeiser or his agents to enforce the judgment, and on June 21, 1909, Smeiser moved to vacate this stay upon the ground that the judgment was not dischargeable in bankruptcy. This motion came on before me, and I entered an order denying the motion on June 29, 1909.

The referee called the first meeting of creditors July 9, 1909, and at that meeting Smeiser's attorney, Reno R. Billington, filed a proof of claim and objected to the bankruptcy proceeding on the score of jurisdiction, alleging that the relator had not resided in this district for the greater part of six months immediately preceding the proceedings. The referee declined to consider the point, and on the 14th day of July Smeiser moved this court for an order dismissing the petition for lack of jurisdiction. At that time I directed a reference to determine whether the relator had in fact resided for the last six months in this district. This hearing commenced on the 16th of July, 1909. The relator was then without the state of New York, but his attorney

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

produced one witness for examination. The hearings were adjourned until the 29th day of July, 1909, on which day the referee had directed the relator's attorney, at the request of Smeiser, to produce him for examination. Prior to producing him, his attorney, on the 29th of July, procured an order of protection from the referee, which provided that all persons were prohibited from arresting the relator upon any civil process while he was in attendance in this court on the 29th of July, or at such further day as he might be directed to be present, and also from arresting him on civil process while coming from Rockingham, in Massachusetts, to the city of New York, for the purpose of attending the hearings, or while returning. The relator did attend the examination on the 29th of July, and on the completion of his examination, while leaving the building in which the reference had been held, he was arrested upon the criminal charge of grand larceny, preferred by Smeiser before Magistrate Finn, one of the city magistrates of the city of New York. He was committed to await the action of the grand jury on August 5, 1909, and he remained in prison under that charge until September 3, 1909, when he was released upon bail.

Meanwhile, and on the 4th day of August, 1909, I made an order modifying the order of Mr. Smith, the referee, and providing that the relator should be exempt from arrest on civil process only for a period of two days after he had been excused from bankruptcy court. I can find no papers upon which this order was entered; but the purpose of the order obviously was to prevent him, under the guise of remaining in attendance upon the hearings, from abusing the privilege so accorded him by loitering within this state. On August 14th, however, the relator's attorney presented an affidavit to me, showing that his delay in the state was in fact caused by his imprisonment on the criminal charge, and I therefore amended my order of August 4th so as to provide that the two days given him after the close of the hearing during which to leave the state should not include the time during which he was imprisoned under the criminal charge. On September 3d, therefore, there existed an order of this court forbidding any person from arresting him on civil process until a period of two days had elapsed from the conclusion of his attendance at the hearings, not counting the time during which he was imprisoned on the criminal charge.

He was bailed on the criminal charge, as I have said, on September 3, 1909, and immediately and upon that day was arrested upon a civil warrant issued by the Supreme Court of the state of New York in the action of Hubbell against James H. Mansfield. The complaint in that action is for damages caused to the plaintiff by false representations of the relator, and it was clearly designed to set up a claim not dischargeable in bankruptcy. The action was started after my decision on the Smeiser judgment, and was undoubtedly meant to avoid the effect of that decision. On September 15, 1909, his bail likewise arrested him and delivered him in exoneration of their undertaking in Smeiser v. Mansfield. It does not appear in the moving papers

what that undertaking is; but it must have been an undertaking either upon a preliminary warrant of arrest, or upon a body execution.

At present, therefore, the relator is restrained under two civil arrests: First, under execution or order of arrest in the Smeiser action; second, under order of arrest in the Hubbell action. So far as concerns the claim under the Smeiser judgment, I have already passed upon its dischargeability, and the arrest by the bail was in violation of Judge Holt's order of April 8, 1909, which operated as well against the bail as against Smeiser, and also of my order of August 14, 1909.

So far as concerns the Hubbell arrest, it is by no means necessary to decide that the claim set up in the complaint is dischargeable. The relator, when the action was commenced, was out of the jurisdiction of the New York Supreme Court. The referee, upon Smeiser's request, had directed his production here and had given him a writ of protection. That protection had been expressly extended under my order of August 14, 1909, so as to cover the time when he was in fact arrested, and the arrest was in violation of that order. The order was valid, regardless of the dischargeability of the debt under Act July 1, 1898, c. 541, § 9a (2), 30 Stat. 549 (U. S. Comp. St. 1901, p. 3425), since the relator was arrested while in attendance on the court and while engaged in the performance of a duty imposed by the act. Wagner v. U. S., 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596; Re Lewensohn (D. C.) 98 Fed. 576. Re Marcus, 105 Fed. 907, 45 C. C. A. 115, is not to the contrary. In such a case habeas corpus is the proper remedy, under Rev. St. § 753 (U. S. Comp. St. 1901, p. 592). Wagner v. U. S., 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596.

Draw an order directing the present officer to whom the relator has been delivered to release him. I wish also to inquire into the violations of the orders of April 8, 1909, and August 14, 1909. Therefore prepare and serve orders directing the bail and Smeiser and his attorney to show cause why they should not be punished for a contempt of these orders. Let the orders be made upon an affidavit embodying this opinion, and be returnable at the motion term, on November 1st, so that the parties may have a reasonable time to prepare.

BOTTOMS v. ST. LOUIS & S. F. R. CO.

(Circuit Court, N. D. Georgia. May 3, 1910.)

1. REMOVAL OF CAUSES (§ 19*)—FEDERAL EMPLOYER'S LIABILITY ACT—PARAMOUNT EFFECT.

An action by an employé against a railroad company to recover for a personal injury, where both parties were engaged in interstate commerce at the time of the injury, is governed by the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), which supersedes all other law, and is controlling on the question of the jurisdiction of a federal court and the right of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37–46, 48, 52, 53; Dec. Dig. § 19.*]

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

2. REMOVAL OF CAUSES (§ 12*)—FEDERAL QUESTION—NONRESIDENCE OF BOTH PARTIES—CONSENT.

Where neither of the parties to a suit is a resident of the district, the consent of both is necessary to confer jurisdiction on a federal court, and the cause is not removable over the plaintiff's objection, whether the ground of removal is diversity of citizenship, or because the suit is based on a law of the United States.

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

Action by J. A. Bottoms against the St. Louis & San Francisco Railroad Company. On motion to remand to state court. Motion granted.

Smith, Hastings & Ransom, for plaintiff.

King & Spalding and E. Marion Underwood, for defendant.

NEWMAN, District Judge. This case was removed to the Circuit Court from a state court, in which it was originally brought, and a motion is now made to remand it. In his declaration the plaintiff alleges that he was an engineer in the service of the defendant, and that the defendant railroad company was engaged in interstate commerce, and that he was engineer of a train running from Amory, Miss., to Birmingham, Ala., when his train was derailed by reason of the defective and unsafe condition of the track in several respects, more specifically alleged in the declaration.

The plaintiff is a citizen and resident of the state of Alabama and the defendant is a corporation of the state of Missouri. There is a count in the declaration omitting the statement that the petitioner and the defendant company were engaged in interstate commerce at the time of the accident; but necessarily, if both were engaged in interstate commerce at the time of the alleged injury, the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), superseding all other law, will be controlling on the question of the jurisdiction of this court and the right of removal. It is very clear that, independently of the case being brought under the employer's liability act, there would be no right to remove to the Circuit Court for this district; the plaintiff being a citizen of Alabama, and the defendant a citizen of Missouri. 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.

The case must be determined with reference to the rights of the parties under the employer's liability act of Congress. The point made is that the defendant railway company, having been incorporated in the state of Missouri, and consequently being an inhabitant of that state under the decisions (Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 513, 30 Sup. Ct. 184, 54 L. Ed. ——), this court would have no jurisdiction of the case originally, and consequently would not acquire jurisdiction by removal. This is clearly true, unless the contention made here by the defendant is correct; and that is that the right to raise the question as to whether this is the proper district is in the defendant alone, and that the plaintiff cannot be heard to object. If the plaintiff can make the question, and object to the jurisdiction of the

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

Circuit Court of a particular district over a case, where the removal is because of diversity of citizenship only, why may not the plaintiff object, and make the question as to jurisdiction where the case is removed because brought under an act of Congress? The decision of the Supreme Court in Ex parte Wisner, supra, would seem to cover as fully cases removed for the latter reason as for the former. Under the authority of the Wisner Case, without reference to other authorities, I am fully satisfied that the plaintiff here had the right to make the question by a timely motion to remand, and this he has done.

The consent of both the plaintiff and the defendant seems to be necessary, where neither of the parties is a resident of the district. Clark v. Southern Pacific Co. (C. C.) 175 Fed. 122, and cases there cited.

The motion to remand will be granted.

In re NELSON.

(District Court, S. D. New York. October 22, 1909.)

BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—CONCEALMENT OF PROPERTY.

A disposition of his property by a bankrupt with intent to keep it from his creditors is with intent to hinder, delay, or defraud them, and will bar his right to a discharge.

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

In the matter of Eugene A. Nelson, bankrupt. On application for discharge. Discharge denied.

Henry T. Hornridge, for bankrupt.

HAND, District Judge. The question is simply of the existence of an intent "to hinder, delay, or defraud creditors." Did the bankrupt have such a specific intent? He intended to take his property and keep it from his creditors. Is that an intent to defraud them? It is an intent to do those things which will result in their being deprived of what was their own, and to deprive them of their own by secreting it is to defraud them.

Of course, it makes no difference that he thought himself justified. In many crimes you must show a specific intent; but no one ever heard that, when the intent was once shown, it made the least difference that the defendant thought he had the right to entertain it. The law forbids his entertaining it, and here the law forbids the bankrupt's entertaining the intent to do what will in fact defraud his creditors.

Report confirmed, and discharge denied, with costs.

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

STATE OF NEW JERSEY v. LOVELL.

(Circuit Court of Appeals, Third Circuit. June 13, 1910.)

No. 59.

BANKRUPTCY (§ 346*)—DEBTS ENTITLED TO PRIORITY—COST OF PRESERVING ESTATE—TAXES.

In the distribution of the estate of a bankrupt, the actual and necessary cost of preserving the estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction, is entitled to priority of payment over taxes due the state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

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

In the matter of the Halsey Electric Generator Company, bankrupt. From an order of the District Court (175 Fed. 825), the State of New Jersey appeals. Affirmed.

Edmund Wilson, Atty. Gen. of New Jersey.

Howard H. Williams, for trustee.

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

BUFFINGTON, Circuit Judge. In the court below the Halsey Electric Generator Company, a corporation of the state of New Jersey, was adjudged bankrupt. Its property was covered by fixed liens, and all moneys realized from its unincumbered effects were required to pay expenses incurred by the receiver in preserving its property, pending litigation over the question of adjudication. The state of New Jersey contended that all of said funds should be applied to pay a franchise tax it had imposed on such corporations. The court below, however, ordered the fund be applied "to pay the actual and necessary cost of preserving the estate subsequent to filing the petition." Thereupon the state appealed from such order to this court.

The question is of grave import, for it is clear that, if the administration of law is to be respected, a court, without power or means to pay for carrying out its orders, must refuse to make such orders; otherwise its helpless jurisdiction will incur merited contempt. By Const. art. 1, § 8, "Congress shall have power," etc., to "establish * * * uniform laws on the subject of bankruptcy throughout the United States." Now as this power, when exercised, suspends state action (Sturges v. Crowninshield, 17 U. S. 191, 4 L. Ed. 529), it would seem that Congress, in passing this bankruptcy act, intended the federal courts should exercise exclusive jurisdiction in bankrupt matters. Is it then possible that Congress, by section 2 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), invested the District Courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to appoint receivers or the marshal,

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

* * * in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts," and, after conferring such enabling power, meant by section 64 to disable the courts from exercising it by depriving them, as is here sought to be done, of the self-respecting power to pay those it had employed to preserve the estate? Indeed, that is a contradiction and construction not to be tolerated unless under stress of impelling necessity. Section 64 of the act, which is claimed to do so, is as follows:

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipt of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. (b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate, subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority. * * *"

Now, while the relative order in which subdivisions "a" and "b" are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision "b" we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees, and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision "a" intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose power to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously subdivision "a" meant that this delay should not occur, and therefore provided that, "in advance of payment of dividends to creditors," "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality," and, to prevent delay from questions concerning such taxes, it provided, "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." And yet in case the court had to take testimony, or order a referee to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now, whether the "creditors" referred to in the phrase, "in advance of the payment of divi-

dends to creditors," places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who under subdivisions 4 and 5 of clause "b" are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a state are, under clause "a," given priority over "the actual and necessary cost of preserving the estate subsequent to the filing of the petition," we are clear they are not.

The appeal is therefore dismissed, and the decree of the court below affirmed.

BOSTON & M. R. R. v. McGRATH.

(Circuit Court of Appeals, First Circuit. June 27, 1910.)

No. 866.

RAILROADS (§ 328*)—INJURIES TO PEDESTRIAN—FAILURE TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.

Where the distance between the track on which a freight car was standing and that on which an engine was approaching was such that plaintiff could have seen the approaching engine for some distance if he had looked in that direction as he was passing the freight car before he stepped on the track, the presence of the freight car, instead of being an excuse for plaintiff's failure to see the approaching engine, was notice to plaintiff of danger, so that his failure to look and listen constituted contributory negligence, precluding a recovery for injuries sustained in the collision which followed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057–1070; Dec. Dig. § 328.*]

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

Action by William McGrath against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Archibald R. Tisdale, for plaintiff in error.

Joseph L. Keogh (Chas. Toye, on the brief), for defendant in error.

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

ALDRICH, District Judge. We think the judgment should be reversed in this case.

There is nothing to show that the plaintiff was a man wanting in ordinary sight and intelligence, and, upon his own statement, he deliberately and without looking walked onto a railroad track, where he was aware that trains and engines were liable to be moving. The undisputed evidence shows that he was injured by an engine moving at the moderate rate of four or five miles an hour, which was no greater speed than that of the brisk walk of a footman.

In the absence of something showing a situation which operates to entrap or throw a footman off his guard, walking onto a railroad track without looking, and in front of an engine thus moving, is in-

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

excusable. The explanation, which the plaintiff claims amounts to an excuse, is that there was a standing freight car between him and the approaching engine, which would have obstructed the view if he had looked. The distance between the track upon which the freight car was standing and that upon which the engine was approaching was such that the plaintiff could have seen the approaching engine for some distance if he had looked in the direction from whence it was coming, as he was passing the freight car and before he stepped into the place of danger. Instead of being an excuse, the presence of the freight car upon the track, obstructing the view, was palpable notice to the plaintiff that he should look, knowing, as he says he did, that a car thus standing between a traveler and an approaching engine, would muffle the sound. In other words, the presence of the freight car was a standing admonition that the plaintiff, in approaching the track, should look.

The rule which requires or admonishes members of the public traveling over railroad crossings to look and listen is not an arbitrary rule of law. While it is generally spoken of as a rule of law, it after all, in a case like this, has reference to something embodying a consequence which results from an admission that the person seeking relief was violating a natural rule of conduct founded upon fact. It is the usual thing for a court to tell a jury that a plaintiff sustaining an injury, in order to recover, must not have been wanting in ordinary care, and that that care is such care as men of ordinary prudence exercise in similar situations. As a matter of fact, as experience and observation show, men of ordinary care and prudence do look and listen before crossing railroad tracks, upon which they know trains and engines are likely to pass at rapid rates of speed.

Such foresight and precaution is involved in the conduct of men ordinarily and generally. It is based upon the instinct of the ordinary man, and it is so general as to be accepted as something ordinarily done. Consequently, when an injured party is living, and says that he walked in front of a moving engine, and that he did it without looking, and furnishes no reasonable excuse, he in effect admits, as matter of fact, that he was not in the exercise of the care generally exercised by men of ordinary prudence. And thus it is that the failure to recover in such a case is not the result of an abstract and arbitrary rule of law requiring members of the traveling public to look and listen, but more logically from the fact that the injured party admits that he did not use the precaution that men ordinarily use at railway crossings.

Of course, there might be a fatal injury where the condition of inanimate things would afford an explanation and satisfy a jury that the injured party did look and listen; but in such a case there would be no express admission that he was not doing what men generally do at such a place. And, of course, in the case of an injury not resulting in death, there might be an explanation or an excuse for not looking which would entitle the injured party to go to the jury upon the question of his exercise of ordinary care under the circumstances. There is, however, nothing in the case at bar which relieves the plaintiff from the consequences which result from an admission, in effect, that the plaintiff was not in the exercise of the care ordinarily exercised.

The fact that there was no flagman does not help the plaintiff, because he in effect says that his conduct was not governed by that.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs of appeal.

HEYWARD v. BRADLEY et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1910.)

No. 895.

1. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE—CERTAINTY.

An option provided that on plaintiff's election after examining defendant's land defendant would convey all phosphate rock and phosphate deposit contained on or in all of the Middleton lands on Ashley river, described in a specified plat, containing about 5,507 acres, for the sum of $20,000, and also convey a right of way over defendant's other lands to the Ashley river together with a site on the river for a washer. *Held*, that such option having ripened into a contract by the payment of the money, though the right of way and washer site were not located, the contract was not so vague or uncertain as to be incapable of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 62; Dec. Dig. § 28.*]

2. SPECIFIC PERFORMANCE (§ 52*)—CONTRACTS ENFORCEABLE—MISTAKE.

Defendant executed a written contract to convey all phosphate rock and phosphate deposit contained on or in all that portion of specified land lying between certain boundaries containing about 5,507 acres for $20,000. Several months elapsed between the execution of the option and the payment of the price during which plaintiffs' employés were engaged in openly prospecting the land, and new deposits were discovered of which defendant must have had knowledge. *Held*, that it was no defense to a suit for specific performance that it was defendant's intention only to sell that portion of the phosphate rock that lay within a tract of about 100 acres, already partially mined.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 155, 159; Dec. Dig. § 52.*]

3. SPECIFIC PERFORMANCE (§ 49*)—UNCONSCIONABLE CONTRACT—INADEQUACY OF CONSIDERATION.

Defendant, aided by the advice and co-operation of her husband, who was a lawyer, contracted to sell to plaintiffs for $20,000 all the phosphate rock underlying certain land, the right to mine, however, being subject to certain timber rights, which might prevent plaintiffs from mining a large part of the land until 1923. Explorations disclosed that on the land claimed there was about 280,000 tons of phosphate rock on which a reasonable royalty would be 25 cents per ton, or $70,000. *Held*, that the contract having been voluntarily made after full opportunity for deliberation, by educated persons of more than ordinary intelligence, was not so unconscionable, nor based on such a grossly inadequate consideration, as to warrant the imputation of fraud, and justify denial of specific performance, under the rule that only such inadequacy of price as shocks the conscience and amounts to conclusive and decisive evidence of fraud will justify the denial of such relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 151; Dec. Dig. § 49.*]

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

4. SPECIFIC PERFORMANCE (§ 16*)—GROUNDS FOR DENIAL OF RELIEF—HARDSHIP.

The court in its discretion would not be authorized to deny specific performance because performance of the contract, independent of fraud, would result in hardship to defendant, there being no circumstance other than alleged inadequacy of consideration constituting such hardship.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 35; Dec. Dig. § 16.*]

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

In Equity. Suit by Peter B. Bradley and Robert S. Bradley against Elizabeth M. Heyward. Decree for complainants (164 Fed. 107), and defendant appeals. Affirmed.

Julius H. Heyward and C. P. Sanders (Sanders & De Pass, on the brief), for appellant.

George F. Von Kolnitz, for appellees.

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

PRITCHARD, Circuit Judge. The careful investigation which we have given this case, required by its importance, and necessary in order to properly dispose of the questions presented by the assignments of error, impels us to the conclusion that the decree complained of is without error. Finding ourselves in full accord with the conclusions of the court below, we have approved the same, and adopt the views of that court as our opinion. We quote with approval as follows:

"This is a bill for specific performance of a contract for the sale of phosphate rock and phosphate deposit on the Middleton lands on Ashley river. The plaintiffs, citizens of Massachusetts, are the owners of a large body of phosphate land in this state lying near the Middleton place. Being desirous of extending their holdings, they employed George F. Von Kolnitz, Esq., a lawyer of Charleston, in the spring of 1905, to obtain options on other lands, and it appears from the testimony that he succeeded in obtaining about 30 options. With that purpose he made a visit to Greenville in April, and had an interview with Julius H. Heyward, Esq., the husband of the defendant, and commenced negotiations with him. Mr. Heyward informed him that nothing could be done without consultation with his wife, then on the Middleton place, and Mr. Von Kolnitz offering to pay his expenses, Mr. Heyward came down, and, after conference with the defendant, agreed with the plaintiffs' attorney upon the terms, and prepared the agreement which gives rise to this controversy, Mr. Von Kolnitz adding the stipulation as to right of way, and the agreement was executed April 20, 1905. The agreement provides:

"'(1) That the said Elizabeth M. Heyward for and in consideration of the sum of $5 to her in hand paid hereby grants and conveys to the said George F. Von Kolnitz, Jr., attorney, for the period of four months from this date, the right and option to purchase all phosphate rock and phosphate deposit contained on or in all that portion of the Middleton lands on Ashley river, etc., containing about 5,507 acres, more or less.

"'(2) That the said George F. Von Kolnitz, Jr., attorney, hereby agrees to pay for said phosphate rock and phosphate deposits (if after examination of said land he shall elect to purchase the same) the sum of $20,000, payable in cash on the 20th day of August, A. D. 1905, on which date this option shall expire.

"'(3) That the said George F. Von Kolnitz, Jr., attorney, his agents and employés are hereby granted all necessary rights of access to and entry upon said

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

land during the above limited period for the purpose of examining the same by soundings, excavations, etc., and all necessary conveyances are in due course to be executed and delivered for the purpose of completing said sale and transfer, which conveyances shall also include the right to a right of way to the Ashley river over the other lands of said Elizabeth M. Heyward, and a site upon said river for a washer, provided, however, that neither said right of way nor site shall in any way interfere with the rights granted heretofore to the United Timber Company, as shown by a lease now on record in the office of the registry of mesne conveyance, Dorchester county.'

"On August, 1905, Mrs. Heyward addressed a letter to George F. Von Kolnitz, attorney, saying: 'The limit of the option heretofore granted you by me for the purchase of the phosphates on the Middleton lands and rights set forth therein is hereby extended to September 1, 1905.' On the 30th of August, Mr. Von Kolnitz paid to the defendant the sum of $20,000, and shortly thereafter prepared a deed conveying to plaintiff all the phosphate rock and phosphatic deposits contained in the land described, and providing a right to construct and operate tramways, or railways, over and upon the lands for the mining or removal of the rock, and the right to occupy a site on the Ashley river for a washer, which Mr. Heyward, who throughout all the negotiation had represented the defendant, with her written authority, objected to, and, after some fruitless negotiations and correspondence, the defendant referred Mr. Von Kolnitz to her attorney, H. A. M. Smith, Esq., who, after some negotiations, prepared an instrument in writing to carry into effect the agreement of April 20, 1905, which was acceptable to Mr. Von Kolnitz, but which Mrs. Heyward refused to execute. Being unable to reach any agreement, this bill has been filed.

"In the answer and in the argument numerous grounds are set up why the agreement should not be specifically enforced. The first is as set forth in the answer, that the terms are 'too vague and uncertain to be capable of reasonable construction and enforcement, inasmuch as no place is fixed for the site of the washer therein referred to, and no limits or boundaries are fixed for the right of way mentioned in said option, nor is the compensation fixed for the use of either.'

"It appears from the testimony that all the negotiations between the parties were conducted between Mr. Von Kolnitz on the one side, and Mr. Heyward on the other. Both of them are lawyers of mature age and considerable experience. The agreement was prepared by Mr. Heyward. It involves a considerable sum of money, and was prepared after full deliberation, and it is fair to assume that when he prepared a paper of this character he intended, if the other party performed its obligation, to give an enforceable contract, and not a mere option on a lawsuit, wherein the measure of damage for breach of contract would be so uncertain as to have no calculable value. I cannot agree to the contention that the terms of this contract are 'too vague and uncertain to be capable of reasonable construction and enforcement.' The main features of the agreement are perfectly clear, and that is, that the plaintiff, if after examination of the land he shall elect to do so, shall have the right to purchase all phosphate rock and phosphate deposit contained on or in all of the Middleton lands on Ashley river described in the plat of Simons and Mayrant, containing about 5,507 acres. It is further stipulated that all necessary conveyances are in due course to be executed and delivered for the purpose of completing said sale and transfer. It is true that the location and dimensions of the right of way are not specifically designated, but it seems to me that the maxim 'id certum est quod certum reddi potest' applies. The testimony is that a right of way for the removal by rail or tram of phosphate rock when mined, and a washer for the purpose of cleaning it, are necessary for the reasonable use of the thing agreed to be sold, and the agreement stipulates specifically for such right of way and a site for a washer. In the nature of the case the precise location of this right of way and washer could not be determined in advance, because it was uncertain where the phosphate rock would be found. In the timber lease referred to there was provision for a right of way not exceeding 66 feet in width, and the location was fixed because the site of the timber was known. In this case it seems to me that there will be little practical difficulty in defining such lo-

cation of right of way and site for washer as would be consistent with the proper use and enjoyment of the main thing granted; that is, the removal of the phosphate rock in the land, and of course with due regard to the rights of Mrs. Heyward.

"The next ground stated as reason for nonperformance is that of mistake. Mr. Heyward testifies that when Mr. Von Kolnitz approached him on the subject he informed him that he knew that there was a body of phosphate deposit upon a certain tract of the Middleton lands, but it was a low-grade rock, and had been worked over by several parties, and that in drawing the agreement he had in mind this tract only. The testimony is that during the lifetime of the father of the defendant several parties successively had mined phosphate on this land, one after the other abandoning operations, and that is was supposed that the phosphate had been exhausted, and each succeeding party finding new deposits, but for a number of years there had been no mining upon the lands. Mr. Heyward's home is in Greenville, but his wife, the defendant, usually spends the winter and spring at the Middleton place, and Mr. Heyward is frequently there. There is no room to doubt that neither Mr. Heyward nor Mr. Von Kolnitz, when the agreement of April 20, 1905, was entered into, had any knowledge of the extent of the phosphate deposit upon these lands, nor is there any ground to believe from the testimony that the plaintiffs had any actual knowledge, although from their experience and the nature of their business they would presumably be more capable of forming a correct opinion on this subject than Mr. Heyward would be. The nature of this phosphatic deposit in the low country of South Carolina is peculiar, and has given rise to much curious speculation. It is found sometimes in pockets, and sometimes in strata, of greater or less thickness, lying at greater or less depth, in certain territory, but does not appear to be a continuous strata.

"A plat was exhibited at the hearing, prepared by Simons and Mayrant from data furnished by M. E. Hertz, under whose directions the investigation was made, from which it appears that upon the whole tract of over 5,500 acres rock was found at 982 stations on about 560 acres; 71 pits were opened, and the rock was found at an average depth of a little over 8 feet, the average thickness of the strata being about 8½ inches. The claim now made, that it was the intention of the defendant to sell only that portion of the phosphate rock lying within a tract of about 100 acres, which had already been partially mined, is utterly inconsistent with the agreement whereby is given in plain words the right to purchase 'all phosphate rock and phosphate deposit contained on or in all that portion of the Middleton lands on Ashley river,' lying between certain boundaries, containing about 5,507 acres, and whatever may have been the defendant's knowledge or lack of knowledge of the extent of the phosphatic deposit in April, certainly by the end of August, when she accepted the payment of $20,000, she must have known that other deposits had been discovered, for a large number of men employed by plaintiffs had been engaged for months, with her permission, in making soundings over the whole tract. It was the kind of work that could not be done secretly. Those who had eyes to see could see what was going on, and it appears from the testimony and from the correspondence of Mr. Heyward that he had other offers during the summer of 1905, for he was somewhat urgent that the matter be closed, expressing the belief that he could make make more advantageous term with other parties if plaintiffs declined to take, and in one of his letters he says: 'I am confident there is a quantity of rock on the land.' Neither at the time the money was paid nor at any other time prior to the commencement of this suit, so far as appears from the record, was there any contention that there had been any mistake. The Master of the Rolls in Swaisland v. Dearsley, 29 Beavan, 433, says: 'The principle upon which this court proceeds in cases of mistake is this: If it appears upon the evidence that there was in the description of the property a matter about which a person might bona fide make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him. If there appear on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake or that he

did not understand what he was about.' This case was cited in Tamplin v. James, 15 L. R. Chancery Division [218], by Baggalay, L. J., who says: 'I think that the law is correctly stated by Lord Romilly in Swaisland v. Dearsley [29 Beav. 430, 433],' and after referring to the facts in that case, he says: 'But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of contracts could rarely be enforced upon an unwilling party who is also unscrupulous. * * * I think that he is not entitled to say to any effectual purpose that he was under a mistake when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed a person might always escape from completing the contract by swearing that he was mistaken as to what he bought, and great temptations to perjury would be offered. Here the description of the property is accurate and free from ambiguity.' Fry on Specific Performance says (section 765): 'It seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract or any of the terms in which it is expressed.'

"I think there is no merit in this contention; and this brings me to the consideration of the other grounds set up as a defense, and as reasons for a rescission of the contract which the answer prays. They are that the contract is an unconscionable one; that the consideration paid is grossly inadequate, and that the enforcement of it by the court would result in injustice and hardship to the defendant.

"The parties to the contract have already been named, both parties being represented by competent lawyers. It is not therefore a case of the wolf and the lamb. The fairness of it must be judged of as of the time at which it was entered into. The defendant was the owner of a large body of land upon which it was known that there was a phosphate deposit, but the extent of that deposit was not known. There is nothing in the testimony which shows that the defendant was at that time under any stress of necessity which would impel her to sacrifice her property, and there is no testimony tending to show misrepresentation or concealment on the part of the plaintiffs. The extent of the phosphate deposits could only be ascertained after thorough examination, which required time, skill, and the expenditure of a considerable amount of money. The plaintiffs were willing to make this expenditure if, after their examination, they could purchase upon terms which would be profitable to them. The defendant, after time for full deliberation, fixed those terms. Up to this point it seems clear that the contract was made fairly, without fraud or over-reaching or taking any undue advantage. It was not made in haste, but after full opportunity for deliberation, by educated men, of more than ordinary intelligence, having the use of their eyes, their minds on the alert, and their interest awakened, and means of knowledge being open to both. It was known to both parties that there was rock on the land. The plaintiffs were willing to expend the time and money necessary to develop the extent of the deposit, and the defendant was willing to allow them to do so, limiting the time for such examination, and agreeing to sell all the rock upon the land for a fixed sum; all the expense of this exploitation was to be borne by the plaintiffs. This expense, according to the testimony, was something over $2,500, and would have been a total loss to the plaintiffs if rock in paying quantities had not been found. There is nothing unreasonable or unconscionable in such a contract. In the very nature of things all mining operations are problematical and doubtful. No science can afford a sure guarantee against losses, disappointment, and reverses, and it comes to this: Shall the plaintiffs be deprived of the benefits of a contract, fair and unobjectionable at the time it was made, because it has turned out that as the result of their enterprise and expenditure a much larger quantity of rock has been discovered on the land than the defendant believed to be there at the time the contract was made?

"Haywood v. Cope, 25 Beavan, 140, was a case for specific performance of a mining contract, where the mines turned out to be worthless. It appears in that case that the plaintiff had, 20 years before, worked the coal under his

estate, but abandoned it as unprofitable. There were two pits on the ground, and, before entering into the agreement with the plaintiff, the defendant applied for leave to have one of them cleared and to examine the coal in the shaft. He went down and examined the coal, and afterwards the agreement was entered into, and the defendant went into possession. It was soon discovered that the coal was 'absolutely not worth getting.' Upon a bill for specific performance the defendant resisted, on the ground of the uncertainty of the contract, misrepresentation and concealment of the plaintiff, and the hardship of being obliged to pay £100 a year during the remainder of the lease, without receiving any benefit whatever from the mines. Although he had examined the mines before purchasing, he said that he had no knowledge of mines, and that he was wholly ignorant of these matters. The Master of the Rolls says: 'The real fact is that the speculation has turned out to be extremely bad, and this is shown by the evidence. The seams dwindled down from 3 feet to 20 inches, but if instead of diminishing it had increased to that extent, the court would probably have heard nothing about it. Then it is said that this is an extremely hard case; that in point of fact the plaintiff is insisting upon the defendant paying him £1,400 for a thing that has turned out to be literally worth nothing, and that according to the discretion that the court exercises in such cases it cannot compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other courts, which is that the discretion of the court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what as between the parties would be fair to be done; what one person may consider fair another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.' Lord Eldon observes in the case of White v. Daman [7 Ves. 35]: 'I agree with Lord Rosslyn that giving specific performance is matter of discretion, but that it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial. I also refer, as I have upon former occasions, to a passage from the celebrated argument of the Master of the Rolls in Burgess v. Wheate [1 Eden, 214], where at the conclusion he cites a well known passage from Sir Joseph Jekyll upon the subject of discretion of the court, and gives his own opinion. He says: And though proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked vir bonus est quis, the answer is qui consulta patrum quit legis jura que servat, and, as it is said in Rooke's Case [5 Coke, 99b], discretion is a science not to act arbitrarily, according to men's wills and affections, so the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not opposed, but each in its terms to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the Constitution intrusted with. This description is full and judicious, and it ought to be imprinted upon the mind of every judge. If, therefore, in a case of this description I were to say that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favorably to one party and very unfavorably to the other? It is obvious that in a case of a sale at auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair or what might have been the right thing to do between the parties had all the elements of value been known which have since transpired cannot be ground for exercising or regulating the discretion of the court if all the facts which were then in existence were known to both parties. I can understand that the court will exercise the discretion, and will not enforce

the specific performance of a contract where, to a degree, the performance of the contract would be to compel a person who has entered inadvertently into it to commit a breach of duty, such as where trustees have entered into a contract the performance of which would be a breach of trust. Those are cases where by fixed and settled rule the court is enabled to exercise its discretion, but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper that the plaintiff make an abatement in respect of it, but that is a totally different matter, one which is in the forum of his own conscience, but not one which I can notice judicially. In my opinion this is a contract which was fairly entered into between the parties. There is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time.'

"Fry on Specific Performance, says (section 389): 'The fairness of a contract, like all its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events, for the fact that events uncertain at the time of the contract and afterwards were in a manner contrary to the expectation of one or both of the parties is no reason for holding the contract to have been unfair. The period, says the Irish Lord Chancellor Manners, at which the court is to examine the agreement between the parties is the time when they contracted.' The contention of the defendant which finds most support in the text-writers and in the decided cases is that a court of equity will refuse to lend its aid to the enforcement of a contract where the price paid is grossly inadequate to the real value. There is no fixed standard by which to determine this question of inadequacy which devolves upon the equity court the duty of revising men's bargains, and substitutes the chancellor's opinion for that of the contracting parties as to the price which ought to be paid. Lord Chief Baron Eyre says in Griffith v. Spratley, 1 Cox Ch. Cas. 388: 'The value of a thing is what it will produce and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a pressure of circumstances which may induce him to sell it at a particular time. Now, if courts of equity are to unravel all these transactions they would throw everything into confusion and set afloat all the contracts of mankind.' Lord Eldon says, in Coles v. Trecothick, 9 Vesey, 246: 'But, further, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.' Fry on Specific Performance says (section 44): 'There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed; it is said to be in the discretion of the court. The meaning of this proposition is not that the court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the court has regard to the conduct of the plaintiff and to circumstances outside of the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor.' And in section 46: 'But of the circumstances calling for the exercise of this discretion the court judges by settled and fixed rules, hence the discretion is said to be not arbitrary or capricious, but judicial; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course and therefore of right as are damages. The mere hardship of the results may not affect the discretion of the court.'

"Before considering the testimony on the subject of inadequacy I will proceed to examine those cases cited and relied on by the defendant as establishing the principle upon which it is claimed that she is entitled to be relieved of the performance of this contract. In considering these cases it is well to bear in mind what was said by the great Chief Justice in Cohens v. Virginia [6 Wheat. 264, 5 L. Ed. 257]: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used.' The first case cited, and one

which seems to be most relied on is Seymour v. Delancey, 6 Johnson's Ch. [N. Y.] 222. In that case Ellison, the ancestor of the defendant, was to convey two farms containing 763 acres of land, in exchange for one equal undivided one-third part of two lots of land in the village of Newberg. The chancellor, after reviewing the testimony, fixed the one-third of the Newberg lots at $6,000, and the farms at $12,000. He also found that Ellison 'was in the last year or two of his life rendered for a considerable part of his time unfit for business by habitual intoxication; his mind must have felt the pernicious effects of that habit, and have lost its original strength when he made the bargain in question. The proof is abundantly sufficient to render the fact of his competency to contract with the requisite judgment doubtful.' The contract was made in January and he died in August, and the chancellor says: 'This fact adds greatly to the force of the considerations growing out of the inadequacy of the price, and is clearly sufficient within the view of all the cases to render it highly discreet and just to refuse the aid of the court to the specific performance of so hard and so extravagant a bargain, gained from an habitual drunkard in the last year of his life and just before his infirmities have begun to incapacitate him entirely for business. There is another circumstance,' said he, 'in the case which ought to be taken into consideration, when the plaintiff comes here seeking a specific performance; he was not in a condition to give a good title to the village lots, either when he contracted or when the deeds were to be executed or at the time of the death of Ellison.' The decree of the chancellor, refusing specific performance, was reversed on appeal by the Court of Errors, 3 Cow. [N. Y.] 445 [15 Am. Dec. 270]. But the doctrine that 'inadequacy of price may of itself and without fraud or other ingredient be sufficient to stay the application of the power of this court to enforce specific performance of a private contract to sell land,' has the sanction of the great name of Chancellor Kent.

"The next case cited is one from our own state (Clitherall v. Ogilvei, 1 Desaus. 250), where the court refused to decree specific performance of a contract for the sale of land, where the inadequacy was very great. In its opinion the court refers to 'the reluctance of the defendant (a young man but just of age, ignorant of the land and its value) to determine the matter hastily, his wishing to consult with a friend whom he thought well acquainted with the land, showed plainly that he was not desirous of selling immediately and that he was not sufficiently competent to determine on the value. All these circumstances show that, though no fraud or imposition on complainant's part, yet there was such an eagerness, such an anxiety in him to conclude the bargain, such an astuteness of conduct as do not give it all the marks of fairness, justice, and equality. * * * That the consideration is enormously inadequate here I need only refer to the testimony of Capt. Pinckney, from whence it appears that the land at the lowest valuation must be worth four times as much as was agreed to be given for it.' In a note to that case by Chancellor Desaussure, he says: 'The rule seems to be that mere inadequacy of price in a contract deliberately made between two persons conusant of their rights and competent to manage their own affairs should not be a ground purely of itself to vitiate the contract, but the decided cases express a qualification which in reality is a material violation of the rule itself, for it is added that the inadequacy of price shall not vitiate the contract unless it be so gross that every good man would at once exclaim against it, and as would furnish violent presumptive evidence of fraud, imposition, or oppression in the buyer, or manifest ignorance or deep necessity in the seller.'

"The next case is Butler v. Haskell, 4 Desaus. 651, where the defendants agreed to sell for $1,200 for each share their interest in the estate of an idiot, and the bill was to set aside these sales, the proof being that each share was worth from $13,000 to $14,000; that the Butlers were uneducated and ignorant men in necessitous circumstances, who had employed the defendant as agent to establish their claims to the property, he being a man of ability, astuteness, and experience. In its opinion the court says: 'It has been left, perhaps wisely, to the experience of the courts of justice, to apply the mere principles of equity to each case according to its particular circumstances, and thus gradually to form a practical system of pure justice, and the courts have never decided as a broad principle that mere inadequacy of price unconnected

with direct fraud or imposition or concealment, or advantage taken of extreme weakness or great necessity, should be a distinct and independent ground of vitiating contracts, but the courts have said that the inadequacy may be so gross as to furnish strong and even conclusive presumption of fraud, and in this way the grossness of the inadequacy may avoid the sale.'

"The next case is Gasque v. Small, 2 Strob. Eq. 72. In that case the court refused to enforce specific performance and in its opinion says: 'In this case the defendant was a young man who had arrived at the age of 21 years a few weeks before the agreement, and who from the want of sagacity, advice and experience was unable to cope with the other party in the contract. It is manifest that his examination of the land was utterly insufficient to enable him to ascertain its value, which from the glowing descriptions of the advantage that he might derive from the purchase was no doubt greatly exaggerated in his imagination, and although the case does not come within the class of contracts of young heirs who are entitled to expectations, yet it approximates the principle in practice. The weight of evidence establishes such inadequacy of value that the most liberal calculation cannot resist the conclusion that Kirton (who, although apparently only the agent of Gasque, is the real party in interest) bargained the land to the defendant for double its value, and probably for three or four times as much as it would bring if sold at public auction.'

"The Church of the Advent v. Farrow, 7 Rich. Eq. [378], was a case where one Henry agreed to give to the church a lot for the site of an Episcopal church and for a burying ground, to contain one acre. Henry went to the spot and pointed out the lot, but no deed was executed. After his death his daughter objected to the use of the lot as a burial ground, and refused to sign a deed in the form demanded. The vestry brought suit for specific performance. Chancellor Johnstone, who heard the case on Circuit, said: 'I do not think there is sufficient evidence, even if parol proof were admissible, to establish an agreement which this court will enforce.' Chancellor Wardlaw, speaking for the Court of Appeals, affirming the decision below, says: 'Besides, if the plaintiff had proved sufficiently an agreement, the suit is an application to the extraordinary jurisdiction of the court, where discretion is tolerated and absolute right cannot be claimed. With every disposition to limit discretion we should hardly be disposed to afford relief to plaintiff when the enforcement of defendant's contract (essentially voluntary) although supported by the consideration of co-subscription, will be attended with inequitable loss to defendants in impairing the value of adjoining lots.'

"These are all of the South Carolina cases cited by the defendant. The cases in the Supreme Court of the United States, are, first, King v. Hamilton, 4 Pet. 328 [page 329 (7 L. Ed. 869)]. In its opinion in that case the court says: 'The complainants, after the lapse of 20 years seek for the specific execution of a contract which has not been performed on their part, and the execution of which will be manifestly unjust and unequitable.' The facts in that case have no possible analogy to those in the case under consideration, and it would be unprofitable to cite them in detail.

"Nickerson v. Nickerson, 127 U. S. 668 [8 Sup. Ct. 1355, 32 L. Ed. 314], was as stated in the opinion of the court on page 677 [of 127 U. S., on page 1359 of 8 Sup. Ct. (32 L. Ed. 314)]: 'The case of a husband who prior to marriage induced in the mind of his intended wife expectations in reference to real property, which, after marriage, he failed to meet, but in respect of that property he did not enter—and perhaps intentionally refrained from entering—into any distinct and binding agreement. * * * She relied upon his honor and has been deceived, but those facts, however strongly they appeal to our sympathy, cannot justify the court in finding upon the meager evidence in this case that there was an agreement upon his part, in consideration of marriage, to settle upon her either the property in Portland, or the property purchased with the proceeds of the sale.'

"McCabe v. Matthews, 155 U. S. 550 [on page 555, 15 Sup. Ct. 190, on page 192, 39 L. Ed. 256], was a case where Mrs. Montgomery entered into a written contract with Matthews for the conveyance of a tract of land containing 1,635 acres. The contract recited the consideration of one dollar, and the further consideration of a tract of five acres to be planted out in orange trees,

etc. The opinion of the court, sufficiently discloses the nature of the case, where Justice Brewer says: 'So that we have presented the case of one who, investing one dollar in the proposed purchase of land and doing nothing to assist his vendor in furnishing the property or performing the work necessary to be furnished and performed by such vendor to acquire the title to the land, waits nine years after his contract has been entered into, nearly nine years after he has good reason to believe that such vendor repudiates all liability under the contract, nearly five years after notice has been given by such vendor of his acquisition of the title by filing the deeds in the public records, two years after he receives actual notice of that fact, and then without the tender of any money or other consideration, appeals to a court of equity to compel such vendor to deed to him an interest in land worth at the time of his contract only $150, and now $7,500. It seems to us to be a case of purely speculative contract on the part of the plaintiff, doing nothing himself, he waits many years to see what the outcome of the purchase by the defendant shall be; if such purchase proves a profitable investment he will demand his share, if unprofitable he will let it alone. Under those circumstances the long delay is such laches as forbids a court of equity to interfere.'

"Willard v. Tayloe, 8 Wall. [557, 19 L. Ed. 501], was a bill for the specific performance of a contract for the sale of certain real property in the city of Washington, made in 1854, in the form of a lease for 10 years, giving the right or option to purchase, which was in the nature of a continuing offer to sell. The contract was not completed by the acceptance of the defendant's proposition to buy, until April, 1864, after the passage of the act of Congress making notes of the United States a legal tender, and one of the chief questions in the case was whether or not the complainant should pay the stipulated amount in gold and silver coin, the legal tender notes at the time when tendered being worth only a little more than one-half of the stipulated price. The court decided that the substitution of notes for coin could not have been in the possible expectations of the parties at the time the contract was made, and ordered the conveyance of the premises upon the payment in gold and silver coin. In considering the question whether there should be an enforcement of the contract owing to the fact that the property had greatly increased in value, the court says: 'It is true that the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts in the case of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made that circumstance furnishes no ground for interference with the arrangements of the parties. The question in such cases always is: Was the contract at the time it was made a reasonable and fair one? If such were the fact the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement.'

"I have now reviewed all the cases in South Carolina and in the Supreme Court of the United States cited by the learned counsel for the defendant, and it seems to me clear that mere inadequacy of price upon a contract deliberately made between two persons conusant of their rights and competent to manage their own affairs does not of itself furnish ground to vitiate the contract; but the counsel insists that gross inadequacy is equivalent to fraud, and cites Byers v. Surget, 19 How. 303 [15 L. Ed. 670], quoting as follows: 'To meet the objection made to the sale in this case founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This decision, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience it will amount to proof of fraud.' The facts in that case are a good illustration of the class of cases calculated to shock the conscience. Byers was a member of the firm of W. B. Duncan & Co., which in the year 1835 bought various tracts of land in the state of Arkansas. In 1836, upon the dissolution of the firm, these lands were conveyed to Byers. In 1840, four years after the dissolution of the firm of William B. Duncan & Co., an action was instituted in the name of that

firm by William B. Duncan against one Noadiah Marsh for a breach of covenant, and in that suit, under the plea of his subsequent discharge in bankruptcy, the court gave judgment in favor of the defendant, with costs of suit. This suit against Marsh was commenced and prosecuted long after the dissolution of the partnership, and, it was claimed, without their authority, all of them residing beyond the limits of the state of Arkansas. Surget, who had been Marsh's attorney in the inferior court, assumed to himself the power to tax the costs adjudged to the defendant, prepared a description of the property which he chose to have seized in satisfaction of that process, and ordered the sheriff to levy upon the whole of what he had so described, and under an execution for $39.10 peremptorily ordered the sale of more than 14,000 acres of land, belonging to Byers estimated by witnesses to be worth from forty to seventy thousand dollars, and as the court says: 'And, finally, under a proceeding irregular in its origin, commenced by himself and by him controlled in its consummation, of becoming the purchaser of the property estimated as above, for the sum of $9.13½, and refused after the sale and purchase to accept in redemption of the lands so sacrificed a sum of money tendered to him much more than equal to all the costs or all the expenses incident to the judgment.'

"In reviewing the facts, the court says: 'They betray that malus dolus in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation, to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice.'

"The rule as stated by Fry, § 442, is as follows: 'With regard to it as a ground for the setting aside of transactions, the doctrine of the court is that inadequacy of consideration, if only amounting to hardship, even great hardship, is no ground for relieving a man of a contract which he has wittingly and willingly entered into, but that it may be so enormously great as to be a conclusive evidence of fraud, and that it is then a ground for setting aside a transaction affected by it.' Section 443: 'Regarded as a ground of defense to a specific performance, the judgment of the older case was that inadequacy of consideration was a sufficient ground; it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which would stay the interposition of the court.' Section 444: 'But it appears to have been established by the decisions of Lord Eldon and Grant, M. R., that mere inadequacy of consideration is no defense to specific performance unless it amount to an evidence of fraud, and so would furnish ground even for canceling the contract.' There follows the citation from Coles v. Trecothick, which has been already referred to.

"It will be necessary now to refer to the testimony to see whether there is such inadequacy of price here as in the words of Lord Eldon 'shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction.' Mr. Hertz, who had charge of the operations for the examination of this property, testifies that he had a plat prepared by Simons and Mayrant from the field notes, and this plat was sent on to the plaintiffs for their information. As this plat was prepared long before this litigation arose, and bears intrinsic evidence of considerable care in its preparation, there would seem to be grounds for accepting it as fairly representing the area of rock which the plaintiffs supposed to exist at the time when the contract was consummated by the payment of the purchase money. From this plat it appears that rock was found on 560.2 acres, at an average depth of 8.27 feet, and average thickness of 8.7 inches. In this area was included 126 acres which had already been mined by successive operators, but it appears from the testimony that some rock was still left in this mined area, how much is not definitely stated. The defendant, since the beginning of the hearings in this case, has had a survey made by Mr. Emerson and others, and their testimony is that there are 718.67 acres of phosphate lands, and plats prepared by Mr. Emerson were offered in evidence. These plats were criticised by witnesses for the plaintiffs, as containing no course and distances and no base lines, but it does not seem to be necessary for me to decide as to the relative accuracy of these surveys, inasmuch as Mr. Hertz, claiming to speak with authority as agent for the Bradleys, testified at the

last hearing that the plaintiffs were willing to accept the plat prepared by Simons and Mayrant, and give to the defendant all outside of it; that the plaintiffs did not want anything except what that plat called for; and the counsel for plaintiffs indorsed and reiterated this statement in his argument, so the plaintiff's rights will be limited to the area described in the plat prepared by Simons and Mayrant, that is to say to the 560.2 acres. The preponderance of the testimony is that there is about 500 tons of phosphate rock to the acre, and if we assume that there is the same average upon the 126 acres already mined there would be about 280,000 tons of phosphate rock upon the land, lying at an average depth of about 8.27 feet. A good deal of testimony has been offered as to the value of phosphate rock. The price of rock is fluctuating, and it is difficult to say what is a fair market price. Since the beginning of the hearings in this case there has been a drop in the price, owing, it is said, in part at least, to the discovery of new phosphate deposits in Florida, and it appears that the greater part of the phosphate territory in this state is under the control of two companies, the plaintiffs being one, and the Virginia-Carolina Chemical Company another, and as they are large manufacturers of fertilizers, most of the product appears to be consumed by these two companies. The testimony as to the royalty—that is to say, the price paid to the owners of lands for rock after it is mined—seems also to vary. At the Bolton mines 15 cents a ton is paid. Mr. Pinckney testifies that on the lands mined by him a royalty of 25 cents and 30 cents a ton is paid, with provision for an increase of royalty when the rock sells at a certain price, on a sliding scale. In the 'flush times' of the phosphate business as much as $1 a ton was paid. No direct testimony has been offered as to the value of the rock upon this land as it lies, except that of Mr. Pinckney, who gives it as his opinion that it is worth 25 cents a ton. If it is worth 25 cents a ton, and there are 280,000 tons, of course it follows that this deposit upon the Middleton lands would be worth $70,000. By the agreement between the parties the right to mine and remove this rock is subject to a timber lease, dated September 17, 1903, which gives to the lessees 15 years from date to remove the timber, with the right to five years' additional time upon certain conditions. As the value of growing timber, such as covers part of this land, is likely to increase from year to year, the probabilities are that the lessees will not remove the timber until near the time of the expiration of their lease, and the right to remove the phosphate, being subject to that lease, there is a possibility, a fair probability in fact, that the owners of the phosphate rock may not have the right to remove it for many years to come. It is true that, according to the testimony, a good deal of this land is not covered by timber, but as a great deal of the rock lies at a depth which will require expensive machinery in its excavation, and a provision for railways and washers, it would seem likely, as a business proposition, that the owners would not provide the plant necessary until the time was near at hand when their operations would not be incumbered by the timber lease, which, as already stated, does not expire until September 17, 1923. If that is so, and the plaintiffs should not come into the enjoyment of their purchase until 15 years after the payment of the purchase money, August 30, 1905, the sum of $20,000 already paid would at the legal rate of interest in this state be about doubled.

"It is impossible for me to say with any certainty what the value of this phosphate deposit will be 10 or 15 or 20 years hence. Its value consists in the presence of bone phosphate of lime, which, treated with sulphuric acid, is converted into a commercial fertilizer. For 15 or 20 years the mining of phosphate rock in this state was considered a very profitable industry. This industry was seriously affected by the discovery of phosphate deposits in the state of Florida, and the testimony is that the Florida phosphates were of much higher grade than those in this state, and that miners there pay 10 cents a ton royalty. Some years after the discovery of the Florida deposits valuable deposits were found in Tennessee, which at one time it was supposed would seriously affect the value of the South Carolina rock. While it is hoped and believed, and there seems reasonable ground for the hope, that the phosphate rock in South Carolina may always continue to have considerable commercial value, with the vast strides made by

science in the discovery of new material for fertilizers, it is a matter of speculation as to what the value of this rock will be at the time when these plaintiffs will be permitted, under their contract, to utilize it. It appears now that they have made a very good bargain, but it may possibly turn out that what now seems to be immensely valuable may not prove to be so profitable to them. At all events, with the lights before me, I cannot say that there is that gross inadequacy which 'amounts in itself to conclusive and decisive evidence of fraud in the transaction.' There is nothing in the contract or in the circumstances connected with it which raises any presumption of fraud. It does not fall within the class of cases such as McCabe v. Matthews, 155 U. S. [550, 15 Sup. Ct. 190, 39 L. Ed. 256], or Byers v. Surget, 19 How. [303, 15 L. Ed. 670].

"The next question to be considered is whether mere hardship alone, independently of any question of fraud, furnishes ground for refusing specific performance. Fry on Specific Performance, § 426, says: 'The cases which have been already quoted as showing that the hardship must be judged of at the time of the contract, also illustrate another obvious principle, namely, that where the hardship has been brought upon the defendant by himself it shall not be allowed to furnish any evidence against a specific performance of the contract, at least whenever the thing he has contracted to do is reasonably possible.' Now, the hardship here complained of is that the defendant should be compelled to execute conveyances for property which she sold for $20,000 and which she has since discovered to be worth a great deal more than that. Granted that she did not know at the time that there were 560 acres of her land underlaid with phosphate rock, yet it cannot be denied that means of knowledge were as open to her as to the plaintiffs, more so in fact, for she required the consent of no one to make the examination, while the plaintiffs could not go upon her land for that purpose without her consent. Her husband, under whose advice she acted, was a gentleman of unusual intelligence. He had as good opportunity to form an opinion as to what the land contained as the plaintiffs had, for it is not to be believed that the plaintiffs would have spent over $2,500 in making their examination if they had known beforehand where the rock was and its value, and there being a full, entire, and intelligent consent to the contract at the time it was made, and as related to a subject, the value of which was a matter of speculation, I can find no principle which has the sanction of English or American courts of respectable authority which would justify me in refusing a decree for specific performance. In the Roman law the case is different. The Constitution of Justinian fixed the arbitrary standard of one-half the real price as that which would give the sufferer the right to the interference of the court, and under the French Code a vendor may require rescission of the contract if he suffers injury to the extent of more than seven-twelfths of the price, but such is not the law of England or of any of the United States.

"Fry, § 446, says: 'The general rule, that the hardship of a contract is, independently of fraud, a ground for refusing a specific performance, would seem to carry with it the particular rule that inadequacy of consideration, when amounting to hardship, but not to fraud, could yet be a defense, but there appears (notwithstanding an expression of opinion from the bench to the contrary great good sense in refusing to adopt such a rule. To make a contract with an insufficient consideration, incapable of enforcement by the purchasers, would be practically to prevent a man from selling his property at less than its value, however impossible it might be to sell it at its value, however desirous he might be to sell it for the price actually obtained, however desirable it might be for his interest that he should do so, and however unwilling or unable the purchaser might be to purchase at its full value. The rule would, when it did not stop the sale, yet further reduce the amount receivable by the vendor, because the purchaser would in effect indemnify himself for the risk he ran by offering less purchase money than he otherwise would have done. The freedom of contract, including in it the freedom to enter into enforceable contracts, should never be infringed without sufficient cause; but, furthermore, if inadequacy of consideration short of fraud

were a bar to specific performance, the question would arise as to the amount of inadequacy which should so operate, a question not easy to answer.'

"I think that I have no discretion except to decree specific performance of this contract. While there are expressions in the opinions in many cases that a court of equity will not lend its aid in the enforcement of a contract where hardship or great hardship would result, I have found no well-considered case where relief from such contract has been granted, unless there were some circumstances outside of that of inadequacy which, taken in connection therewith, justified or required the court to withhold its aid. Some such expressions are found in the older cases loosely reported, where all the facts do not appear. The remarks of the Chief Justice in Union Pacific R. R. Co. v. C., R. I. & P. R. Co., 163 U. S. 600 [16 Sup. Ct. 1187, 41 L. Ed. 265], seem apposite: 'The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the grounds of inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach. It must not be forgotten that in the increasing complexities of modern business equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies so that they should correspond both to the primary rights of the injured party and to the wrong by which that right has been violated, and has always preserved elements of flexibility and expansiveness so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.'

"A few words as to the form of the decree. It should provide for the conveyance of the phosphate rock and phosphate deposit upon the lands containing 560.2 acres, described in the plat of Simons and Mayrant, filed in the cause. As to the location of the right of way for the railway or tramroad and the washer, let the decree direct a conveyance substantially in the form agreed upon between Mr. Von Kolnitz and Mr. H. A. M. Smith. This form of conveyance was produced under subpœna by Mr. Smith, but, upon objection of the defendant, the court reserved the question as to whether it was competent evidence, and upon motion of defendant's counsel the same was sealed and deposited with the clerk. I have not examined it, but as it appears to have been satisfactory to the counsel for plaintiffs, and was prepared by Mr. Smith, a kinsman and counsel of the defendant, and an eminent lawyer, I have no doubt that it makes such provision for the location of the right of way and site for the washer as is consistent with the rights of the defendant."

For the reasons herein stated, the decree of the court below is affirmed.

THORLEY v. PABST BREWING CO.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 235.

1. COURTS (§ 365*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Upon the question of the measure of damages in an action in a federal court for breach of a covenant of quiet enjoyment in a lease, the court is governed by the decisions of the highest court of the state where the property is situated, so far as they determine the question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 955; Dec. Dig. § 365.*

State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

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

2. LANDLORD AND TENANT (§ 130*)—EVICTION OF TENANT—MEASURE OF DAMAGES.

The general rule in New York, established by decision, is that for breach of a covenant for quiet enjoyment in a lease the lessee can recover only nominal damages, with nothing for the value of his lease or for improvements. The only exceptions to such rule which call for compensatory damages are in case of fraud, or that which approximates fraud, on the part of the lessor, or in case of fault, or that which amounts to fault, on his part; and his making of the lease with knowledge that he is without full authority to do so does not amount to a fault, unless the lessee is without such knowledge and is misled.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 479; Dec. Dig. § 130.*]

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

Action by the Pabst Brewing Company against Charles Thorley to recover damages for an alleged breach of a covenant of quiet enjoyment contained in a lease of certain premises in the city of New York. In the opinion following the parties are designated as in the Circuit Court. Modified and affirmed.

The decision of this court, reversing a judgment sustaining a demurrer to the complaint, is reported in 145 Fed. 117, 76 C. C. A. 87.

Leventritt, Cook & Nathan (David Leventritt, William N. Cohen, and I. Maurice Wormser, of counsel), for plaintiff in error.

Mayer & Gilbert (Julius M. Mayer and A. S. Gilbert, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The principal contentions of the defendant, based upon his assignments of error, are that the trial court erred:

(1) In refusing to submit to the jury the question of the ambiguity in the lease.

(2) In excluding testimony tending to show the intention of the parties in executing the lease.

(3) In charging that the plaintiff was entitled to recover as damages the difference between the rent reserved and the value of the lease for the remainder of the term, together with the value of the improvements.

We have carefully considered the first two contentions of the defendant and are satisfied that the action of the trial court was right in the instructions and rulings complained of. In view, however, of our conclusions with respect to the third contention, we deem it unnecessary to do more than thus state the result of our examination of the others.

The third contention presents the question of the measure of damages in an action for breach of the covenant of quiet enjoyment in the lease. This question must be determined by the law of real estate. And the law of real estate which this court is bound to regard is that established by the course of decisions of the courts of the state in which the land is located—the state of New York. If the law be not settled and established, it will be our right and duty to exercise our

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

own judgment. But, if it be settled, we must accept the established rules as authoritative declarations of what the law is. When this case was before this court before, it was said:

"Inasmuch as the question presented relates to the rights and title to the real estate and things having permanent locality, it is to be determined by the decisions of the courts of last resort of the state of New York, so far as they determine the questions herein."

So our inquiry here is whether the courts of the state of New York have established a rule of damages in actions of this nature and, if so, what that rule is. It is quite probable, and quite as immaterial, that we may regard the rule which we find settled as opposed to the weight of authority elsewhere and contrary to the soundest principles. It is equally immaterial that, if this case were before the New York Court of Appeals, that court might modify in favor of the plaintiff the rule now established. The plaintiff has brought its suit affecting land in this court, and we must follow settled rules, not change them. Our only duty is to take the law as we find it, and as we find it apply it.

Two theories have long been adopted by the courts in different jurisdictions in determining the rule of damage for breach of the covenant of quiet enjoyment in a deed. In some of the states the covenant —like the covenant of warranty—is assumed to take the place of the ancient warranty of the feudal law, under which, if the vassal were evicted by a better title, he received from his lord other lands of equal value to those which he lost; such value being computed as of the time of the warranty. As that which is now recovered is money instead of land, the same idea is carried out by giving to the party who has lost his land the money he paid for it and thus restore him to his original condition. In other states, and now in England, the covenant is regarded as one of indemnity, and the rule of damages is to restore to the grantee that which he loses by the failure of the grantor to keep his covenant and, consequently, the measure of damages is the value of the property at the time of the eviction without regard to the consideration paid. The first theory is the earlier one; the latter, the one now more generally adopted. 3 Washburn on Real Property, p. 531; 4 Kent's Com. p. 475.

The same theories have been followed in the case of leases. The rent is the consideration paid for a lease, and as a tenant who is evicted is relieved of the rent, it is held in some jurisdictions that he is entitled to recover nothing for the value of his lease or for improvements. Rent paid in advance is, of course, a consideration paid and recoverable. On the other hand, it is held by many courts, upon the principle of indemnity, that such a tenant may recover the value of his lease—the difference between the rent reserved and the value of the term, and also, provided there be no double recovery, expenditures for improvements.

Coming, then, to the decisions in the state of New York, we find that in Staats v. Ex'rs of Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254, decided in 1805, it was held by the Supreme Court that under a covenant for peaceable enjoyment the vendee, if evicted, can recover only the consideration paid and nothing for the increased value of the

property nor for improvements. Chief Justice Kent reviewed the origin of the rule that, in the absence of fraud, "purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money, with interest and costs, was all that was to be expected."

In Pitcher v. Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229, decided in 1809, the Supreme Court again laid down the rule of Staats v. Ex'rs of Ten Eyck, supra, upon the authority of that decision and early English cases. In Bennet v. Jenkins, 13 Johns. (N. Y.) 50, decided in 1815, Baldwin v. Munn, 2 Wend. (N. Y.) 405, 20 Am. Dec. 627, decided in 1829, and in several intermediate cases the same rule was reaffirmed and approved.

In Kinney v. Watts, 14 Wend. (N. Y.) 38, decided in 1835, the rule governing the covenant of quiet enjoyment in deeds was applied to leases. The court said (page 41):

"A vendee, when he purchases, may insist upon special covenants, which will secure to him a perfect indemnity for any expenditures or improvements upon the premises, in case of eviction; but if he takes the general covenants of warranty and quiet enjoyment, he has no right to complain that the law does not afford him full compensation for the loss and injury which he has sustained by eviction. If he resorts to an action upon this covenant, he must take the rule of damages which the law has established for a breach of it. A lease, where no purchase money is paid by the lessee, does not differ in principle, in this respect, from an ordinary conveyance in fee for a valuable pecuniary consideration. As the lessee has paid no purchase money, he can recover none back upon eviction; and in respect to the improvements which he may have made upon the premises, and the money expended upon them, he stands precisely upon the same footing with a purchaser, who recovers nothing for improvements or expenditures; nor can a lessee, upon the ordinary covenant for quiet enjoyment."

In Kelly v. Dutch Church of Schenectady, 2 Hill, 105, decided in 1841, the same rule was again stated and applied in the case of a lease, and a lessee evicted by a paramount title was held entitled to recover nothing for improvements or rise in value. The court said:

"Under a general covenant for quiet enjoyment, the rule of damages is settled in relation to a purchaser who has been evicted. He recovers back the consideration money paid for land, with interest on the amount for a period not exceeding six years. The price agreed upon by the parties is taken as the true value of the land without any reference to the actual value. Following that analogy, the rents reserved in a lease, where no other consideration is paid must be regarded as a just equivalent for the use of the desired premises. In case of eviction, the rent ceases; and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property. Having lost nothing he can recover no damages. * * * If this rule will not always afford a sufficient indemnity to the lessee, I can only say, as has often been said in relation to a purchaser, he should protect himself by requiring other covenants."

Noyes v. Anderson, 1 Duer (N. Y.) 342, decided in 1852, was a case very like the present one. In that case the defendant leased an office upon premises situated in the city of New York to the plaintiff, with rent payable monthly in advance. The plaintiff duly entered into possession and paid rent. The street inspector of the city tore down the office upon the ground that it constituted an incumbrance upon the

highway. The plaintiff, being evicted, brought an action against the defendant to recover the rent paid in advance and also the value of the lease. It was held that if the street inspector acted by authority of law the existence of such authority and the probability of its being exercised were presumptively as well known to the lessee as to the lessor, and that the recovery must be limited to the rent paid in advance. The court said (page 350):

"The destruction or removal of the building, as both parties must be presumed to have known, * * * was liable to occur at any time on 24 hours' notice. It appears, however, to have been standing, and to have been used for the period of 20 years. To this, so far as the evidence shows, no objection had been made by the municipal officers of the city. We think it is a just conclusion that both parties contracted, the one to rent and the other to hire and pay monthly in advance, on the mutual understanding and expectation that the plaintiff would not be disturbed in the enjoyment of the premises by any action of the city corporation. * * * If the lease had contained covenants of seisin and for quiet enjoyment, and the plaintiff had been evicted by a paramount title, the whole amount which he could have recovered back, in an action upon any of the covenants, would be the moneys paid in advance, deducting therefrom rent at the stipulated rate for such portion of time for which the advance payment was made as the lessee had enjoyed the premises, with interest on such balance. It is regarded as settled law in this state that the ultimate extent of a grantor's responsibility, under any or all of the usual covenants in his deed, is the purchase money, with interest."

In Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463, decided in 1869, the Court of Appeals stated the general rule of the earlier cases, but held that, when a vendor contracts to sell lands in which he knows that he has no title or power of conveyance, he is bound to make good to the vendee the loss of the bargain through his default. This was an action to recover damages for breach of an executory contract to convey, as to the measure of damages in which there has been much discussion and difference of opinion in many jurisdictions. Several New York decisions say that the same rule of damages applies in these actions as in actions upon covenants, but the decisions seem not wholly consistent in this respect.

Pumpelly v. Phelps was limited and distinguished in Burr v. Stenton, 43 N. Y. 462, decided in 1871, and in Margraf v. Muir, 57 N. Y. 155, decided in 1874, and cannot be regarded as authoritative. The following language from the latter decision is especially pertinent in this case:

"In that case [Pumpelly v. Phelps] the vendee did not know that the vendor had no title. Here he did know it."

Mack v. Patchin, 42 N. Y. 167, 171, 176, 1 Am. Rep. 506, decided in 1870, is the leading case upon which the plaintiff must stand to show a modification of the early rule and the exceptions to its application in the case of leases. In that case the court (Earl, C. J.) said:

"In an action by the lessee against the lessor for breach of covenant for quiet enjoyment, the lessee can ordinarily recover only such rent as he has advanced, and such mesne profits as he is liable to pay over; and in cases where the lessor is sued for a breach of a contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of the lease. These rules, however much they may be criticised, must be regarded as settled in this state. But at an early day, in England and in this country, certain cases were declared

to be exceptions to these rules, or, more properly speaking, not to be within them, as, if the vendor is guilty of fraud, or can convey, but will not, either from perverseness or to secure a better bargain, or if he has covenanted to convey, when he knew he had no authority to contract to convey, or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or when he refuses to incur expenses which would enable him to fulfill his contract. In all these cases, the vendor or lessor is liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property."

Smith, J., said:

"The plaintiff was clearly evicted from the premises by the act, procurement, and fault of the defendant. He expedited, if he did not instigate, the foreclosure of the mortgage, under which the eviction was had. * * * It would be a gross wrong, if a landlord could thus conspire and assist in turning his tenant out of possession of demised premises, and the latter be limited, in his action upon his covenant for quiet possession, to mere nominal damages."

An examination of this decision shows that the only exceptions to the general rule which the court had in mind were cases where the lessor was at fault or acted in bad faith. In the General Term decision (29 How. Prac. [N. Y.] 20), which was affirmed, the lower court said that the active part which the landlord took in ousting his tenant took "his case out of the rule of damages established for the protection of those who have acted in good faith." Mack v. Patchin was also in a measure distinguished from a case like the present by Burr v. Stenton 43 N. Y. 462, decided in 1871, and already referred to.

In Cockcroft v. N. Y. & Harlem R. R. Co., 69 N. Y. 201, 203, decided in 1877, the court stated the "well-settled rule" of the earlier decisions, and pointed out that the exceptions to it are founded upon the misconduct, fraud, or bad faith of the vendor or landlord. The court said:

"The exceptions to this general and salutary rule are founded on the acts of the vendor which evince knowledge of the existence of the defect, or a want of authority to convey, thereby showing misconduct, fraud, or bad faith in entering into the contract, or in seeking to avoid it for the purpose of obtaining a large price, or an undue advantage to which he is not entitled."

In Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398, decided in 1889—an action upon a submission in which it appeared that a lessor had failed to give a lessee possession of leased premises—the Court of Appeals used language inconsistent with its earlier decisions which we have noticed. But this language was not necessary to the decision and cannot be regarded as changing the well-settled rule of the earlier cases.

In Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115, decided in 1890, the Court of Appeals, in speaking of the rule of damages in question, said:

"It is the settled doctrine in this state that, without the aid of fraud or bad faith, nothing can be recovered for improvements made or for the increased value of the premises produced by them."

In Matter of Strasburger, 132 N. Y. 128, 131, 30 N. E. 379, decided in 1892, the court said:

"The lunacy of Strasburger did not discharge or affect his covenants in the leases to the appellants. Matter of Otis, 101 N. Y. 580, 5 N. E. 571. His estate is liable for whatever damages the appellants have sustained because of the breach of the covenant for quiet enjoyment in the leases given to them by him. To the extent of such damages they are general creditors, and entitled to have their claim ascertained in order to be paid in the due course of administration. Id. But the question is: What is the measure of their damages? The appellants claim that it is the value of the unexpired term, less the rents reserved. This would be so if the breach of the covenants for quiet enjoyment resulted from the fault of Strasburger. Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506. But the general rule is, in the absence of fault in the lessor, that the lessee can recover only such rent as he has advanced, and such mesne profits as he is liable to pay over. Id. See Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115."

In Doctor v. Darling, 68 Hun, 70, 74, 22 N. Y. Supp. 594, 596, decided in 1893, the Appellate Division for the First Department said:

"Upon a breach of a covenant of seisin or quiet enjoyment the value or expense of improvements made by the evicted grantee cannot be recovered as a part of his damages."

Friedland v. Myers, 139 N. Y. 432, 436, 438, 34 N. E. 1055, 1056, decided in 1893, is the last decision upon the subject by the Court of Appeals, and is particularly relied upon by the defendant. This was an action for the breach of the covenant of quiet enjoyment in a lease. The plaintiff leased of the defendant certain premises to be used as a drug store and made expenditures for contemplated improvements. When he sought to take possession at the beginning of the term, the tenant then in possession kept him out upon the ground that his lease had not expired, and it was so adjudged in proceedings to dispossess him brought by the defendant. It was held that the plaintiff was entitled to recover the expenditures for the contemplated improvements. The court said:

"Anciently the rule was that, where the lessor was sued for a breach of a covenant to give possession, the lessee could, ordinarily, recover only nominal damages and incidental expenses, but nothing for the value of the lease; but this rule was not made applicable to a case like the present, where he covenanted to give possession, when he must be deemed to have known that he had no authority to do so, and the lessor would then be held liable to the lessee for the loss of the bargain. * * * It need not be questioned that the defendant acted in good faith. He evidently misjudged as to the legal effect of the transaction with the occupant, and did not understand that it created a tenancy for another year; but it was so adjudged in the proceedings brought to dispossess him, and the consequence of the defendant's mistake must be borne by him, and cannot justly be visited upon the plaintiff."

In view of the facts in the Friedland Case, it seems clear that the Court of Appeals was merely applying, and not altering, the principles of its earlier decisions. The landlord was held liable for substantial damages, because he acted with knowledge of the facts, and the tenant without knowledge. The parties did not stand in the same position. While bad faith was not shown, the fault and mistake were wholly those of the lessor, and not those of the lessee, and the former was only held responsible for expenditures which the latter was deceived into making. But we see nothing in the decision indicating an intention upon the part of the Court of Appeals to change its decision of

the preceding year (Matter of Strasburger, supra) that the rule is, "in the absence of fault in the lessor" that the lessee can recover only nominal damages.

The plaintiff seeks to found upon this decision in the Friedland Case an exception to this rule in a case where "a person undertakes to let premises which he has no right to let." But such an exception would be as broad as the rule. There can be no breach of the covenant of quiet enjoyment if the lessor have the right to let, and if compensatory damages are to be awarded in all cases where there is no such right there can never be a case for nominal damages. Nor do we think this decision—or the decision in the Mack Case, supra—authority for the proposition that knowledge on the part of the lessor of his want of full authority to let makes out an exception to the rule of nominal damages, unless the lessee is without the same knowledge and is misled.

This examination of the course of decisions in the state of New York leads us to these conclusions:

(1) That the rule of the early decisions fixing the measure of damages for breach of the covenant of quiet enjoyment in a lease is still the general rule in that state, well settled and established.

(2) That under this general rule a tenant who has not paid in advance can, upon eviction by superior title, recover only nominal damages, and can recover nothing for the value of his lease or for improvements.

(3) That exceptions to this general rule which call for compensatory damages arise: (a) In case of fraud, or that which approximates fraud, on the part of the lessor. (b) In case of fault or that which amounts to fault upon the part of the lessor; but the execution of a lease by the lessor with knowledge that he is without full authority to do so, does not amount to a fault unless the lessee is thereby misled.

These conclusions with respect to the rule in New York seem to be in accord with the conclusions reached by text-writers who have examined the authorities. Thus in Reeves on Real Property—a very recent work—the author, a professor in a New York law school, says (volume 2, p. 827):

"* * * Now in England and most of the states of this country (though the rule was formerly less favorable to the lessee) he may recover, in such an action, the total loss which he has suffered; that is, the remaining value of the lease to him—the value of the unexpired term less the rent reserved. But in a few of the states, such as New York and Pennsylvania, it is held that in the absence of fault on the part of the landlord, or other special circumstances, the termination of the tenant's duty to pay rent sufficiently compensates him for the loss of his term."

In a note to the foregoing paragraph it is said:

"This severe rule arose from that as to covenants for quiet enjoyment in conveyances in fee; and it yields to a demand for more adequate damages when the landlord is at fault, or might have prevented the eviction, or otherwise is fairly obligated in a larger amount."

In Taylor on Landlord and Tenant (9th Ed., published in 1904) p. 386, note, it is said:

"The later cases in New York hold that, in the absence of fault upon the part of the lessor, the lessee can recover for a breach of a covenant of quiet

enjoyment only such rent as he has advanced and such mesne profits as he is liable to pay over."

See, also, 18 Am. & Eng. Ency. of Law (2d Ed.) pp. 628, 629; Rawle on Covenants of Title (5th Ed.) § 164; Brightley's notes to Duvall v. Craig, 2 Wheat. 63, 4 L. Ed. 180.

Examining the record in the present case, we find nothing to bring it within the exceptions to the New York rule. The plaintiff itself states in its complaint that the premises from which it was evicted belonged to the city of New York, "of which ownership the plaintiff was fully aware and had notice before entering into said lease." The plaintiff was in no way misled by any act of the defendant. There was no fraud, nor anything approximating it, upon his part. Nor was there any fault or wrongdoing. Both parties were fully advised as to the true conditions. They knew that the city could take possession at any time, but believed that it would not do so and acted accordingly—the plaintiff taking and holding possession under the lease for a considerable period. They were in the situation of the parties in the case of Noyes v. Anderson, 1 Duer (N. Y.) 342, already referred to, in which substantial damages were refused, and in which it was said that they contracted the one to rent and the other to hire the city property "on the mutual understanding and expectation that the plaintiff would not be disturbed in the enjoyment of the premises by any action of the city corporation."

It follows, from these conclusions as to the proper measure of damages, that the instructions of the trial court upon the subject were erroneous. Upon the undisputed facts, the judgment should have been for nominal damages only. Consequently, to correct the error, we are called upon to modify, rather than to reverse, the judgment.

The judgment is modified, by reducing the amount thereof to the sum of one dollar, nominal damages, without costs, and, as so modified, is affirmed. As the judgment is not reversed, we have concluded to allow no costs to either party in this court.

THE DAUNTLESS.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1910.)

No. 954.

SHIPPING (§ 81*)—LIABILITY OF VESSEL FOR TORTS—NEGLIGENT MANAGEMENT—CONTRIBUTORY FAULT.

A barge was lying at the head of a slip, and her stern line was cast off from the pier in order to allow the bow of respondent tug to come between her and the pier to reach a coal chute, the line being made fast to one of the forward bitts of the tug to prevent the stern of the barge from drifting across the slip. After the tug had coaled, she signaled for the casting off of her lines, and, swinging her stern outward to avoid a tug behind her, backed out. She failed to cast off the line from the barge, and no one of her crew was on the part of the vessel to observe the fact. Libelant, who was master of the barge, while attempting to cast off the line, was caught by a part of it which was lying in disorder on his deck, dragged overboard, and injured. *Held*, that it was the

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

duty of the tug under the circumstances to exercise care and give attention to the barge, and her failure to do so was negligence which rendered her liable for libelant's injury. *Held*, further, that libelant was also negligent in failing to keep the line coiled in proper shape, and was not entitled to recover full damages.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 81.*]

Cross-Appeals from the District Court of the United States for the District of Maryland.

Suit in admiralty by Absalom Higbee against the tug Dauntless, the P. Dougherty Company, claimant. Decree for libelant, and both parties appeal. Affirmed.

W. L. Williams (Arthur D. Foster, on the brief), for the P. Dougherty Company.

Willard M. Harris and George T. Mister (Beverly W. Mister, on the brief), for libelant.

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

GOFF, Circuit Judge. The libel was filed in the court below by Absalom Higbee, master of the barge Smoot, against the steam tug Dauntless, in a cause of personal damage. The P. Dougherty Company of Baltimore county, owner of the steam tug, intervened, answered, and defended. The court below found in favor of the libelant and awarded him damages in the sum of $3,000, against the Dauntless, a larger sum not being allowed as he was found guilty of fault and negligence in connection with the accident. There were cross-appeals, the libelant contending that the court erred in finding him guilty of negligence, and also in not finding him entitled to greater damages; the claimant and owner insisting that it was error to find the steam tug at fault. Some of the witnesses were examined in open court, and some of them had their depositions duly taken and subsequently read to the court. As the case is disclosed by the record, the undisputed facts are in substance as follows: Libelant's barge, the Smoot, chartered to the Southern Transportation Company, loaded with a cargo of coal, was lying at the head of the slip, to the north of the pier operated by the Baker-Whitely Coal Company, at Canton, near the city of Baltimore. She had been ordered to leave the slip by 7 o'clock on Monday morning, March 23, 1908. She was 149 feet long, with 23 feet beam. About 9 o'clock of that morning the steam tug Dauntless, intending to take on bunker coal, entered said slip; the barge still being there. In order to enable the Dauntless to reach the coal chute, the stern line of the barge was thrown off from the pier, and the bow of the tug was run in between the barge and the pier. Then, so as to keep the stern of the barge from drifting to the other side of the slip, a small line was thrown from the barge and made fast to the forward port bitts of the tug, after which that vessel, having been fastened to the pier, proceeded to coal. The Dauntless, having finished her coaling, blew signals directing her lines to be cast off, orders to that effect having been given by her mate, who in the absence of the

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

captain was in charge. The Dauntless was a bay tug about 97 feet in length and 22 feet beam of 123 gross tons. At the time the Dauntless blew her whistle, and indicated that she was ready to back out, the Fortuna, a tug of the Southern Transportation Company, was coming up the dock for the purpose of taking the Smoot out. The signals of the Dauntless were given before the Fortuna got into the slip.

The testimony relating to what subsequently occurred was conflicting. Those on the barge testified that the line from it to the forward bitts of the Dauntless was not thrown off by any one on that vessel. The testimony of the mate, and others of the crew of the Dauntless, was to the effect that, when the lines were ordered cast off, the barge's line was thrown off from the Dauntless by a deck hand, after which that vessel proceeded ahead on her engines slowly, in order to work her stern out from the pier, and also so as to obviate collision with another tug—the Tormentor—which was then astern of the Dauntless. After the stern of the Dauntless had been so worked out from the pier, she proceeded to back out of the slip. Respondent offered evidence showing that it was a practice on the part of barges situated as was then the Smoot to cast a line to a tug moving out, so as in that way to be taken from the slip. The libelant denied that he or any one on the barge had refastened the line to the bitts of the Dauntless. A witness on another barge testified that, after the Dauntless had blown signals to cast off, he saw the captain of the Smoot attempting to throw a line over the bitts of the Dauntless. There was testimony tending to show that the line running from the bitts of the Dauntless, attached to the cleat on the starboard quarter of the Smoot, was lying loose and disordered on the deck of the Smoot. The libelant offered testimony showing that the loose end of said line was made fast to the barge's cleat by a half dozen turns, and that the residue of it was carefully coiled up on the deck, forward of the cleat. When the Dauntless backed out, and the Fortuna approached, the captain of the Smoot attempted to cast off this line, he standing on the deck where this rope was then so used and lying, but he failed in his efforts to do so, and the tug having gained sternway, the line commenced to run out, when his leg was caught in the bight, and he was dragged overboard, pulled through the water, and drawn up the side of the Dauntless. He was severely injured, and suffered the loss of his foot.

The testimony is most conflicting, and we find it useless to attempt to explain or harmonize the same. In ascertaining the truth and finding the facts, the conceded location of the vessels and the movements thereof necessary to bring about the changes intended will materially aid in the proper solution of the questions we are to answer. When the Dauntless started to move out, she then having her bow between the stern of the Smoot and the pier, and the line from the Smoot being still fast to the bitts of the Dauntless, the Fortuna close to and intending to enter the slip, and the tug Tormentor lying astern of the Dauntless, the situation was such as to require careful management from all of those in charge of the navigation of those vessels. At that time of the crew of the Dauntless there were seven on board, but not one of them was on her port side, from which only the situation on the Smoot could have been observed, which vessel had had a line fastened

to the port bitts of the Dauntless ever since the latter reached the pier. It is quite evident that the Dauntless started astern very soon after blowing her whistle, and without having thrown off the line that held the Smoot to her. In addition to this, there was no one in the pilot house, or on the bow of the Dauntless, which under the circumstances we have referred to was negligence. A man in the pilot house, or on the bow, would have seen the danger, and have given the signal that would easily have obviated the accident. He would have heard the cries of danger and distress coming from the Fortuna, would have seen the man overboard, and could have stopped the Dauntless almost instantly, for she had gained but little sternway.

We are not impressed with the testimony of those on the Dauntless who claim that the line from the Smoot to the Dauntless had been cast off by a deck hand of that tug, after she had given the signal she was going to "back out." This claim, as well as the insistence of the respondent that the master of the barge, after he had been cast off, for some purpose of his own, and in some way not shown, again made his line fast to the tug, is intrinsically weak, is flatly contradicted, is unreasonable, contrary to the probabilities, and unworthy of belief. The Smoot was where she had a right to be, and she had the right to demand and receive from the Dauntless the care, attention, and consideration that all vessels similarly situated should have from vessels alongside of which they may chance to be. That she was not so treated is beyond question, that the Dauntless neglected to give her the attention and the treatment required by good seamanship is plainly apparent from the record before us, and that she is liable to the libelant we have no doubt.

While the tug was negligent, was she solely responsible for the accident that followed? We are compelled by the facts clearly shown to answer this question in the negative. The libelant was not free from fault, yet still under the circumstances, having in view the negligence of the tug, and the equitable spirit of the admiralty rule applicable in such cases, he is nevertheless entitled to damages. He was injured when endeavoring to extricate himself from a dangerous position, caused by the negligence of the Dauntless and his own carelessness in allowing the disordered condition of the line by which the barge was fastened to the tug. This rope was about 30 fathoms long, from 20 to 30 feet only of which were used in making fast to the tug. It was not coiled as it should have been, but much of it was loose and scattered over the deck. He knew the Dauntless was making ready to back out, and that, unless the line was cast off, there would most likely be a strain upon it. He may have expected that the Dauntless would throw off his line, or may have believed that he would have ample time in which to do so, but still that did not obviate the duty that was his, to have his own deck in proper condition, "his own house in order." When the emergency was upon him, and he endeavored to cast off his line, he realized and suffered from the carelessness to which he had contributed, for the bight in which he was caught was from the rope scattered and disarranged over the deck of his barge.

We find that the decree appealed from properly imposes damages on the Dauntless because of its negligence, and that it justly recognizes

the fault of the libelant. The assignments of error on the appeals mentioned are without merit.

Affirmed.

STEWART et al. v. BRUNE.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1910.)

No. 3,112.

1. APPEAL AND ERROR (§ 1031*)—REVIEW—HARMLESS ERROR—PRESUMPTIONS AS TO EFFECT OF ERROR.

The presumption always is that error produces prejudice, and it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038–4046; Dec. Dig. § 1031.*]

2. TRIAL (§ 110*)—RECEPTION OF EVIDENCE—MISCONDUCT OF COUNSEL.

In an action by an employé to recover for a personal injury, it was prejudicial error to permit plaintiff's counsel on the examination of a juror to ask questions the evident purpose and effect of which were to convey to the jury a strong intimation that defendant was insured against such liabilities, and that the insurance company was the real party in interest as defendant, contrary to what appeared from the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. § 110.*]

3. MASTER AND SERVANT (§§ 217, 238*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF SERVANT—ASSUMPTION OF RISK.

Plaintiff, who was a licensed engineer with several years' experience in operating derricks, was operating a derrick for defendants in pulling sheet piling, used in constructing the foundation of a building, when he was injured by the breaking of an eyebolt to which one of the guy ropes of the mast was attached. The derrick was of a common and usual construction, practically new, and was sound, including the eyebolt, and being used for an ordinary purpose. It was shown that the amount of power applied to a piling was left wholly to plaintiff's control, and that, if after one pull the piling did not come out, it was cut off and left in the ground. *Held*, that if, as he alleged, the derrick and eyebolt were being at the time subjected to an excessive strain he alone was responsible therefor, and that if, as he also alleged, the number of guy ropes was insufficient, and they were not anchored at sufficient distance from the mast, he was as competent as any one to know such fact, and assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 587, 744; Dec. Dig. §§ 217, 238.*]

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

Action by Fred Brune against Alexander M. Stewart and James C. Stewart. Judgment for plaintiff, and defendants bring error. Reversed.

Percy Werner (Seneca N. Taylor, on the brief), for plaintiffs in error.

D. D. Holmes (Benj. J. Klene, on the brief), for the defendant in error.

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

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This was an action brought by the defendant in error, hereafter called the plaintiff, against the plaintiffs in error, hereafter called the defendants, to recover damages for personal injuries alleged to have been sustained by the plaintiff on or about the 5th day of December, 1907.

The defendants were contractors, and at the date of the injury complained of by the plaintiff were engaged in the erection of a building at the northeast corner of Broadway and Pine streets, in the city of St. Louis. In the erection of this building they were using what is designated in the record as a "guyed derrick" for the purpose of lifting and moving material and pulling up piling. The upright mast of the derrick was about 80 feet high, and a boom about 70 feet long was connected to said mast at its base, together with the usual pulleys and the usual fall and boom lines. The derrick was held in an upright position by means of four steel guy lines. These guy lines were each fastened at one end in a separate eyebolt at the top of the mast, the other end of the guy lines being anchored to the ground about 63 feet from the base of the derrick, and in such directions therefrom as to hold the mast in a perpendicular position. The derrick was operated by means of a steam engine. The plaintiff was the engineer and was in charge of the engine at the time he received the injuries of which he complains. While the derrick was being used for the purpose of drawing out sheet piling, or boards, which had been placed in an upright position in a trench as a mold for concrete, one of the eyebolts at the top of the mast broke and the derrick fell to the ground, something, supposedly the guy line, striking the plaintiff and injuring him. The eyebolt which broke was made of 1½ inch steel and the breakage revealed a clean surface without flaw or weld.

The testimony shows that the derrick was a new one, of approved type, and manufactured by a reputable firm; that the use to which it was being put was a usual, ordinary, and appropriate one; that the derrick was sound in all its parts, and had been carefully inspected before being set up for use at the place where the accident occurred; that it was designed to raise twelve tons with four guy ropes. The method employed in taking out these sheet piling was to fasten a chain, attached to the boom, around the upper end of the piling, start the engine, and pull the piling out. If after taking a pull on the piling it did not come out, it was cut off and left in the ground. The record shows that prior to the time of the accident the men operating the derrick had in the manner just described taken out 60 or 70 of these piling. The plaintiff testified that he was a licensed engineer and derrick operator, and had been engaged in that employment for several years prior to the time of the accident. The negligence charged in the petition is that the derrick, "as constructed, erected, and maintained was dangerous and unsafe for the purpose for which it was being used in the erection of said building by reason of the said guy ropes and the said eyebolts by which it was secured being of an insufficient number and strength." The answer of the defendant con-

sisted of a general denial, and an allegation of contributory negligence.

In reply the plaintiff admits that the derrick at the time of the accident was being subjected to more than the usual strain. The averment is as follows:

"Plaintiff alleges that it is true, however, that said derrick, guy ropes, and eyebolts, as constructed, erected, and maintained, were being subjected to a greater strain than they were calculated to sustain, and further avers that plaintiff did not know at the time, nor by exercise of ordinary care could have known, that said derrick guy ropes and eyebolts, as constructed, erected, and maintained, were being subjected to a greater strain than they were designed and calculated to sustain."

At the trial, counsel for the plaintiff, while conducting the examination of the jury on voir dire, propounded the following questions to a juror:

"Q. Does your firm carry any insurance in the Ocean Liability Insurance Company? A. Not that I know of. I don't know what insurance the firm carries.

"Q. Would the fact that the Ocean Insurance Company, if such should be the fact, was the real defendant in the case, and the one who was defending, make any difference in case your company was insured by them?"

This question was objected to by counsel, and the court said:

"I am not able to say as to that. He asked the question whether or not he has any connection with the company mentioned, whether that fact would have any effect upon him if he did. That is the question."

Counsel for the defendant then stated that his objection was directed to the last question, and the court further remarked:

"The court will hold that this question, whether this concern mentioned by the counsel for plaintiff has insured the men in the employ of this defendant, may be asked. * * * Counsel had better state right here whether or not this company that has been mentioned—what is the name?

"By Counsel for Plaintiff: I don't know the full name. It is commonly known as 'The Ocean Insurance Company.'

"By the Court: If counsel desires, they may state whether the Ocean Insurance Company is interested in this suit or not."

Counsel having declined to make any statement on the ground that it was immaterial, the court further said:

"Then the question may be asked, and answered. Here is a matter that in my judgment is perfectly proper to be inquired about. This man has sued Stewart & Co., and if Stewart & Co. are carrying insurance in that company, the Ocean Insurance Company, and the Ocean Insurance Company is ultimately interested in that matter, whether they are parties to the suit or not, inquiry may be had as to the connection they have, inasmuch as counsel have declined to say whether they have or not, I will permit the inquiry."

These several questions by counsel and rulings by the court were properly excepted to and are assigned as errors.

Under the issues formed by the pleadings, and in view of the answer of the juror to the first question, the purpose of the second question is we think at once apparent. It was well calculated, as suggested by the Supreme Court of Illinois in McCarthy v. Spring Valley Coal Company, 232 Ill. 473, 83 N. E. 957:

"To intimate strongly to the jury that the appellant was insured against liability for accidents of this character and that the party who would have to respond for any judgment which might be rendered was the insurance company." Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357; Howard v. Beldenville Lumber Co., 129 Wis. 98, 108 N. W. 48.

The question whether or not the defendants were insured was wholly foreign to the issues being tried, and the plaintiff would have been precluded from making direct proof of that fact, even if it existed. This indirect attempt to get before the jury extraneous matter or issues that were foreign to the case could not be other than prejudicial, intensified in this case by the court's inquiring in the presence of the jury into the relationship of the defendants' counsel with parties not before the court, and thus placing counsel in the embarrassing position of either making a disclosure or admission which he might feel he had no legal right to make, or, by his silence, take the risk of having the jury infer something more prejudicial even than the admission sought to be extorted would perhaps convey. And then, as if to place beyond all doubt the inference which might be drawn from the question objected to, that the insurance company and not Stewart & Co. was the real defendant, the court added:

"This man has sued Stewart & Co., and if Stewart & Co. are carrying insurance in this company, the Ocean Insurance Company, and the insurance company is ultimately interested in that matter, whether they are parties to the suit or not, inquiry may be had as to the connection they have, inasmuch as counsel have declined to say whether they have or not, I will permit the inquiry."

While it is quite true that an appellate court will not ordinarily consider whether the amount of damages awarded by the jury was, under the evidence, excessive, it is proper, as bearing upon the possible effect upon the jury, to consider the impropriety of bringing into the trial of a case matter wholly unconnected with it, the direct tendency of which may well be to prejudice one of the parties, and the extent of which it is not always, if ever, possible to measure. "The presumption always is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable." Union Pacific Railroad Co. v. Field, 137 Fed. 14, 69 C. C. A. 536; United States v. Gentry, 119 Fed. 75, 55 C. C. A. 658; Moores v. Bank, 104 U. S. 625, 26 L. Ed. 870; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Railroad Company v. O'Brien, 119 U. S. 103, 7 Sup. Ct. 118, 30 L. Ed. 299; Mexia v. Oliver, 148 U. S. 675, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Company v. O'Reilly, 158 U. S. 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heurich, 167 U. S. 629, 17 Sup. Ct. 927, 42 L. Ed. 302.

The next assignment of error to be noticed is based upon the refusal of the court at the conclusion of all of the evidence to instruct the jury to return a verdict for the defendant. The testimony showed conclusively that the derrick being used at the time the plaintiff received his injuries was practically new and sound; that before it was erected at this place it was carefully inspected and no defects whatev-

er were found in it; and that it was fit for the purposes for which it was then being used. It is true that an expert, Prof. Kinealy, testified that the stress on the eyebolt at the top of the mast with the guy lines placed as they were in this case with the engine pulling so as to lift four tons would be 62,536 pounds to the square inch, and that a bolt of this character would not stand a stress greater than 60,000 pounds to the square inch. He further testified that, if the guy lines had been placed further away from the mast, the stress on the eyebolt would have been decreased, also that the placing of additional guy lines to the mast would lessen the stress on the eyebolt. He further testified that that model of derrick was one that had been used for a great many years, but he nowhere testifies that it was unfit for the purposes for which it was being used, or that there was any danger in its use so long as the stress did not exceed 50,000 or 60,000 pounds per square inch.

It is to be borne in mind that the plaintiff was a licensed engineer and derrick operator of many years' experience; that he knew the derrick was supported by four guy lines and the distance at which those guy lines were anchored to the ground from the foot of the mast. He had worked with this and another derrick with the same engine at another place, and was familiar with its construction, and, as operator of the derrick, he was charged with the duty of pulling out only the sheet piling which came within its capacity, erected as it was, the whole matter of the application of power, and how much it was proper and safe to use, was left entirely to his discretion and judgment. His testimony on this point is as follows:

"Q. Who was it that directed the amount of power when at the engine? A. I did.

"Q. You as operator? A. Yes, sir.

"Q. That was left entirely to your judgment and discretion and your method of operation? A. Yes, sir.

"Q. You say that after it goes above three tons it is very difficult to tell how much you are pulling? A. Well, you can tell three to three and a half or four tons."

When a board was encountered which resisted beyond the capacity of the derrick, the engineer had simply to desist in his attempt, and the testimony shows the board was abandoned and the top cut off level with the ground. As a licensed engineer and operator of the derrick, he knew, or by the exercise of reasonable care might have known, of the circumstances under, and the purpose for, which it was being used, and to govern himself according to the situation as it existed. He was not asked or directed to use the machine beyond its capacity as it was erected. He alone had control of the power, and must have fully appreciated the dangers of applying it beyond the capacity of the derrick, and, if he saw fit to apply power beyond the capacity of the derrick as constructed, he alone was responsible for the result.

If, indeed, it can be said that the appliance was defective as erected, because the defendants had only used four guy lines when they should have used six, or because they had not anchored the guy lines to the ground at a sufficient distance from the mast, that fact was well known to the plaintiff, as he was engaged in operating this derrick for some

days before the injury happened. The manner in which the derrick was erected was apparent to his observation, and if, as he contends, the defendants were negligent in this respect, the case would fall within the well-known rule that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. Kirkpatrick v. St. Louis & San Francisco Railroad Company, 159 Fed. 855, 87 C. C. A. 35; St. Louis Cordage Company v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Glenmont Lumber Company v. Roy, 126 Fed. 524, 61 C. C. A. 506; Denver & R. G. R. Co. v. Norgate, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981; Federal Lead Company v. Swyers, 161 Fed. 687, 88 C. C. A. 547. So that, in any view that may be taken of the case as disclosed by the record, we think the defendants were entitled to have the jury instructed to return a verdict in their favor, and the refusal of the court to do so was error.

For the errors mentioned the judgment is reversed, with instructions to grant a new trial.

DEWAR et al. v. MOWINCKEL.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1910.)

No. 1,816.

1. ADMIRALTY (§ 118*)—APPEAL—REVIEW OF FINDINGS.

The finding of a trial court made on conflicting evidence that a firm to whose agent the bill of lading of a cargo of coal was indorsed was the consignee, and bound by the terms of the bill of lading and charter party in respect to time for discharge, affirmed.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 770; Dec. Dig. § 118.*]

2. SHIPPING (§ 181*)—DEMURRAGE—ARRIVAL OF SHIP—FAILURE OF CONSIGNEE TO DESIGNATE PLACE FOR DISCHARGING.

Where the consignee of a ship's cargo is given the right by the charter party to designate the place of discharge at the port of delivery, either at a safe wharf or alongside, it is his duty to exercise such right within a reasonable time after notice of the arrival of the vessel at the port, and his failure to do so is a waiver of the right, and entitles the ship to consider her voyage at an end, and give notice of her readiness to discharge, which will start her lay days to running.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589–592; Dec. Dig. § 181.*

Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

3. SHIPPING (§ 173*)—CHARTER PARTY—CONSTRUCTION—CESSER CLAUSE.

The rule of construction of a charter party containing a cesser clause relieving the charterer from responsibility after the completion of loading and also providing that the charterer shall pay freight and demurrage for delay in discharging, and giving a lien therefor, is that the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurable, and where a ship was required to deliver her cargo of coal to a purchaser, and discharge the same upon a

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

general pile, by which the lien was lost, the charterer may be held liable for the freight and demurrage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 570; Dec. Dig. § 173.*]

4. SHIPPING (§ 49*)—LIEN ON CARGO GIVEN BY CHARTER PARTY—ENFORCEMENT AGAINST INDORSEE OF BILL OF LADING.

A shipowner's lien on cargo given by the charter party is not preserved against the indorsee of a bill of lading except so far as those terms of the charter party are expressly incorporated into it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 198–200; Dec. Dig. § 49.*]

5. SHIPPING (§ 183*)—DEMURRAGE—MEASURE OF DAMAGES.

A rate of demurrage agreed upon in a charter party for a certain number of demurrage days will be adopted by the court as the measure of damages for further detention of the ship in the absence of other evidence, but it is open to either party to show that it is not the true measure.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 593; Dec. Dig. § 183.*]

Appeal from the District Court of the United States for the Northern District of California.

Suit in admiralty by J. Ludwig Mowinckel, as owner of the steamer Rygja, against James Dewar, John McLaren, Ernest Gripper, and William Webb, partners as Dewar & Webb, the Lithgow Coal Association, Evan C. Evans, garnishee, and Joseph L. Schmidt and James B. Smith, sureties. Decree for libelant (173 Fed. 544), and respondents appeal. Modified and affirmed.

On November 30, 1907, the Norwegian steamer Rygja was chartered by the appellee to the Lithgow Coal Association, a corporation of New South Wales, for the carriage of a cargo of coals from Sydney to San Francisco. The charter provided in clause 4 that the vessel with her cargo "shall therewith proceed to San Francisco (California) and deliver the said full and complete cargo in the usual and customary manner, at any safe wharf or place, or into craft alongside at San Francisco or other safe place within the Golden Gate, always afloat, as ordered by consignees. * * * (12) The cargo to be taken delivery of from alongside ship at the average rate of not less than 600 tons per working day (Sundays and legal holidays excepted), from the time the ship is in berth and ready to discharge, and 24 hours notice thereof has been given by the master in writing, with 12 days allowed on demurrage (4) at the rate of four pence per register ton per day." When the steamer was loaded, the bill of lading was issued to the charterer, requiring delivery of the cargo to order or assigns, and the captain of the steamer bore with him a sealed packet, the contents of which were unknown to him, containing the charterer's copy of the bill of lading indorsed to Evan C. Evans, the agent at San Francisco of Dewar & Webb of London. On arriving at San Francisco, the Rygja was entered at the customhouse on February 4, 1908. Having learned from a San Francisco shipping journal that his vessel was consigned to Evan C. Evans, Capt. Svendsen, the master, gave notice to Evans that the steamer had arrived and had entered at the customhouse, and was ready for discharge at 3 p. m. on February 4, 1908. On the following day Evans replied, advising the captain that the receivers of his cargo were the Western Fuel Company "who have a copy of the charter party, and from whom you will please take your orders under clause 4 of your charter party." He later further advised the captain that the agent for the charterer was John Barneson of Barneson & Hibbard, East street, San Francisco. Immediately after the receipt of Evans' letter, the master of the Rygja had a conversation with him, in which the latter said that he had nothing to do with the cargo, that

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

Barneson represented the charterer, and that the cargo was for the Western Fuel Company. Evans gave the captain a letter to the Western Fuel Company, on the presentation of which to that company the captain was informed that there was no berth to be had "for quite awhile," and that he would be informed when he could get a berth. The captain then went to Barneson, and the latter confirmed the statement of Evans, and said that he could give no information as to the time when a berth could be had, but that he would do his best to obtain one as soon as possible. In a conversation with Evans on February 5th, the captain was informed by Evans "that it was a very complicated affair," and, when he was asked to give the captain an acknowledgment of the receipt of his notice, Evans answered that he could not do it at the time. In order to clear up the situation, and ascertain who was his consignee, the captain had a second conversation with Evans on the afternoon of February 5th, and asked him for money on account of freight. Evans informed him that he had better see Barneson again about it. On the morning of the 6th the captain called on Barneson, and asked for money on account of freight. Barneson answered that he could not do any such thing, and advised the captain to go to Evans, where he would get his money. The captain again saw Evans, and, with a view to ascertaining whether or not he was the consignee, asked him again for money on account of freight. Evans refused to pay money on account of freight, and suggested to the captain that he seek legal advice. On the 7th the captain secured from Barneson an acknowledgment that he had received the notice of the arrival of the vessel, and of her readiness to discharge, with the further statement therein: "Will notify you as soon as a berth can be obtained for discharging." On February 7th, under advice of his attorneys, the captain sent to the Western Fuel Company, Evans, and Barneson each a notice detailing the facts above set forth, and demanding that they severally and jointly, as representing the charterers of the Rygja, exercise the option given by the charter party, and designate a place for discharge as therein provided, and notified them that the owner would hold the proper parties responsible for demurrage and damage for any detention of the Rygja beyond the terms of the charter party, and for any damage resulting from their failure to designate a safe place for the cargo's delivery under the terms of said charter party. On February 8th Evans wrote the captain, saying: "So far as I am concerned, I have only to refer you to your charter party and to my letter of the 5th inst., instructing you where your steamer would discharge. If you did not ascertain from the Western Fuel Company when you first called on them the particular wharf of theirs that your steamer is to proceed to, I would suggest that you again call on the company and get this information." Barneson answered, directing the captain's attention to the notice given him by Mr. Evans referring him to the Western Fuel Company for his instructions, as to berth, "which notice we confirm and repeat." The Western Fuel Company answered: "We are to take delivery of the cargo of coal aboard your vessel as per terms of your charter party." These answers leaving the captain in doubt and uncertainty, he cabled the charterer at Sydney: "Arrived here February 4th. Telegraph name of consignees, also who pays freight. Evans representing Dewar & Webb and Captain Barneson do not admit any responsibility." No answer was received to this request for information. On February 11th the captain's attorneys wrote to the Western Fuel Company, referring to the fact of the detention of the vessel since February 4th, and to the fact that Evans had informed the captain that the Western Fuel Company were the receivers of the cargo, and had a copy of the charter party, that he was to take his orders from the company, and concluded: "As the captain of the Rygja has had contradictory information on the subject, we should be obliged if you will affirm or disaffirm the statement that, under clause 4 of the charter party, he is to take his orders from you as the consignees of the cargo. If you affirm this, you will please advise us when you became the holders of the bill of lading covering this cargo, and also whether the Rygja is to look to you for the payment of her freight and demurrage." There was no written answer to the letter, but the company informed the captain by telephone that it was not the consignee of the cargo, or the holder of the bill of lading covering the same, and that the vessel was not to look to the company for her freight. On

February 13th the captain's attorneys wrote to Barneson, informing him of the master's dilemma, and asking his help in the solution of it. Barneson answered on February 15th that he had no authority to represent the charterer. On February 18th Evans wrote the captain that he had just received a cable message from Dewar & Webb, instructing him to pay freight as per charter party "for our account," and stating that he was prepared to pay freight as per charter party. On February 26th Evans wrote the captain, saying: "I am instructed by the Western Fuel Company to instruct you to take the Gymeric's berth as soon as she has finished discharge. You will therefore please be careful to see that you follow the S. S. Gymeric, and as soon as you are in berth and ready to discharge give me and/or the Western Fuel Company notice thereof." At that time the Gymeric was lying in the stream, but on March 4th she was docked at the Mission street wharf, No. 2, and on March 12th she finished discharging cargo. On that day the captain wrote Evans that, if he discharged as ordered, he would be unable to retain possession of the cargo, and would thereby lose his lien, and requested that some arrangement be made to protect his lien. He also asked to be allowed to see the bill of lading of the cargo, so that he might know to whom to make delivery. In answer to that letter Evans referred him to the terms of the charter party, and informed him that the bill of lading had been lodged with the custom authorities. Following up this information, the captain found from an inspection of the charterer's copy that it had been first endorsed by the charterer to Evans, that Evans had then indorsed it to Barneson, and that Barneson had, in turn, indorsed it back to Evans, and the captain also discovered that on March 12th Evans had entered the cargo as consignee and had turned over to the collector of the port under oath the bill of lading covering the same. On the morning of March 13th, the steamer proceeded to the designated wharf, where she finished discharging on March 22d, receiving her freight money daily from Evans. In his libel to recover demurrage for his detention of 39 days, the appellee, in addition to the other facts therein set forth, alleged upon information and belief that at the time of the arrival of his vessel at the port of San Francisco a contract was then in existence between either Evans as the representative of Dewar & Webb, or the charterer and the Western Fuel Company, for the sale to the latter of the cargo after its delivery at said port, and that the detention of the steamship and the failure of the master to find a consignee of the cargo arose through a desire on the part of the libelees, as charterers and consignees, to avoid responsibility for demurrage. In the original answer of both the charterer and Dewar & Webb to the libel, it is distinctly alleged that the Western Fuel Company was the consignee of the cargo, and that the master of the steamship was so informed on February 5th, but that "he refused to recognize his said consignee." The answer also denied that the cargo was under an agreement for sale after its delivery at the port of San Francisco, and alleged that it had been sold while en route to the Western Fuel Company. On the trial, however, Dewar & Webb amended their answer, and alleged that the charterer was the consignee, and that they were the purchasers from the charterer of the cargo, to be delivered by the charterer to Evans "landed on the wharf at San Francisco, duty paid." They also changed their answer by omitting the denial that the cargo was under an agreement for sale after its delivery to an admission of that fact. The trial court found from the evidence that the charterer delivered the cargo on board at Sydney for carriage to the port of San Francisco; that a bill of lading was issued to the charterer; that Dewar & Webb thereafter purchased the cargo to be delivered at San Francisco, and thereupon, as part of the transaction, the charterer indorsed the bill of lading to Evans; that the purpose of the indorsement was to enable Evans to enter the cargo at the customhouse, and to make sale and delivery thereof at San Francisco for his principals Dewar & Webb; that, while the cargo was afloat, Evans sold the same to the Western Fuel Company, that company to take delivery thereof upon the wharf at San Francisco, the contract also giving the vendee the right to designate the wharf to which delivery should be made; that at the date of the arrival of the steamship at San Francisco there was a controversy between the Western Fuel Company and the representative of the charterer and Dewar & Webb growing out of the refusal of the Western

Fuel Company to receive the cargo, unless the vendors would undertake to secure it against any damage which it might sustain in the event that the cargo contained an excess of twenty per cent. of screenings; that this controversy was not adjusted until February 8, 1908, at which time the Western Fuel Company finally accepted delivery of the cargo under an agreement then made; that the bill of lading incorporated the terms and stipulations of the charter above set out, and that, although Evans, as indorsee of the bill of lading, held the legal title to the cargo until it was delivered to the Western Fuel Company, still he held it as the agent of Dewar & Webb, and that firm was in fact the consignee of the cargo, and as such bound by the stipulations contained in the bill of lading.

The conclusion reached by the District Court was that Dewar & Webb were the consignees of the cargo, and bound by the terms of the charter party and bill of lading; that, although under the charter party the consignee was given an option to designate the precise place of discharge, and although, if the option had been exercised, the lay days of the ship would not have commenced to run until she had reached that place, still, the option not having been exercised within a reasonable time, the right to exercise it was waived, and consequently the steamship, being at the time her notice was given, at one of the alternate places of discharge named in the charter party, was an arrived ship; that a reasonable time within which to exercise the option of naming a precise place for discharging the cargo expired on February 6th, so that the vessel was to be regarded as an arrived ship on February 7th, and notice of her readiness to discharge was properly given on that day; that her lay days commenced on February 10th, 24 hours after the notice, and excluding Sunday, February 9th, and that, therefore, the appellee was entitled to 12 days' strict demurrage at four pence per register ton per day, and damages in the nature of demurrage for each day's subsequent delay, and the court held that such damages should be prima facie calculated on the basis of the strict demurrage rate, but that it was open to either party to show that the true measure of loss to the shipowner was less, for which purpose the case was referred to a commissioner. The commissioner, upon the evidence, found that the appellants had failed to prove that the rate of four pence per register ton did not express the true measure of damage, but upon the testimony of one of the appellee's witnesses, he found that the true measure of damages for the delay for the 20 days following the 12 strict demurrage days was £30 a day. His report was approved by the court.

Nathan H. Frank, for appellants.

E. B. McClanahan and S. H. Derby, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The District Court found that Dewar & Webb were the consignees. Aside from the presumption which attends such a finding of fact on conflicting testimony, it is to be observed that the finding is well supported by the evidence. In answering the libel Dewar & Webb alleged that the Western Fuel Company was the consignee. On the trial it amended its answer, and alleged that the charterer was the consignee. It was not denied that the bill of lading came indorsed by the charterer "Deliver to the order of Evan C. Evans," that Evans indorsed it to the order of Barneson as agent of the charterer, and that it was subsequently reindorsed to Evans. Evans attempted to explain the transaction by saying that the cargo was purchased for the charterer "delivered on the wharf here, duty paid," and that he indorsed the bill of lading over to Barneson as agent of the charterer, in order that he might tender the cargo in accordance with the terms of the contract; that, desiring Evans to finance the cargo for the charterer,

Barneson reindorsed the bill of lading to Evans, but that the charterer remained the owner of the cargo until it was landed on the wharf, or, in other words, the bill of lading was indorsed to Evans, and he refused to accept it when he found that the terms of the contract were that the coal was sold, delivered on the wharf, and that he afterwards entered the cargo for the charterer at the customhouse at the suggestion of Barneson as agent of the charterer. This was on March 12th, and, although the affidavit filed in the customhouse declared on oath that Evans was the consignee, he testified that he made it as agent for the charterer, but was not allowed so to express that fact in his affidavit, and he testified that Barneson had appointed him agent of the charterer to enter the cargo, and had directed him to enter the cargo and to pay freight and duty, and take the costs of the same out of the money to be collected eventually from the Western Fuel Company. There was no corroboration of Evans' testimony in these particulars. On the contrary, it is inconsistent with Barneson's letter of February 15th, in which the latter stated that he had no authority to represent the charterer in the matter of the cargo of the Rygja. Barneson was not called as a witness to corroborate any of Evans' statements. It is to be observed also that in his letter of February 18th to Capt. Svendsen Evans stated that Dewar & Webb, his principals, had instructed him to pay the freight "for their account." In view of the undisputed facts, as shown by the correspondence and papers, it is not surprising that the trial court failed to credit the statements of Evans. He, as the agent of Dewar & Webb, was the indorsee and holder of the bill of lading. He filed the bill of lading in the customhouse, paid the custom duties, and required the captain of the steamship to give him notice of his readiness to discharge. He made the payments of freight as the discharge progressed, and he received the master's receipts of payments on account of freight. His letters to the master were signed as agent for Dewar & Webb, and the captain's letter of March 13th, on ascertaining who his consignees were, is addressed to Evans as representing the consignees of the cargo, and Evans made the affidavit to Dewar & Webb's first answer to the libel, in which it was stated that the Western Fuel Company was the consignee.

It is contended that the District Court erred in holding that, under the charter party, notice assigning the ship to a berth must be given within a reasonable time, and it is said that it is immaterial when the notice is given so long as the ship receives the first available berth. The rule that the consignee's option must be exercised within a reasonable time is supported by Carver on Carriage by Sea (5th Ed.) 625b, and Scrutton on Charter Parties (5th Ed.) 99. In Tharsis Sulphur & Copper Co. v. Morel, 7 Asp. Mar. Cases (N. S.) 106, Bowen, L. J., said, "The option was given for the benefit of the charterers, and must be exercised within a reasonable time"; and in Carlton S. S. Co. v. Castle Mail Co., 8 Asp. Mar. Cas. (N. S.) 325, Lord Esher said that, upon the arrival of the ship in port, "the charterers became entitled to give the order as to the berth into which the ship should go, and the owners were entitled to receive the order from the charterers. The charterers had no right to wait for a month before giving the order. They were bound to give it almost immediately." The appellants

quote the language of Lord Herschel on the appeal of Carlton S. S. Co. v. Castle Mail Co., to the House of Lords (App. Cas. 1898, 492), in which he said that the obligation of the charterers to name a berth as soon as the vessel arrived was not to be found in the charter party. "It is not there in terms—there is no provision to that effect. If it exists, it must be only because that is the reasonable inference to draw as to the intention of the parties from the construction of the whole of the contract. It seems to me impossible to find properly by implication in this contract any such condition. * * * If, when the ship arrives, they delay naming a berth, but yet load within a reasonable time, they are not liable. The obligation is to load within a reasonable time." But the remarks of Lord Herschel must be measured by the facts of that case, facts materially different from those of the case at bar, and his remarks were not concurred in by Lord Watson, Lord Macnaughton, or Lord Shand. From their opinions it would seem that the views of the lower court as to the point under discussion were approved. In The St. Bernard (D. C.) 105 Fed. 994, Judge Brown held that a designation by a charterer of a berth on notice of the vessel's arrival in port was given within a reasonable time when delivered within two or three hours after such notice. Every suggestion of equity as well as the exigencies of carriage by sea tend to support the rule that such an option must be exercised promptly on the arrival of the ship, and that then the shipowner is entitled to be informed to what berth his ship is to be assigned. If he consents to give the consignee the option to name a place of discharge, he should have the right to demand that the option be exercised within a reasonable time. He does not contract that his ship shall lie in the harbor as a storehouse of cargo. The facts in the present case serve to emphasize the reasonableness of the rule. The captain spent a number of days in a blind search to find his consignee. On February 5th he was directed by Evans to take his orders from the Western Fuel Company, who, Evans said, were the receivers of the cargo. But that direction to take orders was not an exercise of the option. When the master did as he was told, he found that the Western Fuel Company denied its obligation to receive the cargo. He then applied to Barneson, who, as Evans said, represented the charterer. Barneson could give him no information about a berth. He did not then deny that he had authority to act, but he subsequently denied it. On February 10th, the Western Fuel Company wrote the captain: "We are to take delivery of the cargo of coal aboard your vessel as per terms of the charter party." But this was no designation of a place of discharge, and on the following day the manager of the fuel company denied that his company was the consignee or the holder of the bill of lading, or that it was responsible for the freight. There was no exercise of the option until February 26th when Evans, "representing Dewar & Webb of London," instructed Capt. Svendsen to take the Gymeric's berth "as soon as she has finished discharge," and named the berth which the Gymeric was to take. It is no answer to these considerations to say that, if the Rygja had upon her arrival been ordered to the bunkers of the Western Fuel Company, she could not have discharged her cargo at any earlier date than she did. Those bunkers were not the only

places for discharge to which she might have been assigned. The court below well said that if the consignee could delay naming one of those bunkers as the place of discharge from the 4th to the 26th of February, and still retain the option given by the charterer, "it would have had the right at the latter date to direct the vessel to proceed to one of the many other places referred to in the charter and discharge, if for any reason it had been to the interest of the consignee to so order." We find no error in the conclusion of that court that the failure to exercise the option within a reasonable time was a waiver of the right to exercise it at all, and that, where a contract provides alternative modes of performance and gives the right of election to one party, upon the failure of such party to make his election at the proper time the right to elect the mode of performance passes to the other party. It follows that, if the right to exercise the option was waived, the Rygja became an arrived ship as soon as she reached one of the alternative places named for her discharge, and she was ready to discharge, and that her lay days began to run 24 hours after she had given notice of that fact, and that her delay was chargeable to the consignee of her cargo.

The appellants contend that the charterer was released from its liability for demurrage and damages by the cesser clause of the charter party, which provides: "Charterer's liability under this charter party to cease on completion of loading, owners having a lien on the cargo for freight and demurrage"; and it is said that there is no evidence to justify the claim that the lien so conferred was not capable of enforcement. The rule of construction of a charter party which provides that the charterer's responsibility shall cease on completion of the loading, and also provides that the charterer shall pay freight and demurrage for delay and creates a lien on the cargo for freight and demurrage, is that the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate. Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106, and cases there cited. The court below evidently found the lien not commensurate with the liability, and in so finding there was no error. The charter party required a discharge of the cargo at a place to be ordered by the consignee, and freight was only to be paid on final discharge. The master requested of Evans that the discharge be made in such a way as to protect his lien, but his request was not complied with. The master testified that he was required to discharge into a general coal pile. Evans, it is true, testified that a portion of the coal was taken up into the bunkers, and thence shot into the Beacon Rock, and that the Beacon Rock then went over to Sausalito, but the manager of the fuel company testified that the coal went into hulks mostly, and that only 2,626 tons of the cargo went into the Beacon Rock. In any view of the evidence, the cargo passed out of the possession of the master, and went into the possession of a third party, the Western Fuel Company. The lien for demurrage, like the lien for freight, is lost when the cargo is delivered to the consignee. "The lien of a shipowner for freight being but a right to retain the goods until the payment of freight, it is inseparably associated with the possession of the goods and is lost by an unconditional delivery to

the consignee." Chief Justice Taney in Bags of Linseed, 1 Black, 108, 17 L. Ed. 35. Another ground for holding that the cesser clause is not applicable here is that the clause was not inserted in the bill of lading and the bill of lading was in the hands of a stranger to the charter party. The shipowner's liens on cargo given by the charter party are not preserved against the endorsee of a bill of lading except so far as those terms of the charter party are expressly incorporated in it. Carver on Carriage by Sea (5th Ed.) § 160; Scrutton on Charter Parties (5th Ed.) p. 50. The cesser clause is not imported into the bill of lading in this instance by the use of the words "all of the terms and exceptions contained in which charter are herewith incorporated," for such words include only the conditions of the charter party which are to be performed by the holder of the bill of lading, such as the payment of demurrage and freight and the mode of delivery to him by the shipowner. Carver, § 160.

We find no ground for disturbing the award made by the trial court for demurrage and damages chargeable against the appellants. The parties to the charter party agreed upon four pence per register ton per day for detention during the stipulated demurrage days. Ordinarily the rate of damages so agreed upon will be adopted by the court for further detention, but either party may show that it is not the true measure of the loss to the shipowner, and the rate may be adjusted accordingly. Carver's Carriage by Sea, § 609; Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334. No effort was made by the appellants to adduce evidence before the commissioner, to whom the question of damages was referred, to show that the agreed rate of four pence per ton did not express the true measure of damages. There was evidence, however, proffered by the appellee to the effect that £30 per day was a fair and reasonable rate for damages under the circumstances of the case, and he found that that sum was manifestly the loss to the owner through the detention of the ship for the 20 days following the stipulated demurrage days. The appellee contends that the damages for the delay for the whole period should be fixed at the stipulated rate of four pence per day per register ton, but, in view of the evidence, we are not convinced that there was error in the finding of the commissioner or in the affirmance of the same by the court.

Having found that the lay days of the Rygja commenced to run on February 5th, instead of February 10th, the decree of the District Court is modified, by increasing the amount awarded thereby to $6,136.32, and, as so modified, will stand affirmed.

NEW ENGLAND TELEPHONE & TELEGRAPH CO. v. MOORE.

(Circuit Court of Appeals, First Circuit. May 26, 1910.)

No. 856.

ELECTRICITY (§ 16*)—OBSTRUCTION—INJURIES INCIDENT TO USE.

The foreman in charge of the poles and wires of an electric light company, in undertaking to remove a broken wire which hung from a pole of a telephone company against an electric light pole in such position as to interfere with the climbing of such pole by his workmen, was not a volunteer, interfering with the property of the telephone company, but was acting within his duty to his employer to remove an obstruction to its own property, and was not required to first notify the telephone company to remove the wire; and the latter company is liable for its negligence in permitting the broken wire to remain in such position as to become dangerously charged with electricity by contact with a light wire, which caused the death of the foreman when he took hold of it.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

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

Action by Cecelia V. Moore, administratrix, against the New England Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry W. Dunn (Powers & Hall and Pitt F. Drew, on the brief), for plaintiff in error.

William A. Pew, Jr., 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, under St. Mass. 1907, c. 375. There was evidence to show that Marston, the plaintiff's intestate, was killed under the following circumstances: He was the foreman in charge of the construction and maintenance of the poles and wires of the Beverly Gas & Electric Company. A pole carrying the wires of this company "stood within half an inch of" a pole which carried the defendant's wires. There was evidence tending to show that a telephone wire of the defendant, out of use and having a loose end, was hanging from the latter pole "within a few inches of the electric light pole; that there was a bend in the lower end of the wire, and that this bend rested against the electric company's pole, the extreme end of the wire pointing slightly away from the pole and being about six inches away from it; that this wire was in such a position as to interfere with an employé of the electric light company going up on the northwestern side of the electric light pole; that it might hit him in the face or hook into his clothes. The telephone pole was on the north side of the electric company's pole." This wire became crossed with an electric light wire, and was alive with a dangerous current. Marston and his lineman had finished some work on the electric light pole. The lineman had descended without touching the telephone wire. Marston said:

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

"I guess I will fix that wire before it biffs somebody in the eye." He mounted the pole, took hold of the telephone wire, and was immediately killed. The defendant asked the court to direct a verdict in its favor. The court refused, and the jury found a verdict for the plaintiff under instructions not otherwise objected to. The defendant then brought the case here by writ of error.

"It is stipulated that the only ground relied on in support of this exception is the contention that, as shown by the plaintiff's evidence, Marston was undertaking, at the time of the accident, without invitation or authority, or other legal justification, to interfere with the defendant company's wire, and that in the absence of willful or wanton misconduct on the part of the defendant, its duty of care to keep its wires in safe condition did not extend to a person interfering with them under the circumstances disclosed by the evidence. All other exceptions taken by the defendant are waived."

The defendant admits that the verdict of the jury must stand, if it owed to Marston any duty other than that owed to a volunteer, the duty of refraining from willful or wanton damage. The defendant contends that Marston took hold of the defendant's wire at his own peril. But Marston was not volunteering to remove a dangerous obstruction from the defendant's pole or from the highway at large, however benevolent such an attempt might have been. He was seeking to remove an obstruction from the property and electric system of his own employer. This was his duty. The defendant cannot be permitted to drop a live and broken wire upon a neighboring electric light pole, and then treat as a mere volunteer the electric light company's foreman, who removes the wire in order to make safe the place where his subordinates must work. The defendant urges that Marston should have called the telephone company to remove the wire, and it relies particularly upon Sias v. Lowell Street Railway Co., 179 Mass. 343, 60 N. E. 974. But there the poles in question were the property of the defendant street railway company. The telephone company, the plaintiff's employer, had no right in these poles, except under an agreement with the street railway which permitted their use for the purpose of conveying telephone wires. In order to protect these wires, the plaintiff proceeded to set up and tighten the street railway's guard wires. The court held that the telephone company was not authorized to do this by the terms of the contract, and hence that its agent was a mere volunteer. In the case at bar the relations of the two companies did not depend upon a contract, and Marston's right and duty to clear his employer's property from obstruction depended upon the common law. We need not hold that Marston would have been authorized by the defendant's trespass to make serious repairs upon its electric system; for those he might possibly have been required to apply to the defendant. The defendant here admits a right to remove an obstruction in case of emergency, and our decision turns somewhat upon a comparison between the interference with the property of the electric light company caused by the obstruction and the interference with the defendant's property caused by its removal. Had Marston followed the course which the defendant now suggests, and had he sent in haste for the defendant's mechanics to remove the offending wire, they would probably have asked him with some heat

why he was so unneighborly as to give them needless trouble, and why he did not remove it himself.

The foreman of an electric light company, who finds his employer's property made unsafe or inconvenient by a dangling bit of wire resting upon it, is not required, first, to discover the ownership of the offending wire, and, second, either by legal proceedings or even by preliminary notice, to require that owner when discovered to remove his property. We are of opinion that the court below was right, and the defendant's exceptions must be overruled.

The judgment of the Circuit Court is affirmed, with interest; and the defendant in error recovers her costs of appeal.

In re TRACY et al.

(Circuit Court of Appeals, Second Circuit. May 23, 1910.)

No. 255.

BANKRUPTCY (§ 224*)—PROCEEDINGS FOR RECLAMATION OF PROPERTY—PROCEDURE.

Where petitions for the reclamation of property from a trustee are presented to a court of bankruptcy, it is the prevailing practice to refer the same to a special master, instead of to the referee in bankruptcy; and such practice should not be changed, except by a general order of the Supreme Court which would be uniform in its operations.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 224.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of William W. Tracy and others, bankrupts. On petition to revise order of District Court. Affirmed.

This cause comes here upon petition to review an order of the District Court, Southern District of New York, referring it to William H. Willis, as special master, to hear and determine the title and rights of persons who have instituted reclamation proceedings to recover, as their own, certain stocks, bonds, and securities found in the possession of the bankrupt or pledged by him, and of which the receiver and trustee have taken possession, or the proceeds thereof.

Crocker & Wickes (F. S. Crocker, of counsel), for petitioner.

H. H. Kaufman, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Upon adjudication in bankruptcy the proceedings were referred to Mr. Willis, one of the referees in bankruptcy, and it is the contention of petitioner that the matter under consideration should not have been sent to a special master, but should have been brought on before the referee under his general powers. Reliance is had on the provisions of the last clause of paragraph 1 of General Order XII (89 Fed. vii, 32 C. C. A. xvi), which reads as follows:

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

"And thereafter all the proceedings except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

There is force in the contention that the proceedings to which jurisdiction of referees in bankruptcy is thus extended are proceedings in the bankruptcy action itself. It is argued that reclamation proceedings are not brought to enforce claims of creditors against the bankrupt or his estate. They are collateral proceedings, to establish or secure an independent title to certain items of property which the applicants contend are their own. They might be brought as independent actions against (or by) the trustee, and their character is not changed because the court to which they are brought hears them, with the assent of all parties, summarily without formal pleadings. The referee would not have jurisdiction to try an action of replevin or of trover to recover property or its proceeds, which it is alleged the trustee has unlawfully obtained; and it is argued that, on principle, he has not jurisdiction when the proceeding is summary.

On the other hand, the case of Miller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, is cited to sustain the proposition that the referee, as such, has jurisdiction to determine all of the questions which have thus been referred to him as special master, and that the parties should not be subjected to the expense of a reference. Our attention is also called to the amendment of 1903 (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 [U. S. Comp. St. Supp. 1909, p. 1317]) to the effect:

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." Section 72.

We recognize the fact that the trustee's contention is not free from doubt, and that an able argument has been presented in support of the petitioner's contention; but we are not sufficiently satisfied as to its correctness to give it our assent. The practice to which exception is taken has been generally adopted and is of long continuance. The objection is made by one of a large number of claimants, the others being apparently satisfied by this disposition of their claims, and it is not apparent how the petitioner will be injured by the decision of the controversy by Mr. Willis as master, rather than as referee, except, possibly, by being required to pay some portion of the master's fees, which as yet has not been determined.

It will create confusion in the administration of the law if one system is adopted in the Second circuit and another in the other circuits. A change so sweeping in its results should be made by the Supreme Court, in order that the practice may be uniform throughout the United States. Although conceding that there is much to be said in favor of the petitioner's contention, we are not convinced that we would be justified in making a decision so far-reaching in its results.

The order is affirmed.

YEE KING et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 210.

ALIENS (§ 32*)—PROCEEDING FOR DEPORTATION OF CHINESE—REVIEW ON APPEAL—FINDINGS OF FACT.

A person of Chinese descent, arrested for being unlawfully in the United States, has the burden of proof to establish his claim that he was born in this country; and a finding against such claim by the commissioner affirmed by the District Court on additional testimony, will not be set aside by an appellate court, unless clearly against the weight of evidence.

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

Citizenship of Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

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

Proceeding for deportation of Yee King and Yee Sing under the Chinese exclusion act. From an order of the District Court, affirming an order of deportation made by the commissioner, defendants appeal. Affirmed.

The cases were originally heard before United States Commissioner Shields in the Southern district of New York, who found that the defendants were Chinese persons and laborers and were within the said Southern district without having the necessary certificates of residence. He also found that the testimony that they were born in the United States was unsatisfactory and unconvincing and ordered them deported to China.

Max J. Kohler, for appellants.

Henry A. Wise, U. S. Atty. (Addison S. Pratt, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The defendants attempted to prove that they were citizens of the United States. Yee King testified that he was born in San Francisco and lived there 11 years, when he came to New York where he remained for 3 years and then went to Tarrytown. His parents, he says, went to China when he was 9 years old and are there now, or at least they were there on the day when the testimony was taken, May 12, 1904.

The only knowledge he had as to the place of his birth was from his father, although it would seem that this information was actually derived from his uncle. He says, "My father told him so and my uncle told me so." His uncle also was in China at the time of the hearing. In fact, the entire family except the witness and a "sixth or seventh cousin" had returned to China. Young Sam testified that while he lived in San Francisco he saw the defendant when he was a few months old. When asked how he was able to recognize him

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

he answered, "I know him by his mentioning he is the son of Tseung Tuen Dow."

On the part of the government, Mr. Wiley, the officer who made the arrest in July, 1903, testified that at that time the defendant stated, in English, that he had no certificate, that he was born in the Sun Wee district of China, that he was 28 years of age and that he came to the United States about 2 years prior to July, 1903. He also said that his father had been in the United States and that his occupation was that of a laundry man.

The defendant was sworn and gave some additional testimony in the District Court.

In the case of Yee Sing, the testimony is substantially similar.

The commissioner who saw and heard the witnesses and the judge who saw and heard the defendants did not believe that they were born in this country. That the defendants are persons of Chinese descent is conceded, they produced no certificate, when apprehended, entitling them to remain in this country. The burden was, therefore, upon them to establish by affirmative proof their right to remain, and this they undertook to do by showing that they were American citizens. We do not pause to point out the inconsistencies and improbabilities of the testimony offered for the defendants; it is sufficient that the commissioner and the judge do not believe the defendants' contention that they were born in the United States. The question here is not what this court would have found had the testimony been originally taken before us. The question is—Was the finding of the commissioner and the judge so clearly against the weight of evidence as to justify us in disregarding it? The rule that this court will not reverse, in such circumstances, has been so frequently followed that we do not deem it necessary to do more than cite the more recent decisions on the subject. Hong Yon v. U. S., 164 Fed. 330, 90 C. C. A. 542; Yee Yet v. U. S. (C. C. A.) 175 Fed. 565.

It is argued that in 1892, when registration of Chinese laborers was required, the defendants were students between 11 and 12 years of age, the sons of restaurant keepers too young to require registration.

We do not discuss the interesting question of law thus presented as we are convinced that there are no facts upon which to base it. The witnesses presented by the defendant have been discredited. If their testimony is unworthy of belief upon the question of citizenship it cannot be received to sustain the defendants' right to remain here upon some other theory. We know that they were Chinese laborers, found here without a certificate, in the summer of 1903. This is all we know about them unless recourse is had to the testimony of witnesses who were regarded as unworthy of belief by the commissioner and the judge.

The facts shown are wholly insufficient to support their contention.

The judgments are affirmed.

KUM SUE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 23, 1910.)

No. 323.

ALIENS (§ 32*)—PROCEEDING FOR DEPORTATION OF CHINESE—REVIEW ON APPEAL.

The burden of proof rests upon a person of the Chinese race arrested for being unlawfully in the United States, to establish his claim to American citizenship; and a finding against such claim by both the commissioner and District Judge, on evidence in its support so general that it was impossible for the government to contradict it, will not be disturbed by the appellate court.

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

Citizenship of Chinese persons, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

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

Kum Sue and Quan Ling were ordered deported to China, and from an order of the District Court, affirming that of the commissioner, they appeal. Affirmed.

R. M. Moore and B. W. Berry, for appellants.

George B. Curtiss (Harry E. Owen, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The appellants are Chinese persons arrested in the town of Burke, Franklin county, N. Y., upon complaints charging them with being unlawfully in the United States. They insist that they were born in the United States and are entitled to remain here. The commissioner and the District Judge, to whom an appeal was taken, both found against the appellants on this issue. But one witness was produced before the commissioner, but on appeal the testimony of both the appellants, and also of another Chinese person named Charley Chong, was taken before the commissioner, as special master, and returned to the judge, who, after examining the entire testimony, reached the result that the order of deportation should be affirmed. The burden was upon the appellants to establish their citizenship. The commissioner and the judge concur in finding that they have not sustained this burden, and it is now well settled that in such circumstances this court will not disturb the finding unless clearly against the weight of evidence. We have read the testimony and find nothing therein to take this case out of the general rule. It was conceded at the trial that the appallants are persons of Chinese descent and are not of the class exempted by the Chinese exclusion act (Act May 6, 1882, c. 126, § 3, 22 Stat. 59 [U. S. Comp. St. 1901, p. 1306]); that they were arrested in the town of Burke, Franklin county, N. Y., in the Northern district of New York, at about 10 p. m., on May 18, 1909, at a point about four miles south of the border line between the United States and Canada, the appellants being in

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

a wagon with seven other Chinese persons and two white men; that one of the white men jumped from the wagon and ran; that at the time of the arrest the appellants and other Chinese persons were in the wagon with closed curtains.

On the hearing before the commissioner Lem Moon, an alleged uncle of the appellants, was the only witness produced. He testified that the appellants were born in Oakland, Cal. Subsequently, the appellants and Charley Chong gave testimony to the same effect. This testimony was of so general a character that it is manifestly impossible for the government to obtain evidence to contradict it. The commissioner and the judge found it so inherently improbable that they did not believe it, and we are not prepared to hold that their action was arbitrary or their finding erroneous or clearly against the weight of evidence.

The case presents the same general features which have frequently been passed upon by this court, the latest decision being filed May 2, 1910, in the case of Yee King and Yee Sing v. United States, 179 Fed. 368.

The orders are affirmed.

THE HURSTDALE.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 207.

SHIPPING (§ 58*)—CHARTER—DEFICIENCY IN SPEED—LIABILITY OF OWNER.

Evidence considered, and *held* insufficient to establish by the decisive proof required to sustain an action for deceit that representations made in a charter party as to the speed of the vessel were not believed by the owner to be true, and therefore not to entitle the charterer to recover damages; the charter party expressly providing that "these particulars are not guaranteed."

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

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

Suit in admiralty by George L. Duval and others, composing the firm of Wessel, Duval & Co. against the steamship Hurstdale; the Hurstdale Shipping Company, Limited, claimant. Decree for claimant (169 Fed. 912), and libelants appeal. Affirmed.

See, also, 171 Fed. 607.

Henry W. Rudd (Charles C. Burlingham, of counsel), for appellants.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The charter party contains this clause:

"Owners represent that the steamer under ordinary conditions, and laden, will steam on an average about 8½ knots per hour on about 17 tons of best

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

Welsh coal for 24 hours, and that her dead weight capacity for cargo and bunkers is about 5,200 to 5,250 tons. *These particulars are not guaranteed.*"

The italicized words were inserted in typewriting. The residue of the paragraph was in the original printed form, except that the figures were inserted with a pen. Proof showed that on the voyage covered by the charter party the average speed of the Hurstdale was as follows:

New York to Coronel, Chili	7	knots
Coronel up and down coast to Coronel	7	"
Coronel to Montevideo	6.2	"
Montevideo to Charleston	6.2	"
Charleston to Baltimore	5.5	"

The libel sets forth a cause of action for deceit, averring that the representation as to speed was material, that it was false and made with the intent that it should be acted on by the execution of the charter, that it was acted on and to libelants' damage, and that in so acting the libelants were ignorant of its falsity and reasonably believed it to be true. Communications passed between the parties prior to the execution of the charter party on April 30, 1906; but the questions which have been discussed as to the admissibility and effect of these communications need not be considered, since their contents are epitomized in the quotation supra.

The theory of the libelants seems to be that, although the italicized words may operate to exclude any undertaking for the Hurstdale's future performance, the statement as to speed should be regarded as a representation of present capacity, which, if false and relied upon, might be the basis of an action for deceit. It is not necessary to discuss the questions raised by the presentation of this theory, because the proofs do not satisfy us that the statement that the "steamer under ordinary conditions, and laden, will steam on an average about 8½ knots per hour on about 17 tons of best Welsh coal for 24 hours" was *not actually believed by the defendant, on reasonable grounds, to be true.* To establish such a cause of action as this there must be clear and decisive proof that defendant did not actually believe his representation to be true. Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678. The steamer had made two prior voyages, one from Leith to Rio, the other from Calcutta to Colombo, at a better average than 8½ knots. For aught that we can see, her owners might reasonably have believed that on the day the charter party was signed the Hurstdale was capable of repeating that performance. The change in her load line, which by increasing her draft retarded her speed, was not authorized under the statute till she was remeasured by Lloyd's surveyor on May 25, 1906, nearly a month after the charter party was signed.

The decree is affirmed.

BRINA v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

1. FOOD (§ 14*)—FOOD AND DRUGS ACT—"MISBRANDING"—"SALAD OIL."
"Salad oil" prima facie means olive oil, and, in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton seed oil shipped in interstate commerce constitutes a misbranding in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U S. Comp. St. Supp. 1909, p. 1188).
[Ed. Note.—For other cases, see Food, Dec. Dig. § 14.*]

2. CRIMINAL LAW (§ 1036*)—WRIT OF ERROR—REVIEW.
The question whether there was sufficient evidence to warrant the submission of a criminal case to the jury cannot be raised for the first time in the appellate court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641; Dec. Dig. § 1036.*]

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

Guido Brina was convicted of a criminal offense, and he brings error. Affirmed.

This cause comes here on writ of error from a judgment of the Circuit Court, Southern district of New York, imposing a fine of $100 entered on verdict of a jury finding defendant guilty of a violation of the food and drug act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187). The offense charged was the shipment from New York City to Newark, N. J., of cotton seed oil contained in cans labeled (the Italian words in large type and the English words in small type) as follows:

"Ilio per Insalata, Sopraffino Vival.

"Brand, Cotton Salad Oil extra quality."

It was charged that the oil was misbranded in that the label failed to disclose to Italian purchasers ignorant of the English language that the oil was a cotton seed oil, and that it was calculated to mislead the purchaser and induce him to believe the cans contained olive oil.

Frank Wasserman, for plaintiff in error.

Henry A. Wise, U. S. Atty. (Goldthwaite H. Dorr and R. Stephenson, Asst. U. S. Attys., of counsel).

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The section declared on (section 2) imposes a penalty on "any person who shall ship or deliver for shipment from any state * * * to any other state * * * any article of food or drug so * * * misbranded." It was proved that the words "Olio per Insalata" mean "oil for salad" or "salad oil" and the trial judge held, and so charged the jury, that "as a notorious fact salad oil prima facie means olive oil," but allowed the defendant to show if he could that "it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil." No such proof was introduced,

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

and the ruling is assigned as error. The Century Dictionary, Worcester's, Stormont's, Imperial, and the Encyclopedia all define "salad oil" as "olive oil." Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that "salad oil prima facie imports olive oil; that is what the world has been accustomed to regard as salad oil."

The evidence showed that the articles complained of were sold and shipped by the "Standard Trading Co." of which defendant was an employé—its "manager." He negotiated the sale. It did not appear whether the concern was a corporation, or a firm, or an individual trading under this corporate name; nor whether the defendant had any interest in the concern other than as employé. It is contended that the Circuit Court should have directed a verdict of not guilty at the close of the case on the ground that there was not sufficient proof to sustain a finding that he personally shipped the goods or caused them to be shipped. The plaintiff in error is in no position to make such contention in this court. At the close of the government's case motion was made to dismiss the information upon several grounds; one of which was "that it has not been shown that the defendant Brina shipped these goods to any place out of the state." The motion was denied and exception reserved. Testimony was thereafter introduced by the defendant on the various issues in the case, part of it being directed to the matter of shipment. At the close of the case defendant renewed his motion to dismiss the information, but only "on the ground that it had not been shown by any evidence that the can which was used in this case deceived any of the public." This motion was denied, the court stating that it was "the only question for the jury." No objection was taken on the ground that shipment was not proved, nor was there any request to go to the jury on that question. There is, therefore, no exception in the case which raises the point now relied upon.

The judgment is affirmed.

JUENGST v. GULLBERG et al.

(Circuit Court of Appeals, Second Circuit. March 7, 1910. Ordering Reargument, March 30, 1910. On Rehearing, May 2, 1910.)

No. 120.

PATENTS (§ 328*)—INFRINGEMENT—SIGNATURE-GATHERING MACHINE.

The Juengst patent, No. 761,496, for a signature-gathering machine, claim 1, was not anticipated, but covers a novel and patentable improvement on the machines of the prior art, and is entitled to a fair range of equivalents; also, *held* infringed. Claim 19 *held* invalid as a substantial duplication of claim 1, and the remaining claims not infringed.

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

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

Suit in equity by Charles A. Juengst against Alexander Gullberg and Charles L. Smith, as copartners. Decree for defendants, and complainant appeals. Reversed.

This cause comes here on appeal from a decree of the Circuit Court, Southern District of New York, dismissing the bill. The suit was brought for alleged infringement of letters patent No. 761,496 issued May 31, 1904, to Charles A. Juengst for a signature-gathering machine. The opinion of the Circuit Court will be found in 171 Fed. 428. The following excerpt therefrom succinctly describes the art.

"Printed sheets, as they come from a printing machine, are usually folded once or more. These folded sheets are known to the trade as signatures. They may be in pamphlets or simply sheets. They are gathered to form a book or magazine. A signature-gathering machine takes these several sheets or pamphlets automatically and assembles them for the book or magazine. As these sheets or pamphlets called signatures are frequently imperfect, by leaves being missing or too many present, it is essential that the machine be so constructed that it shall gather only perfect signatures, and that imperfect signatures may be detected in such a manner that the error may be readily corrected. The machine must be adjusted for a pre-determined thickness of the signatures, and, if there is a deviation from that, it must be detected."

Ralph L. Scott (F. B. Brock, of counsel), for appellant.

W. E. Warland (William J. Wallace, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The patent states that the object of the invention is to detect signatures or sheets which for any reason are imperfect, reversed, or are variations from the predetermined thickness, and to immediately act upon devices to stop the machine, so that the same may be removed or rectified. According to the specifications the

—"invention comprises in a signature-gatherer and in combination with a stopping and starting mechanism and a signature-gripper of any well-known or desired character, a device intermediate of said devices, which is actuated and controlled by the latter or signature-gripper device and which exercises a control upon the former device—that is, the device for stopping and starting the machine—whereby variations from the predetermined thickness of the signature or sheet act upon the aforesaid intermediate device for their detection and stopping the machine. I prefer that this intermediate device shall be in the form of adjustable plates mounted upon an arm that is adapted to be moved into contact with the stopping and starting mechanism and that an arm and finger moved by the gripper device shall move over the surface of these plates and pass through a regulatable aperture between the same, providing the sheets and signatures agree in thickness, and in case they do not agree and are too thick or too thin this finger shall stop on the surface of said plates and with the further movement of the gripper stop the machine, and in connection with these devices I employ means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature or sheet, this adjustment acting to control the position of the aforesaid finger, so that it will truly pass through the aperture between said adjustable plates."

In considering the prior art, the Circuit Court referred to certain "signature-gathering machines on the market involving the same principles." We are not satisfied from the evidence that these were prior to the date of invention, which was proved to be several months prior to the filing of the application. In neither such machines nor in

the prior art disclosed in patents and publications did the Circuit Court find anticipation and it held the patent to be valid, in which conclusion we concur. The only subject which need be discussed is the question of infringement.

The claims are unnecessarily numerous, 20 in all, of which Nos. 1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, and 20 are involved. It will be sufficient to quote the first three, since the others are as detailed as are Nos. 2 and 3, some of them more so:

"1. In a signature-gatherer, the combination with a stopping and starting mechanism and a signature-gripper, of an adjustable device intermediate of said mechanism and gripper and actuated and controlled by the gripper and exercising a control on the said mechanism, whereby variations from the predetermined thickness of the signatures or sheets act upon the intermediate device for their detection and stop the machine.

"2. In a signature-gatherer, the combination with a stopping and starting mechanism, and a signature-gripper, of means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature or sheet, a device intermediate of the stopping and starting mechanism and gripper, actuated and controlled by the latter and exercising a control on the former device, whereby variations from the predetermined thickness of the signature or sheet act upon the intermediate device for their detection and stop the machine.

"3. In a signature-gatherer, the combination with a stopping and starting mechanism and a signature-gripper, of means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature or sheet, a part movable with the gripper, a lever having a part adjustable and co-acting with said movable part, and which parts are intermediate of the stopping and starting mechanism and gripper, whereby variations from the predetermined thickness of the signatures or sheets act upon the part movable with the gripping to shift the position of the same and cause the engagement thereof with the adjustable part of the lever to swing the same and stop the machine."

The patent shows a grip-lever, D, which swings towards a pile of signatures, and, after it has seized one of them, swings back to a carrier on which the signature is dropped, whereupon the grip-lever moves forward again. So much is old and the defendant also uses a swinging grip-lever. Both levers have gripping jaws at the lower end which open to receive the signature, close on it, and subsequently open to let it fall on the carrier. In the machine of the patent the upper jaw is rigid and the lower jaw moves. The reverse is the case in the defendant's machine, which is an immaterial difference, involving no change of function. It is apparent that, when the jaws are closed on two sheets of paper, they have come closer together than when they are closed on four sheets. The movable jaw being a lever, it is also apparent that, if the gripping end of it varies in position when it has gripped varying thicknesses of paper, the other end of the same lever will also vary in position, and so will whatever part is attached to such end. At this further end of complainant's lever is a rod, D3, D4, which runs upward a considerable distance and has a short arm, D30, and a long arm, D15, nearly at right angles with the rod. This rod is pivoted on a projection of the gripper-lever in such a way as to permit motion of both the short arm and the rod and long arm on the pivot. The rod, pivot, and arms move as the gripper-lever swings and also move on their own pivot. Without going into

elaborate details of the mechanism, it may be stated that, when the gripper-lever has moved in and the signature is between the open jaws, an auxiliary shaft, F, through connecting parts pulls up the short arm, D30, which depresses the rod, D3, D4, and makes the lower jaw close on the signature. The gripper-lever and all parts then move out, and, when in proper position, a further movement of the auxiliary shaft, F, through connecting parts, depresses the short arm which causes the rod, D3, D4, to rise and the lower jaw to open. The long arm, D15, is the detector arm provided with a finger or projection at its extremity. It is rigidly connected with the rod. Since the rod is connected to one end of the pivoted movable jaw, its position in space when the jaws are closed will be influenced by the thickness of the package of paper on which the movable jaw has closed, and that influence is also felt in the detector arm. By reason of the location of pivots and proportion of parts, changes of position in the gripping end of the jaw are exaggerated at the end of the detector arm. A unit of displacement in space at one end of the chain of mechanism becomes many units at the other end. Therefore such a slight difference as would be caused at the jaws by the absence of a single sheet from a signature of 16 sheets is sufficiently increased at the finger of the long arm to allow it to be utilized as a detector of such absence. This is accomplished by interposing the stopping and signaling mechanism in the orbit which the detector arm follows, as it moves in and out with the swing of the gripper-lever and up and down with the rod under the action of the auxiliary shaft, and then opening a pathway through the interposed parts of such stopping and signaling mechanism, which the detector finger may travel unobstructed when its movement in space is such as it will follow when the predetermined number of sheets are gripped. This opening, however, is so circumscribed that if, by reason of an abnormal number of sheets affecting the position of the movable jaw, the detector finger travels in an abnormal orbit, it will contact with one or other side of the pathway, and operate the stopping and signaling mechanism. This is accomplished by gauge-plates, B3, B4, on a prolongation of a swinging lever, B, which connects with the stopping devices. These gauge-plates, the specification says, "are adjustable towards and from one another by (screws) to increase or lessen the diameter of the aperture or slot through which the gauge-finger (detector finger) is adapted to pass."

This device, the detector arm and finger in co-operation with the movable gauge-plates, is the invention of the patent (see first quotation supra). It is the device, intermediate the stopping and starting mechanism and the signature-gripper, "which is actuated and controlled by the latter or signature-gripper and which exercises a control upon the former device—that is, the device for stopping and starting the machine." The specification, as it seems to us, goes into entirely unnecessary details as to those other mechanisms, which the patentee nowhere asserts to be his invention. In consequence it is difficult to eliminate the essentials from the nonessentials, and one is likely to be misled by differences between parts of the described machines of complainant and defendant which in reality have nothing to do with the device claimed.

Defendant's entire machine differs in many respects as to parts and arrangements from the entire machine described in the specifications. The stopping mechanism is hung upon a separate shaft. The opening and closing of the jaws is effected not by a rod, but by a toggle and spring which are operated by a sliding pin in the gripper-lever. It is not necessary to recount all the differences, since we are concerned only with so much of the device as deals with the detector arm. Attached to the swinging gripper-lever of defendant is a pivoted arm, one end of which is connected by a rod, D3, D4, with the outer end of the movable jaw (the upper jaw in defendant's machine). At the other end of the arm is a projection or finger which describes an orbit as the gripper-lever swings and the jaws open and close. In the path of this moving finger is located a prolongation of the stopping mechanism, presenting an opening through which it moves under normal conditions, but which opening may be regulated as to size and location by adjustable dogs. Through the action of the movable jaw and of the rod, D3, D4, the position in space of the finger, or detector, is changed as the thickness of the package of paper changes, and by reason of the proportion and position of the parts the difference is exaggerated so that the dogs may be easily adjusted to bring the stopping mechanism into operation by intercepting the moving finger when it follows an abnormal orbit. This device seems to us to be a fair equivalent of the detector mechanism of the patent; it effects the same function by the operation of similar parts similarly arranged.

By reference, however, to the first quotation, it will be seen that the patentee in connection with his device employs means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature, this adjustment acting to control the position of the finger, so that it will truly pass through the aperture between the adjustable plates. This "means for adjusting the closed relation of the gripper-jaws" is found in the rod, D3, D4. This is a two-part straight rod. The lower part of D4 is inserted into the upper part of D3, and by means of screw-threads, a screw-cap, hooks, etc., the combined lengths of the two parts of the rod can be altered easily and with great nicety "to adjust the grippers for signature or paper of different thicknesses." There is much conflicting testimony as to this part of the machine, but we are satisfied that this adjustment is essential to the efficiency of the gripper-jaws, and that in this respect there is a difference between the two machines. Farther along in the train of mechanism which operates the jaws of the patented device there is a spring, D21, and we were at first impressed with the contention of complainant's expert that in it was to be found the operative force which closed the jaws. More careful study of the device, however, has satisfied us that, although it may take up a bit of lost motion, the opening and closing of the jaws are both effected by the unvarying sequence of movements of the auxiliary shaft, and, unless the length of the rod, D3, D4, is adjusted, as the specification says, "for signatures of different thicknesses," the jaws will not close sufficiently to be perfectly efficient. The defendants' jaw-closing device—the toggle and spring—seems capable of effecting a full closing, metal to metal, without so much adjustment. The testimony supports this conclu-

sion. Defendants' rod, D3, D4, is made of two parts with turn-buckles, an arrangement which they contend is a mere shop expedient to cheapen original construction. Since infringement was charged these turn-buckles have been riveted in place so that the user can no longer by adjustment alter the length of the rod, and with this change the jaws operate perfectly with every change of thickness of signature, closing metal to metal when there is no signature between them. We therefore find that defendants' rod, D3, D4, is not an infringement of complainant's rod, D3, D4. The result is that there is no infringement of any claim in which the rod, D3, D4, is made an element as "means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature or sheet." This eliminates every claim except the first.

The length of the rod, D3, D4, affects the position in space of the detector finger, and defendant contends that the patent must be restricted to an adjustment of that finger by the screw-cap arrangements which regulate the length of the rod. But the specification does not so state. It asserts that the operation of the finger in making clearance or encountering obstacles is effected by the shifting of the gauge-plates, on the arm, B, which as we have seen is the equivalent of the adjustment of dogs, B3, B4, of defendants' device. The regulation of the length of the rod may be essential to the efficiency of the gripper-jaws, but it is not essential to the clearance or contact of the detector finger with parts of the stopping mechanism. Claim 1 is confined to the adjustable device intermediate the gripper mechanism and the stopping mechanism. It presupposes an efficient gripper-mechanism and an efficient stopping mechanism. The patent discloses such mechanisms, both efficient. The defendant by using a mechanism to make the gripping efficient which differs from complainant's does not escape this claim, so long as the "adjustable intermediate device" is the equivalent of the "adjustable intermediate device of the patent," which we are satisfied that it is.

The decree is reversed and cause remanded, with instructions to enter a decree in favor of complainant for infringement of claim 1 only. Since neither side has prevailed as to all the claims involved, no costs to either side.

Ordering Reargument.

PER CURIAM. A reargument is ordered on the single question whether the prior art negatives invention under claims 1 and 19 as this court has construed them. The argument must be strictly confined to this single question, and one-half hour will be allowed to each side. The briefs filed on main argument may be used, or new ones if the parties prefer.

On Rehearing.

LACOMBE, Circuit Judge. Decision was rendered and opinion on this appeal handed down March 7, 1910. As to all the claims involved except the first (and the nineteenth, which by some oversight we sup-

posed was not presented on the appeal), we held with the Circuit Court that infringement was not shown, because all of them include as one element of the combination "means for adjusting the closed relation of the gripper-jaws in proportion to the thickness of the signature or sheet." We held that this element was not included in the first claim, and that the combination of that claim was infringed by defendant's device. The oral argument on the appeal had been almost entirely directed to this element, to the necessity of its presence in the patented device and to its absence in defendant's structure. The mechanism of the patent in suit and of those in the prior art is intricate and the description thereof voluminous and involved. Our decision was not handed down until several weeks after the argument. Therefore, when defendant petitioned for a reargument as to the validity of this claim, we thought it best to grant the application, restricting the argument, however, to the single proposition whether, construing the first claim as we construed it, the prior art would warrant the court in holding that it disclosed patentable novelty. Having heard argument, we have reached the conclusion hereinafter expressed.

Counsel for defendant seems to have misunderstood the scope of our former decision. We did not hold that the claim covered any and every mechanism intermediate the stopping and starting mechanism and the signature-gripper, which accomplishes the results. Such a broad construction was not intended, nor, as we think, was it expressed in the opinion. Under familiar principles, the device claimed must be the device disclosed by Juengst or its substantial equivalent. It is not necessary to repeat the elaborate description of complainant's device which is found in the opinion—that device or one substantially the same, allowing for fair equivalents of parts of the mechanism, is the "adjustable device intermediate, etc.," which must be shown in any device complained of before infringement can be proved. Neither is it necessary to repeat the detailed discussion of defendant's mechanism in which we pointed out wherein it was substantially the device of the patent. Our views on these points remain unchanged. We did not hold that this was a pioneer patent, but were satisfied that it disclosed a meritorious improvement on earlier machines, entitling the patentee to a fair range of equivalents. Whether or not we were correct in holding that it did disclose a meritorious improvement is the question now to be considered, and we will proceed at once to the patents of the prior art.

La Sor No. 665,789 is for a book signature-gatherer. The device for detecting a failure of the gripper-jaws to act normally and thereupon to stop the machine is thus described in the specifications:

"To provide against the assembling of an incomplete book, the clutch-operating devices above described are provided. Should any pair of the gripper-jaws fail to grip a book-section in one of the compartments, the contact buttons, 114 and 114a, thereof will coengage [there being no insulating sheets of paper between them], closing an electrical circuit through the respective branch wires, 116 and 117, the circuit-wires, 108 and 109, and the electromagnet, 102, causing the armature, 103, thereof to free the trigger-dog, 105, from the catch-head, 102a, and lowering the arm, 99, which operates the clutch 95

to operatively disconnect the operative parts of the machine from the power-shaft 10."

This is certainly very remote from anything Juengst has shown or claimed.

Dexter 567,303 is for a stop mechanism for printing presses. The specification says:

"To prevent the paper from entering the printing-press in case two or more sheets are accidentally fed simultaneously from the feeding machine I employ an automatic auxiliary stop mechanism for throwing the press out of gear. This preferably accomplished on a two-revolution press by the following mechanism. [The details need not be repeated. The mode of action sufficiently discloses the essentials of the device.] The free end of the finger is supported above the feedboard a distance exactly equal to the thickness of a single sheet of paper designed to be fed to the printing press. By the adjustment of the set-screw the finger, m, can be regulated to the varying thickness of different qualities of paper. * * * The finger m constitutes one of the electric terminals and over the same is adjusted the other terminal, o, * * * so adjusted as to cause the finger m to come in contact therewith and thus close the circuit by the lifting of said finger by two sheets of paper passing simultaneously under the finger. Said circuit maker and breaker is connected with the magnet, N, and battery, E. By closing this circuit [a pawl is brought in contact with a lever, which is turned on its pivot so as to shift the driving belt to the loose pulley]."

Dexter describes other mechanisms differing somewhat from what he says is preferable for a two revolution press, but in all of them the circuit makers and breakers and the electromagnet are the essentials of his automatic stop mechanism. No such device as this, if later, could be held to be an infringement of the "intermediate device" which Juengst has shown and claimed.

Dexter 588,635 is for a "collating" or signature-gathering machine. The signatures are taken from the hopper not by a swinging gripper lever, but by a pair of rollers, B, B. The signatures, as in most of these machines, are sucked from the pile on the hopper by the nozzles of a suction pipe, and fed forward to the rollers, to which they are presented perpendicularly. The description is voluminous and the mechanism intricate. Reference is made to the following passage from the specifications:

"The salient features, however, of the invention reside in the mechanisms employed for automatically controlling the action of the described signature delivering and gathering devices, so that in case said devices fail to deliver simultaneously a single signature from each hopper, A, or deliver more than one signature at a time from one or more hoppers, the delivering devices adjust themselves to prevent the delivered signatures from passing onto the gathering-carrier, H, and as soon as the delivering devices have resumed their proper requisite operation to deliver from each hopper, A, a single signature, said devices cause the signature to be conducted to the gathering-carrier. For this purpose I employ the laterally-yielding rollers, B, B, which act as normally-closed calipers opened automatically by the pressure of the signature passing through said calipers, and thus measuring the thickness of the signature in transit. In connection with these laterally-yielding rollers or calipers I employ suitable levers which are actuated by the lateral movement of said rollers or calipers and control the position of the chutes, f', f', and the motion of the gathering-carrier, H, so as to operate in harmony."

We shall not undertake to quote the elaborate description given in the patent, but inserting small sections of Figs. 1 and 2 will endeavor briefly to indicate the fundamental character of the device.

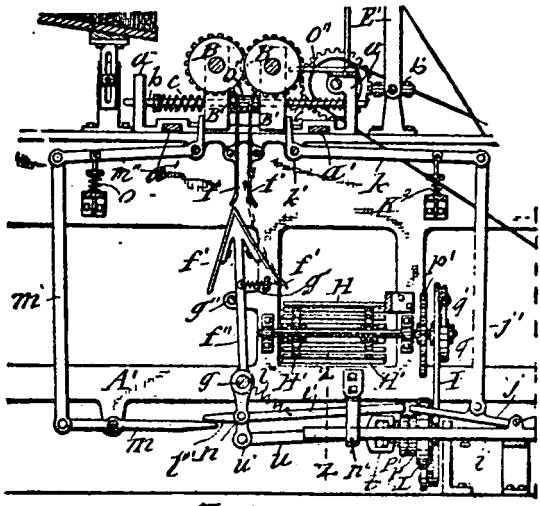


FIG. 1.

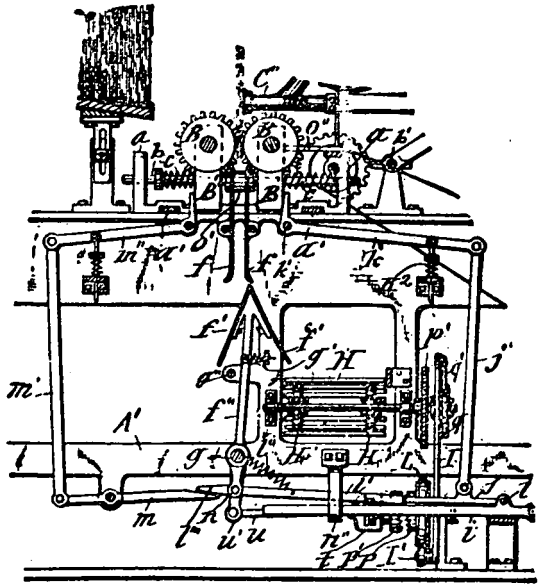


FIG. 2.

Looking at figure 1, B, B, are the rollers to which the signatures are fed, passing vertically downward between the guides, f, f. Beneath these guides is a two-way chute, f', f', on one or the other slope

of which the signature will slide. When the chute is in the position shown in figure 1, the signature will pass on to the carrier, H. When it is in the position shown in figure 2, the signatures are shunted off—to the floor or somewhere else. The rollers are movable laterally through their supports, B′, B′, against the action of springs, c, c; the spring on one side being stronger than that on the other. Through a chain of mechanism which will be seen in the drawings but need not be described, the chute is shifted from one position to the other by tilting the post, f″, which supports it. This chain of mechanism receives its impulse from the movement of one of the roller supports, B′, against the bell-crank lever, k, or from the movement of the other roller support, B′, against the bell-crank lever, m′. When the rollers, B, B, are normally in position with no signature between them, the post is tilted so as to put the chute in the position shown in figure 2. When a single signature comes between the rollers support, B,′ is forced against the weaker spring moving one of the bell-crank levers and tilting the post so as to bring the chute into the position shown in figure 1—conducting signatures to the carrier, H. When two signatures, by some mischance, come between the rollers, their excessive thickness pushes aside the roller support against the stiffer spring and through the appropriate bell-crank lever and connecting parts tilts the post so as to bring the chute into the position shown in figure 2.

In this machine a change of position of the parts which grip the signatures produces a corresponding change of position of another part at the end of a train of mechanism, but the intermediate devices are differently arranged from those of Juengst and because of the different arrangement produce less comprehensive results. Dexter's device provides for the detection merely of a double delivery or of a total failure to deliver. It is not organized to reveal so slight an error as the presentation of signatures with a single sheet missing, while reversed signatures, being presented by the suction nozzles in a plane perpendicular to the bite of the rollers, would apparently be passed on as perfect signatures properly placed.

The Jamieson British patent, 13,850, of 1886, shows signatures fed forward out of a series of boxes upon a traveling table. The specification says:

"As the missing of a section would affect the efficient working of the machine, a small lever is provided in such a position in front of each box that as a section is drawn out it causes the lever to be pushed back and by so doing rotates a bar running the whole length of the machine, which, if not completely or correctly rotated (by reason of one particular gripper failing to catch the section and coming away from the box empty) fails to allow another rod to rotate. A releasing device is then brought into operation that disconnects the moving parts of the machine from the driving pulley thereby stopping the machine until the attendant supplies (by hand) the missing section."

This is quite remote from the intermediate mechanism of the patent both in organization and in function.

Heywood, No. 590,984, is for a stop-motion mechanism to "control the movements of machines for various purposes." It is described and illustrated in connection with an envelope machine. Immediately below the paper blank is a set-screw which is adjusted to contact with the blank, immediately above is a vertical threaded shaft on which there

is a disk with a slot cut in it. Through the free space left by this slot a stop-finger passes, as it rocks up and down when the vertical shaft descends so as to touch the upper surface of the paper blank. But if there is no paper blank, or if there are two, the vertical shaft will descend lower, or not so low (as the case may be) and in consequence the disk will be rotated too far, or not far enough, to present the slot to the stop-finger, which thereupon impinges on the disk and stops the machine. This is very similar to Juengst's detector finger and adjustable portal—indeed, there is nothing about this particular stop device, the interposing of an obstruction in a path normally free, which is broadly novel. But the general arrangement of connecting mechanism between the paper in the gripper-jaws and the detecting device actuated by such mechanism, which is found in complainant's and defendant's machines, is not in Heywood.

The Schofield and Baker patent, No. 135,598, for feeding paper to a printing press, with its spur or needle, z, for penetrating the sheet or sheets fed forward, need not be described. Neither it nor any of the other patents referred to are any closer to Juengst's device than those which have been discussed.

Defendant contends that the novelty of the first claim is conclusively negatived by the action of the Patent Office. That claim reads as follows:

"1. In a signature-gatherer the combination with a stopping and starting mechanism and a signature-gripper of an adjustable device intermediate of said mechanism and gripper, and actuated and controlled by the gripper, and exercising a control on the said mechanism, whereby variations from the predetermined thickness of the signatures or sheets act upon the intermediate device for their detection and stop the machine."

It was before the examiner exactly as it stands now (save for some immaterial verbal changes) except that it did not contain the word "adjustable" applied to the intermediate device. It was rejected on the patents to Dexter and La Sor. Thereupon the applicant inserted the word "adjustable," and it was allowed. The insertion was a proper one because the intermediate device shown was really adjustable by shifting the position of the gauge-plates on the arm, B (see our former opinion), so that the same machine could handle signatures of 2, 4, 6, 8, or even more sheets. But we are not satisfied from the proofs that the office allowed the patent solely because this element of adjustability was incorporated in the claim, and that it would otherwise have rejected it. The letter which inclosed the amendments refers to a personal conference with the examiner at which interview the reference patents were discussed. We cannot say that such discussion did not convince the examiner, as a study of the prior art has convinced us, that Juengst's device was novel irrespective of its feature of adjustability for signatures of different thicknesses.

As to claim 19 which was overlooked in our former opinion, it differs from claim 1 only in the statement that the jaws of the gripper come at opposite sides of the signature. But jaws that grip necessarily come at opposite sides of what they grip. Claim 19 is therefore a mere duplication of claim 1 and should be thrown out.

The conclusion expressed in the original opinion is reaffirmed.

BOSSERT ELECTRIC CONST. CO. v. PRATT CHUCK CO.

SAME v. SPRAGUE ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. May 23, 1910.)

Nos. 237, 238.

1. PATENTS (§ 157*)—RULES OF CONSTRUCTION—CONSTRUCTION TO GIVE VALIDITY AND EFFECT TO GRANT.

Patents granted under the laws of the United States pursuant to Const. art. 1, § 8, are grants made in consideration of discoveries which "promote the progress of science and useful arts," and are to be construed liberally so as to effect their real intent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 230, 231; Dec. Dig. § 157.*

For other definitions, see Words and Phrases, vol. 6, pp. 5228–5231; vol. 8, p. 7748.]

2. PATENTS (§§ 27, 328*)—INVENTION AND INFRINGEMENT—ELECTRIC WALL BOXES.

The Bossert patent, No. 571,297, is for an improvement in electric wall boxes which are constructed with holes already made in the bottom and sides so as to accommodate the entrance of the conduits at any desired point; the holes being closed, however, in such manner that the workmen wiring the house can open such as are required without special tools, leaving the rest of the box imperforate. This had previously been done in various ways, as by partially cutting out the holes, leaving uncut connections, by weakening the part so it could be knocked out, or by covering the holes with stiff paper or fitting them with stoppers. The improvement of the patent consisted in cutting the holes with an ordinary punching die and forcing the cut out portion back as a plug, where it is held by frictional contact, but may be readily punched out. *Held* that, although the punching process had been used for various other purposes, it had never before been applied to such boxes, and that, in view of the superior results attained by such construction, the improvement involved invention. Claim 5 also construed, and *held* infringed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

3. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC WALL BOXES.

The Bossert patent, No. 682,233, for improvement in outlet boxes for interior conduits, construed narrowly, and *held* not infringed.

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

Suits in equity by the Bossert Electric Construction Company against the Pratt Chuck Company and the Sprague Electric Company, respectively. Decrees for defendants, and complainant appeals. Reversed.

J. Edgar Bull, for appellant.

Edmund Wetmore (Richard R. Martin, of counsel), for appellee Pratt Chuck Company.

S. O. Edmonds, for appellee Sprague Company.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

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

PER CURIAM. This is an appeal from a decree dismissing the bill upon two patents to William F. Bossert, viz., No. 571,297, November 10, 1896, for a new and useful improvement in electric wall boxes, and No. 682,233, September 10, 1901, for improvement in outlet boxes for interior conduits upon the ground of noninfringement. The requirements of the trade of wiring interiors for electrical purposes brought about the use of wall outlet boxes. The wires are carried in tubes or conduits in the walls of the house, and where they issue for the purpose of distribution to different rooms the ends of the conduits are inclosed in a box. The boxes are constructed with holes already made in the sides and bottom so as to accommodate the entrance of the conduits at any desired point; but the holes are covered so that the ordinary workman while on the job can without the use of any special tools open such holes as he desires to use, leaving the rest of the box imperforate. These boxes were known as "universal knockout boxes," and various forms were gradually developed. In 1889 the predecessor of the defendant, the Sprague Electric Company, installed in the house of William Rockefeller, at Tarrytown, N. Y., a box made of thin galvanized iron in which holes had been punched and then filled by reinserting the part punched out and keeping it in place by tacks of solder. In 1890 a box was put in the Dunshee apartment house of thin brass out of which disks had been partially cut and were held in place by two uncut connections with the wall of the box. Other boxes, as in the case of the Mezger patent, No. 564,527, were made of iron cast thinner at points where holes could be opened by breaking the wall or with holes closed by plugs like the ordinary stovepipe hole cover which could be drawn out; or holes covered by sheets of stiff paper or thin metal which could be easily broken through at desired points. Others had holes filled by ordinary plugs of cork or rubber which could be pulled out or caps which could be unscrewed.

Bossert's invention, if any, consists in his applying in 1896 to the well-known universal knockout box the old punching process. That is to say, he made a box of ductile metal of sufficient thickness, and then, by the use of dies, punched out disks where holes were wanted and drove the disks back into their original places. This made an integral box in which orifices could be opened by driving out the disks. The punching process has never been applied to a universal knockout box, and during the seven or more years in which the trade was making these boxes no one thought of making them in this way until Bossert did. The judge of the Circuit Court has found that in this way Bossert produced a box so superior in all respects as to displace all others.

The first question is whether the improvement is the result of mere mechanical skill or involves the higher quality of invention. This question might be answered differently by persons of equal intelligence, but we think the judge of the Circuit Court rightly held that invention was involved. The general subject is discussed in decisions very familiar to the profession. Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294; Potts v.

Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Hobbs v. Beach, 180 U. S. 383, 389, 393, 21 Sup. Ct. 409, 45 L. Ed. 586; and our own decision, O'Rourke Engineering Co. v. McMullen, 160 Fed. 936, 88 C. C. A. 115.

We do not think the Rockefeller box or the Dunshee box or the patents cited like the Bartlett patent, No. 100,234, for the lid of a powder box, or the McGill patent, No. 160,834, for an oyster can, or the Britain patent, No. 106,911, for a can cover, illustrate in any way the plugs held in place by wedging. The Holz patent, No. 412,-618, for punching wads, is an instance of wedging in a nonanalogous art.

We are next to inquire whether the defendants infringe. The claims relied on are for an article of manufacture as follows:

In the first patent:

"5. The combination with a wall box having openings adapted to receive electric conduits, of plug plates wedging in the openings and adapted to be displaced or removed to clear the opening for the conduit by being forced inwardly or outwardly, substantially as set forth.

"6. A wall box drawn out of the sheet metal having numerous openings formed by punching and adapted to receive electric conduits, plug plates therefor wedging in the openings and conforming to the exterior and interior surfaces of the walls in which the opening is formed and capable of being removed by forcing the plug plates outwardly or inwardly, substantially as set forth."

In the second patent:

"2. A metal outlet box, having one or more partially-formed openings in its walls, each opening being circular in configuration, the peripheries of the openings and of their partly-expelled blanks being mutually indented, as set forth."

The judge of the Circuit Court was of opinion that inventors should be held strictly to the wording of their claims because patents are monopolies given out of the sovereign's generosity and given ex parte. We, however, think that patents are grants made in consideration of discoveries which "promote the progress of science and useful arts" (Const. art. 1, § 8), and that they are to be construed liberally so as to effect their real intent. Grant v. Raymond, 6 Pet. 240, 8 L. Ed. 376; Blanchard v. Sprague, 3 Sumn. 535, Fed. Cas. No. 1,517. Still it is the settled rule that inventors be held to the form of claim which they have accepted under objections from the Patent Office.

The elements of claim 5 are:

(1) A wall box with openings.

(2) Plug plates for such openings.

These plug plates must be such as will wedge in the openings and can be displaced by being forced in or out of such opening. The specifications state that the same piece which is punched out to form the hole is driven or forced back therein. The crux of the patentee's invention seems to be that by punching out a disk of metal and thereafter plugging it back into the hole thus formed the metal at the cut edges will be in such condition as to wedge the plug in the hole. As the punching tool completed its operation, its cutting edge was between the periphery of the cut out portion and the plate from which it

was cut. Manifestly at that time the diameter of the hole exceeded the diameter of the plug by twice the thickness of the cutting edge. It might be expected that if the cut out part were replaced in the hole it would fall out again, being of smaller diameter; but for some reason, which was not made entirely plain upon the argument, and which the record seems not to disclose, the plug if punched back in place will wedge so tight in the hole as to require quite a heavy blow to dislodge it. Each plug is of the same thickness as the metal in which the hole has been punched, and if it is forced back into its original position its interior and exterior surfaces will conform to the interior and exterior surfaces of the wall in which it is placed. This limitation is found in the sixth claim, but there is no such limitation specified in the fifth claim. Nothing in the specifications or in the record indicates that the plugs will not "wedge in" unless they are driven home; indeed, some of the exhibits indicate that they will wedge even when forced back halfway. We do not find that the prior art is such as to require such a limitation to be read into the claim in order to sustain it.

Defendants contend that the file wrapper and contents require such a construction. The original application contained four claims, of which 2, 3, and 4 were allowed and retained the same numbers when issued. Claim 1 read:

"The herein described wall box, having numerous plugged conduit openings, substantially as set forth."

This was rejected on two patents to Mezger. Thereupon this first claim was amended by adding various limitations, including coincidence of the surfaces of plugs and wall. The applicant also submitted a new claim No. 5, as follows:

"The combination with a wall box having openings adapted to receive electric conduits, of plug plates wedging in the openings and adapted to be displaced or removed to clear the opening for the conduit by being forced into the box, substantially as described."

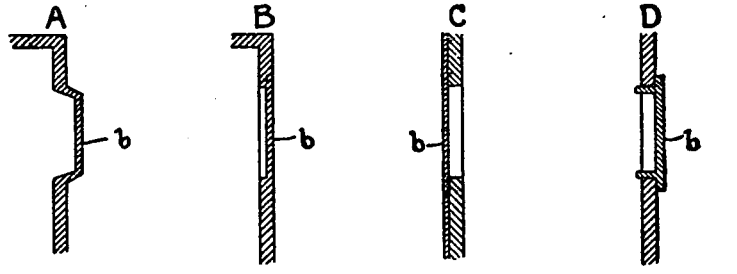
The amended first claim and the new fifth claim were again rejected on Mezger. Applicant amended the fifth claim by stating that the opening could be cleared "by (the plug) being forced inwardly or outwardly." He also submitted a new claim 6, in the language in which it now stands, and resubmitted the first claim without further amendment. He also submitted a letter stating inter alia:

"The fact that it is an obvious advantage to have the conduit openings closed by devices which can with equal facility, as circumstances may require or permit, be removed to the exterior or the interior and an advantage to have no external or internal projections at the plug openings taken in consideration with the results of the efforts of others in this line, as evidenced by the references, seems to quite effectively negative the holding of the examiner that there is no patentable novelty involved in providing a plug plate instead of a cover."

Thereupon the patent with six claims was allowed. Defendant contends that because of this letter it must be held that the applicant acquiesced in a ruling that he was not entitled to a patent unless his claims were restricted to plugs whose surfaces were coincident with the wall surfaces, although claim 5 as issued contains nothing which imports such a limitation. This proposition seems to carry the doctrine

of acquiescence far beyond any limits it has yet reached. The applicant was addressing himself to the references cited against him, viz., the two Mezger patents, Nos. 564,527 and 564,443. The earlier of these showed many forms of box. These are well illustrated in one of defendant's exhibits:

FORMS OF "WEAKENED PORTIONS" DESCRIBED AND ILLUSTRATED IN MEZGER PATENT.

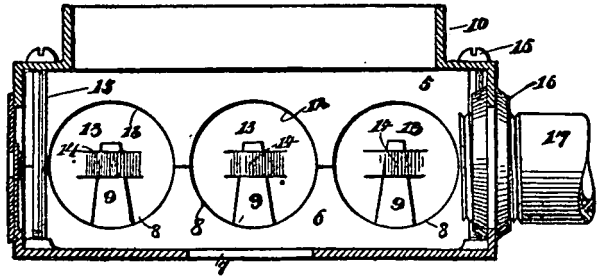


(FIGS. 1, 2 & 3.) (FIGS. 7 & 8.) (FIGS. 4, 5 & 6.) (FIGS. 11 & 12.)

("WEAKENED PORTIONS" INDICATED AT "b")

In forms A and B there is an incipient hole made integral with the walls of the box, but thinner than said walls, so that it can be broken out with a hammer. There is no hole and no plug, and it is inconceivable that the examiner or the applicant were concerned with any question of differentiation from these forms of Mezger. In C the box is made with all the holes completely formed and is then completely covered, holes and all, with a thin sheet of metal through which holes are to be cut with an appropriate instrument. Here there is a hole but no plug. In D there is a hole, and it is closed by the insertion in it of the flange of a cover like the cover of a stovepipe hole. It is called the "stovepipe" device in the testimony and briefs. The second Mezger patent shows a different device for keeping the cover in place.

There are circular openings cut in the wall, and the specifications say:



"Covering each of these circular openings is a plate, 13, such plate being circular and larger than the openings, 8, so as to engage the sections 5 and 6 at their outer sides to effectively close the openings."

These plates 13 manifestly project beyond the outside of the openings, as does the part x of b in form D, ante.

"Formed in each plate, 13, are two parallel cuts producing a loop, 14, such loops respectively receiving the arms, 9, and thereby holding the plates, 13, in position. The arms, 9, being very much weaker than the material forming the sections 5 and 6, it will be seen that upon the application of a sharp blow to the arms they will be broken away carrying with them the attached plate."

Being confronted with these earlier devices for covering holes, the applicant insisted that his "plug-plate" device was nevertheless patentable, and he differentiated it from the Mezger covers, in very plain and simple language, by showing that his plug could be driven out or in, while the Mezger cover was adapted to be driven in one direction only, and that his "plug plates wedging in the openings" have not the external or internal projections at the openings which are found in x, y, and 9 of Mezger drawings, ante. It is not surprising that this satisfied the examiner that Mezger did not disclose any anticipation of claim 5 as it was amended, so as to confine it to a plug which could be driven in or out, and we find in the transaction no acquiescence in any construction which would restrict the combination of that claim to plug plates who surfaces are coincident with the walls.

Defendants refer to a letter of Bossert to his counsel written nearly five years after the issuance of his first patent, in which he expresses the opinion that the sixth claim of that patent is practically the only one which protects him. We are of the opinion that patents may be more safely construed by studying their language in connection with the prior art than by referring to the subsequent dissertations of the patentees. In this letter the patentee states that at the time the patent was granted the plug was set back in the press:

"Which would conform to that part of the claim which states that the plug plates conform to the exterior and interior surface of the walls."

Presumably the "claim" thus referred to is the "last claim" (the sixth claim), which the writer mentioned in the next preceding sentence, and which does contain the limitation of conformity of surfaces. But it is not material that at the time the patent was applied for the patentee was in the habit of driving the plugs entirely back. If the wedging in would be accomplished by driving them partly back, and neither the claim nor the prior art confines him to the precise method he used when he made application, both methods of driving or forcing back—wholly or partly—will be covered by the patent. The patentee in this letter also states to his counsel that he is then (five years after issue) making boxes, in which the "plugs are not flush with the wall," of which he says:

"This method would not practically conform to the exact wording of the patent."

This statement of his might fairly be held to apply only to the sixth claim, which was the one he was discussing, and which he considered was practically the only one which protected him. Applied to that claim, the statement in the letter is strictly accurate. If it be held, however, that the writer's expressions applied to the whole patent, then

they merely state his construction of the fifth claim of the patent five years after its issue, and we are satisfied that our own construction of that claim is the more accurate.

It appears that, although defendants' plugs may be knocked out in either direction, they may be driven one way with a single blow of the hammer, while it requires several blows to drive them the other way. It is argued that for this reason they do not infringe, because in the patentee's letter to the Patent Office quoted supra he stated that the plugs might be removed either way with equal facility. No such limitation is found in the claim, nor is there anything in the Mezger references (which he was then discussing) nor in the prior art which requires such limitation. The mere statement in the letter implies no more than that the plugs may be knocked either in or out without breaking the box or disorganizing the device, whichever way is selected.

The defendants' plugs are not flush with the walls, but they are punched out of the metal and then forced back. A small tongue or ear integral with the wall remains when a plug is punched, but the plug is thereafter forced back into place and is there retained by wedging in the opening, although the ear contributes in some slight degree to keep it there. Infringement of the fifth claim of the first patent is proved.

The second patent, if valid, must be so narrowly construed that the defendants cannot be held to infringe.

Decree reversed, without costs.

UNITED STATES ex rel. GORDON v. CROOK, Major General.

(District Court, D. Nebraska. September 6, 1875.†)

1. INDIANS (§ 12*)—TREATY CREATING RESERVATION—REQUIREMENT OF RATIFICATION BY "CONGRESS."

The term "Congress," as used in an act appointing a commission to negotiate a treaty with Indians "subject to the action of the Senate," and to select a district or districts of country, "said district or districts when so selected and the selection approved by Congress" to be and remain a permanent home for the Indians to be located therein, means the lawmaking branch of the government, and the approval of both Houses was necessary to create a valid reservation of the district so selected.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 2, p. 1432; vol. 8, p. 7611.]

2. INDIANS (§ 12*)—INDIAN COUNTRY—CONSTRUCTION OF TREATY.

The treaty made by commissioners with the Sioux Indians April 29, 1868 (15 Stat. 635), under authority of an act of Congress empowering the commission to select as a reservation "a district or districts of country * * * to which the government has the right of occupation or to which said commissioners can obtain the right of occupation," and which, in addition to the designation of a reservation described by boundaries, further provided, in article 16, that "the country north of the North Platte river and east of the summits of the Big Horn Moun-

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

† Received for publication July, 1910, and published because inadvertently omitted from Federal Cases.

tains shall be held and considered to be unceded Indian territory," and that no white person shall be permitted to settle upon or occupy any portion of the same, or to pass through it without the consent of the Indians, did not include in such unceded territory any land within the state of Nebraska.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 12.*]

3. INDIANS (§ 32*)—PERSONS AND PROPERTY UNLAWFULLY IN INDIAN COUNTRY—AUTHORITY OF MILITARY.

Rev. St. §§ 2147, 2150, 2151, authorize the military forces of the United States by direction of the President to be employed to prevent the introduction of unauthorized persons and property into the Indian country, which persons and property shall be proceeded against according to law, to remove persons found therein contrary to law, and to apprehend any person so found and convey him immediately by the nearest convenient and safe route to the civil authority of the territory or judicial district in which he is found, but expressly provide that he shall not be detained longer than five days after arrest and before removal. A civil action is authorized against property seized for a violation of the law and for the collection of a penalty imposed on any person who returns to the country after being once removed. *Held*, that the Military Department has no authority to hold a person apprehended for being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found.

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

Habeas corpus, on relation of John Gordon, against George Crook, Major General Commanding the Military Department of the Platte. Hearing on writ and return. Order for surrender of petitioner to civil authorities.

Baldwin & Smythe, for relator.
Judge Advocate Burnham, for respondent.

DUNDY, District Judge. On the 22d day of July last, John Gordon, by his counsel, presented his petition in due form, in which he alleges that he was then restrained of his liberty by the respondent, Gen. Crook, without the shadow of law or authority therefor. A writ of habeas corpus was thereupon issued as prayed for therein. The writ was made returnable in 20 days; but it seems that no personal service thereof was ever made on the respondent. Nevertheless the respondent makes a voluntary appearance and answers fully to the said writ.

The relator admits the truth of the allegations contained in the return to the writ, supposed by the parties to be important and material, and upon the return to the writ, so admitted to be true, after the argument of the counsel, the cause was submitted for determination.

The return to the writ states, in substance, and the relator admits the facts to be:

First, that Gen. Crook is, and was at the time of issuing the writ, the commander of the military department of the Platte, and that the military officer in command at Camp Sheridan, where the relator was confined, was and is subject to the orders of the said Gen. Crook.

Second, that on the 17th of March, 1875, Gen. Sherman, by direction of the President of the United States, issued or caused Gen. Crook

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

to issue an order to prevent all expeditions going into the Black Hills country so long as the present treaty with the Sioux Indians exists.

Third, that Gen. Sherman, on the 17th of March, 1875, ordered that:

"Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian reservation, you are hereby directed to use the force at your command to burn the wagon trains, destroy the outfits and arrest the leaders, confining them at the nearest military post in the Indian country. Should they succeed in reaching the interior you are directed to send such force of cavalry in pursuit as will accomplish the purpose above named."

Fourth, that John Gordon, the relator, with many others, was arrested 16 miles below the mouth of Antelope creek, within what is claimed to be unceded Indian territory; the said Gordon being the reputed and acknowledged leader of the outfit, and whilst he, and they, were on their way to settle upon and occupy a portion of the Black Hills country which is a part of the unceded Indian territory.

Fifth, that said Gordon, immediately after his arrest, was conveyed to and confined at the military post of Camp Sheridan, and there remained until the time of issuing the writ herein.

Sixth, that the military officer having the immediate custody of the relator proposed to him (the relator) to discharge him from custody on his agreeing not to enter the Indian country in violation of law, and that the relator declined to make such promise.

It is conceded that Gordon was in no way connected with the military service of the government, and therefore not subject to the orders of the commander of the department of the Platte.

These facts involve the necessity of determining:

First, the character or condition of the country where the arrest of Gordon was made.

Second, the liability to be incurred by a person who goes into the Indian country without authority of law.

Third, how far the military authorities are justified in going to arrest, imprison, or expel therefrom parties found in the Indian country.

Fourth, the duty of the military authorities after an arrest has been made.

On the 20th of July, 1867, Congress passed an act entitled "An act to establish peace with certain hostile Indian tribes" (15 Stat. 17, c. 32), in which it provided that:

"The President of the United States be, and he is hereby, authorized to appoint a commission to consist of three officers of the army not below the rank of brigadier general, who, together with N. G. Taylor, commissioner of Indian affairs, John B. Henderson, chairman of the committee of Indian affairs of the Senate, S. S. Tappon and John B. Sanborne, shall have power and authority to call together the chiefs or headmen of such bands or tribes of Indians as are now waging war against the United States, or committing depredations upon the people thereof, to ascertain the alleged reason for their acts of hostility, and in their discretion under the direction of the President, to make and conclude with said bands or tribes, such treaty stipulations, subject to the action of the Senate, as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and

other thoroughfares of travel to the western territories, and such as will most likely insure civilization for the Indians, and peace and safety for the whites."

The second section of the act referred to further provides:

"That said commissioners are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains not now peacefully residing on permanent reservations under treaty stipulations, to which the government has the right of occupation or to which said commissioners can obtain the right of occupation. * * * Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon. * * *"

In pursuance of the authority conferred by the said act of Congress, a treaty was made with the hostile Sioux Indians, at Ft. Laramie, on the 29th of April, 1868 (15 Stat. 635), which was ratified by the Senate on the 16th of February, 1869.

The second article of this treaty agrees:

"That the following district of country, to wit, viz., commencing on the east bank of the Missouri river, where the forty-sixth parallel of north latitude crosses the same, thence along low water mark down said east bank to a point opposite where the northern line of the state of Nebraska strikes the river, thence west across the said river and along the northern line of Nebraska to the one hundred and fourth degree of longitude, west from Greenwich, thence north on the said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along the same parallel to the place of beginning. * * *"

The sixteenth article of the treaty declares:

"That the country north of the North Platte river, and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same, or without the consent of the Indians, first had and obtained, to pass through the same. * * *"

It has ever been the policy of our government to treat the several Indian tribes as "dependent domestic nations." No other government, state or individual, is permitted to treat with them for any purpose, without the consent of the general government. Nevertheless, the government accords to them a sort of sovereignty which seems to justify the exercise of the treaty-making power. The uniform practice of the government for many years was to treat with the tribes as was done in independent nations. But in later years dissatisfaction at this policy has manifested itself in as well as outside of Congress. Hence we see in the act of Congress, before referred to, that the commission to treat with the hostile Sioux was very much restricted in its powers.

It is true that the treaty when made was to have no binding force until it should be ratified by the Senate, and it is equally true that part of the treaty which sets apart the said reservation was to have no binding force until it was approved by Congress. It seems that the Senate ratified the treaty as required by the first section of the act of Congress, creating the commission.

But I have seen no act or resolution indicating in any way that Congress approved of the selection of the reservation. Argument was

advanced to show that a ratification by the Senate alone of the treaty was sufficient. But it is only fair to presume that Congress meant precisely what is stated when its approval was required. The term "Congress," as here used, and as is generally used and understood, means the lawmaking power of the government; and we are not authorized to give it any other meaning here. If these views are correct, it necessarily follows that the portions of the treaty setting aside certain country as a reservation and declaring certain other parts of territory as unceded Indian country have no binding force until the same is approved by Congress.

But if the treaty was made in all respects in strict conformity to the act of Congress authorizing the making of it, it then becomes a serious question as to whether or not Gordon was arrested in that part of the country called by the treaty "unceded Indian territory." The arrest was made on the Niobrara river, about 16 miles below the mouth of Antelope creek, and in the state of Nebraska, but at a point some distance west of a line running north from the mouth of the North Platte river. Counsel for Gordon very strenuously insists that no part of the "unceded Indian territory" lies within the boundaries of the state of Nebraska. After a careful examination of this question, a question in which the people of this state justly feel a deep concern, I conclude that no part of the "unceded Indian territory" described in the treaty is included within the limits of the state of Nebraska, and that the parties to the treaty neither so understood nor intended it, at the time of making the treaty. I think I ought to hesitate long and scrutinize closely a treaty which is claimed consigns near one-fifth of our state to the exclusive use of a semicivilized race, and that, too, without the sanction of the state authorities, and against the known and expressed wishes of the people of the state, before I so decide, unless the terms of the treaty require such a decision.

It will be observed that the boundaries of the tract of land intended for the reservation are described with the utmost particularity. The description is as specific and definite as language can make it. Commencing at a point at low-water mark on the east bank of the Missouri river, the line then runs down the east bank of that river, to a point opposite to where the northern boundary of Nebraska strikes the river; thence across the river to the corner of the state; thence west along the state line to the western boundary of the state; and thence north, etc. So particular were the parties to the treaty about this description that no effort seemed to have been spared to make it clear that they intended to include the bed of the Missouri river in the reservation. About the boundaries of this reservation and "permanent homes" of the Indians there is no chance for dispute. But while the boundaries of this reservation are certain and specific, the boundaries of the "unceded Indian country" are vague, uncertain, and indefinite as language can well make them. For this reason we are left to give the sixteenth article of the treaty a construction, and ascertain as well as we can what country was really intended to be included as unceded territory. The treaty declares that the country north of the North Platte river and east of the summit of the Big Horn Mountains shall

be regarded as the unceded country. It is fair to presume that the commissioners well understood the boundaries of this state, because in defining the boundaries of the reservation they follow the northern boundaries of the state its full length. The moment the western boundary is reached they conclude to make the western line of the state the western line of the reservation. So that the action of the commissioners seems to have conformed to the state boundaries, and that they did not any time intend to interfere in any way with any part of the territory included within this state. Again, it would seem that no part of the state was intended to be included in the unceded territory, because that territory lies north of the North Platte river, and east of the summit of the Big Horn Mountains. The northwest corner of Nebraska is in a direct southeast course from the southern extremity of the Big Horn Mountains. It will be seen then that, if it was ever intended to include any part of the state in the unceded territory, the words used to describe it are not very apt ones. Then, too, if it had been so intended, what an easy matter it would have been to say so. How easy and how natural it would have been to designate the mouth of the North Platte river as the starting point of the eastern boundary of the unceded territory.

One of the avowed objects in making the treaty was to protect the persons employed in constructing and operating our great national thoroughfare—the Union Pacific railroad—and the language of the act of Congress authorizing the treaty "and such as will most likely insure civilization for the Indians, and peace and safety for the whites." "Peace and safety for the whites," in a country such as that traversed by the Union Pacific railroad, was, at the time of making the treaty, and still is, regarded as of some consequence, and, the better to insure this, it was deemed advisable to remove the Indians as far from the road and settlements as possible. This was done by locating them north of the state, as provided in article second of the treaty. And in the absence of language clearly expressing the intention of the contracting parties so to do, we cannot safely infer that they intended to include any part of the Union Pacific Railroad in the unceded territory, which would be done if all the country north of the North Platte river were to be included in the unceded Indian territory. It is more consonant with reason to suppose that this never was intended. When we consider the fact that the paramount object in making the treaty was the protection of the railroad company in building and operating its road, and the protection of persons and property of the whites, we can readily see that the commission would be quite unlikely to set apart a section of country in and through which the Indians might come at will, and in which the more fortunate, but less favored, white man could not place his foot without violating the laws of his country, and that, too, when the road passes over a portion of it, and where much of it is in close proximity to the road and the settlements along the same.

These considerations have induced me to hold that no part of the "unceded Indian territory" described in the sixteenth article of the treaty is within the limits of the state of Nebraska.

But should we concede to the country described in the second and sixteenth articles of the treaty the character claimed for it by the relator, then it becomes necessary to determine how far the military authorities are justified in going, for the purpose of carrying out the provisions contained in the two articles as aforesaid, and expelling therefrom unauthorized persons. Both articles declare, in substance, that no white persons shall be permitted to pass over, settle upon, or reside in, the territory described therein, save and except a few officers of the government who may be required to do so under certain provisions of the treaty, which are unnecessary to here consider.

Section 2147 of the Revised Statutes provides that:

"The Superintendent of Indian Affairs, and the Indian agents and sub-agents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

This section gives the clear and undoubted right to the President to direct the military force to be employed in removing unauthorized persons from the Indian country; and, when the President so directs, then the military authorities can use all the force necessary to expel the intruder. This would necessarily include the right to arrest the intruder and to use all the force necessary to overcome any resistance, actual or threatened.

Section 2150 of the Revised Statutes goes still further, and declares that:

"The military forces of the United States may be employed in such manner and under such circumstances as the President may direct: First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law. Second. In the examination and seizure of stores, packages, and boats, authorized by law. Third. In preventing the introduction of persons and property into the Indian country contrary to law, which persons and property shall be proceeded against according to law."

Here is ample authority for using the military force of the government for the purpose of not only removing intruders from the Indian country, but to prevent them from going upon forbidden ground.

But the authority here conferred must be exercised in the mode and manner pointed out in the section of the law just quoted. That requires the offender to be removed immediately, by the nearest convenient and safe route, to the civil authority of the territory or judicial district where the offender is found.

Section 2151 of the Revised Statutes expressly declares that:

"No person apprehended by military force, under the preceding section, shall be detained longer then five days after arrested and before removal. * * *"

The conclusion, therefore, is that when a white person is found passing over, residing in, or settling on, any portion of the Indian country, the military force may, when so directed by the President, arrest and, within five days thereafter, remove him by the nearest

convenient and safe route to the territory or judicial district in which the arrest is made, there to be proceeded against as provided by law.

The respondent produces a general order from his superior officer (Gen. Sherman), directed to the commander of the department of the Platte, which seems to have been issued last March, from which the following is an extract:

"Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian reservation, you are hereby directed to use the force at your command to burn the wagon trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country. * * *"

Notwithstanding the distinguished character of the officer, and the high source from which this order emanates, it is respectfully submitted that that portion of the order which directs the burning of any part of the captured property is wholly unauthorized by law. The third subdivision of section 2150, before quoted, declares:

"Such persons and property shall be proceeded against according to law."

Section 2125 (Revised Statutes) also declares that:

"When goods or other property shall be seized for any violation of this title, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods or other property, in the manner directed to be observed in the case of goods, wares or merchandise brought into the United States in violation of the revenue laws."

If the laws work or declare no forfeiture of goods, when the owner commits a wrongful act, then surely no person has the lawful right to destroy them. If the improper or unlawful use of goods results in a forfeiture of the same, then, the moment of the commission of the wrongful act, the title to the goods so used changes and rests in the government. And when the goods can be seized and reduced to possession, it is the duty of the officer seizing the same to protect and place them in position to be proceeded against as provided in said section 2125, in order to have the forfeiture judicially declared and the property sold for the benefit of the government. When this course is taken, both the government and the claimant of property have every desirable facility afforded them for maintaining their respective rights. Here the cause of the seizure is inquired into, and the right to make it is either established by the government or overthrown by the claimant. This course of procedure fully accords with the humane spirit of our laws, and is so obviously just that it needs no commendation here. No argument is necessary to show the wisdom and utility of such a course. Both are self-evident and must so appear to the most careless and casual observer. And when Congress, in the exercise of its constitutional powers, declares what disposition shall be made of the captured and forfeited property, it becomes the duty of all alike to obey the law, and none are safe in violating it even in the Indian country.

Notwithstanding the said treaty and several provisions of the old "intercourse law" (the same from which quotations are herein made) forbid white men trespassing on the Indian country, nevertheless no

penalty is thereby incurred by an intruder for the first offense. At least no one but an alien incurs any penalty therefor. But if the offender returns to the Indian country after having been removed therefrom, then he incurs a penalty which is fixed and certain.

Section 2148 of the Revised Statutes reads as follows:

"If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country he shall be liable to a penalty of one thousand dollars."

And even when this offense is committed, and this penalty is incurred, the proper proceeding to be instituted against the accused is to bring an action in the nature of an action of debt to recover the penalty.

Section 2124, Rev. St., provided that:

"All penalties which shall accrue under this title, shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any state or territory in which the defendant shall be arrested or found. * * *"

This remedy is well understood and seems to be the only one to be pursued in the federal courts in prosecutions instituted against those who incur the penalty provided by section 2148, before referred to. Then in no case like the one under consideration can the criminal process of the federal courts be invoked. And if the government has not provided an adequate remedy, one that is commensurate with the offense itself, it must be content to pursue the only remedy furnished until a better one can be provided by due course of law.

It is therefore ordered that the respondent, Gen. George Crook, brigadier general and brevet major general of the United States army, commanding the military department of the Platte, turn over and deliver up, without unnecessary delay, the said John Gordon, to the United States marshal for the state of Nebraska, to be proceeded against as provided by law.

The clerk of the United States District Court for said state will forthwith make an official copy of this order and place the same in the hands of said marshal for immediate service.

BOARD OF TRADE OF CITY OF CHICAGO v. PRICE et al.

(Circuit Court, E. D. Missouri, E. D. June 17, 1910.)

No. 5,787.

EXCHANGES (§ 14*)—PROCEEDINGS—EVIDENCE.

In a suit to restrain defendants from receiving or using continuous quotations of the Chicago Board of Trade, individually and as the Price Commission Company, evidence *held* insufficient to show that defendant P. was in any manner interested with such company, or had engaged in its business, or received the quotations.

[Ed. Note.—For other cases, see Exchanges, Dec. Dig. § 14.*]

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

In Equity. Suit by the Board of Trade of the City of Chicago against Thomas E. Price and others. On order to show cause why an injunction should not be granted. Rule discharged.

Henry S. Robbins, Martin H. Foss, and Lehman & Lehman, for plaintiff.

Thos. B. Harvey and Chester H. Krum, for defendants.

DYER, District Judge. On the 23d of October last a bill for an injunction was filed in this cause, the general object and purpose of which was to prevent the defendants Burtis Price and Thomas E. Price, individually and as the Price Commission Company, from receiving and using the continuous quotations of the Chicago Board of Trade in the city of St. Louis. An order to show cause why the complainant's prayer should not be granted was issued that day, and made returnable on October 30th.

Burtis Price was not served; but Thomes E. Price was. On the 30th of October Thomas E. Price made his return to the order to show cause. In this return he in substance denies that he had been receiving the quotations and used the same as charged in the bill, and avers that he was not in any manner interested in the business of the Price Commission Company. An issue being joined upon this return, the same was referred to Robert M. Fulton, as special master, to take all the evidence that might be offered by either side in reference to the question as to whether or not Thomas E. Price was in any wise interested in the Price Commission Company, or whether said Thomas E. Price is directly or indirectly participating in, or is or was connected with, the Price Commission Company, or using the quotations of the Chicago Board of Trade as an individual.

Subsequently the complainant dropped from its bill the name of Burtis Price, but included in it the name of Risdon H. Price, Thomas F. Sullivan, and Louis E. Straeder. Risdon H. Price has not been served with process, but Thomas F. Sullivan and Louis E. Straeder have entered their appearance to the amended bill.

Two hundred and fifty or more pages of testimony was taken in this case by the special master, and the same was filed in this court, together with his report thereon, on the 17th of March last. On this testimony the master's report gives his conclusions as follows:

"On the issue involved in this case, the conclusion of the master is that Thomas E. Price is connected with and interested in the business which at the time of the filing of this bill, October 23, 1909, was being conducted at 200-202 North Third street, in the city of St. Louis, under the alleged name of 'Price Commission Company,' sufficiently to make him amenable to an injunction prohibiting the further use of the quotations of the Chicago Board of Trade, provided they are being improperly used at that office and in that business."

The question upon which evidence was to be taken by the master was as to whether or not Thomas E. Price had any connection whatever with the Price Commission Company, or whether he was interested with his brother, Burtis Price, or his other brother, Risdon H. Price. The evidence very clearly shows that Burtis Price had no connection with the Price Commission Company, and that he had

not been doing business in the city of St. Louis for more than two years. It developed upon the hearing that Risdon Price was in fact interested in it, and that Sullivan and Straeder were employés of the Price Commission Company. The burden was upon the complainant to show by a preponderance of the evidence the falsity of Thomas E. Price's return to the order to show cause.

The original bill alleged, and the amended bill alleges, that Thomas E. Price was either receiving these quotations with his brother or was receiving them under the name of the Price Commission Company. The complainant called as its first witness Thomas E. Sullivan. Sullivan was asked by the complainant's counsel a great many questions, and the witness gave a great many answers to such questions, that could have no particular bearing upon the question that was to be tried. It appeared from his testimony, as it did from the testimony of other witnesses, that a box in a safe deposit vault was in the name of R. H. Price and Thomas E. Price, both of whom had access to the same, and that in the absence of Risdon H. Price from business his brother Thomas E. Price opened and closed this box; that the moneys from the Price Brokerage Company were deposited each evening in this box, and the same were taken out in the morning and returned to the office by Thomas E. Price in the absence of his brother. Subsequently Sullivan made the deposits and the withdrawals. Sullivan testified that two employés of the Price Brokerage Company, to wit, Mr. Stack and Mr. Straeder, carried the box from the office to the safe deposit company, and there met Mr. T. E. Price, and he opened the box, and the money was deposited. The following question was asked Mr. Sullivan on page 86:

"Q. Does T. E. Price have anything to do with the depositing of that box with the Mississippi Valley Trust Company, or getting it out, save only when his brother R. H. Price is sick or out of town? A. None whatever."

Sullivan in substance testified that Thomas E. Price was in no wise interested in the business of the Price Brokerage Company, and that, while he was in and out of the office frequently, he neither directed nor had anything to do with the transactions in that office; that he had nothing to do with the employment of clerks, nor the fixing of the salaries; and that he was in and out of the office as many others were. It appears that Thomas E. Price has an office in the Merchants' Exchange and is a broker; that he is a member of the Merchants' Exchange, and as such had a right upon the floor of that Exchange; that Risdon H. Price was his brother, and succeeded to the business of Burtis Price.

A. J. Stack was also called by the complainant as a witness, and he testified that he was a clerk in the office of the Price Brokerage Company, and had been a clerk for a long time prior thereto at the same place. He also testified that Thomas E. Price was not a member of the concern, nor had he anything to do with the management of its affairs. To the same effect was the testimony of Straeder, who was also a clerk in that office, and whom the complainant called as a witness to prove the issues upon its part.

Thomas E. Price, the defendant, was called by the complainant to

testify on its behalf, and he was asked a great many questions and gave a great many answers to matters that seem to be foreign to the real question that was to be tried. But he gave testimony as follows:

"Q. At whose instance and request did you let your name be used as a joint renten of the box in the Mississippi Valley Trust Company that has been spoken of? A. During the incumbency of R. H. Price. Q. Have you any interest in the box? A. Absolutely none. Q. Do you pay the rent? A. I do not. Q. Have you any concern with who pays the rent? Do you look after that? Is your attention directed to it? A. No, sir. Q. Have you any interest as to the contents of the box? A. Not a dollar. Q. Do you exercise any supervision over the business when your brother is gone? A. No, sir. Q. Do you? A. No, sir. Q. Do you interfere with or have anything to do with his business, except to attend the place where the box is kept, getting it out in the morning, and putting it back at night? A. No, sir; that is the only thing. Q. That is the extent of your connection with that business? A. Absolutely."

It appears that the circumstances surrounding the transaction relied upon to prove Thomas E. Price's connection with the business of the Price Commission Company is all there is. The only persons who are in a position to know whether he is so connected or not seem to be Thomas E. Price, Risdon H. Price, Sullivan, Stack, and Straeder. The testimony of Risdon Price was not taken, because it appears that he was ill and unable to attend the hearing and give his testimony. The burden, as the court has stated, was upon the complainant to prove that Thomas E. Price was a proper defendant, before Thomas E. Price could be called upon to answer the bill of complaint. The testimony of the only men who were examined, who knew or could know about this matter, does not support the complainant's contention; but, upon the contrary, it is positively proven that he was not connected with the Price Commission Company, and was not engaged in the business of that company, nor as such received the quotations of the Chicago Board of Trade. To find otherwise I must discredit the positive statements of the witnesses called by the complainant itself to prove that Thomas E. Price is a proper party to this suit.

Risdon Price has not been served with notice to show cause, as was Thomas E. Price. Before proceeding further against him, and before the granting of an injunction against him, he is entitled to his day in court. The other defendants have entered their appearance to the bill, and may be proceeded against at the pleasure of the complainant. It was stated upon the hearing that the Price Commission Company has ceased to do business. This seems to be agreed to by both the complainant and the defendants. I refer to these matters as mere extraneous circumstances. In no way are they necessary to the proper determination of the real and only question now to be determined.

The conclusion of the court is that the complainant has not proven the falsity of the return made by Thomas E. Price to the order to show cause. The rule upon Thomas E. Price to show cause will be discharged.

In re C. M. BURKHALTER & CO.

ROGERS v. PEOPLE'S SAVINGS BANK & TRUST CO.

(District Court, N. D. Alabama, S. D. May 11, 1910.)

1. RECEIVERS (§ 129*)—RECEIVERS'S CERTIFICATE—PAYMENT.
Where a receiver's certificate promised to pay only from a fund in court in process of administration, and payment in full was conditioned on the sufficiency of the fund to answer all claims of equal priority, the certificate was not an absolute promise to pay, and the court having control of the fund was alone competent to determine its sufficiency and the proper proportional payment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 223; Dec. Dig. § 129.*

Receivers' certificates, see notes to Postal Tel. Cable Co. v. Vane, 26 C. C. A. 350; Nowell v. International Trust Co., 94 C. C. A. 601.]

2. RECEIVERS (§ 129*)—RECEIVER'S CERTIFICATE—PAYMENT BY RECEIVER—RECOVERY.
Where a receiver in bankruptcy made a partial payment on a receiver's certificate, in disobedience of a court order directing him to pay out no funds except on order of the court, and on suit being subsequently brought by the receiver's successor to recover the amount so paid it was held that the creditor was entitled to a preference out of the fund from which the payment had been made, and that the money should be repaid to the receiver only in case the amount the creditor was entitled to receive was less than the payment, a plenary suit was not necessary to determine that question; it being determined in summary proceedings instituted by the receiver's petition to require the creditor to show cause why the money should not be restored, on which a reference could be had to determine the state of the account.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 129.*]

In the matter of bankruptcy proceedings against C. M. Burkhalter & Co. Petition by Thomas M. Rogers, receiver, for a rule on the People's Savings Bank & Trust Company, to show cause why it should not return a payment by a former receiver. Granted.

Weatherly & Stokely, for People's Savings Bank & Trust Company.

London & Fitts, for receiver.

GRUBB, District Judge. This matter comes on to be heard upon the petition of the receiver for a rule upon the respondent to show cause for not paying back to the receiver $4,285.55, with interest, being the amount paid it by the former receiver in disobedience of an order of court, directing him to pay out no funds thereafter except upon order of court.

The amount was paid by the former receiver as a credit on a claimed indebtedness of the receiver to the respondent of $11,000, evidenced by a receiver's certificate in that amount issued to it for money loaned by it to the receiver. The present receiver disputes the existence of any such indebtedness at the time of the payment. The Circuit Court of Appeals declined to pass upon this issue because of the unsatisfactory condition of the record, and remanded the case,

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

with instructions that it be referred to the special master to state the account between the bank and the receiver in conformity to its opinion. The opinion was to the effect that whatever indebtedness was due the respondent was a preferred claim against the fund, that the only issue was the amount of such indebtedness, and that the money, though paid wrongfully and in violation of the order of the court, should not be ordered paid back to the present receiver unless and until it was determined upon such reference that there was due respondent out of the fund on its certificate a less amount.

It seems clear from this opinion that the Circuit Court of Appeals (177 Fed. 386) held (1) that the money was wrongfully paid by the original receiver to the respondent, and should for that reason have been restored to the fund in court, except that to do so would be a vain thing, if there was due respondent as much or more out of the same fund; and (2) that the issue as to the amount of such indebtedness to respondent should be determined in the bankrupt cause by a reference to a special master for the purpose of restating the account between the receiver and the respondent, and not in a plenary suit to be brought by the receiver.

If the money was paid by the original receiver in disobedience to the court's order, it was wrongfully paid by him, whether justly owing to the respondent or not. If the payment was made, not only without the authority of the court, but contrary to its instructions to the receiver, it would be competent for the court to order it restored, regardless of the state of account between the parties. The Circuit Court of Appeals did not hold that the court was without authority to order such payment, but that it would be a useless exercise of it until it was determined that the receiver would not, by the state of the account between the parties, be required immediately to repay it to the respondent. The respondent had accepted the payment without knowledge of the court's prohibition upon the receiver of its payment, and was not in contempt in so doing; so that no useful purpose could be served by ordering it to surrender the money to the court, if it was justly entitled to payment of it again. The power of the court to so order it was not only not denied by the Circuit Court of Appeals, but impliedly sustained.

If the power had been exercised, and the money repaid to the receiver, the respondent would have been put to affirmative action to get his certificate paid. Since the court had the power to put the parties in this attitude, and refrained from doing it only because it might have proved useless, if justice, upon a proper accounting, had demanded repayment to respondent, it would be fair to treat the parties as occupying this attitude. In that event, would the respondent have been entitled to sue the receiver upon his certificate in a plenary suit? The certificate was not an absolute promise to pay. It was a promise to pay only from a fund in court in process of administration and subject only to the orders of the court which was administering it. The payment of the certificate in full was conditioned upon the sufficiency of the fund to answer all claims of equal priority. If insufficient to pay all, proportional payment only could be demanded. The court, in whose control the fund was, was alone competent to de-

termine the sufficiency of the fund and the proper proportional payment, if it was insufficient for payment in full. Referring to such certificates, the court, in the case of Turner v. Peoria & Springfield Railroad Company, 95 Ill. 134, 35 Am. Rep. 144, said:

"It usually appears on the face of such instruments by what authority they were issued, and for what specific purpose. Holders thereof will always be chargeable with notice of these facts. Considerations of the highest concern to all parties interested in the trust property make it imperative that the court that charges the fund, through its appointed officer, should have the most vigilant care that the property is not improvidently wasted. *All persons dealing in such securities must know that payment can only be coerced by application to the court having the control of the trust property for an order upon its acting officer.*"

The respondent, if the money had not been paid to it by the receiver wrongfully and without authority, could have coerced payment only by petitioning the court having control of the fund to direct its receiver to make the payment. It had no right to demand a determination of its right to payment in a plenary suit. Its position is in no way improved by the wrongful payment to it. Hence the respondent cannot complain of the jurisdiction of the bankruptcy court to order it restored upon condition that petitioner shows that there was no existing indebtedness to the respondent when it was paid, and to determine for itself in a summary proceeding the issue as to the existence of such indebtedness, as it would have had exclusive jurisdiction to do if no wrongful payment had been made. This is what the Circuit Court of Appeals determined, since it directed the remanding of the cause, with instructions "that it be referred to the special master to restate the account between the bank and the receiver in conformity with these views," and not that a plenary suit be instituted by the receiver against the bank to recover the amount so paid.

The petition prays for a rule upon the respondent to show cause why the money should not be restored to the fund by the respondent. This has the effect of bringing the respondent into court. An answer by the respondent that the fund in the custody of the court was indebted to the respondent in a sum equal to or in excess of the amount paid to it by the former receiver will present the issue as defined by the Circuit Court of Appeals. A reference to the special master to state the account between the receiver and the respondent as to such indebtedness will provide the method indicated by the Circuit Court of Appeals to determine this issue.

No order will be made directing the money to be repaid until there has been a determination of the amount, if any, that was due from the receiver to the respondent when the wrongful payment was made. If the parties agree that the issue can be more conveniently determined by the court without a reference, upon testimony now in the record, the matter may be submitted to the court for decision.

HUBBARD v. WORCESTER ART MUSEUM.

(Circuit Court, D. Massachusetts. June 24, 1910.)

No. 633.

1. CORPORATIONS (§ 434*)—TITLE TO REALTY—AUTHORITY TO ACQUIRE.
Without express statutory authority, a Massachusetts corporation may acquire title to real estate.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1765; Dec. Dig. § 434.*]

2. CORPORATIONS (§ 436*)—REAL ESTATE—MODE OF ACQUIRING—DEVISE—STATUTES.
St. Mass. 1856, c. 215, § 4, provided that educational, charitable, and religious corporations might hold real and personal property to an amount not exceeding $200,000. This amount was increased to $500,000 by St. Mass. 1874, c. 375, § 7, which authorized such corporations to hold real and personal property of that value, and to lease, purchase, or erect suitable buildings for their accommodation, to be devoted to the purposes and objects thereof. *Held*, that such statutes are to be construed as limiting the amount, otherwise unlimited, of real and personal property which may be held by a given corporation, and hence an art museum had authority to take and hold real property by devise.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1772; Dec. Dig. § 436.*]

Writ of entry by Benjamin W. Hubbard against the Worcester Art Museum. Judgment for defendant.

Charles A. Snow and Joseph H. Knight, for plaintiff.
Ropes, Gray & Gorham and T. Hovey Gage, for defendant.

LOWELL, Circuit Judge. Stephen Salisbury died in 1905, and devised the real estate here in question to the Worcester Art Museum, a corporation established in 1896 under Pub. St. Mass. c. 115. At the death of Mr. Salisbury the Museum held about $700,000 of property, real and personal. The real estate devised by Mr. Salisbury to the Art Museum was valued at about $1,200,000. More than $1,800,000 of personal property passed to the Museum under his will. The present action is a writ of entry, brought by one of Mr. Salisbury's heirs and next of kin. It was heard upon an agreed statement of facts. This devise was before the Supreme Court of Massachusetts in Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689.

The demandant's contention is substantially as follows: Without express statutory authority, no corporation in Massachusetts can acquire title to real estate. By Rev. St. 1836, c. 44, § 6, corporations generally were empowered to "hold lands to an amount authorized by law." Whatever right corporations may have had to acquire and hold personal property, no corporation could, in the absence of specific statutory authority, acquire title to real estate. St. Mass. 1856, c. 215, § 4, the earliest statute which dealt with general incorporation for educational, charitable, and religious purposes, provided that:

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

"Such corporations may hold real and personal estate, necessary for the purposes of said organization, to an amount not exceeding two hundred thousand dollars."

This act also gave no authority to any corporation to acquire title to real estate by any conveyance whatsoever. No authority was subsequently derived from St. 1857, c. 56, Gen. St. 1860, c. 32, or St. 1869, c. 276. St. 1874, c. 375, § 7, provided that:

"Such corporations may hold real and personal estate, and may lease, purchase or erect suitable buildings for their accommodation, to an amount not exceeding five hundred thousand dollars, to be devoted to the purposes and objects set forth in their agreement of association, and they may receive and hold in trust, or otherwise, funds received by gift or bequest to be by them devoted to such purposes."

By this statute the demandant admits that a charitable corporation, not specifically authorized thereto, might take title to real estate by conveyance inter vivos, but contends that it could not take title by devise. His contention is that the word "gift" is applicable only to a conveyance inter vivos, and the word "bequest" to a conveyance by will of personal property. The demandant contends that, for the purposes of this suit, the law was not affected by Pub. St. c. 115, § 7, by St. 1897, c. 97, and by Rev. Laws, c. 125, § 2. The demandant therefore contends that the tenant was in 1905 without corporate authority to take title to any real estate by devise, however small the value thereof might be. He further contends that the point decided by Hubbard v. Worcester Art Museum was this: The petitioners there could not be heard to maintain that the Museum was limited in its holdings of property by the amount set out in the General Laws. The demandant contends that the question here raised, viz., that the tenant can take title to no real estate by devise, is raised in this suit for the first time. It seems that the decision made in Hubbard v. Worcester Art Museum could not have been made if the demandant's contention in the case at bar is sound. In other words, the tenant's right here contested was there passed upon and upheld, although the argument here made against it was not urged or considered. But it is not necessary in the case at bar to determine if the matter be res judicata. The demandant's contention is wholly opposed to the statutes of the commonwealth and to its law as established by its authoritative decisions.

In Hubbard v. Worcester Art Museum, the court said, at page 285 of 194 Mass., at page 492 of 80 N. E. (9 L. R. A. [N. S.] 689):

"We start with the inherent right already referred to of every corporation to take and hold property at common law by virtue of the act of its creation. This right is recognized in our statutes by implication without express mention. Rev. Laws, c. 109, §§ 4, 6."

If the meaning of the provision of the Revised Statutes above quoted had been that which the demandant suggests, it would have been self-contradictory. How could a corporation "hold" real estate, if it was forbidden to acquire title thereto? That the right to hold includes some right to acquire is plain. See Rev. St. 1836, c. 36, § 15. And the language of Rev. St. 1836, c. 44, § 6, is that employed in many other statutes, as appears from the references made in the demandant's

brief. The demandant's first contention therefore fails. Without express statutory authority a corporation may acquire title to real estate.

In the case above cited, the Supreme Court said:

"Some judges, in holding that such titles cannot be taken under further wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other." Page 287 of 194 Mass., page 493 of 80 N. E. (9 L. R. A. [N. S.] 689).

It follows, therefore, that the charitable corporations of Massachusetts might always acquire title to real estate by devise, except so far as they were limited by statute. This was the construction put upon the charter of Harvard College granted in 1650, which empowered the corporation to—

"purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements, or hereditaments, within this jurisdiction of the Massachusetts Bay, not exceeding the value of five hundred pounds per annum."

There is here no mention of taking or acquiring title to real estate by devise, yet the power of the corporation to take real estate in this manner was not questioned. Most of the statutes above cited are not to be taken to enlarge the authority of corporations to acquire or hold real estate by conferring upon them authority otherwise nonexistent. Those statutes are to be taken as limiting the amount, otherwise unlimited, of property, real and personal, which may be held by any given corporation. The demandant's contention, therefore, fails altogether. The tenant has corporate authority to take title to the real estate in question by devise, and that authority has been limited only as to the amount fixed by statute. The statute limiting the amount of property that could be held by the corporation (Rev. Laws, c. 125, § 7) could not be taken advantage of by the demandant, but only by the state. Brigham v. Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393. There must be judgment for the tenant.

The course of reasoning above set out and the decision here rendered are not to be taken to decide, or even to suggest, that the demandant's claim of title does not fail also by reason of the other objections made to it by the tenant. The result here reached is in accord with that reached by Judge Colt in Home for Destitute Children v. Peter Bent Brigham Hospital, decided December 29, 1909 (memorandum), although in that case the learned judge did not state his reasons at length.

Judgment for the tenant.

In re MILLS.

(District Court, E. D. New York. June 20, 1910.)

1. BANKRUPTCY (§ 21*)—JURISDICTION—WAIVER.

Where, in a proceeding in bankruptcy against stockholders of a corporation to compel the delivery of their stock to the bankrupt's trustee, on the theory that an exchange of property for the stock by the bankrupt in the first instance was fraudulent, the stockholders, by answering to the merits, waived an objection to the jurisdiction of the bankruptcy court to determine the issue of title to the stock.

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

2. BANKRUPTCY (§ 250*)—ASSETS—TITLE TO CORPORATE STOCK—DETERMINATION.

Where more than four months had elapsed between the date of issuing stock of a corporation and that of filing a petition in bankruptcy against M., who organized the corporation and transferred his property in exchange for stock, a part of which he had transferred to others, and in proceedings against such stockholders to recover the stock for the benefit of his estate in bankruptcy, on the theory that the transfer was originally void as to his creditors, it appeared that one of the alleged owners was an infant and that various other transactions and events were involved in determining the title of the stockholders, the matter should be determined in a plenary suit by the trustee, and not in a summary proceeding in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

In the Matter of Clifford D. Mills, bankrupt. Application of petitioning creditors, directed to various stockholders of a corporation formed by the bankrupt, asking that the stock be turned over to the trustee in bankruptcy as the property of the bankrupt's estate, on the theory that the original transfer by the bankrupt of his property to the corporation in exchange for stock was fraudulent ab initio. Application denied, with leave to trustee to bring a plenary action for such relief.

Lesser Bros. for trustee.
Wingate & Cullen, for People's Trust Company.
Pitney, Hardin & Skinner, for C. D. Mills Baking Co. and others.
William W. Butcher, in pro. per.
Coombs & Wilson, for bankrupt.

CHATFIELD, District Judge. The petitioning creditors previously made application to this court to have certain property, formerly belonging to the bankrupt, but transferred by him to the C. D. Mills Baking Company, a New Jersey corporation, at the time of its organization, turned over to the trustee in bankruptcy as a part of the bankrupt's estate. This motion was denied; the record in the case showing that the property had been in fact transferred to the corporation as a consideration in kind for the capital stock issued by the corporation upon the subscriptions of the original stockholders, and that the greater portion of the stock was taken by Mr. Mills, or disposed of at his direction; the remaining few shares of stock being issued to the attorney for his services in connection with the organization.

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

The decision on that motion was based upon the case of In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, and another application has now been made, directed to the various stockholders and to the corporation, asking that the stock of that corporation be turned over to the trustee in bankruptcy as the property of the bankrupt estate, upon the theory that the original transfer by Mills of his property, in exchange for the stock of the corporation, was fraudulent and void ab initio. To this motion objection has been made by the various parties cited, as well as by the corporation, which still has some of the stock unissued in its treasury, claiming that the court has no jurisdiction to dispose of the issue involved; these parties in their answers claiming title to the stock in question and denying the necessary elements by which fraud could be proven.

Clifford D. Mills, personally, was the holder of 10 shares of stock, which have been turned over to the trustee in bankruptcy. His daughter, Dorothy M. Mills, was made the recipient of 70 shares of stock, issued to Clifford D. Mills as trustee for her; she being an infant. Fifteen shares of stock were issued to one Potter, who had been superintendent for Mr. Mills for a considerable period, and who it is claimed by Mr. Mills had become entitled to some share in the business, which he had aided in building up, as well as being a man whom the corporation needed to keep interested in the business. Five shares of stock were transferred to one William W. Butcher for services, and subsequently sold by him to William H. Agard, who apparently gave a note therefor. This note, in some way, appears to have got into the possession of Mr. Mills, and he has destroyed the note, or has not called for its payment. This accounted for the 100 shares of stock issued by the corporation, referred to in its minutes as "fully paid up" stock, for which cash had been turned in.

The various respondents upon this motion have attempted to appear specially and to interpose only such statements or answers as would form a basis for their pleas that this court has no jurisdiction to determine the title to property in the possession of other parties claiming to be bona fide holders of title. Each of these parties has, however, presented an answer, by which certain facts are admitted, and as to which there can be no controversy, showing the situation as above.

The petition in bankruptcy was filed on the 26th day of August, 1909, and the corporation in question was formed and the shares of stock issued about the 5th day of March, 1909. It is apparent that the property in question is not in the possession of the trustee, and that this court has not jurisdiction to determine these questions of title, upon any theory that the stock is, at present, a part of the estate in the hands of the trustee. Nor do the admitted facts show conclusively a condition of affairs from which fraud must be inferred, and upon which the court or any one considering the transactions could assume the responsibility of concluding that the transactions were void, as has been held in the case of In re Friedman, 161 Fed. 260, 88 C. C. A. 306, affirming Id. (D. C.) 153 Fed. 939.

On the other hand, the actions of Mr. Mills were valid and his transfers unassailable only in case he was solvent at the time, and if

his gift of assets to other parties would not work a fraud upon his creditors. No actual consideration passed either from Dorothy M. Mills nor from Mr. Potter in return for their stock. It was equivalent to a gift, and could not be valid, therefore, in the absence of consideration, unless Mills were in a position to make a gift of the sort in question. The stock issued to the attorney would be in a different class, and the transfer to him valid, if it had been retained. But the subsequent transaction between Mr. Agard and Mr. Mills in reference to the promissory note makes it possible that testimony would prove the transmission of these 5 shares of stock to be lawful only in case Mills had the right to make a transfer thereof without consideration. The 10 shares of stock issued to Mr. Mills himself are not involved, inasmuch as they are a part of his property and have been turned over.

The respondents have appeared specially to question jurisdiction, but have voluntarily filed answers which show the weakness of the claims of title, if Mills was not solvent at the time of transfer, or was rendered insolvent by the transfer. By these answers, the presumptive invalidity of their acquisitions of stock as against creditors, unless they can sustain the burden of proving the right on the part of Mr. Mills to cause the stock to be transferred to them at that time, has been brought to the attention of this court, and they have submitted to its jurisdiction, to the extent of submitting the question of jurisdiction to the determination of this court. But further complication is added by the fact that Dorothy M. Mills is an infant, and must be represented by some one capable of protecting her legal rights, and separated from her father's position as voluntary trustee of the shares of stock for her, while at the same time the bankrupt herein and the person from whom the property in question was acquired by her by gift.

Upon the entire situation it would seem that, inasmuch as more than four months elapsed between the date of issuing the stock in question and that of filing the petition in bankruptcy, inasmuch as various other transactions and many different events must be passed upon in determining whether the title of the holders of the stock is valid, and as that stock is in their possession under a claim of title, the issue should be determined in an action, rather than in a summary way by this court, even though there might be sufficient to hold the summary proceeding in this court upon the facts voluntarily presented by the answers above set forth. The trustee should bring his appropriate action, if the creditors so desire; but in the meantime he should be protected against further transfers of the stock in question, and the parties holding the same will be restrained from transferring or incumbering it, except after application to this court to modify that restraining order.

MARACH v. COLUMBIA BOX CO. et al.

(Circuit Court, E. D. Missouri, E. D. June 15, 1910.)

No. 5,824.

REMOVAL OF CAUSES (§ 49*)—CITIZENSHIP—SEPARABLE CONTROVERSY.

Plaintiff alleged the death of her decedent while working in the mill of defendant box company, a foreign corporation, owing to the latter's failure to provide a reasonably safe place for plaintiff to work, in that such company was required, but failed, to provide a guarded platform over its shaving pit, where plaintiff was required to go to open the pipes leading into it, and that while performing such work, and using a defective stick provided by defendant, deceased fell from the platform by reason of its unguarded condition, and lost his life. The petition alleged, also, that defendant K., a resident of the same state as plaintiff, was negligent in failing to inspect the place and appliances, and discover and report any defects found therein to defendant company. *Held*, that the box company and defendant K. were not jointly liable, but that there was a separable controversy between plaintiff and the box company, which was removable to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 49.*

Separable controversy as ground for removal of cause, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

Action by Mary Marach against the Columbia Box Company and another. On motion to remand. Denied.

John C. Robertson, for plaintiff.

Watts, Williams & Dines and Wm. R. Gentry, for defendants.

DYER, District Judge. The motion to remand in this case is based upon the proposition that the controversy is not wholly between citizens of different states. This raises the question as to whether the plaintiff has a joint cause of action against the two defendants. This must be determined by the averments in the plaintiff's petition.

The plaintiff is the widow of the deceased, who came to his death, it is alleged, by the negligence of the box company in failing to provide a reasonably safe place for the deceased to work in; that it "provided a short platform, consisting of boards placed upon girders; that said platform is about one foot or more wide and about six feet long; that said boards were on the day aforesaid not properly fastened, and said platform was wholly unguarded with a rail or fence, or anything whatever, for the protection of the person standing and working thereon"; that the box company was further negligent in failing to provide its system of "blowpipes" with proper and reasonably safe "shut-offs," and in providing a stick that was short and of rotten material, and not a reasonably safe appliance, and in maintaining and operating a system of "blowpipes" that were not safe, and the system was old, inadequate, and unsafe. The petition states that on the 28th day of July, 1909, the plaintiff was at work in a reasonably safe place in said factory, and that he was ordered and directed by the foreman of the defendant to go into the shavings pit and open up the pipes etc., and that such were

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

not his usual and ordinary duties in and about said factory; that while performing the work directed to him, and while standing upon said platform and using the stick so provided by defendant, and while standing upon said platform, which was on said day covered with shavings, the deceased fell from said platform by reason of its unguarded and unfenced condition, and by reason of his unsteady foundation on said platform, into the pit and lost his life.

It clearly appears from this petition that the plaintiff lost his life by falling from a platform which was unsafe for the purposes for which it was used, and that this platform had been erected there by the box company. The only allegation in the petition which tends in any way to make Krueger, the superintendent, responsible, is this: That he was—

"charged with the duty, among others, of providing and inspecting the place in which the deceased had to work, and the appliances with which he had to work; that said defendant Martin L. Krueger had entered upon the discharge of this among his other duties; and that said defendant Martin L. Krueger negligently failed to perform his duty of providing and continually inspecting the place where deceased had to work, and the appliances with which he had to work, and that by reason of his said negligence in this behalf, he is jointly liable," etc.

The duty of the master, to wit, the box company, to the deceased, to provide a reasonably safe place for men to work, is not to be questioned. The duty of Krueger, under his employment by the box company, was to inspect these places, and supposedly, if any defect was discovered, to report the same to the master. The failure to perform the duty imposed upon him by the master neither excused the master from providing a reasonably safe place for the deceased to work in, nor does it establish in any wise a joint liability of a master and servant to the plaintiff. If Krueger, superintendent for the defendant, was guilty of any negligence whatever, that negligence of the servant might be assigned as a cause of action against the master.

In my judgment the case was properly removed to this court, and the motion to remand will be denied.

In re ROBERT GREENBERG & BRO.

(District Court, E. D. New York. May 25, 1910.)

BANKRUPTCY (§ 136*)—ASSETS—CONCEALMENT.

Facts *held* insufficient to explain a loss of assets by a bankrupt, and to justify the referee's order requiring the payment of a specified sum to the trustee as his assets.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of Robert Greenberg & Bro., bankrupts. On petition to review the referee's order requiring the bankrupts to turn over to the trustee concealed assets. Affirmed.

Nathaniel Tonkin, for bankrupts.

James, Schell & Elkus (Robert P. Levis, of counsel), for trustee.

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

CHATFIELD, District Judge. The referee, as special commissioner, reports that the bankrupts should turn over the sum of $2,022.89, which they have concealed and failed to account for, to the trustee. The property admitted by them to have been in their possession, over and above all liabilities, on the 1st day of March, 1908, amounted to $11,437.50, which, with the excess of liabilities over assets, as shown by the schedules, viz., $17,457.08, makes a total of $28,894.58 to be charged against the bankrupts. They are credited by the referee with certain items presented in the testimony to account for those sums. He accepts as credible the loss of $3,400 in conducting a store in Cortlandt street, New York, $13,934.09 on individual sales throughout their general business during the period in question, and $1,000, a wedding present given by Robert Greenberg to his sister (which he says represented money that she had earned in connection with the business), and other items, including the stock on hand at the time of bankruptcy.

The bankrupts also allege that the testimony shows, beyond the amounts credited by the referee, $500 expenses of the sister's wedding, $200 more estimated as lost in the Cortlandt street store, $1,031 paid to one Fox, who had been nominally a partner, $300 for business expenses during a period of three weeks not included by the referee, $200 more from losses on bad debts, and $462.40 additional, estimated value of stock; the referee having credited them in each instance with the minimum, instead of the maximum, as estimated by the bankrupts. These items, added together, would more than equal the amount of the deficit as found by the referee.

If any items are to be allowed at all, and if such ridiculous testimony as was given by these bankrupts in estimating their business losses is to be believed, there would seem to be no reason for disputing the statements of the bankrupts as to when they made the payments in question, and their maximum estimates of loss should be used, rather than the minimum estimates thereof.

It is impossible to explain the loss of goods in such wholesale manner, and such large items by ordinary expenses and mere shrinkage of business between March 1st and November 5th of the same year. Either the goods of the firm were secreted and disposed of in large quantities, or the firm had no such stock as they claimed when they attempted to show a surplus of over $11,000 in March, 1908. But, even if that be granted them, their business from that time until November shows no such depreciation as would cause a shrinkage to a point where their liabilities exceeded their assets by over $14,000; and if any satisfactory method of tracing the property, or of picking out the amount of assets which the bankrupts have not satisfactorily explained, had been presented, there would be abundant testimony upon which to base the referee's report.

Inasmuch, however, as the referee has found in favor of the bankrupts upon all the items of testimony, with the exception of the small ones above mentioned, and as he refuses to believe the same sort of statements as those previously made by them, it is difficult to see how he reached such a conclusion. Upon the entire matter, the

court has no hesitation in directing that the bankrupts turn over to the trustee in bankruptcy whatever property they have in their control or which they have secreted from the trustee, and to hold that (judged from their attempted explanation) this property amounts to much more than the sum named by the referee.

Hence an order may be entered directing the bankrupts, upon this report, to repay that amount, or be punished if they fail so to do.

MOXIE NERVE FOOD CO. OF NEW ENGLAND v. MODOX CO. et al.

In re THATCHER.

(Circuit Court, D. Rhode Island. March 13, 1908.)

No. 2,709.

PARTIES (§ 40*)—INTERVENTION—SUIT FOR UNFAIR COMPETITION.

In a suit for unfair competition in trade, consisting in part of the use by defendant of bottles for its product alleged to be similar in design to complainant's and calculated to deceive purchasers, the fact that the bottles used by defendant are of a patented design does not give the manufacturer and patentee any legal or equitable interest in the suit which entitles him to intervene.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 40.*]

In Equity. Suit by the Moxie Nerve Food Company of New England against the Modox Company and others. On demurrer to petition of Frederick B. Thatcher for leave to intervene and defend. Demurrer sustained.

See, also, 162 Fed. 649, 89 C. C. A. 441.

Roberts & Mitchell and Robert I. Cushman, for complainants.

Charles A. Wilson and George H. Huddy, Jr., for respondents.

BROWN, District Judge. The petitioner, a manufacturer of bottles upon which he holds a design patent, seeks to intervene and become a party defendant to the controversy between the Moxie Company and the Modox Company, which relates to unfair competition in trade and to imitation of complainant's trade dress. Upon this issue it is immaterial whether the bottles used as a part of the trade dress are patented or unpatented. While it may be true that an injunction against the Modox Company will deprive the petitioner of a customer for his bottles, he cannot be said to have any legal interest in the question whether the defendants are using these bottles as an instrument of deception.

Even if there are such differences between the bottles of the complainant and those manufactured and sold by the petitioner to the Modox Company as to make his bottles a proper subject of a design patent, yet, despite these differences, there is such a substantial gen-

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

eral resemblance as to make the patented bottles susceptible of use in connection with unlawful sales. Neither as a manufacturer nor patentee of glass bottles can the patentee confer upon the Modox Company any rights of imitation of complainant's goods. It would, moreover, be idle to inject into this case a controversy between the Moxie Company and this petitioner over the validity of a design patent upon the Modox bottle. As patentee, the petitioner stands no better than as a mere manufacturer or seller of glass bottles; and if he should be permitted to intervene, it would seem to follow, also, that all those who supply the Modox Company with parts of its package—the printers of labels, the vendors of caramel for coloring the contents of the bottles, etc.—would have a similar right to intervene on the ground of the threatened loss of a customer by an injunction against the Modox Company.

Whether the business of the Modox Company is legitimate, or an invasion of the rights of the Moxie Company, is a question solely of private right between the parties to this suit. The validity of the petitioner's patent is not involved; and the possibility or probability that the Modox Company, if not enjoined, may continue to purchase his bottles for use in the particular way which the complainant seeks to enjoin, gives him neither a legal nor equitable interest in the present controversy. No authority is cited which in any degree tends to support this position, and it seems contrary to principle.

The demurrer to the petition for leave to intervene is sustained.

SOUTH MEMPHIS LAND CO. v. McLEAN HARDWOOD LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

1. CONTRACTS (§ 280*)—CONSTRUCTION—CONTRACT TO PROVIDE RAILROAD CONNECTIONS TO MANUFACTURING PLANT.

Plaintiff purchased from defendant land company a site for a large lumber manufacturing plant, but took a contract from defendant, stating that its covenants and undertakings were a part of the consideration for the payment of the purchase price of the site, which recited that "in order to operate said plant certain railroad and transportation facilities * * * are necessary and are guaranteed by the party of the first part (defendant)." Defendant further bound itself, inter alia, that "the Union Railway Company will by * * * erect a spur track from its line on Railroad avenue to the sawmill." The railway company had no line on Railroad avenue, but one was contemplated. *Held*, that the obvious purpose of such provisions was to secure to plaintiff a track connection with the lines of the Union Railway Company, which was a belt line company, and that defendant's guaranty was not conditioned on the building of a line by the railway company on Railroad avenue, nor was it fulfilled by the building of a track from the mill to such avenue without any connection with the lines of the railway company.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 280.*]

2. CONTRACTS (§ 303*)—ACTIONS FOR BREACH—DEFENSES—VIS MAJOR.

That a court had granted a temporary injunction restraining the Union Railway Company from crossing the tracks of another company at grade, which injunction had remained in force for three years without a trial of the case, and because of which the line on Railroad avenue had not been built, did not constitute such vis major as to relieve defendant from liability for nonperformance of its contract; it not appearing that it was impossible to build the line without making such grade crossing.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.*]

3. DAMAGES (§ 120*)—MEASURE FOR BREACH OF CONTRACT—EVIDENCE.

Where the vendor of a site for a lumber mill as a part of the consideration for the purchase price contracted to furnish to the plant certain track connections with lines of railroad, the difference between the value of the plant as constructed with and without such connections may fairly be taken as the measure of damages for breach of such contract contemplated by the parties; but the jury should have been instructed, in estimating the present value of the plant, to take into account the contingency of the plaintiff's being able, independently of the defendant's agency, to obtain the track connections.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 120.*]

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

Action by the McLean Hardwood Lumber Company against the South Memphis Land Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error brought this suit for the recovery of damages by reason of the failure of the plaintiff in error to perform its agreement to furnish certain switching facilities. Upon a jury trial plaintiff recovered verdict and judgment for $15,000. There were motions for new trial and in arrest of judgment, both of which were overruled. The facts are these:

Before and at the time of the making of the contract in question the defendant was the owner of a large tract of land, for the most part undeveloped, adjoining the city of Memphis, Tenn., which it was desirous of developing, and on which it wished to secure the location of factories and industries gen-

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

erally. W. A. McLean, an officer of the Hugh McLean Lumber Company, which operated in the state of New York and perhaps elsewhere, went, in the early summer of 1905, to Memphis, and there opened negotiations with defendant respecting the purchase of a site for a large lumber manufacturing plant then in contemplation. The site which was made the subject of negotiation was at this time without any immediate railroad facilities, not being on or connected with a railroad, and thus was unsuited to McLean's requirements, which, as communicated to defendant, included switching facilities to all the railroads in Memphis. The tracks of the Illinois Central Railroad and the Yazoo & Mississippi Valley Railroad (the latter being under Illinois Central management) passed through the defendant's lands. The Illinois Central also operated a belt line for switching cars to its own and other railroads in Memphis. The Union Railway Company, exclusively a belt line, was projecting its road towards defendant's lands. McLean insisted that in the event of his purchase of the site in question he be furnished with both the Illinois Central and the Union Railway Company switching facilities. Defendant negotiated a contract with the Union Railway Company that the latter should construct its main track upon defendant's land, including the locating of the line upon "Railroad Avenue," so-called, and should construct spur tracks from the main line "to any industry that may be located on the said tract of land of (South Memphis) Land Company, upon the request of the land company, provided the business to be obtained by the railway company by the construction of such spur tracks will be sufficient in the opinion of the managing officer of said railway company," and on August 3, 1905, conveyed to McLean the 10-acre site in question upon a consideration of $5,000, of which $500 was paid down, the balance being secured by reservation of vendor's lien. Concurrently with the delivery of this deed, the parties entered into a written agreement whereby, for a consideration of $5 paid by McLean to defendant "and of the consideration paid for" the 10-acre site in question, "the said South Memphis Land Company for itself, its successors and assigns, covenants and agrees with the said William A. McLean, his heirs and assigns, as follows:

"The said Wm. A. McLean expects to convey the said ten acres of land to a corporation known as the Hugh McLean Lumber Company, which will establish a branch in Tennessee after duly complying with Tennessee laws, and said Hugh McLean Lumber Company expects to use said ten acres of land as a site for its sawmill and lumber yards. In order to operate said plant certain railroad and transportation facilities and street improvements are necessary, and are guaranteed by the party of the first part as follows: (1) That the Illinois Central Railroad Company or the Y. & M. V. Railroad Company will, within sixty (60) days from this date construct necessary side track from its main line or from line on Railroad avenue, to the sawmill to be erected by the second party or his assigns. (2) That the Union Railway Company will, by February 1, 1906, erect a spur track from its line on Railroad avenue to the sawmill to be erected by the second party or his assigns. To enter yard of the second party at or near southeast corner of the ten-acre tract, and to continue north to the north boundary of said ten-acre tract. (3) The first party will cause Mallory avenue to be graded and graveled from Florida avenue to the Y. & M. V. Railroad within sixty (60) days from this date.

"The covenants and undertakings of the first party in and by this agreement made and entered into are a part of the consideration moving from the second to the first party, paid upon the execution and delivery of said warranty deed to said ten acres of land, and run with that land to any company hereafter operating a sawmill plant thereon."

Instead of establishing in Tennessee a branch of the Hugh McLean Lumber Company, the plaintiff company was organized November 18, 1905 (which McLean testified "was the Hugh McLean Lumber Company"), to take over the site. The plaintiff company immediately began the erection upon the site of a large lumber manufacturing plant, completed the same (at a cost of about $100,000), and began the operation thereof in the latter part of April or early part of May, 1906; plaintiff's total investment in and connected with the business done at the plant being about $250,000. The date of the conveyance of the site from McLean to the plaintiff is not shown in the record, although the acknowledgment there given bears date of December 17, 1906. The construc-

tion of the Illinois Central (or Yazoo & Mississippi Valley) side track to plaintiff's mill, as well as the grading and graveling of Mallory avenue, were done as provided by the contract. The Union Railway Company constructed its line up to the right of way of the Illinois Central Railroad Company, and was preparing to cross the tracks of that company and enter upon Railroad avenue when, upon bill filed by the latter company in the court below, it was on January 20, 1906, restrained, and on February 6, 1906, temporarily enjoined "from crossing or attempting to cross with railroad tracks the track of complainant with the same grade or level as the tracks of complainant at said point described in the bill until further order of this court." The injunction was never dissolved, and, so far as shown by the record, the injunction suit has not been tried. The crossing has never been made, the tracks of the Union Railway Company have never been built on Railroad avenue, and no switch has been constructed from plaintiff's plant to the tracks of the Union Railway Company. As early as April 3, 1906, plaintiff began complaining of defendant's failure to furnish the agreed switching facilities, and on March 11, 1907, proceedings were threatened unless within 30 days the Union Railway Company's switch should be furnished. Nothing resulting from this threat, this suit was begun May 8, 1907. The trial was begun December 4, 1908. Upon the trial the court construed the contract in suit as obligating defendant to furnish an actual switch connection with the Union Railway Company, holding that the existence of the temporary injunction did not excuse defendant from liability to the plaintiff for failure to furnish the connection; submitted to the jury the question of plaintiff's alleged waiver and defendant's breach, and ruled that the measure of damages was the difference between the respective values of the plant with and without such switching connection. The jury fixed the date of the breach as February 1, 1906.

L. E. Wright, for plaintiff in error.
W. E. Percy, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). The question which first demands attention relates to the construction of the guaranty on which the suit is brought. Defendant contends that its guaranty was only that the Union Railway Company should construct a spur track from plaintiff's mill to a track on Railroad avenue, which the parties then contemplated the railway company would construct; that defendant's undertaking did not extend to a guaranty that the spur track should connect with any track in Railroad avenue; or, in still other words, that the guaranty was conditioned upon the railway company building a track in Railroad avenue. It is apparent that, if this construction is correct, plaintiff should not have been permitted to recover; for there has been no track in Railroad avenue from which a spur could be built, and, moreover, it is clear that plaintiff could not have been damaged by the failure to construct a switch to Railroad avenue unless connection was thereby obtained with the railroad. In our opinion, the construction contended for by defendant cannot be sustained. Such construction does violence, in our judgment, to the express language of the contract, especially in the light of the circumstances under which the guaranty was made. McLean had insisted that in the event of his purchase of the site he be furnished connection with the Union Railway Company. The record leaves no room for doubt that McLean would not have bought

the site but for the expectation and understanding that he was to have the Union Railway Company connection, and that the defendant knew it. The contract in question recites that "in order to operate said plant certain railroad and transportation facilities, and street improvements are necessary, and are guaranteed by the party of the first part." The contract further provides that the covenants and undertakings of the defendant are a part of the consideration for the payment of the purchase price of the site. A track laid from the mill with no connection with the railroad would not furnish a "railroad facility" or a "transportation facility." The guaranty in question is in terms that the railway company will "erect a spur track from its line on Railroad avenue to the sawmill to be erected by the second party or his assigns." To characterize as a "spur track" a track extending from the mill but without other connection would be a solecism in language. The very term "spur track" implies that it extends from another track. Construed as a guaranty that the track in question would connect with a railroad track on Railroad avenue, the contract is entirely reasonable, and in harmony with the intention of the parties as manifested by the surrounding circumstances. A construction that the obligation to build the spur track was conditional upon the railroad being laid in Railroad avenue is, to our minds, unreasonable. The record cannot be read without a clear conviction that if the defendant had proposed in terms to limit its guaranty to the contingency of a track being laid by the railway company in Railroad avenue the purchase would not have been made. The construction adopted by the trial court, and which we approve, is, moreover, in accord with the practical construction placed upon it by the parties.

It is urged by the defendant that the issuing of the injunction forbidding the Union Railway Company to cross the Illinois Central tracks at grade rendered defendant's guaranty impossible of performance, and was thus a complete defense to plaintiff's action. It is also insisted that as the proof showed that the Union Railway Company was seeking to enter upon Railroad avenue, and was ready and willing, on being permitted so to do, to give plaintiff the spur connection guaranteed by defendant, the jury should have been instructed that the failure to furnish the spur was temporary only. This suggestion last referred to is answered by the consideration that while it may be, as contended, that under the law of Tennessee the Union Railway Company had the right to make the desired crossing of the Illinois Central tracks, and that thus the injunction could not be permanently sustained, yet the injunction had existed for nearly three years before the trial, and, so far as the record shows, without the injunction suit having been brought on for hearing; and while the defendant could not control that situation and was not morally responsible for it, yet so far as the plaintiff was concerned it was a fact which it had to meet. Did the issuing and continuance of the injunction constitute such vis major as to amount to impossibility of performance within the law? As said in Dermott v. Jones, 2 Wall. 1, 7 (17 L. Ed. 762):

"It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him"—

and as expressed in The Harriman, 9 Wall., at page 172 (19 L. Ed. 629), quoted in Jacksonville, etc., Ry. Co. v. Hooper, 160 U. S. at page 527, 16 Sup. Ct., page 384 (40 L. Ed. 515):

"The principle deducible from the authorities is that, if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

See, also, Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 466, 25 Sup. Ct. 84, 49 L. Ed. 269; Lima Locomotive & Mach. Co. v. National Steel Castings Co. (C. C. A., 6th Circuit) 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713.

It is clear that, unless the issuing of the injunction is to be regarded as an act of the law, the injunction, even if an absolute prohibition against the crossing of the Illinois Central tracks, would not excuse the breach of the guaranty. There is no doubt that a legal impossibility arising from a change in the law of the country exonerates the promisor. Clark on Contracts, p. 681; Dermott v. Jones, supra. There is highly respectable authority for the proposition that judicial process, order, or decree may constitute such vis major as to relieve a party from an otherwise absolute obligation. Bishop on Contracts, § 607; People v. Globe Mutual Life Ins. Co., 91 N. Y. 174; Malcomson v. Wappoo Mills (C. C.) 88 Fed. 680; Kansas Union Life Ins. Co. v. Burman (C. C. A., 8th Circuit), 141 Fed. 835, 73 C. C. A. 69; Burkhardt v. Georgia School Tp., 9 S. D. 315, 69 N. W. 16. On the other hand, there is excellent authority for the proposition that an injunction in a suit by a third party furnishes no excuse for nonperformance of an express contract. Page on Contracts, § 1734; Union Co. v. Campbell, 2 Cal. App. 535, 84 Pac. 305; Wilkinson v. First National Fire Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166; Spader v. Mural Decoration Manf'g Co., 47 N. J. Eq. 18, 20 Atl. 378. In the view we take of the case, we do not find it necessary to determine what the effect of the injunction would have been had it absolutely forbidden the entering of the Union Railway line upon Railroad avenue. The injunction did not have that effect. At the most it forbade the Union Railway Company crossing the Illinois Central tracks at grade. It did not forbid entering upon Railroad avenue in any other manner. The defendant did not definitely offer to show that it was impossible for the Union Railway Company to reach Railroad avenue, and thus to make connection with plaintiff's plant, otherwise than by crossing the Illinois Central tracks at grade. The offered testimony (so far as material here) was merely that if "he (the witness) would put a crossing there underneath—an under

crossing, or a subway crossing—that it would prevent the surveys (service?) to many of the factories which are there in South Memphis, and which this company (the Union Railway) would like to reach." This amounts, at most, to a proposition that the crossing of the tracks otherwise than at grade would be difficult and expensive, as well as unsatisfactory and undesirable to the railway company. But difficulty or expensiveness of construction is not a defense to an action for breach of a positive guaranty. Passing, therefore, the question of whether the defendant should not be held, in view of the express nature of its guaranty (in connection with the provision in its contract with the Union Railway Company relative to injunction) to have contemplated the possibility of injunction, and to have intentionally guaranteed against it, we have no hesitancy in holding that the injunction as issued did not constitute a legal defense to plaintiff's action.

The defendant's final contention is that the measure of damages adopted by the trial court, viz., the difference between the respective values of the plant with and without the guaranteed connection, is erroneous, in that such damages are remote, uncertain and speculative, and cannot fairly be said to have been within the contemplation of the parties. Defendant insists that, at the most, plaintiff can recover only what it would have cost it to build the spur track. If we have rightly construed the guaranty as requiring connection with a railroad in Railroad avenue, manifestly the measure of damages suggested by defendant is not the proper one. In our opinion the criticism that the damages permitted to be recovered, viz., the lessened value of the plant through the loss of the railway connection, cannot fairly be said to have been within the contemplation of the parties to the guaranty, as likely to result from its breach, is not justified under the facts presented. The guaranty was of a facility deemed by the parties necessary to the beneficial operation of the plant. The site was bought and sold for the express purpose of the operation of such plant. The guaranty was expressly stated to be a part of the consideration for the purchase. The lessened value of the plant may thus well be held to have been within the contemplation of the parties as the damage likely to result directly from a breach of the guaranty, In this connection, specific complaint is made that the court admitted evidence that the lumber company had purchased large quantities of logs along the line of the Yazoo & Mississippi Valley Railroad Company, and which logs were either badly damaged or became a total loss by reason of the inability of the lumber company to get cars. It is urged that the connection with the Union Railway Company could not have facilitated the handling of the logs in question. There was testimony that at times plaintiff was unable to get loaded cars in the Illinois Central yards delivered to its plant because of inadequate switching service on the part of the Illinois Central; also, that in times of car shortage other roads were loth to furnish cars because of fear that they would be kept by the Illinois Central. We cannot say that this condition may not have interfered with plain-

tiff's ability to get cars to promptly bring in the logs. Moreover, this testimony was admitted not as the basis for a recovery of specific damages for this special alleged loss, but by way of actual experience as bearing upon the subject of the lessened value of the plant. Was the testimony of such lessened value speculative? The evidence most relied upon by the plaintiff as to the value of the plant with the railroad connection in question, and with which the value without the connection was compared for the purpose of ascertaining the resulting damage, was that the plant would be fully worth, with the connection, all it cost. Testimony of this nature does not impress us as necessarily speculative when applied to a lumber manufacturing plant adjacent to a prosperous city, having good railway connections, and with a large and heavily timbered territory tributary to it. At the time of the trial the plant had been in operation for nearly three years without the railway connection in question. Its value, shown by actual use during that period, was not more highly speculative than testimony usually given of the value of real estate. An important question in this connection is whether there was testimony fairly tending to attribute the lessened value to the lack of the railroad facility. There was testimony tending to show that during nearly three seasons of operation there had been insufficient railroad facilities, resulting in an inability to get logs, through failure in many cases to get switching promptly done, and that thus logs spoiled in the woods; that plaintiff had to stop buying logs; that the mill was thus not only unable to run full hours, but at times was compelled to shut down entirely. There was testimony tending to show that these conditions were traceable, to a greater or less extent, to the lack of the Union Railway connection, and especially to the lack of competition with the Illinois Central Railroad. While it could not be demonstrated, with mathematical certainty, that the conditions referred to resulted from the lack of the Union Railway connection, we cannot say that the testimony did not furnish a reasonable basis for determining the injury resulting from the lack of that connection. See 4 Elliott on Railroads, § 1799; Montana Ry. Co. v. Warren, 137 U. S. 352, 11 Sup. Ct. 96, 34 L. Ed. 681. The following cases are authority for the proposition that the measure of damages for failure to contruct a depot or other railroad facility is the difference between what the real estate to which the facility was to have been given would be worth had the facility been furnished and its value without such facility. Watterson v. Alleghany Valley R. R. Co., 74 Pa. 208; Mobile & Montgomery Ry. Co. v. Gilmer, 85 Ala. 422, 5 South. 138; Blagen v. Thompson, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315; Belt v. Washington Water Power Co., 24 Wash. 387, 64 Pac. 525; Houston & Texas Central Ry. Co. v. Molloy, 64 Tex. 607.

It is, however, insisted by defendant that the case of Eckington, etc., Ry. Co. v. McDevitt, 191 U. S. 103, 24 Sup. Ct. 36, 48 L. Ed. 112, is expressly opposed to the rule of damages adopted in this case. In the McDevitt Case plaintiff had conveyed to the street railway company a right of way across her land and had agreed to pay

a certain sum of money, in consideration of which the railway company had agreed to extend its road over the right of way granted, and that after such extension should be completed and open for traffic, cars should be run at stated intervals and during certain hours, but without provision for such operation during any designated period. The extension was made and operated for several years, when it was abandoned because not profitable, and on account of doubts as to the right to so operate without congressional authority. The plaintiff's demand that the railway company take up its tracks and restore possession of the right of way was complied with, and plaintiff was relieved from paying the money consideration provided for. The trial court instructed the jury that the measure of damages was the excess, if any, in the market value of the land at the time the railway company entirely ceased to run its cars, with the cars running in accordance with the terms of the contract, and the expectation of their continuing to so run in the future, over the market value of the same land at the same time without any cars running on the same, and without any expectation that they would ever run thereon. As said by Chief Justice Fuller:

"The instruction was addressed to differences in market value as affected by the running of the cars, with the element added of expectation of continuance or cessation for all time. As thus put the supposed difference in market values amounted to anticipated profits, and thus were not recoverable if dependent on uncertain and changing contingencies, and not in the contemplation of both parties as a probable consequence of the breach. Howard v. Stillwell & Bierce Manf'g Co., 139 U. S. 199 [11 Sup. Ct. 500, 35 L. Ed. 147]; Globe Refining Co. v. Landa Cotton Co., 190 U. S. 540 [23 Sup. Ct. 754, 47 L. Ed. 1171]."

And again, with reference to the claim of right of recovery upon the basis of future values, Justice Fuller said:

"What might have been made by selling the land at a value enhanced by the operation of the tracks in perpetuity was purely problematical, and not naturally in contemplation. And the more so in view of the fact that railroad companies, while private corporations, are quasi public, engaged in the performance of public duties, and that contracts which prevent them from the discharge of those duties cannot be sustained. It did not follow that the company, because it possessed the power to construct and operate this extension, could contract to operate it forever in so absolute a sense that damages could be awarded for the breach of such a contract predicated on the expectation of its perpetual operation. Texas & Pacific Railway Co. v. Marshall, 136 U. S. 393 [10 Sup. Ct. 846, 34 L. Ed. 385]."

Several cases are cited in the opinion in the McDevitt Case as illustrative of the uncertainties which may defeat recovery of anticipated profits. Neither the McDevitt Case, nor any of the cases cited therein, contains the element found here, viz., a damage to the real estate with respect to the very use and purpose for which it was sold, and for the direct and immediate benefit of which, as respects such use, the guaranty was made. Moreover, the damages sought here are rather in the nature of losses incurred than of gains prevented. As applied to the facts of this case, we think that, generally stated, the measure of plaintiff's damage was the difference between the respective values of the plant with and without the guaranteed connec-

tion. It follows from what we have said that the court did not err in refusing to direct a verdict for defendant.

It is clear, however, upon the authority of the McDevitt Case, that if in this case the jury were instructed expressly or by fair implication that they should assess plaintiff's damages upon the assumption that plaintiff would never get the Union Railway connection the judgment must be reversed. The language used by the court was that "the measure of damages, if any, is the difference between the market value of the plant of the plaintiff, in its condition at the date of the breach of the contract, and what its market value would have been at the same date if the switching connection guaranteed by the defendant had been furnished"; and again, "What was the market value at that time, situated as it was? What does the proof show its market value would have been at that time if the connecting had been made?" Following this query, the court said:

"How are you to arrive at that? Testimony has been introduced in which witnesses state that the property situated as it was and is would have been and is worth fifty thousand dollars; with the connection that was contracted for under this agreement it would have been worth one hundred thousand dollars. Some said it was worth seventy-five and some said one hundred thousand dollars as it is, and much more, 30 per cent more if it had the connection. You will remember how these facts are. But that is the opinion of these witnesses, and it goes to you as circumstances, together with all the other proof, to enable you to determine for yourselves, under all the proof, what the damage is, if any, to that property, and the jury will, for themselves, determine, from the proof, together with the opinions of these witnesses, what the damage was, if any."

Did this instruction, either expressly or by fair implication, direct the jury to assume, in measuring the plaintiff's damages, that the plant would never obtain the switching connection in question? Considering the instruction in connection with the plaintiff's testimony as to the amount and nature of the damages claimed to have been suffered, and with what occurred in connection with the reception of such testimony, and in view of the fact that the instruction in question was nowhere qualified, we think the jury might naturally infer that the present value of the plant should be determined on the basis that the plaintiff would never get the Union Railway connection. To the proffered testimony of the respective values of the plant with and without the belt line facility, the defendant objected that such difference was not the measure of the plaintiff's damage, urging in support of such objection that plaintiff was endeavoring to show damages for all time; that, however, if the injunction should be dissolved there was reasonable expectation that the switching facility in question would be promptly furnished; and that the value of the plant thereafter would not be affected by the previous lack of this facility. The trial judge does not seem at this time to have finally determined what measure of damages would be ultimately adopted. The objection referred to was overruled, with the statement that the testimony might be later withdrawn from the jury. Later, a witness as to the lessened value of the plant through the lack of the switching connection stated, in answer to a question by the court, that if the

Union Railway should soon build the connection that would restore the value of the property "from the present time on"; and that "if we had it there to-day, it would be the same as if it was put in there some time ago, barring the inconvenience." Still later, the court, in admitting testimony of the rental value of the plant with and without the guaranteed connection, told the jury that the testimony was admitted not to fix the amount of damages, but to enable them to determine "the value of the property as it is and the value as it would be if it had this connection"; again propounding to the witness the question—"What would be the reasonably fair valuation of the property if it had this additional connection as provided for in the contract?" To this question the witness answered that with the switching connection in question the plant would be worth $100,000, that he "would be willing to take $50,000 for it to-day," stating on further cross-examination, "If I thought we couldn't get that switch in there finally, I would take $40,000 for it." We do not think it was the duty of the court to instruct the jury to take into account the contingency of defendant's ultimate compliance with its guaranty, for the reason that the plaintiff was suing for, and was allowed to recover, damages once for all, and the judgment would thus effectually relieve defendant from further liability under its guaranty. But in view of the state of the record to which we have called attention, it was, in our opinion, the duty of the court to instruct the jury to take into account the contingency of the plaintiff's being able, independently of the defendant's agency, to obtain the desired connection; and in view of what had taken place upon the trial, the jury may well have been misled by the charge of the court into an understanding that they were to take into account the value of the plant as perpetually deprived of the Union Railway facility. This consideration constrains us to a reversal of the judgment.

We have considered the remaining assignments presented, but, in view of the conclusions we have reached, do not find it necessary to discuss them, beyond saying that we discover no error in the record except, as above pointed out, in the charge upon the measure of damages. For this error, the judgment must be reversed, and a new trial ordered.

BERRY et al. v. CHASE et al.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,024.

1. PRINCIPAL AND AGENT (§ 145*)—UNDISCLOSED PRINCIPAL—ELECTION OF REMEDIES.

While any decisive act by a party after knowledge of his rights and of the facts determines his election in the case of inconsistent remedies, yet an act to have the effect of election must be decisive, and the assignment of a claim against an agent, with an express authorization of suit against any undisclosed principal, although the assignor had knowledge

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

of a principal originally undisclosed, does not amount to an election to look to either the agent or principal to the exclusion of the other.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 499; Dec. Dig. § 145.*]

2. PRINCIPAL AND AGENT (§ 145*)—UNDISCLOSED PRINCIPAL—RIGHT OF ELECTION.

Where a plaintiff had the right of election between suing an agent and a principal, originally undisclosed, a delay of a few months after knowledge of the principal before bringing suit against him *held* not so unreasonable as to bar the right of election, where it did not appear that defendant was prejudiced by such delay.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 499; Dec. Dig. § 145.*

Election of remedies against undisclosed principal or agent, see note to Berry v. Chase, 77 C. C. A. 166.]

3. ASSIGNMENTS (§ 80*)—INCIDENTS.

The owner of a debt upon which he had the right to sue a principal or his agent through whom the debt was contracted, the principal being then undisclosed, in assigning the debt may also transfer to the assignee such right of election.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 147; Dec. Dig. § 80.*]

4. PRINCIPAL AND AGENT (§ 190*)—ACTION—EVIDENCE.

A firm of brokers *held* justified, under the circumstances testified to, in carrying out the orders of agents, of whom defendant was the undisclosed principal, by buying stock on the New York Stock Exchange to cover a short sale after defendant had failed to comply with a demand for more margins.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 190.*]

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

Action by Jacob Berry and Harold L. Bennett, copartners as Jacob Berry & Co., for the use of John P. Darwent, against Mattie L. Chase and Ike A. Chase, executors of the last will and testament of William J. Chase, deceased. Judgment for defendants, and plaintiffs bring error. Reversed.

L. Lehman, for plaintiffs in error.

J. H. Malone, for defendants in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The plaintiffs, Jacob Berry & Co., a firm of stock brokers doing business in the city of New York, brought this suit, for the use and benefit of Darwent as assignee of their claim, to recover the loss alleged to have been sustained by them through their purchase to cover a short sale of 25 shares of Northern Pacific Railway stock, made by the direction of Schloss, Miller & Malone, a Memphis, Tenn., brokerage firm, which firm is alleged to have acted in the transaction on behalf of Chase as undisclosed principal. Upon a former trial verdict was directed for the defendant upon the ground that the purchase by Berry & Co. was shown to have been made not upon Chase's order, but at the sole direc-

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

tion of Schloss, Miller & Malone; and upon the further ground that the contract of sale was a Tennessee contract, the laws of which state make a contract for the sale of stocks or bonds void "when either of the contracting parties have had no intention or purpose of making actual delivery or receiving the property in specie." This court reversed the judgment of the Circuit Court, holding that there was substantial evidence from which a jury might find that Chase had authorized Schloss, Miller & Malone to make the purchase in question, as well as evidence tending to show that the contract was a New York contract, the laws of which state make such stock transaction void only where both parties join in the intention that there shall be no delivery of the subject of the contract of sale or purchase. See Berry v. Chase, 146 Fed. 625, 77 C. C. A. 161, where the material facts appearing upon the former trial are set out. The assignment from Berry & Co. to Darwent was of the former's "claim and debt owing to them by the firm of Schloss, Miller & Malone, of the city of Memphis, Tenn., of $5,762.50, created in the purchase by said Jacob Berry & Co. for and on behalf of said Schloss, Miller & Malone, on the 9th day of May, 1901, of 25 shares of the capital common stock of the Northern Pacific Railway Company * * * with the right and authority to said John P. Darwent to sue for and recover same from said Schloss, Miller & Malone, as well as any undisclosed principal or principals whom they represent in the purchase of said shares of stock, etc." It was held by this court, upon the former review, that Berry & Co., upon discovering Chase's principalship, had the right to elect to hold Schloss, Miller & Malone or Chase, but that they could not hold both liable, and that they must choose between the two and must abide an election once made. 146 Fed. 626, 77 C. C. A. 161. Upon a later trial a verdict was again directed for defendant upon the ground that, at the time of the assignment to Darwent, Berry & Co. had not elected to sue Chase instead of Schloss, Miller & Malone; that they were required to make such election personally, and could not assign the right of election to another. The trial judge further expressed the opinion that what was really transferred to Darwent was the account against Schloss, Miller & Malone and not an account against Chase or any other undisclosed principal, and that up to the time of the transfer Berry & Co. were looking to Schloss, Miller & Malone for payment of the claim, and that Darwent thus acquired only the right to sue the latter firm.

Defendant contends that the evidence is undisputed that Berry & Co. had, previous to the assignment to Darwent, elected to look to Schloss, Miller & Malone, rather than to Chase. If this contention is correct, verdict was properly directed for defendant. The plaintiff, on the other hand, insists that the record contains undisputed evidence that Berry & Co. had elected to look to Chase alone. In support of defendant's contention, principal reliance is had upon the language of the assignment itself, which it is insisted transfers an account against Schloss, Miller & Malone, and so is inconsistent with a release of their liability; and in connection therewith, the fact

that although Berry & Co. learned through Schloss, Miller & Malone on June 24, 1901, of Chase's principalship, and were then requested by the former to release them and to take action against Chase, they not only are not shown to have released the account against the brokerage firm, but, on the contrary, appear to have carried it for more than three months, and until October 1, 1901, without making any demand upon Chase. The evidence relied on by plaintiffs is that no demand appears to have been made by the plaintiffs upon Schloss, Miller & Malone, together with the testimony of one of the defendants, that following a talk by telephone with one of the plaintiffs a day or two after the communication of June 24th, plaintiffs "took it out of our account and put it to Chase's account and looked to Chase for it."

In our opinion the evidence was not sufficient to establish an election by Berry & Co. to look to either Chase or the brokerage firm, to the exclusion of the other. On the one hand, although the instrument of assignment in terms conveys an account against Schloss, Miller & Malone, any inference from this fact is overcome by an express authorization of suit against any undisclosed principal. On the other hand, the testimony as to Berry & Co.'s treatment of the account, following the conversation by telephone, was manifestly no more than a conclusion of the witness, and incompetent as evidence. While any decisive act by a party, after knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies (Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52), yet an act to have the effect of election must be decisive. The mere act of charging the agent, after knowledge of an originally undisclosed principal, does not, as matter of law, amount to an election to look only to the agent. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582. It has been held, for manifest reasons, that the bringing of suit against both the agent and his originally undisclosed principal does not constitute an election to hold the principal and discharge the agent. Mattlage v. Poole, 15 Hun (N. Y.) 556. Whether or not the mere bringing of suit against the agent, without proceeding to judgment, would amount to an election to look to the agent (a proposition upon which the authorities are not entirely agreed), there was here no suit against the agent, nor was there any overt act in our opinion inconsistent with the right of Berry & Co. to ultimately look to Chase. It is urged that the delay in electing to sue Chase was unreasonable. We cannot say this is so, in the absence of any altering for the worse of Chase's position towards Schloss, Miller & Malone, or of any circumstance making the holding of Chase unjust or unreasonable.

Was Berry & Co.'s right of election assignable? Defendant, in denial of such assignability, invokes the familiar rule that contracts involving the exercise of personal skill and knowledge, or in which a party has been contracted with by reason of the trust and confidence reposed in him personally, are not assignable. A license to explore for minerals is, accordingly, held not assignable. Mendenhall v. Klinck, 51 N. Y. 246. Other applications of this rule are found in Arkansas Smelting Co. v. Belden, 127 U. S. 379, 8 Sup. Ct. 1308,

32 L. Ed. 246; Burck v. Taylor, 152 U. S. 634, 651, 652, 14 Sup. Ct. 696, 38 L. Ed. 578. But in the case we are considering there was involved in the election whether to sue the brokers or their principal on no consideration of trust or confidence. The right to make this election ws not agiven because of any such consideration. On the contrary, the law gave the right absolutely to Berry & Co. to elect which of the two parties to hold liable. An analogy is also suggested between the right of election here presented and the right to perfect mechanics' liens, which in several cases have been held not assignable. This nonassignability, however, is usually, if not universally, predicated upon the statutory character of the lien. Thus in Rollin v. Cross, 45 N. Y. 766, 771, cited by defendants, it is said:

"The lien under statutes of this character is, in general, a personal right given to the mechanic, materialman and laborer, for his own protection, and the right to create it cannot be assigned or transferred to another (Daubigny v. Duval, 5 Term, 604; Caldwell v. Lawrence, 10 Wis. 332; Pearsons v. Tinker, 36 Me. 384), unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved (Urquehart v. McIver, 4 Johns. 103; McCombie v. Davies, 7 East. 5). The statute, under which the plaintiff claims, does not authorize a lien to be filed by the assignee of a debt for work performed under a building contract."

See, also, Norman & Co. v. Eddington, 115 Tenn. 309, 312, 89 S. W. 744. There is, in our opinion, no analogy between this class of cases and that we are considering. Again, it is urged that the case is controlled by the principle which denies the assignability of actions for fraud and deceit, or mere naked rights to overthrow legal instruments. But, conceding the analogy, for argument's sake, the distinction, with respect to actions for fraud and deceit, is clearly recognized between the assignment of a mere naked right of action and the assignment of something involving a right of property, as a debt or a chose in action. Thus: In Sweet v. Converse, 88 Mich. 1, 10, 12, 49 N. W. 899, 900, in which a judgment creditor's bill was filed to set aside a fraudulent conveyance by the debtor, it was said:

"It is true that the law will not encourage speculation in the naked right to complain of a fraud; but a clear distinction is made of the assignment of a naked right to complain of a fraud and the assignment of a liquidated claim or judgment in favor of a creditor."

And again, after a discussion of authorities:

"All of the cases cited concede that the rule contended for, that a right of action for fraud is not assignable, has no application to an assignment of something which is in itself tangible and capable of delivery, involving a right of property."

In Reeder Bros. Shoe Co. v. Prylinski, 102 Mich. 468, 471, 60 N. W. 969, 970, it was held that the assignee of a vendor's account for goods sold could, upon discovery of the fraud inducing the sale, rescind the same and recover the goods sold. The court there said:

"The action here is not for fraud or deceit, but to recover the property, on the ground that the title never passed. The assignee is in the same position as the assignor of the demand, with like rights of recovery. It was not an assignment of a right of action for the fraud, but the right of the assignor to recover the specific property."

In Traer v. Clews, 115 U. S. 528, 539, 540, 6 Sup. Ct. 155, 159, 160 (29 L. Ed. 467), the plaintiff, under assignment from his trustee in bankruptcy, sued to recover the value of certain corporate stock and the dividends thereon, claimed to have been fraudulently obtained by the defendants from the trustee. To the objection that a right of action was not assignable, the court said:

"The rule is that an assignment of a mere right to file bill in equity for fraud committed upon the assignor will be void as contrary to public policy and savoring of maintenance. But when property is conveyed, the fact that the grantee may be compelled to bring suit to enforce his right to the property does not render the conveyance void."

After a discussion of authorities, it was said:

"Applying the rule established by these authorities, we are of opinion that, so far as the question under consideration is concerned, the assignment of Tappan to Clews was the transfer, not merely of a naked right to bring a suit but of a valuable right of property, and was, therefore, valid and effectual."

In the instant case the right which was transferred was not a mere naked right to maintain suit to redress a wrong. If the contract was made between Chase and Berry & Co. through Schloss, Miller & Malone as agents of the former, both Chase and the firm of Schloss, Miller & Malone actually owed the debt to Berry & Co., not jointly, but severally. This debt was a property right under all the authorities, and as incident to it was the right to sue either the principal or the agent. Berry & Co. had two remedies available for the collection of this indebtedness, viz., suit against Chase or suit against Schloss, Miller & Malone. We have thus far discussed the question as if there was an analogy between the case before us and an action for fraud and deceit. In fact, the action here is merely to collect a sum due upon a contract which the law implies. Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. The general rule is too well settled to require citation of authority that an assignment of a debt transfers all remedies which the assignor had, where no express agreement to the contrary is made. Among the familiar cases to which that rule is applied are assignments of notes secured by mortgage and transfers of promissory notes which carry therewith the right in the transferee to maintain suit against either or all of the indorsers, as the payee might have done. The case of Hager v. Swayne, 149 U. S. 242, 13 Sup. Ct. 841, 37 L. Ed. 719, cited by defendants, is not opposed to the rule above stated. In that case the nonassignability of an action to recover back an excess of duties paid was based upon an express provision of the statute declaring such assignment a nullity. Nor do we think the case is controlled by the rule of law adopted in Tennessee (but not universally elsewhere) that the vendor's equity as security for the purchase price does not pass to the assignee of the vendee's obligations. Cate v. Cate, 87 Tenn. 41, 9 S. W. 231.

In our opinion the learned trial judge erred in holding that the right of election in question was not assignable.

It is urged, however, that defendants were entitled to a direction of verdict in their favor upon each of two other grounds. The first of these is that the purchase of the stock was required by the alleged

contract to be made according to the rules of the Exchange in New York, and that it was not so made. A member of the firm of Schloss, Miller & Malone testified, with respect to the contract with Chase, that the latter "said in all his stock transactions he wanted them on the New York Stock Exchange or the Consolidated Stock Exchange; in other words, he specified that he wanted all his transactions made absolutely and not bucketshop transactions." And again:

"He said the Consolidated Stock Exchange or the New York Stock Exchange, whichever was the most advantageous, didn't make any difference to him so long as it was on the actual transaction through the New York Stock Exchange and under their rules."

The rules of the exchange through which the original short sale was made provided in substance that margins called for before 2:20 p. m. must be deposited within one-half hour thereafter; that if called for after 2:20 p. m. must be deposited by 10:30 a. m. of the following day; and in case of default:

"The party calling having given due notice may report the default to the presiding officer of the exchange who shall purchase the security forthwith in the exchange, and any difference that may accrue shall be paid over to the party entitled thereto."

The record shows that on May 8th the market for Northern Pacific stock was excited; the market generally rising, although fluctuating. There was testimony: That on that day Berry & Co. called upon Schloss, Miller & Malone by wire for a readjustment of margins. That the latter firm called on Chase to furnish either the stock or sufficient money to protect it. That the latter promised to do the one thing or the other the next morning. That he failed to do so. That on the next day (May 9th) Berry & Co. continued to make telegraphic calls on Schloss, Miller & Malone for money, finally asking for $20,000. The stock ranged that day from $170 to $1,000 per share, closing at $350. That Schloss, Miller & Malone tried to find Chase on May 9th at his place of business, as well as elsewhere. That they failed to do so, and after 2:20 p. m. wired Berry & Co. to buy at $350 per share. That Berry & Co. received this order before the exchange closed, and bought in the stock on the exchange that day at $325 per share; that being the price on which the plaintiff's damages are based. That the market opened the next morning at $150 per share.

It is urged that the purchase was not made under the rules of the exchange because not carried over until 10:30 a. m. the next day, and because not executed by the president of the exchange; and that if executed at the latter time the loss would have been based upon a purchase at $150 per share only. It is assumed, for the purposes, at least, of this opinion, that in this suit against Chase, as the undisclosed principal, the extent to which the latter is bound, as respects the authority to Berry & Co. to purchase, must be measured by the actual authority given by Chase, either in terms or by his conduct; as Schloss, Miller & Malone were not held out as Chase's agents, and the principle governing under circumstances of such holding out does not apply. But assuming, though not deciding, that Chase's original authority to sell required that the calling of the margins or the

purchase of stock to cover the short sale be made, as between Berry & Co. and Chase, under rules applicable between members of the exchange, the record does not convince us that the remedy by way of purchase through the president of the exchange was exclusive rather than permissive. If such remedy was not exclusive, Berry & Co. had the right, under the circumstances of Chase's default testified to, to buy at once, provided they acted in good faith and in the exercise of their best judgment as to the necessity of so doing. Armstrong v. Bickel, 217 Pa. 173, 66 Atl. 326. In any event, even had Berry & Co. waited until the next morning before purchasing they would have been compelled, as appears by the record, to pay $150 per share, which purchase would have entailed a loss of $1,384.75. In our opinion defendant was not entitled, upon the record presented, to a direction of verdict in its favor upon the ground of failure to buy according to the rules of the exchange.

The other ground urged as justifying direction of verdict for defendant is that Schloss, Miller & Malone had themselves paid Berry & Co. the amount of their loss, and caused the assignment to be made to Darwent, and this suit to be brought and prosecuted, for their own use and benefit; and that such action is a fraud upon the court, as creating a fictitious appearance of diversity of citizenship necessary to jurisdiction. These facts were pleaded in abatement. By stipulation the issues under the pleas in abatement and in bar were to be tried together. If it be assumed that the facts so pleaded would, if proven, have defeated the present action, it is enough to say that the evidence in support of the plea was not so clear and undisputed as to authorize the direction of verdict.

The judgment of the Circuit Court must be reversed, and a new trial ordered.

PETROLEUM IRON WORKS CO. v. BOYLE.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,021.

1. MASTER AND SERVANT (§§ 101, 102, 124*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—MACHINERY AND APPLIANCES—MASTER'S DUTY.

The general rule with respect to the installation and use of a given machine or other article is that an employer discharges his duty of exercising ordinary care to provide a reasonably safe place to work if he buys the machine from a reputable manufacturer, and uses ordinary care in inspecting it before using; and it is also the general rule that, where there is no visible defect in the machine, the purchaser is not negligent in failing to discover defects which were not discoverable by the use of the usual tests, but he is not absolved from the duty of making what is, under the circumstances, a reasonable inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. §§ 101, 102, 124.*]

2. MASTER AND SERVANT (§ 124*)—INSPECTION OF MACHINERY—"EXTERNAL EXAMINATION."

An "external examination," such as a purchaser of a machine or appliance, which is to be used in the place where his employés are to work,

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

is required to make, is not necessarily limited to the outer surface as distinguished from the inner surface of a valve actually exposed or naturally exposable to view in the process of installation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

3. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—INSPECTION OF APPLIANCE.

Plaintiff's intestate, an employé in defendant's iron works, was killed by the explosion of a valve in an air compression line, which was structurally defective and unfit, by reason of blowholes in the iron. It was a standard valve, purchased from a reputable dealer, and made by a reputable manufacturer with a guaranty of its sufficiency. It was 12 inches long and 5 inches in diameter, and while the holes were concealed by paint on the outside they could be seen from the inside when the seat was removed, as it was for about an hour while the valve was being installed four weeks before the explosion, but defendant's chief engineer, under whose general direction the installation was made, did not inspect it. The holes were noticed by one of the workmen, but he was unskilled, and did not know that they rendered the valve dangerous. *Held*, that the court properly submitted to the jury the question whether the defect was a latent one not discoverable by ordinary care, and whether ordinary care under the circumstances required defendant to make at least a visual inspection of the interior of the valve.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1029; Dec. Dig. § 286.*]

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

Action by J. J. Boyle, administrator of the estate of Conrad Hoover, deceased, against the Petroleum Iron Works Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, plaintiff below, recovered verdict and judgment against the plaintiff in error (hereinafter called the defendant) for damages on account of the death of plaintiff's decedent caused by the explosion of a valve in an air compression line in defendant's manufacturing plant, in which decedent was a general workman. The facts are these:

For the construction of the compression line in question the defendant's engineers, regularly in its employ, specified a 5-inch Jenkins Bros'. valve, which is the valve in question. Jenkins Bros. were reputable manufacturers of valves for air and steam lines, and the valve in question was a reputable and standard design, and it was bought by defendant's chief engineer of a local and reputable hardware dealer; defendant's engineer knowing at the time that valves of the description so bought were guaranteed by the manufacturers to have a safe working pressure of 150 pounds. The valve was installed under the direction and supervision of defendant's chief engineer, who did not, however, make any examination or inspection of it. When pointed out by the engineer, with directions to the pipe fitters to install it, it was still crated. The valve was 12 inches long, of cast iron pipe, of an interior diameter of 5 inches. It weighed 75 to 80 pounds. There was a globular expansion in the center of the valve on the under side. Upon the top of the valve was a seat or stem fastened to the valve by 8 bolts, and provided with a wheel and screw for opening and closing the gate which divided the valve midway between the two ends. In the installation of the valve the stem or seat was removed, because it was inconvenient to turn the valve with the seat attached. The seat remained off the valve for about one hour during the process of installation, which seems to have occupied more than half a day. While the seat was off, one of the pipe fitters, who was engaged in installing the valve, noticed that the interior surface of the bowl of the valve was punctured with numerous holes of the size of a pin, 50 or 60 of such

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

holes appearing in a space of about two or three inches square. He did not call the attention of the chief engineer to it, nor did he know that it indicated an unsafe condition, for, although working at the time as a pipe fitter, he was not a practical pipe fitter and was unacquainted with the grades and character of iron. The chief engineer did not actually see the pin holes, nor was his attention called to them, and the evidence does not indicate that he saw the valve while the seat was in fact off. He appeared at the work at intervals of about an hour during its progress. The inside of the valve was unpainted, the outside was painted and no holes were there visible. The line was provided with a pop valve adjusted to blow off at a pressure of 95 to 100 pounds. The valve had been in use for from four to six weeks, at a pressure never exceeding 100 pounds. It exploded under a pressure of 65 to 70 pounds, being blown into from 50 to 100 pieces. Examination after the explosion showed that the bowl of the valve was fairly honeycombed with blow holes or sand holes, ranging in size from that of a pin to a match head, at least one of the holes having a diameter of ⅛ of an inch, some of them extending nearly, if not quite, to the outer surface, being concealed, however, by the paint. No test, examination, or inspection of the valve was ever made by the defendant, or by any one on its behalf, unless the valve may be said to have been tested from the mere fact of its use from the time of installation to the explosion. Plaintiff's decedent had nothing to do with the installation of the valve. There was no defense that he was contributorily negligent, or that he had assumed the risk in question. The court instructed the jury that the sole cause of the explosion was the defective or weakened condition of the fiber of the iron in the globular part of the valve, due to the blowholes or sand holes. The sole ground of defendant's negligence submitted to the jury was the failure to inspect the interior of the valve before or in connection with its installation. The jury were instructed that the defendant performed its duty in so far as the purchase of the valve was concerned, if it bought the valve of a reputable dealer in reputable valves, and under a guaranty that it should stand a working pressure of 150 pounds; also that the pipe fitter's knowledge was not imputable to the defendant, and that therefore his discovery of the blowholes would not bind the defendant.

The court submitted, however, the question "whether or not the defendant was in the exercise of ordinary care in not inspecting the interior of the valve, notwithstanding the fact that if the valve seat had been taken out it would have discovered blowholes; and whether or not, if such inspection had been made and the blowholes had been seen, they would have been visible to such an extent as to lay upon the defendant the duty of either rejecting it or further inspecting or examining to find out whether the holes were there in sufficient extent of quantity or quality as to be a dangerous thing"—saying:

"What do you say ordinary care required of people in their circumstances, in view of the uses to which this was to be put, considering the confidence that they would have in the vendor of it and the manufacturer, considering such danger as might be apprehended from an explosion of a valve, whether it was likely to explode or not, the number of men that would be about it, the dangers that might result from an explosion if a part hit anybody; in view of all those things and anything that appears in the testimony as to any reasonable habit or custom among such people, what did ordinary care require them to do? They were not required to do things that manufacturers would not ordinarily do, but only what they ordinarily do do. They could not blindly take the valve and not look at it at all. Whatever was obvious, or whatever, by the exercise of reasonable care * * * they ought to do to see whether it was all right or not, it would be their duty to do; and the question here narrows itself down as a practical one to you, as to whether or not ordinary care would require that they should look at the inner surface of the globular part of the valve. * * * What difficulties surrounded any such inspection? In the ordinary course of the operation of installing this valve in the line, would it be likely to be visible?"

And, again, that whether ordinary care required such examination "depends upon the character of the instrumentality, the means that it had at hand of inspection, the knowledge that any persons in its employ would naturally have, perhaps, the naturalness or otherwise of the inside of the valve

being exposed in the ordinary operation of installing it. * * * Whether such inspection as would ordinarily be made of such valve, at such a place, and, if it were required to be done, of the interior of the valve, would disclose such a condition as would arouse suspicion or put them naturally upon inquiry to learn whether or not that condition which was there discerned made the valve dangerous to use. Could it repose completely upon the fact that it had bought of a reputable dealer, and that it was of a reputable make, by a reputable house, or, under the circumstances, was there some additional duty of inspection of the interior?"

The assignments here urged relate to the refusal of the court below to direct a verdict for the defendant, and to the giving of instructions contained substantially in the paragraphs above quoted.

W. B. Stewart, for plaintiff in error.

C. Koonce and T. McNamara, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). The considerations necessary to the determination of this case lie within a narrow compass. We shall set aside the plaintiff's contention that the valve in question was of inadequate capacity, by reason especially of the strain to which it was subjected on account of vibration and heat, in addition to the strain due to the mere pressure of the air, for this contention becomes immaterial in view of its elimination from the consideration of the jury. We shall also pass by without decision thereon the plaintiff's further contention that a verdict should have been directed in his favor upon the ground that the knowledge obtained by the pipe fitter of the defective condition of the valve was the knowledge of the defendant. In view of the defendant's concession that the valve was actually structurally defective, and was thus unsuitable for the purpose for which it was intended, we may likewise dismiss, as immaterial to this review, the testimony of an actual test by the manufacturers, as distinguished from the fact of their guaranty. The duty of the defendant to exercise ordinary care in providing the plaintiff a reasonably safe place to work is unquestioned. The testimony supports the conclusion that by reason of the defective condition of the valve at the time of its installation the place provided by the defendant for the plaintiff to work in was not reasonably safe. That the defendant in fact made no inspection or examination of the valve before or in connection with its installation is likewise undisputed. It is also undisputed that the valve in question was a standard and reputable valve, made by a reputable manufacturer, and sold by a reputable hardware dealer under the manufacturer's guaranty that it would safely stand a working pressure of 150 pounds, shown by actual test. It appears by the record that, by reason at least of the paint on the outside of the valve, its defective condition was not apparent from a mere visual inspection of the exterior. The testimony, however, tended to show that a merely visual inspection of the interior of the valve would have disclosed such condition as to at least impose upon the defendant the duty of further examination. The defendant insists, however, that by such purchase from a reputable dealer of a standard valve, made by a reputable manufacturer under a guaranty of its sufficiency,

it, as matter of law, discharged its whole duty toward the plaintiff with respect to the exercise of ordinary care in providing a safe place for the plaintiff to work, and thus was not bound to examine or inspect for any defects not discernible by visual inspection of the outside surface of the valve. Upon the correctness of this contention the case must turn; for if defendant is right in this contention, a verdict should have been directed in its favor.

The general rule with respect to the installation and use of a given machine or other article is that an employer discharges his duty of exercising ordinary care to provide a reasonably safe place to work if he buys the machine from a reputable manufacturer, and uses ordinary care in inspecting it before using. But the question still remains: What measure of inspection does ordinary care require in the case of an article so bought? It is the general rule that where there is no visible defect in a machine the purchaser is not negligent in failing to discover defects which were not discernible by the use of the usual tests. Railway Co. v. Toy, 91 Ill. 474, 33 Am. Rep. 57; Reiss v. New York S. S. Co., 128 N. Y. 103, 28 N. E. 24; Reynolds v. Merchants' Woolen Co., 168 Mass. 501, 503, 47 N. E. 406. Nor is he guilty in failing to discover latent defects which ordinary care would not disclose. Cryder v. Chicago, etc., Ry. Co. (C. C. A., Eighth Circuit) 152 Fed. 417, 81 C. C. A. 559; Westinghouse Elec. & Mfg. Co. v. Heimlich (C. C. A., Sixth Circuit) 127 Fed. 92, 62 C. C. A. 92. With respect to what is ordinary care, it has been held by this court as well as by the Supreme Court that ordinary care does not require the purchaser of a piece of machinery or other article, whether simple or complicated, to tear it to pieces in a search for hidden defects. Westinghouse Elec. & Mfg. Co. v. Heimlich, supra; Richmond & Danville R. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728. The purchaser of an article from a reputable manufacturer is thus justified in assuming, in the absence of anything to the contrary discoverable by ordinary tests, that the article is properly made. But the assumption thus permitted is not absolute in the sense that it absolves from all duty of reasonable inspection, nor in any case does it relieve from an inspection as to defects discernible by superficial examination. Fenney v. York Mfg. Co., 189 Mass. 336, 339, 75 N. E. 733.

In support of its proposition that the facts did not justify an allegation of negligence on its part, defendant relies especially upon the cases of Westinghouse Elec. & Mfg. Co. v. Heimlich, supra, and Richmond & Danville R. R. Co. v. Elliott, supra. Neither of these cases, in our judgment, sustains the broad contention made by defendant. In the Westinghouse Case, which involved an allegation of negligence in the use of a derrick chain purchased by the defendant from a reputable manufacturer, the trial court had charged the jury that it was defendant's duty to test the chain by subjecting it to sufficient weight to determine its actual strength. The court held this instruction error. Judge (now Mr. Justice) Lurton there said:

"The duty of examining for a defect thus discoverable grows out of the fact that the master is chargeable with knowledge of any defect in an ap-

pliance furnished his servant which was discoverable by the exercise of reasonable care."

The defect in question was said to be:

"One which could not have been discovered by anything short of a test which would develop its existence by putting upon it a greater strain than the chain so defective would stand. In other words, in order to determine whether the iron was in fact crystallized, it was necessary to break or cut into each link, for it was altogether possible that if one link was made from crystallized iron that others were also defective."

It was held that:

"Ordinary care does not require such tests as are appropriate only to the process of manufacture. Nor does it demand that the article should be taken to pieces or subjected to any other test which is not shown to be practically efficient and in ordinary use by careful users."

In that case the chain in question had been many times examined for external evidences of defects, injury, or wear, and there was no reason to apprehend a latent defect. The rule as there stated by Judge Lurton is that "a purchaser of such an article from a reputable manufacturer, with representations as to its tested strength and quality of material, is not responsible for hidden defects, which cannot be discovered by a careful external examination." Railway Company v. Elliott, supra, involved the explosion of a boiler of a locomotive engine. Mr. Justice Brewer there said:

"With regard to the defect in the iron casting, which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency."

The controlling questions, as respects the case before us, are: First, must the defect in question necessarily be held to be a latent defect which ordinary care might not discern? and, second, does the requirement of "careful external examination" only necessarily exclude the duty to take note of the interior surface of a valve actually exposed or readily and naturally exposable to view in the process of installation? We think these questions must be answered in the negative. A latent defect is one which in point of fact is not patent. An "external examination" is not necessarily limited to the outer surface, as distinguishable from the inner surface of an open receptacle. One of the definitions of the term "external," as given by a standard lexicographer, is "Outward; exterior; visible from the outside; hence, capable of being perceived; apparent."

As to the facts: Defendant contends that without removing the valve seat the defective condition of the globular part of the valve was not discoverable. We cannot say that this is necessarily so. The

valve was but 12 inches long and the openings were of a diameter of 5 inches. If the valve gate were closed, the two chambers would be but 5 inches by 6 inches in dimensions. We cannot say, from anything that appears in the record, that the condition testified to by the pipe fitter was not readily discoverable by mere visual inspection, without taking off the seat, and whether the gate was open or closed.

Defendant further contends that the valve came from a reputable manufacturer complete, so that there was no necessity to take it apart in installing it, and that no one representing the defendant knew that it was to be taken apart. The seat was, however, in fact removed because it was inconvenient to make the connection without removing it. We think the jury were at liberty to infer that it would not unnaturally be removed in the process of installation, and that the defendant's engineer might well so expect. Moreover, while the seat was off, the valve was for about an hour open to visual inspection. We cannot say that the jury had no right to infer negligence on the part of defendant's engineer, who was supervising the installation, in failing under such circumstances, to observe the condition of the valve.

It is further contended that the pipe fitter did not testify strongly to seeing the defective condition; that he, at the most, testified to seeing an interiorly rough casting, and that the fitter did not himself think the condition dangerous. But it was proper to submit to the jury whether the condition testified to by the pipe fitter was such, as if seen, or by such inspection as the defendant was bound to make would have appeared, was sufficient to put the defendant upon further examination. The fact that the pipe fitter did not regard the condition as dangerous is not controlling, from the fact, which appears in the statement of the case preceding this opinion, that the fitter was unacquainted with the grades and character of iron.

It is further urged that the evidence does not indicate whether manufacturers using such valves do or do not test them, and that the court erred in referring to what manufacturers "ordinarily do do." It must be remembered, however, that the defense of purchase and guaranty, as relieving from the obligation to make further tests, is made by the defendant, and it cannot well complain that the plaintiff has not shown to what extent such purchase relieves from the duty to inspect.

Finally, it is urged that defendant's negligence is to be determined as of the date of the explosion, and that negligence on that date is not shown, from the fact that the valve had been tested by four weeks' use without accident. Of this contention it is enough to say that if the defendant neglected its duty in respect to the installation of the valve, it had no right to subject its employé to the dangers of a test by actual operation in the place provided for the employé to work.

We think that under the circumstances presented the court did not err in submitting to the jury the question whether the defect in question was a latent defect which ordinary care might not discern, nor whether ordinary care did not require, under the circumstances presented, at least a visual inspection of the interior of the valve. In our opinion the case was submitted to the jury under careful and correct instructions. It follows from the views we have expressed that the

defendant was not entitled to a direction of verdict in its favor, and that the case was properly submitted to the jury.

The judgment is accordingly affirmed.

CYBOROWSKI v. KINSMAN TRANSIT CO.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1910.)

No. 2,005.

1. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS BY AGENT.

A statement, made by the master of a vessel some time after the injury of a stevedore, tending to show that he had previous knowledge of the insecure condition of a trim board, which fell and caused the injury, was not a part of the res gestæ, but a narrative of a past transaction, and inadmissible to bind the owner of the vessel, in an action against him for the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351–368; Dec. Dig. § 123.*]

2. SHIPPING (§ 84*)—LIABILITY OF VESSEL OWNER FOR TORTS—INJURY TO STEVEDORE.

In an action against a vessel owner to recover for the death of a stevedore's employé, who was killed by the falling of a trim board alleged to have been hanging in a dangerous position, assuming that defendant stood in the relation of a master to the deceased, it was incumbent on plaintiff to prove that defendant knew of the dangerous position of the board long enough before the accident for it to have been remedied, or that its condition should have been known by defendant in the exercise of reasonable care; and where neither of such things was alleged or shown, and there was no evidence showing how long the board had been in such position, or that it was not so placed through the negligence of the fellow servants of the deceased after they began work, no case of negligence was made out against defendant which warranted a recovery.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84;* Master and Servant, Cent. Dig. § 492.]

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

Action by Wincenta Cyborowski against the Kinsman Transit Company. Judgment for defendant, and plaintiff brings error. Affirmed.

F. B. Williams, for plaintiff in error.

F. L. Leckie, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The plaintiff, the widow of Theofil Cyborowski, brought this action in the court below to recover $10,000 damages from the defendant for the negligent killing of her husband. The cause of action arose in the state of Pennsylvania, and as the widow of the deceased the plaintiff claims under the laws of that state the right to any damages which are now recoverable. We shall assume that the laws of Pennsylvania support this claim. In her petition she states:

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

"That on or before the 15th day of August, 1907, the said defendant was possessed of and had the management and control of a certain steamboat called Matthew Andrews, then lying alongside a certain dock, known as the Philadelphia & Erie ore dock, in the harbor of the city of Erie, in the state of Pennsylvania, aforesaid. * * * And at the time and place aforesaid the boat aforesaid, while lying at said dock, was being unloaded of her cargo of iron ore, with which it was laden, which was being taken out of the said vessel and placed upon the said dock by means of ore buckets operated by machinery, but which buckets were filled by men working in the hold of the vessel.

"At the time and place aforesaid Theofil Cyborowski, the husband of the plaintiff in this case, and a stevedore, was in the employ of one James Thompson, a contractor on the docks at Erie, and while in the employ of the said Thompson was sent with other men to unload the said steamboat Matthew Andrews, as plaintiff is informed and believes, at the request of and on behalf of the agents of the defendant company, in the work of unloading ore from the said boat, it being his particular duty to assist in filling the buckets in the hold of the ship, and while so engaged at about 8 p. m. on the day aforesaid, while working underneath one of the hatches in said boat, a board, commonly known as a trim board, came loose from its fastenings and fell upon and struck him with great force. The said trim board was a board about sixteen (16) feet long, about three (3) feet in width, and about two and one-half (2½) inches in thickness, and was suspended by chains fastened at each end of the board, which chains were intended to be hitched into hooks fastened to the side of the hatchways or openings in the deck.

"During the day prior to the evening on which the accident hereinbefore mentioned occurred, one of the chains which held the trim board in its place was loose, and remained in the said condition, and was left hanging above where the men engaged in filling the buckets with ore were at work, without sufficient support to maintain it there in safety, and, being in this unsafe condition when the husband of the plaintiff in this case was at work at the time and place aforesaid, became unfastened entirely, and fell a considerable distance, and struck him, which falling of the said trim board and the injuries inflicted upon the husband of the plaintiff thereby was occasioned by, through, and because of the negligence and lack of care on the part of the defendant company, its agents and servants in charge of the said boat, and without any fault or negligence on the part of the deceased; that the said deceased, Theofil Cyborowski, had no knowledge of the condition in which the said trim board which fell upon him and caused his injuries was fastened and he did not know that the said board was suspended in the way it was and had never been notified nor in any way made cognizant that he was in danger of being injured by the falling of the same while engaged at his work. * * *

"The plaintiff further avers that the defendant company and its agents and servants who were in authority in the operating and management of said boat were grossly negligent in permitting the said trim board to be hung in such a condition or to be left a long time in such a manner without being securely fastened that it was liable to fall at any time as it did, it being the duty of said defendant and its agents and employés to take proper precaution and use due care for the safety of the men working in the said boat, and alleges that the duty thus owing to the defendant in this case was not performed, and that by reason of the neglect of the said defendant to perform its duty the said accident was caused, and the injuries and death of the said Cyborowski was occasioned thereby."

The case was tried before a jury, and at the conclusion of the plaintiff's testimony the defendant moved the court to direct a verdict in its favor. The court sustained the motion, and exception was taken.

The principal issue raised by the pleadings was whether the defendant had been guilty of the negligence alleged against it. It appears from the testimony that after the landing of the steamboat at the dock she was turned over to one James Thompson, who had contracted

to unload her. The plaintiff's intestate worked for Thompson, the contractor, and not for the defendant, the owner of the vessel. In carrying on his work Thompson had two shifts or gangs. There were "twelve men in a gang—thirteen including the dumper—three men at a bucket and four buckets in the hold." One of these shifts worked in the day and the other at night. Cyborowski was a coal shoveler, and belonged to the night shift. On the day of the accident the day shift had worked until 6 p. m. Then followed an interval of an hour before the night shift went to work at 7 p. m. During that interval the defendant had one watchman, and probably two, on the boat. The vessel was a large one, and appears to have been especially constructed for the transportation of iron ore. Its deck contained 32 hatches, each of which was probably 30 feet long and 10 feet wide. In each of these hatches there swung what is called a trim board, which was 16 to 18 feet long and 30 inches wide, and made up of two or three heavy boards bolted together with iron cleats. This trim board was suspended horizontally upon hooks in the middle of the hatch. As ore was being poured into the vessel when she was loading in the upper lakes, these boards were designed to help trim the vessel by forcing some of the ore to one side and some of it to the other, and thus aid in distributing it in the hold. In one of the hatches one of the hooks which held the trim board in a horizontal position at some time and in some way on the day of the accident became detached, leaving the board hanging from the margin of the hatch down into the hold, which was about 25 feet deep. Cyborowski was in the hold shortly after 7 p. m. assisting in shoveling ore into buckets to be hoisted through the hatch in which the trim board was hanging. He was working under that particular hatch, but some distance from the suspended trim board. A bucket was filled and attached to the hoisting apparatus, which was worked by steam. The signal was given, and with unusual swiftness the hoist was made. The cable and the bucket struck the trim board with great force, and detached it from the other hook. It fell upon the deceased, and inflicted the injuries from which he afterwards died. This hanging trim board was in plain view of those at work, and no testimony seems to indicate that it was of itself dangerous. It only became so if struck by something else.

There was no testimony to show how the trim board was so detached from one of its hooks as to be put in a vertical position. There was no testimony to show precisely when it got into that position nor by whose agency. The first time its derangement was noticed was about 7:05 p. m., soon after the night shift went to work. This was about 15 to 20 minutes before the accident. The attention of the defendant was not shown to have been called to the condition of the trim board until after the accident occurred. The only attempt to do so was by telling the watchman to take the board out of the way; the watchman replying that he was about going off duty, but that his "partner" would be there in a few minutes, and he "would tell him." There was no showing that this watchman had any authority to represent the defendant with respect to the receiving of notice of a condition such as is here complained of. No one of the day shift was called as a witness

by plaintiff, and no one of them testified to having seen this trim board before that shift quit work at 6 p. m.

In the examination by plaintiff of the witness Vogel, who was one of Thompson's foremen, and who was in charge of the night shift, he was asked if, after the accident, he had a conversation with the master of the boat. The court sustained an objection to the question, and this ruling is assigned for error. The plaintiff's avowal in this connection was that, if the witness were permitted to answer, he would say, "I tried to get them to stop in the afternoon so I could fix it, but they would not stop;" the avowed object being to show that the boat crew knew the condition of the trim board in time to have corrected it between 6 and 7 o'clock. The avowal shows that the alleged conversation was had "a short time" after the accident. Other parts of Vogel's testimony show that it took place after the arrival of the ambulance, and after Cyborowski had been put into it by the assistance of the witness and others. The purpose of the proposed testimony was to bind the defendant, not by proving what the fact really was, but by showing what one of the defendant's servants, while not under oath, had stated or admitted it to be. The supposed admission or statement by the servant was made after the accident, and there is nothing to show that it was made by the authority of the defendant, nor does it appear to have been made in the course of the servant's duty. It was not made contemporaneously with the accident, and was not, therefore, part of the res gestæ. It was only the narrative of a past occurrence, and we are clearly of opinion that the ruling of the court below was right upon the authority of the very analogous case of Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S. 103–106, 7 Sup. Ct. 118, 30 L. Ed. 299. See, also, the opinion of this court in Inman Bros. v. Dudley, etc., Co., 146 Fed. 449, 76 C. C. A. 659.

The other assignments of error all have reference to the action of the trial court in directing a verdict for the defendant. The established doctrine is that a ruling of that character should only be made where, giving the plaintiff the benefit of every inference that could reasonably be drawn therefrom in his favor, the testimony nevertheless fails to establish the facts alleged as the basis of the action. The vital question here was whether the defendant had been negligent in the discharge of some duty which, under the circumstances of this case, it owed to an employé of the contractor, Thompson, and whether the negligence, if any, of the defendant, was the proximate cause of the injury.

The proposition most pressed upon our attention by the learned counsel for the plaintiff was that it was the duty of the defendant to furnish a reasonably safe place for those persons to work in who might be employed to unload the steamer. The general proposition is not open to question, though when a negligent discharge of this duty is alleged by a servant against a master the proposition becomes somewhat more complex than the general statement of the rule suggests. The deceased, strictly speaking, was an employé of Thompson, and not of the defendant; but the plaintiff in her petition avers that the deceased was sent with other men to unload the steamboat at the

request of the defendant through its agents. This averment, we take it, was intended by the plaintiff to show that the defendant was under the duty of providing a reasonably safe place for such persons to work in as were engaged in unloading the vessel, whether directly employed by the owner or not. Doubtless plaintiff's theory in framing her petition was that the defendant, in the broad sense, was the master and the deceased the servant, although more direct relations might exist between him and Thompson.

We for this occasion accept this theory, for otherwise the deceased, as between himself and the defendant, might have been a stranger or an intruder on the boat, to whom the defendant owed no duty. But the duty of the master to provide a safe place was not absolute, nor was the master an insurer of the safety of the servant. The duty of the master was to use reasonable care to provide a reasonably safe working place. If such care was not used, there was negligence; otherwise, not. The plaintiff in her petition does not in terms allege that the defendant knew of the dangerous condition of the trim board long enough before the accident for it to have been remedied, nor that its condition could have been discovered and remedied by the use of due care and prudent inspection. Nevertheless these things were essential elements of any negligence charged against the master, and their existence should have been shown by substantial testimony. Nor could this be avoided by an omission of any statement in respect to them in the petition where the plaintiff did not choose to be very specific in details. In a case between master and servant proof of an injury does not of itself justify a presumption of negligence. Moit v. Illinois Central R. R. Co., 153 Fed. 356, 82 C. C. A. 430 (decided by this court), Omaha Packing Co. v. Sanduski, 155 Fed. 899, 84 C. C. A. 89, 19 L. R. A. (N. S.) 355.

And so in Carnegie Steel Co. v. Byers, 149 Fed., at page 669, 82 C. C. A., at page 117, 8 L. R. A. (N. S.) 677, this court said:

"In such a suit it is not enough to show that there was a defective tool or machine, and that the injury was due to such defect. The servant must go further, and show that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Illinois Cent. Railroad Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101. In Cincinnati, etc., Railroad Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, we gave elaborate consideration to the circumstances under which the fact of negligence may be inferred from the nature of an accident and noted the distinctions to be observed in applying the rule of res ipsa loquitur in suits between employers and servants and those in which liability to passengers or strangers is involved. It was not enough to show that this accident had occurred through an erratic and unexplainable rising of the elevator. That might have made a prima facie case of negligence in favor of a passenger or stranger; but the plaintiff was an employé, and the burden was upon him to show that this sudden erratic upward movement was due to some defect in the mechanism, which was known or should have been known to the Carnegie Company, and which they had neglected to repair. The distinction referred to is pointed out in the cases cited above. The pinch of the case was, not only whether the plaintiff had shown a defective valve, which might have produced such an unexpected and rapid movement as that

described by the plaintiff, but also whether the defect was known, or might have been known if ordinary care had been exercised."

The opinion of the Supreme Court in Patton v. Texas & Pacific Ry. Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361, is strongly to the same effect.

The rule stated in Carnegie Steel Co. v. Byers may probably apply with even greater force here where there is an absence of proof (1) that the trim board was detached before the contractor took possession of the vessel; (2) that its detachment was not the work of the fellow servants of the deceased during the time when the day shift was hoisting ore through the hatch, whereby the detachment might have been brought about; and (3) that the defendant knew, or could by due inspection have known, of the condition of the trim board in time to have put it in a safe position before the accident occurred. Besides, it was manifest folly for the night shift, composed, as we must suppose, of reasonably sensible men, not themselves with the hoisting tackle or otherwise to have hooked the trim board up to its proper place if the danger of its swinging position was obvious. Cyborowski shared in this folly of his fellow servants. Indeed, it is almost impossible to avoid the conviction that the condition of the trim board was brought about by the carelessness of the stevedores engaged in the work of unloading, and that that negligence of the fellow servants of the deceased was the proximate cause of his injury.

But, be that as it may, manifestly the burden of proving the essential elements of the negligence she charged rested upon the plaintiff. Testimony confined to the condition of the appliance and to the mere happening of the accident was not sufficient to establish negligence in this action by the representative of an employé. Plaintiff should have gone further, and should have shown actual knowledge on defendant's part of the condition of the trim board, or knowledge which should be imputed to it because of a sufficiently long existence of the defect to have enabled defendant to discover it by prudent inspection. We have concluded that the plaintiff, by confining her testimony to the matters indicated, and by not showing either that the trim board had become detached before the day shift of Thompson's employés went to work or that, if afterwards detached, it had remained in that condition long enough to justify an inference of negligence in not discovering or remedying the defective condition, failed to prove the negligence she had charged against the defendant.

But, though possibly somewhat inconsistently with the claim that the defendant was bound to provide a reasonably safe place for the deceased to work in—a claim which must in large measure if not entirely depend upon the existence of the relation of employer and employé—the learned counsel for the plaintiff insists that the defendant was guilty of negligence, as were also Thompson's employés, and ingeniously urges: (1) That the fellow-servant doctrine does not apply to this case, because the men employed by Thompson were not servants of the defendant; (2) that the doctrine of assumed risks cannot be applied between the plaintiff and the defendant, because the relation of master and servant did not exist between the deceased and the defend-

ant; and consequently (3) that this case presents an instance where the injury was the result of the concurrent negligence of two persons, which makes both liable when the case is considered independently of the doctrine of assumed risks and of that relating to fellow servants.

The keystone of this proposition is that the defendant was guilty of negligence equally, or at least concurrently, with Thompson's employés; but, as we have seen, there was a failure to prove that the defendant had been guilty of any negligence, or of any failure to perform any duty it owed the deceased, and thus the proposition falls to the ground. The suggestion that the fellow-servant doctrine is not applicable, from the fact that the relation of master and servant did not exist between defendant on the one hand and the deceased and his colaborers on the other, is somewhat academic; for, if that relation be rejected, it is enough to say that the fellow laborers of deceased were not the servants of defendant, and thus the latter is not responsible for their negligence.

To the claim that the deceased was not subject to the doctrine of assumed risks, it is sufficient to say that this, also, is academic. Whatever peril arose from working in the place and under conditions that were obvious, the deceased must be treated as having voluntarily subjected himself to, without regard to the relations which either he or those working with him bore to the defendant.

Viewing the case from any standpoint suggested by the record, we are satisfied that the direction to the jury was proper.

The judgment must be affirmed.

GIRARD TRUST CO. v. RUSSELL.

(Circuit Court of Appeals, Third Circuit. May 5, 1910.)

No. 64 (1,259).

1. CHARITIES (§ 2*)—CONSTRUCTION AND VALIDITY—WHAT LAW GOVERNS.
An agreement or other instrument creating a charitable trust is to be construed and its validity determined by the law of the state where made and to be executed.
[Ed. Note.—For other cases, see Charities, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. PERPETUITIES (§ 8*)—RULE AS TO TRUSTS FOR PUBLIC CHARITIES.
A liberal rule of construction is applied to trusts for public charitable purposes, and they will be sustained where private trusts would be held invalid as in violation of the rule against perpetuities.
[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57–66; Dec. Dig. § 8.*]

3. CHARITIES (§ 14*)—PURPOSE OF GIFT—PAYMENT OF DEBT OF STATE.
A gift in trust for the payment of the debt of a state, if not defeated by illegal provisions, is a good charitable gift.
[Ed. Note.—For other cases, see Charities, Cent. Dig. § 38; Dec. Dig. § 14.*]

4. PERPETUITIES (§ 8*)—REMOTENESS OF GIFT TO CHARITY—ACCUMULATIONS.
Where a gift to charity is absolute, and the gift and the constitution of the trust for charity are contemporaneous and immediate, the fund

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

may then perhaps be accumulated, subject to reasonable control by a court of equity; but where the accumulation is a condition precedent to the vesting of the gift in charity, and the period of accumulation transgresses the rule against remoteness, the gift is void ab initio.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57–66; Dec. Dig. § 8.*]

5. PERPETUITIES (§ 8*)—VALIDITY OF CHARITABLE TRUST—REMOTENESS.

A settlor deposited money in trust, to be "accumulated for the benefit of the state of Pennsylvania in the way and manner hereinafter mentioned." The trust agreement then provided that the trustee should invest the money and all its accumulations in the public stocks of the state whenever they could be purchased within a certain price, otherwise in government or other stocks, and the proceeds collected until the time should arrive when the fund so accumulated, together with any other sums which might be deposited with the trustee for a like purpose, should "be equal to the debt at that time owed by the state," when it should be paid over to the Treasurer of the state "for the purpose of discharging the whole indebtedness of the state, and for no other purpose whatsoever." It further provided that each state bond purchased by the trustee should be so indorsed as not to be transferable, and to release the state from paying the same except to the trustee; but if at any time the state should pay the interest on any such bond by issuing a new obligation, unless that should be the usual way of paying interest on its remaining debt, the trust should cease, and the fund be paid over to the oldest living male heir of the settlor. *Held*, that the state took no present vested interest in the fund, but was to receive the benefit of it only on a contingency which might never happen, or might happen at some indefinite time in the future which might exceed the limitation of the rule against remoteness, and that the trust was therefore void ab initio, and the fund recoverable by the personal representative of the settlor after his death, as held by the trustee on a resulting trust for the benefit of the decedent.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57–66; Dec. Dig. § 8.*]

Buffington, Circuit Judge, dissenting.

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

Suit in equity by Charles Russell, ancillary administrator of the estate of Charles F. McCay, deceased, against the Girard Trust Company. Decree for complainant (171 Fed. 161), and defendant appeals. Affirmed.

A. H. Wintersteen (M. Hampton Todd, Atty. Gen., on the brief), for appellant.

Arthur W. Machen, Jr., and G. W. Pepper, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. In this case the court is required to decide whether a certain fund, now in the possession of the Girard Trust Company of Philadelphia, is held by it as a charitable trust for the benefit of the state of Pennsylvania, or as a resulting trust in favor of Charles Russell, ancillary administrator of the estate of Charles F. McCay, deceased. The decision must be controlled by our construction of a written agreement, dated December 18, 1848, signed and sealed by the Girard Trust Company, of the first part, and Charles F. McCay, of the second part. Mr. McCay died in Baltimore in 1889, and by his

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

bill of complaint McCay's administrator alleges that the trust which McCay by his agreement attempted to create for the benefit of the state of Pennsylvania is "an illegal trust for accumulation, transgressive of the limits allowed for such trusts, and that the ultimate gift to the state of Pennsylvania, or the creditors thereof, will not become vested under the terms of said trust until the accumulated fund equals the amount of the debt of the state, and that such equality may not be attained until after the expiration of the period fixed by the rule against perpetuities as the period within which future interests must vest," and, accordingly, that the Girard Trust Company "holds said accumulated fund as a resulting trust" for the administrator.

The agreement, after setting forth its date and the names of the parties thereto, contains a single recital to the effect that:

"The said Charles F. McCay has deposited with the said company the sum of $377.35 for the purpose of having the same, together with such other additional sums of money as he may hereafter deposit, accumulated for the benefit of the state of Pennsylvania in the way and manner hereinafter mentioned."

It then contains six covenants on the part of the Girard Trust Company, the first, third, and sixth of which are as follows:

"First. That they, the said company, shall and will invest the said sum of three hundred and seventy-seven dollars and thirty-five cents so as aforesaid deposited, and all and every such other sum and sums as may hereafter be deposited, in like manner by the said Charles F. McCay, in the public stocks issued by the state of Pennsylvania, and collect the interest on these stocks, and after deducting two and a half per cent. of this interest as their compensation for performing the duties of this contract, shall and will invest the remaining ninety-seven and a half per cent. of said interest promptly and without delay in the said stocks before mentioned, and shall and will continue collecting the interest on all the said stock, and reinvesting ninety-seven and a half per cent. of the same, so long as said stocks can be purchased by said company at a price not exceeding one hundred and twenty dollars for each one hundred dollars of the said stocks, and in case the price of said stocks rise above said limit the said company shall invest in the public stocks of the United States or in good first bonds and mortgages of real estate until the said Pennsylvania stocks shall fall back to or below said limit, so that the said sum or sums deposited shall accumulate at compound interest until the time shall arrive when the fund accumulated from the said deposits, together with such other sum or sums of money as may be deposited with the said company by others than the said Charles F. McCay for the purpose aforesaid, if any, and the accumulation thereof, shall be equal to the debt at that time owed by the state of Pennsylvania; and the said company further agrees to pay over at that time the said accumulated fund to the Treasurer of the state of Pennsylvania, or other officer or agent legally authorized to receive the same, for the purpose of discharging the whole indebtedness of the state and for no other purpose whatsoever; and the said company further agrees to collect the principal of any of the said stocks and other securities and to reinvest the same in the manner before mentioned."

"Third. And the said company further agree to indorse on every certificate of stock of the state of Pennsylvania which they may purchase for the accumulation fund, if the said certificate shall be for an amount of stock of five hundred dollars or upwards, the following words or words to the same effect: 'This bond being purchased by the Girard Life Insurance, Annuity & Trust Company of Philadelphia, for a trust fund, is not transferable, and the state of Pennsylvania is hereby released from paying the same except to the said company.'"

"Sixth. And the said company further agree that if the state of Pennsylvania shall at any time hereafter pay the interest due on the said stocks be-

longing to the said accumulating fund by issuing to the said company new stocks or other obligations in lieu of money to pay the said interest, then, unless this shall be the usual way in which the interest shall at that time be paid by the said state on the remaining portion of the said debt of the said state, this trust and all benefit and advantage to the said state therefrom shall cease and become determined, and the said company shall pay over to the oldest male heir of the said Charles F. McCay then living, his executors, administrators, or assigns, the whole amount belonging to the said accumulating fund at that time uninvested in the said stocks of the state of Pennsylvania, and also all the amounts they shall thereafter receive from the said state as principal and interest on said stocks, and all stocks of the United States, and bonds and mortgages and interest thereon belonging to the said accumulating fund, reserving only to themselves their two and a half per cent. on all interest received by them, which per cent. is above provided as their compensation for performing the duties of this contract."

McCay, during his lifetime, increased his deposits to the sum of $2,000. The accumulated fund is now about $20,000. The decree of the court below adjudges:

"That the trusts of the deed of trust executed on December 18, 1848, between Charles F. McCay and the Girard Trust Company are illegal trusts for accumulation and are void; that the gift of the accumulated trust funds to the state of Pennsylvania is a gift of which the vesting is postponed beyond the limit allowed by the rule against perpetuities; and that the defendant, the Girard Trust Company, holds said trust funds as a resulting trust for the use of the complainant, Charles Russell, ancillary administrator of the estate of Charles F. McCay."

An accounting and payment to the ancillary administrator was also directed to be made. From this decree the Girard Trust Company now appeals.

In Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397, Mr. Justice Gray said:

"By the law of England from before St. 43 Eliz. c. 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed."

Language to the same general effect was used by this court in Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100. The courts of the state of Pennsylvania have likewise declared themselves in favor of a liberal rule of construction for the support of gifts intended for charity. In Franklin's Administratrix v. Philadelphia, 2 Pa. Dist. R. 435, Judge Arnold, speaking of the law of the state of Pennsylvania, said:

"The rule with us, when a charity is created, is to adopt every means to uphold it; and every attack upon it, unless founded upon the strongest reasons, shall fail."

And in Domestic & Foreign Missionary Society's Appeal, 30 Pa. 425, Mr. Justice Strong, speaking for the Supreme Court of the state of Pennsylvania, said:

"No better illustration is needed of the extent to which the law of Pennsylvania has gone in sustaining charitable bequests than is found in the language of this court in Witman v. Lex, 17 Serg. & R. 93 [17 Am. Dec. 644] where it was said: 'It is immaterial whether the person to take be in esse or not, or whether the legatee were, at the time of making the bequest, a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether their corporate designation has been mistaken. If the intention sufficiently appears on the bequest, it would be held valid.' "

The agreement is a Pennsylvania contract, and should be construed in accordance with Pennsylvania law. As was said by Chief Justice Taney in Fontain v. Ravenel, 17 How. 369, 395, 15 L. Ed. 80:

"In a suit by an heir or representative of the testator, authorized from his place of residence to sue in a court of the United States, to recover property or money bequeathed to charity, the court must of necessity examine whether the bequest was valid by the laws of the state, and barred the claim of the heir or representative."

See, also, Russell v. Allen, 107 U. S., at page 170, 2 Sup. Ct. 327, 27 L. Ed. 397.

If, then, the agreement shows a purpose on the part of McCay to establish a trust for charity, the trust should be sustained, unless it be founded upon conditions that are obnoxious even to the liberal rule of construction applicable to charitable trusts. That a charity was intended seems clear, for the use declared was the payment of the debt of the state of Pennsylvania; and a gift in trust for the payment of the debt of a state, if not defeated by illegal provisions, is a good charitable gift. Newland v. Attorney General, 3 Meriv. 684; Nightingale v. Goulburn, 5 Hare, 484; Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230; Russell v. Allen, 107 U. S. 163, 170, 2 Sup. Ct. 327, 27 L. Ed. 397; Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146.

The real question in the case is the one adjudicated by the decree of the court below, namely, whether McCay intended that the money deposited by him with the Girard Trust Company on December 18, 1848, should be an absolute, immediate gift for the benefit of the state of Pennsylvania, or whether it should vest in the proposed charity when, and only when, it, with its accumulations, should equal the debt of the state. The intent to establish a charity being clear, we should not declare the donor's scheme an illegal one, if we can, under the law, avoid doing so. Indeed, we should look at the agreement with an eye keen to discover reasons for sustaining it.

In favor of a construction of the agreement holding that there was a gift to charity contemporaneously with the deposit of the first sum of $377.35, it is said that the words "has deposited," in the recital contained in the agreement, taken with other parts of the agreement, indicate a purpose to make an immediate gift to charity, and that the words of the recital concerning the "way and manner" in which the fund should be accumulated relate only to the manner of administering a trust fund already given to charity. It has also been suggested that such purpose is confirmed by the provision of the third covenant that every state bond for the sum of $500 or more, purchased for the fund,

shall be indorsed by words destroying its transferability and releasing the state from paying the same except to the trust company.

On the other hand, however, it must be observed: (1) That the recital declares that the purpose for which the deposit was made was to have it accumulated, "for the benefit of the state of Pennsylvania," it is true, but "in the way and manner hereinafter mentioned." (2) That the "way and manner" in which the fund was to be accumulated was, as shown by the first covenant, by investing it in public stocks of the state of Pennsylvania, collecting the interest thereon, adding the interest, less the trust company's commissions, to the corpus, and investing the accretions in like stocks, or for want of them in bonds and mortgages, until the accumulated fund "shall be equal to the debt *at that time* owed by the State of Pennsylvania," and that the trust company "shall pay over *at that time* the said accumulated fund to the Treasurer of the state of Pennsylvania, or other officer or agent legally authorized to receive the same, for the purpose of discharging the *whole* indebtedness of the state, *and for no other purpose whatsoever.*" (3) That the indorsements on the state bonds purchased for the fund, required by the third covenant, did not release the state from paying the same, at maturity, to the trust company, the holder thereof. (4) That the fund should never be paid to the state at all if it should violate the condition mentioned in the sixth covenant, and that, in case of such violation, it should be paid to the donor's oldest male heir living at the time of such violation. (5) That there are no express words of gift in the agreement. (6) That the recital expressly refers to the "way and manner" of accumulating the fund mentioned and defined in the later parts of the agreement.

These provisions, in our judgment, make it clear that the gift to charity was not absolute, but conditional. The deposit of the $377.35 with the trust company and the gift to charity were not intended to be contemporaneous. While the gift to McCay's oldest male heir was void because it violated the rule against perpetuities, or rather the rule against remoteness, in that it postponed the investment of the fund in that heir possibly until beyond a life or lives in being and 21 years and 9 months (Hopkins v. Grimshaw, 165 U. S. 342, 355, 17 Sup. Ct. 401, 41 L. Ed. 739; City of Philadelphia v. Girard's Heirs, 45 Pa. 9, 27, 84 Am. Dec. 470), still the language by which that invalid gift was sought to be made cannot be rejected, when we read the agreement for the purpose of ascertaining the donor's intent concerning the time when the gift to charity should take effect. We think the conditional gift to the oldest male heir was not intended as a gift over, after the determination of a precedent, but forfeited, gift to charity, but that the purpose of the donor was to provide that the fund should go to his oldest male heir if the state should violate the condition precedent to the investment of the fund in the charitable object mentioned. This view of the sixth covenant is confirmed by the language of the first covenant, which prescribes the "way and manner" in which, and the period during which, the moneys should be accumulated, the time when they should be paid over to the state, and the purpose for which they should be paid to the state. That purpose is the sole charitable purpose mentioned in the agreement. It is for "discharging the whole indebtedness

of the state, and for no other purpose whatsoever." No general charitable purpose is expressed. After reading and re-reading the agreement with the utmost care, we are convinced that the able argument of the learned counsel for the appellant to the effect that the deposit of $377.35 with the trust company and the gift to charity were contemporaneous events, and, therefore, that the direction as to the "way and manner" of accumulating the moneys was a direction concerning the administration of a fund already given to charity, is not sound. The gift to charity was conditional. The donor did not intend that his deposit should ever take effect as a gift to charity if, at any time before the accumulated fund should equal the state's debt, the state should violate the condition mentioned in the sixth covenant, nor did he intend that it should take effect as a gift to charity before the time when the accumulated fund should equal the state's debt. He did not know, nor could any one know, that that time would ever come. The vesting of the fund in charity was therefore postponed, possibly forever. In such circumstances, have we the power to give effect to the donor's charitable intent?

When a gift to charity is absolute, and the gift and the constitution of the trust for charity are contemporaneous and immediate, the fund may perhaps then be accumulated, subject to reasonable control by a court of equity. Some American cases so hold (St. Paul's Church v. Attorney General, 164 Mass. 188, 203, 204, 41 N. E. 231; Woodruff v. Marsh, 63 Conn. 125, 137, 138, 26 Atl. 846, 38 Am. St. Rep. 346; Brigham v. Peter Bent Hospital, 134 Fed. 513, 524, 67 C. C. A. 393), though in England it has been held that where there is an absolute immediate gift to charity, payable with accumulated income at a future time, no one but the charity being interested therein, the charity may put an end to a direction to accumulate (Wharton v. Masterman, App. Cas. [1895] 186; Gray on Perpetuities, § 679a). The American cases rest on the doctrine that, since the rule against perpetuities is not applicable to a gift to charity, a direction to accumulate for a period longer than a life in being and 21 years shall not make the gift void, but that a court of equity may limit the period of accumulation where in its judgment a sound public policy demands that the period prescribed by the donor should be shortened. But where the accumulation is a condition precedent to the vesting of the gift in charity, and the period of accumulation transgresses the rule against remoteness, the gift, by the great weight of authority, is void ab initio. It was so held in Hillyard v. Miller, 10 Pa. 326. It was said, it is true, in Odell v. Odell, 10 Allen (Mass.) 1, 12, that Hillyard v. Miller was overruled by Philadelphia v. Girard's Heirs, 45 Pa. 9, 84 Am. Dec. 470. But we do not so understand the later case. Chief Justice Lowrie, in referring to that part of the opinion in Hillyard v. Miller which dealt with this question, said:

"It is quite clear that the secondary trust was void, although a charity, because it might not become vested within the time allowed for the vesting of executory devises."

In Jocelyn v. Nott, 44 Conn. 55, where lands were devised to trustees for a charitable use, subject, however, to a condition contravening the rule against remoteness, the devise was held to be void. In Brooks v. Belfast, 90 Me. 318, 38 Atl. 222, it was said:

"It is suggested in reply, however, that trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Russell v. Allen, 107 U. S. 163 [2 Sup. Ct. 327, 27 L. Ed. 397]. And the statement is often found in the books that the law against perpetuities does not apply to public charities. But the statement is misleading. It is undoubtedly true that the principle of public policy, which declares that estates shall not be indefinitely inalienable in the hands of individuals, is held inapplicable to public charities. Odell v. Odell, 10 Allen [Mass.] 1. But it must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested. The perpetual duration of a charitable trust, after it has become vested, is one of its distinctive characteristics. It is the possibility that the estate left in trust for a charitable purpose may not vest or begin within the limits of a life or lives in being and 21 years that offends against the rule of perpetuity or remoteness. In this respect a gift in trust for charity is 'subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition * * * is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio.' "

It is urged by the counsel for the appellant that the rule against perpetuities or remoteness is applicable to gifts to charity only where there is a prior gift or a "first taker," whose estate may continue for a period beyond the time limited by the rule against perpetuities or remoteness. As there is no "first taker" in the case now in hand, it is said that the rule mentioned does not defeat the gift. The argument ignores the fact that by the McCay agreement there is no gift, either to charity or to any other party, except upon a condition which contravenes the rule. If by the agreement there had been expressed an intention to make an absolute immediate gift to charity, we should have a very different case before us. There are many cases in the books where immediate gifts to charity have been sustained, although they have been made payable to corporations not formed when the gifts to charity took effect. So there are many cases where immediate gifts to charity have been sustained, notwithstanding illegal directions concerning the manner of administering the charity. But these cases are not in point. Here the gift was not vested in charity when McCay deposited his money with the Girard Trust Company. As is said by Prof. Gray in his work on Perpetuities (section 674):

"If the accumulation is a condition precedent, and the time of accumulation is or may be too long, the gift of the accumulated fund is bad altogether. The settlor or testator has said that the gift shall vest at a certain time, or on a certain event. The courts cannot substitute a shorter time or a speedier event."

Our conclusion is that the gift to charity was void ab initio, and, consequently, that the Girard Trust Company held the deposits made by Charles F. McCay, and all accretions thereto, as a resulting trust in favor of Charles F. McCay, his executors, administrators, and assigns. As McCay is now dead, his administrator is entitled to the fund.

The decree of the court below was correct, and is affirmed. The costs of both parties, both in this court and the court below, should be paid out of the fund.

BUFFINGTON, Circuit Judge (dissenting). There is no controversy as to the law in this case. Concededly, the gift was for a law-

ful charity. The only question is the construction of McCay's deed. Did the state of Pennsylvania take a present interest in the gift when McCay gave the fund "for the purpose of discharging the whole indebtedness of the state and for no other purpose whatsoever"? The court below held, and this court concurred in its view:

"That the gift of the accumulated trust fund to the state of Pennsylvania is a gift of which the vesting is postponed beyond the limit allowed by the rule against perpetuities."

Now to me it is clear that McCay's deed vested in the state, ab initio, a present interest in the fund. True, the full, absolute enjoyment thereof was postponed until the gift's accumulations equaled the charity in view; but when the fund passed from the donor a present interest in the corpus thereof passed to the state. I say this because clause 1 made it compulsory on the trustee to invest, and as they were paid, to reinvest, the fund in the bonds of the state of Pennsylvania. In reality the gift created, in private hands, a sinking fund for the state; and will it be contended that a state, a municipality, a private corporation, has no interest in a sinking fund which in form continues an indebtedness that in reality is paid as soon as sinking fund ownership accrues? But McCay went further. He linked the state's interest to this private sinking fund, and gave it a present interest therein, by the third provision of his deed, which made it compulsory on the trustee, as it turned the gift into Pennsylvania state bonds, to stamp on each one:

"This bond, being purchased by the Girard Life Insurance, Annuity & Trust Company of Philadelphia for a trust fund, is not transferable, and the state of Pennsylvania is hereby released from paying the same, except to the said company."

This indorsement in furtherance of the charity in view, and made in accord with the donor's directions, released the state from payment of such bond. If the trustee had diverted such released bond from the sinking fund, and transferred it to third persons, surrendered it to McCay, or even to his personal representatives, will it be contended the state could be held for its already released bond thus sought to be revivified? That the bonds were, in the donor's view, released by the indorsement upon them, is shown in the provision for paying over in the event of forfeiture, viz.:

"Shall pay over to the oldest male heir of the said Charles F. McCay, then living, his executors, administrators, or assigns, the whole amount belonging to the said accumulating fund at that time *uninvested* in the said stocks of Pennsylvania, and also all the amounts they shall thereafter receive from the said state as *principal and interest on said stocks.*"

But it is said the indorsement on the bond did not release the payment of the bond as against the trustee, and therefore no interest in the gift vested in the state. But this contention loses sight of the real purpose of this narrow exception to the broad, general release to the state. It was an exception made simply to provide for reinvestment in other state bonds and reindorsement thereon of the same release. In other words, payment by the state to its own trustees was for reinvestment in its own reindorsed and re-released securities. It was a

mere continuance of a state debt extinction, which began, and had to begin, when the gift was made.

Finding such provisions in McCay's deed, and bringing to its construction the virile purpose of the law to uphold the intent of donors of public charities, for "the rule with us," as said by Judge Arnold, supra, "when a charity is created, is to adopt every means to uphold it, and every attack upon it, unless founded on strong reasons, shall fail," I am constrained to differ from the court's construction. And in so doing I cannot but believe the view here expressed is in accord with the intent of the donor, who during the 40 years of his life succeeding his gift never asserted the absence of interest of his state in his gift. This fact is a significant aid to construction, for in Attorney General v. Drummond, 1 Dr. & War. 368, Chancellor Sugden well said:

"Tell me what you have done under such a deed, and I will tell you what that deed means."

OMAHA ELECTRIC LIGHT & POWER CO. v. CITY OF OMAHA et al.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1910.)

No. 3,141.

1. MUNICIPAL CORPORATIONS (§ 78*)—LEGISLATIVE GRANT OF POWER—CONSTRUCTION.

Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power, except so far as expressly delegated or indispensably necessary to the exercise of some other power which has been expressly delegated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 182; Dec. Dig. § 78.*]

2. MUNICIPAL CORPORATIONS (§§ 680, 681*)—POWERS—GRANT OF PERPETUAL FRANCHISE TO LIGHT COMPANY.

A legislative grant of power to a city generally to "provide for lighting the streets" and to "care for and control the streets" is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business; that being a servitude not embraced within the ordinary control over streets usually given to municipalities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1463; Dec. Dig. §§ 680, 681.*]

3. ELECTRICITY (§ 4*)—GRANT TO COMPANY OF RIGHT TO USE STREETS—CONSTRUCTION—DURATION OF FRANCHISE.

A city by ordinance granted to an electric light company a franchise to erect and maintain poles and wires "for the purpose of transacting a general electric light business through, upon, and over the streets, alleys, and public grounds of the city * * * under such reasonable regulations as may be provided by ordinance; * * * provided, further, that whenever the city council shall by ordinance declare the necessity of removing from the public streets and alleys the * * * electric poles or wires thereon constructed or existing said company shall within sixty days" remove the same. The company was not at the time incorporated, but was immediately afterward incorporated, in accordance with the understanding of the parties, for a term of 20 years. *Held*, that it could not be presumed that it was intended to grant to such company a perpetual franchise, but, no term being expressed, it would be construed as a grant at

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

least for the life of the corporation, and that its assigns or successors might thereafter hold and enjoy the same at the will of the city only.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4;* Municipal Corporations, Cent. Dig. § 1482.]

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

Suit in equity by the Omaha Electric Light & Power Company against the City of Omaha and others. Decree for defendants (172 Fed. 494), and complainant appeals. Affirmed.

Westel W. Morsman, for appellant.

Harry E. Burnam and I. J. Dunn, for appellees.

Before SANBORN and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The electric light company had been carrying on the business which its name indicates in the city of Omaha for some 25 years, when in May, 1908, by a concurrent resolution of the city council, the electrician of the city was directed to disconnect the wires of the company so as to prevent their use for the transmission of electric current for heat or power. To enjoin that threatened action was the purpose of this suit, which was instituted by the company against the city and its electrician, Michaelson. The Circuit Court refused to issue the injunctive order, and on final hearing dismissed the bill. The company appeals.

On December 16, 1884, the city passed an ordinance known as No. 826, as follows:

"Be it ordained by the City Council of the City of Omaha:

"Section 1. That the New Omaha-Thomson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business through, upon and over the streets, alleys and public grounds of the city of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance. * * * Provided further, that whenever the city council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the city of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing, said company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated."

At the time this ordinance was passed, the electric light company referred to therein had not been incorporated.

It was, however, understood that it should be and it subsequently was incorporated pursuant to that understanding for a term of 20 years to expire September 26, 1905. The company, being then an incorporated body of limited life tenure, accepted the ordinance as passed, and thereby entered into contract relations with the city. These facts estop both parties from denying that there was a corporation in existence at the time the contract was formally concluded, or that such corporation was one of limited life tenure. The company afterwards proceeded to construct a plant and machinery for generating electric current with a system of poles and wires in the streets and alleys for its transmission and distribution throughout the city and maintained the same contin-

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

uously until July 29, 1903, when, its corporate life being about to expire by limitation, it sold and transferred its property and franchises to the complainant Omaha Electric Light & Power Company. The latter named company continued the business of its predecessor without interruption until May, 1908, when the following concurrent resolution was adopted:

"Resolved, by the city council of the city of Omaha, the mayor concurring, that the city electrician be, and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light & Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires, electricity to private persons or premises for heat or power purposes. * * *"

The city was about to carry this resolution into effect when the bill in the case was filed. On the hearing of an application for a temporary restraining order the cause was by agreement submitted on the merits for a final decree.

The complainant claimed that because its grant from the city was absolute in form, containing no limitation upon its duration, it constituted a grant in perpetuity entitling it and its successors or assigns to use the streets forever for the distribution of its electric current. The city claimed (1) that it was without power to grant a perpetual franchise, and (2) that, if it had the power, it did not exercise it, but, at best, conferred upon the company a license to occupy its streets revocable at the will of the city at least after the expiration of the corporate life of the company.

The joint resolution of May, 1908, disclosed the intention on the part of the city to prevent the company from using its streets for transmitting electricity for heat or power purposes only. The claim was that the ordinance in terms granted the right of way for the purpose of transacting "a general electric light business" only, and that furnishing either heat or power was not comprehended within the terms of the grant. The court below adopted the theory that the ordinance in granting the right to transact "a general electric light business" necessarily limited the right of the company thereunder to use the streets to carry on a lighting business only, and did not confer upon it the right to use them for any other branch of business. It was argued in opposition, among other things, that the words "general electric light business" are of such uncertain and ambiguous import as to permit elucidation by the practical construction placed upon them by the parties, and that, as so constructed, they comprehended the business of transmitting electric current for heat and power as well as light.

Many facts called to our attention by learned counsel for complainant indicate that the city allowed the company to invest large sums of money in preparing for this extended service, knew it was about to enter upon it, and that it was continuing in it, and not only did not object, but received pecuniary emoluments therefor. Such being the case, the argument at the bar was extended beyond the limited inquiry made by the trial court. It was addressed to the fundamental questions, wheth-

er the city had the power to grant a perpetual franchise, and if so whether it had in fact done so. As these questions necessarily include the less important one actually decided below, we will confine ourselves to them.

Undoubtedly the ordinance granted to the company either (1) a franchise to use the streets of the city perpetually; (2) a franchise to use them for a reasonable time, the same to be determined in view of all the facts and circumstances; or (3) a license revocable at the will of the city at any time. Which of these is correct? The city contends it cannot be construed as a perpetual franchise because that would violate the prohibition of article 1, § 16, of the Constitution of Nebraska, which ordains that "no * * * law * * * making any irrevocable grant of special privileges or immunities * * * shall be passed." The company contends that the grant of a perpetual franchise which confers no exclusive right to the grantee is not the grant of a special privilege or immunity within the meaning of the Constitution and relies upon Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 464, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779, Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 272, 147 Fed. 1, 12 L. R. A. (N. S.) 736, and cases there cited. This contention of the company might be conceded, and the question would not be settled. The Legislature of the state which primarily had the authority to grant the use of streets for other than the ordinary purposes of travel could have exercised its authority by direct legislation or through the instrumentality of the city in which the streets were situated.

In Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921, the question related to the grant of a franchise to maintain a toll bridge. The Supreme Court there said:

"A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll bridge for public travel. The Legislature of the state alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant when made binds the public, and is, directly or indirectly, the act of the state. The easement is a legislative grant, whether made directly by the Legislature itself, or by any one of its properly constituted instrumentalities."

See to the same effect City Railway Co. v. Citizens' Railroad Co., 166 U. S. 557, 563, 17 Sup. Ct. 653, 41 L. Ed. 1114.

The mayor and council, therefore, in making the contract evidenced by Ordinance 826, were exercising a delegated authority. The state by act of its Legislature approved February 21, 1883 (Laws 1883, p. 90, c. 10), empowered the mayor and council of each city to pass any and all ordinances not repugnant to the Constitution and laws of the state; "* * * to provide for the lighting of the streets, * * * to care for and control * * * streets, avenues, parks and squares within the city," and by act of its Legislature approved March 3, 1885, before acceptance by the company of the grant in question (Laws 1885, c. 13, p. 117), it again empowered them "to provide for the lighting of streets, laying down of gas pipes and erection of lamp posts, and to regulate the sale and use of gas and electric lights, the charge for electric light and the rent of gas meters within the city,

and to require the removal from the streets, avenues and alleys, and the placing on the ground of all telegraph, electric and telephone wires." Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated. Boise City Artesian Hot & Cold Water Co. v. Boise City, 59 C. C. A. 236, 123 Fed. 232; City of Detroit v. Detroit City Ry. Co. (C. C.) 56 Fed. 867, 876; Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. Ed. 651; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 17 Sup. Ct. 718, 41 L. Ed. 1165; Citizens' St. Railway v. Detroit Railway, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67; Water, Light & Gas Co. v. City of Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257; Lancaster County v. Green, 54 Neb. 98, 74 N. W. 430.

Applying this rule to the present case, we are of opinion that the conference of power in general terms to "provide for lighting the streets" or "to care for and control the streets" is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude not embraced within the ordinary control over streets usually given to municipalities. A perpetual franchise, even if not exclusive in fact, becomes largely so by the advantage in the race which preoccupancy of the field and perpetual right to continue in it afford. And, while it may not be technically obnoxious to the constitutional prohibition against "granting special privileges or immunities," it is so unusual and extraordinary as to require, in our opinion, a more specific legislative authorization than the general language relied on by the company therefor. We therefore conclude that, even if the mayor and council had intended to grant a perpetual franchise to the company, they were powerless to do so.

This conclusion might put an end to further discussion, but another proposition was argued before us which brings us to the same result. The ordinance when taken as a whole and construed in the light of what was expressed as well as unexpressed in it, and, in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise. The right to use the streets of the city forever to inaugurate and promote a private enterprise would seem to have been so important and valuable a feature of the contract as to irresistibly lead the contracting parties to mention it specifically if they intended to provide for it and not leave its existence dependent upon implication.

The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within 60 days after the city council should declare the necessity therefor by ordinance. This is not only inconsistent with, but it seems quite repugnant to, the claim of perpetuity now made by the company. On the other hand, the cost and expense of installing and maintaining an electric lighting system was so great as to render it unlikely that the company would embark upon it without assurance of some reasonable term of enjoyment. Moreover, the fact that the company was permitted without let or hindrance to continue its business for the full period of 20 years

indicates a mutual understanding that some substantial term of enjoyment was contemplated. That was a practical construction placed upon a contract of dubious meaning which, according to well-recognized law, should receive due consideration at the hands of the court. In view of the foregoing, disclosing that no perpetual franchise was intended and pointing to the improbability of the company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the company continued for a period of 20 years affords a key to the true intention of the parties. It is improbable that the mayor and city council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors by granting a perpetual franchise to a company whose corporate life rendered it certain that it could not discharge its duties more than 20 years, and with no obligation upon it at the end of its life to assign its rights to another person or corporation empowered or obligated to accept the grant and perform the desired service.

In Turnpike Co. v. Illinois, supra, the Supreme Court of the United States, in considering whether the grant of a given franchise was in perpetuity or not, made use of the following language:

"No term was expressed for the enjoyment of this privilege, and no conditions were imposed for resuming or revoking it on the part of the state. It cannot be presumed that it was intended to be a perpetual grant, for the company itself had but a limited period of existence. At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. But, by analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. * * * Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public."

In Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821, the Supreme Court of Michigan considered an application to restrain interference with poles and wires of an electric light company, and said:

"If a railroad company were organized for a period of 30 years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here"—citing Turnpike Co. v. Illinois, supra.

To the same effect are Blair v. Chicago, 201 U. S. 400, 481, 26 Sup. Ct. 427, 50 L. Ed. 801; City of Rock Island v. Central U. Tel. Co., 132 Ill. App. 248; Virginia Cañon Toll Road Co. v. People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

We think the facts of this case in the light of the foregoing authorities disclose the intention that the company should have and enjoy the franchise in question at least for the period of its corporate existence, and that its assigns or successors might thereafter hold and enjoy the same at the will of the city only.

This conclusion reconciles many if not all of the apparent inconsistencies of the situation, and is not in disharmony with the principle

declared in Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. Ed. 592, and State ex rel. City of St. Louis v. Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789, that a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life. The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the company, but relates to the probative force which limited life tenure among other facts and circumstances has in construing a contract of uncertain and ambiguous character like that under consideration.

It follows that the electric light and power company at the time of the threatened removal of its equipment by the city was occupying the streets as a licensee at the will of the city. Without passing on the question whether the grant of a franchise to use streets for "an electric light business" is sufficiently comprehensive to include the right to use them for the purpose of transmitting electric current for heat and power purposes, we think the decree dismissing the bill was correct on the ground that the franchise to use the streets for any purpose had expired before this suit was brought.

The decree below is accordingly affirmed.

DOLLEY, State Bank Com'r of Kansas, et al. v. ABILENE NAT. BANK, OF ABILENE, KAN., et al.†

(Circuit Court of Appeals, Eighth Circuit. May 20, 1910.)

No. 3,331.

1. CONSTITUTIONAL LAW (§ 211*)—EQUAL PROTECTION OF LAWS—VALIDITY OF STATE STATUTES.

The provision of the fourteenth constitutional amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws" does not render state legislation, properly confined within its appropriate sphere, invalid because it does not extend to and embrace objects beyond the state's jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 211.*]

2. CONSTITUTIONAL LAW (§ 240*)—BANKS AND BANKING (§ 4*)—KANSAS BANK GUARANTY LAW—CONSTITUTIONALITY.

The bank depositors' guaranty act of Kansas (Laws 1909, c. 61), which authorizes banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for securing certain classes of their depositors against loss in case of the insolvency of any of their number, is not unconstitutional as denying to the national banks within the state the equal protection of the laws; there being nothing in the statute discriminating against them, and the only reason they cannot accept its provisions being that, because of the duties and obligations prescribed by the laws of the United States under which they are created, they cannot subject themselves to the jurisdiction and authority of the state. Nor is such act unconstitutional on the ground that its effect may be to attract depositors from the national to the guaranteed banks, and thus increase competition with the national

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

† Rehearing denied September 20, 1910.

banks, and impair their efficiency as instrumentalities of the national government; such effect, if any, being merely indirect and incidental.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688–699; Dec. Dig. § 240;* Banks and Banking, Cent. Dig. § 3; Dec. Dig. § 4.*]

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

Suit in equity by the Abilene National Bank, of Abilene, Kan., and others, against J. N. Dolley, as Bank Commissioner of the State of Kansas, and another. From an interlocutory order granting a preliminary injunction (175 Fed. 365), defendants appeal. Reversed.

A. C. Mitchell, G. H. Buckman, and Fred S. Jackson, for appellants.

John L. Webster and Chester I. Long (B. P. Waggener, J. W. Gleed, and John L. Hunt, on the brief), for appellees.

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

HOOK, Circuit Judge. One hundred and fifty national banks domiciled and doing business in Kansas sued the Bank Commissioner and the Treasurer of that state to enjoin them from carrying into effect a Kansas statute, approved March 6, 1909, known as the "Bank Depositors' Guaranty Act" (Laws 1909, c. 61). At the instance of the banks the Circuit Court granted a temporary injunction, and the state officers took this appeal.

The questions before us require no more than a brief outline of the provisions of the statute. There are many details of the guaranty scheme of which much complaint is made; but we think they are so clearly matters with which the national banks have no legal concern, or are so manifestly within the legislative province of the state, it is unnecessary to mention them. The statute authorizes banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for securing certain classes of their depositors against loss. The administration of the law is committed to the Bank Commissioner; the custody of the fund to the State Treasurer. Whether a bank shall become a party to the scheme is optional, not compulsory. Its desire to join is signified by a resolution of its board of directors, authorized by its stockholders. If upon an examination of its affairs by the Bank Commissioner it is found to be qualified, it then contributes to the permanent guaranty fund a sum in bonds or cash proportioned to the deposits to be guaranteed, and receives a certificate that it has complied with the provisions of the act and "that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas." The permanent fund is raised to a fixed amount by the initial payments, and, if necessary, by annual assessments of one-twentieth of 1 per cent. of the guaranteed deposits in each bank, less capital and surplus; and any depletion of the fund caused by payments to depositors in insolvent banks is cared for by like assessments, not exceeding five in any calendar year. When a guaranteed bank, so called, becomes insolvent, the Bank Commissioner takes charge, winds up its affairs, and applies its assets and the moneys realized from the liability of its stockholders.

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

When these are exhausted, balances still due guaranteed depositors are paid in full from the guaranty fund, if it is sufficient, and, if not, then by continued assessments, not exceeding five annually, as above stated, upon all banks which are parties to the plan. It is also provided that national banks may avail themselves of the act upon compliance with the prescribed conditions.

The visitorial power of the State Bank Commissioner over the guaranteed banks, and his control of their liquidation in case of insolvency, including the authority to appoint receivers, are radically inconsistent with the jurisdiction of the Comptroller of the Currency conferred by Congress over national banks. There are other points of conflict in the operation of the Kansas statute and the national banking laws, and it is obvious that the national banks cannot lawfully avail themselves of the provisions of the state enactment. Without further and appropriate legislation by Congress, they cannot throw off the duties and obligations prescribed by the law of their creation, or enter into engagements that will subject their corporate affairs to the supervision and control of another sovereignty. This view was expressed by the Attorney General of the United States in an opinion delivered April 6, 1909. The Kansas statute should, therefore, be regarded as though it related exclusively to banks incorporated under the laws of the state.

In their final analysis the objections of the national banks to the Kansas statute are reduced to two propositions: First, that, since they cannot avail themselves of the provisions of the statute, it operates to deny them the equal protection of the laws contrary to the fourteenth amendment to the Constitution; and, second, that the effect of the guaranty plan will be to attract depositors from the national banks to the guaranteed state banks, and will therefore impair the efficiency of the former as instrumentalities of the national government. Counsel admit this to be their position. The federal questions presented by these propositions constitute the ground of jurisdiction of the Circuit Court, and upon their soundness rests the temporary injunction it granted.

The national banks owe their existence to the laws of the United States, and in respect of the things which pertain to supervision and control by the sovereignty which created them they are as much beyond the jurisdiction of Kansas as though they were domiciled in Maine or California. Their exclusion from the operation of the statute in question is not from any design on the part of the state to discriminate against them, but results from the limitation of governmental powers. Because of their origin and the paramount authority of Congress, they are not, in matters inhering in the character of their corporate structures, within the legislative province of the state. The state can neither take away the essential powers granted them by Congress nor confer others that are inconsistent. Its legislation is necessarily limited to objects within its jurisdiction. The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A conclusive answer to the objection to the Kansas statute now being considered would seem clearly to appear from the face of the amendment itself. A most extraordinary

condition would exist if the legislation of the states properly confined within its appropriate sphere were to be held invalid because it does not extend to and embrace objects beyond their jurisdiction. A legislative *impasse* would be created. Neither the nation nor the states could move forward; the former because power over matters purely of state concern is not conferred by the Constitution, and the latter because, under the construction now urged upon us, they can affect none if they cannot affect equally all within and without their jurisdiction. Of course, such a construction is inadmissible. As Mr. Justice Field observed in Missouri Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107:

"The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application."

The amendment does not profess to secure to all persons in the United States nor all persons in the same state the benefit of the same laws. Great diversities in the character of laws may exist in two states separated by an imaginary line, and there may also be such diversities in different parts of the same state. Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989. Jurisdictional limits are an obvious and sufficient reason for lack of universal uniformity in legislation. The equality clause of the amendment does not require indiscriminate operation of state laws, but proceeds upon due consideration of the relations of persons to the state and to the legislation in question.

"It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liability imposed." Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Home Insurance Company v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578.

In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, it was said:

"Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment."

Such has been the consistent holding of the Supreme Court. This is not the ordinary case of classification for legislative purposes. The power of a state to classify implies jurisdiction of the various objects to be classified, and the voluntary selection of some of them for inclusion within the law. Even in such cases a classification, when made, will be upheld, whenever it is not purely arbitrary or capricious, but proceeds upon some difference which has a just and reasonable relation to the purpose sought to be accomplished. Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. But were this a case of classification, what line of division between corporations included and those excluded from the operation of a statute could be more clear or more necessary than that which marks the very boundary of the legislative power? A state has the right to confer corporate powers

upon its own corporations, and its action cannot be held in contravention of the equality clause of the fourteenth amendment merely because like corporations of the United States cannot, by reason of their organic structure and the duties they owe their creator, avail themselves of them. The state of Kansas did not single out national banks as the special object of hostile or discriminative legislation, and no such conclusion can be helped out by averments of intention in a bill of complaint.

It is urged that the statute is void because the effect of its operation will impair the efficiency of the national banks as instrumentalities of the national government by attracting depositors from them to the guaranteed state banks. If this contention is sound, and the statute falls, then all state legislation designed to improve banking methods and to maintain the local institutions on a sound basis and secure the depositors from loss is likewise void. Indeed, it will be impossible to uphold even the creation of banking corporations by the states, for it can be said with equal if not greater reason that by merely giving them corporate existence and allowing them to enter the field of competition for business they deprive the national banks of depositors they would otherwise secure and thereby impair their efficiency. To state the proposition contended for is to demonstrate its unsoundness.

That Congress may create corporations for the execution of the powers conferred by the Constitution is well settled, and the corporations so created are fitly termed agencies or instrumentalities of the government. Familiar examples are national banks for carrying on the fiscal operations of the United States, and railroads and bridges for promoting interstate commerce. McClellan v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461; Mercantile National Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808. It is doubtful that it ever occurred to a railroad corporation chartered by Congress to urge that a state statute providing for public aid to a railroad corporation organized under the laws of the state was void, because its ultimate effect would be to create an unfair competition and deprive the former of business, thereby lessening its efficiency as a governmental agency. The contention made here is not different in principle. Congress may prescribe the powers and legislate concerning the corporations it creates; but it has never attempted to set an unalterable copy in those particulars for corporations organized under state laws.

The effect of the Kansas statute upon the business of the national banks will at the most be indirect and incidental. Whether there will be any appreciable effect at all depends upon the individual views of depositors, which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance in a case like this. Ground for complaint would exist if the statute had, for instance, made it an offense to deposit funds in national banks,

or subjected them to a higher rate of taxation than that imposed on like deposits in state institutions, or in some other perceptible way had evinced an evil and discriminating purpose, or an attempt to subject them to rules inconsistent with those prescribed by Congress. Davis v. Elmira Savings Bank, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700, is an illustration. There a New York statute giving deposits of a certain character a preference in the distribution of the assets of insolvent banks was held to be in conflict with the federal law providing for ratable dividends, and therefore void when attempted to be applied to an insolvent national bank. We have not considered the merits of the guaranty plan, whether practically beneficent, experimental, or illusory. Such matters are for the state Legislature. Our province is confined to the question whether the exercise of its power is within constitutional limits so far as the national banks are concerned. We think the objections they urge are so clearly without foundation, the temporary injunction was improvidently granted.

The order is accordingly reversed.

KELLEY et al. v. BENTON.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1910.)

No. 1,710.

JUDGMENT (§ 251*)—ON TRIAL OF ISSUES—CONFORMITY TO PLEADINGS.

Where the only issue raised by the pleadings, in an action at law to recover a balance alleged to be due for lumber delivered under a contract, was as to the quantity so delivered, which was of the grade called for by the contract, and the court found the quantity less than alleged and to have been fully paid for by defendants, a further finding that the parties orally agreed to settle in accordance with an estimate to be made by appraisers, and that the appraisers reported the quantity alleged by plaintiff to have been delivered, was wholly outside the pleadings and did not warrant a judgment for plaintiff based on such estimate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

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

Action by T. H. Benton against William E. Kelley and Allan H. Daugharty, partners as W. E. Kelley & Co. Judgment for plaintiff, and defendants bring error. Reversed.

This was an action at law based upon a written contract made in the form of a letter and its acceptance between the defendant in error, who was plaintiff in the court below, and the plaintiffs in error, the defendants there, which contract was made a part of the complaint and is as follows:

"Platteau, Shasta Co., Cal., 5/27/05.

"W. E. Kelley & Co., 901 Chamber Commerce, Chicago, Ill.—Gentlemen: For and in consideration of one dollar ($1.00) to me in hand paid, receipt of which I herewith acknowledge, I hereby offer to sell you all the No. two shop and better California sugar and white pine that I manufacture at my sawmill near Platteau, during the season of 1905.

"All grades mentioned in this contract are the same as per rules adopted Apr. 1st, 1903, by the Cal. Sug. & W. P. Agency.

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

"All lumber to be delivered at Cottonwood, Cal., and piled in some convenient place near the Southern Pacific R. R. for shipment as directed by you.

"The price of above lumber to be twenty-four dollars ($24.00) per M. for all grades.

"The terms of payment to be 60 ds. from shipment or 2 per. cent. off for cash (at my option) from face of invoice; cash payments to be made by your San Francisco office drawing sight draft on your Chicago office and remitting same promptly to Bank of Tehama County, Red Bluff, Cal., for credit on my account.

"The sugar and white pine to be delivered separately, also the several thicknesses of each to be delivered separate.

"In the matter of delivery, my teams will, upon arriving with a load at point of delivery present your representative with our shipping tally in duplicate and if said load arrives in apparent good order you are to O. K. one copy and return to us. If for any reasons loads appear damaged or short you to make notation of same on tally that is returned to us. This is for our convenience in keeping a check on our teamsters.

"After lumber is delivered at R. R. by us you are to ship the same within thirty days; as soon as lumber is shipped by you, you are to furnish us promptly with a copy of tally showing the number of feet shipped by your men.

"I am to always have the privilege of keeping an inspector on the ground to keep a check on your inspector if I desire.

"In the event of your not shipping any portion of the above lumber within 30 ds. from the time it is rec'd, you are at my request to make an estimate of said lumber and make settlement for same as per above terms.

"It is understood that the above settlement based on estimates is not to be final, but is subject to adjustment after the final inspection at time of shipment is made by you.

"All lumber is to be delivered by me, dry and in first-class manner.

"All lumber is to be properly edged and otherwise properly manufactured.

"The above proposition does not refer to any stained lumber which I may have; should I have any of such lumber it is subject to further negotiation at the option of both parties.

"All lumber to be manufactured to standard lengths, widths and thicknesses.

"You agree to take all my short clear 5/4, 6/5 & 8/4, 10" and over wide 4 ft. and over long or if 6 ft. 8" or over long it may be 5¼ inches and up wide @ $20.00 per M. at same point of delivery and terms.

"And sugar pine I deliver in excess of 15 per cent. of the total cut, you are to pay me three dollars ($3.00)per M. extra for.

"All lumber to be manufactured as nearly as possible to your trade requirements as you advise us from time to time, but I reserve the right to not cut anything over 3 inches thick, and not to cut over 50 M. 3" and 100 M. 2½" and none over 16 ft. long.

"Yours truly, T. H. Benton.

"Accepted: W. E. Kelley & Co., by Frank W. Warren."

The complaint alleged the execution of the contract above set out by and between the respective parties on the 27th day of May, 1905, and that in compliance therewith plaintiff delivered to the defendants in the county of Shasta, state of California, sugar and white pine lumber of the grades of No. 2 shop and better, to the extent of 2,297,175 feet, and that the defendants received the same from the plaintiff pursuant to the terms of the contract; that by reason of such sale and delivery the defendants became indebted to the plaintiff in the sum of $55,132.20, of which the defendants only paid $45,164, leaving owing, due, and unpaid from the defendants to the plaintiff therefor the sum of $9,968.20, which indebtedness, it was alleged, was incurred and was and is payable in the state of California. The prayer was for judgment against the defendants for the amount last stated, with interest and costs of suit.

In and by their answer the defendants admitted the making of the contract sued upon, but denied that thereunder or at all plaintiff delivered to the defendants in Shasta county, Cal., or elsewhere, sugar and white pine lumber, or sugar or white pine lumber, of the grades of No. 2 shop and better to the extent of 2,297,175 feet, or any greater amount of such lumber than 1,750,268 feet, and 10,493 feet in shorts. The defendants denied that by reason of the sale and delivery of the said lumber they became indebted to the plaintiff in the sum of $55,132.20, or any greater sum than $42,387.92, which latter sum, they alleged, they paid the plaintiff prior to the commencement of the action. And as a counterclaim the defendants alleged that at the time of the commencement of the action they were and still are citizens and residents of the city of Chicago, Ill., during all of which time the plaintiff was and still is a citizen and resident of Shasta county, Cal. The defendants then set up the above-mentioned written contract, and alleged that under and by virtue of its terms the plaintiff sold and delivered to the defendants, which they received, lumber as follows:

"1,750,268 feet of No. 2 shop and better; 10,493 feet of shorts. That by the terms of said contract, the said plaintiff was required to make deliveries of said lumber to the said defendants at their yards, as therein stated. That thereafter the said defendants were required, if possible, to ship said lumber within 30 days from the time it was so delivered at said yards; provided, however, that if the said defendants were unable, from any cause whatsoever, to ship said lumber within 30 days after the same was received, or any part thereof, upon a request from the said plaintiff, the said defendants were required to make an estimate of the said lumber then on hand in said yards, and not shipped, and, based upon said estimate, were required to advance to the said plaintiff a sum of money equal to the value of said lumber so on hand and unshipped, computed upon the prices fixed in said contract; provided, further, that said settlement, based on said estimate, in no event was to be considered as a final settlement, but was subject to an adjustment between the said plaintiff and defendants after a final inspection of said lumber at the time the same was shipped out of said yards by the said defendants. That in the month of January, 1906, these defendants had in their yards, as aforesaid, of the lumber delivered there by the said plaintiff, a large quantity of lumber which had not been shipped out, as contemplated by said contract. That said plaintiff, under the terms of said contract, requested that these defendants make an estimate, and, based upon said estimate, make a payment to plaintiff of the lumber so on hand. That thereupon these defendants did make an estimate, and thereafterwards, to wit, on the 12th day of January, 1906, paid to this plaintiff the sum of $20,000, based on said estimate so made in January, 1906. That prior to making the above-mentioned payment, these defendants had paid to the said plaintiff for lumber shipped out $29,364. That the total payments for lumber made by these defendants to the said plaintiff, including the payment above mentioned, made upon said estimate, amounted to the sum of $49,364. That after said lumber was all shipped out by these defendants under the terms of said contract, it was for the first time ascertained and determined that the total amount of lumber which had been delivered by the said plaintiff, and which had been received by the said defendants, under the terms of said contract, was as follows, viz.: 1,750,268 feet of No. 2 shop and better; and 10,463 feet of shorts. That the total liability incurred by these defendants by reason thereof to the said plaintiff amounted to and was the sum of $42,387.92."

The defendants in their counterclaim then alleged: That they made payment for the lumber delivered to and received by them at such times and in such amounts as entitled them under the terms of the contract to a deduction "of 2 per cent. off for cash," amounting to the sum of $601.09, which last-mentioned sum the defendants were and still are entitled to receive from the plaintiff. That by reason of making the payment based upon the estimate, as aforesaid, the defendants overpaid the plaintiff the sum of $6,976.08, which was paid by mistake; the defendants believing at the time the same was so paid that the indebtedness that would be due by the defendants to the plaintiff under the contract would amount to that sum. That the matter

was subject to adjustment after the final inspection of the lumber, and that, by reason of the facts pleaded by the defendants, they are entitled to have the sum last mentioned repaid to them by the plaintiff, and accordingly pray judgment therefor.

The issues thus made came on for trial before the court below without a jury, pursuant to a written stipulation, and, evidence having been introduced by and on behalf of the respective parties, the trial court made these findings of fact:

"(1) That on May 27, 1905, plaintiff and defendants entered into the contract which is set forth and attached to the complaint. That after the making of said contract, and its partial performance, the place of delivery of lumber by plaintiff was changed by the consent of plaintiff and defendants from Cottonwood, Cal., to Anderson, Cal.

"(2) That in pursuance to the terms of said contract plaintiff delivered at Anderson, Cal., and at Cottonwood, Cal., 2,779,276 feet of lumber in gross. That said lumber was delivered at various times between June 5, 1905, and November 22, 1905; the first delivery by plaintiff being made June 6th, and the last November 22d. That said lumber was delivered by plaintiff at places designated by defendants in accordance with the terms of the contract. That of said total amount delivered by plaintiff, there was a large amount of lumber of a grade below that No. 2 shop and better, California sugar and white pine. That said lumber was not sorted so that the lumber of a quality of No. 2 shop or better was separate from that of inferior quality at the time said lumber was delivered by plaintiff and unloaded at the places designated by defendants.

"(3) That defendants have shipped, of the lumber delivered by plaintiff at Anderson and Cottonwood, 1,774,648 feet of No. 2 shop and better lumber, according to the contract, of which 1,741,999 feet was loaded on railroad cars at points named, and shipped by defendants, and of which 32,649 feet was delivered by defendants from their yards to a planing mill. That said 1,774,648 feet of lumber shipped out by defendants was graded as provided by said contract, at the time of shipment, as herein stated. That defendants also caused all the lumber delivered by plaintiff to them, to wit, 2,779,276 feet, to be graded as provided by said contract at the various times lumber was shipped by them, as hereinbefore stated, at the time of each shipment. That a large amount of the lumber delivered by plaintiff to defendants was rejected by defendant, as not being No. 2 shop or better, and was piled separately from the lumber not yet graded. That, of the lumber so rejected, plaintiff sold, to wit, 19,000 feet, to one Cunningham prior to November 9, 1905, and also sold a large number of feet to one F. W. Warren. That in pursuance to the terms of the contract, as made May 27, 1905, defendants have shipped all the No. 2 shop or better lumber which plaintiff delivered to them at Anderson and Cottonwood. That the total amount so shipped by defendants was, as hereinbefore stated, 1,774,648 feet. That the first shipment of lumber by defendants was on June 24, 1905. That the last shipment of lumber by defendants, as aforesaid, was in March, 1907. That defendants have paid plaintiff for lumber sold to them under the terms of the contract made May 27, 1905, subsequently modified, as hereinbefore set forth, $45,164. That $29,364 of this amount was paid at such times as to entitle defendants to a discount of 2 per cent. under the terms of the contract, and plaintiff allowed defendants such discount. That the total credit to which defendants are entitled is $45,765.09, being cash as stated, and a discount of $601.09.

"(4) That on or about December 20, 1905, it was orally agreed by plaintiff and defendants that a final determination and settlement of the amount and grades of lumber delivered by plaintiff to defendants, and the amount of indebtedness of defendants to plaintiff, be made, and when so determined the sum should be paid by defendants to plaintiff. That the said determination was based and was to be based on estimates of two appraisers, one appointed by plaintiff and one by defendants, in case they could agree as to the amount of No. 2 shop and better lumber then at Cottonwood in the yard known as the yard of Kelley & Co., delivered by plaintiff. That in pursuance to such oral agreement, one Clifton was orally appointed by defendants, and one

Ruff was orally appointed by plaintiff, as appraisers, and on January 11, and 12, 1906, said Clifton and Ruff made a report, after examination of the lumber delivered by plaintiff to defendants, then at Cottonwood, Cal., at the place where said plaintiff had been directed to deliver said lumber by said defendants.

"(5) That by said report and agreement of said Clifton and Ruff, it was determined that plaintiff had delivered to defendants 2,675,219 feet of lumber of various kinds. That of the lumber then at Cottonwood, at the time of the report, January 12, 1906, 449,314 feet was of lower grade than that called for by the contract, and that the total amount of No. 2 shop or better lumber, as called for by the contract, which had been delivered by said plaintiff to said defendants, was 2,225,965, and said Clifton accepted this determination as correct for defendants, and said Ruff accepted the same as correct for plaintiff. That said determination was in writing, and was evidenced by two separate sheets of paper made in duplicate; one dated January 11, 1906, purporting to be the estimate of lumber below the grades called for by the contract, then at Cottonwood, Cal., and the other dated January 12, 1906, purporting to be a summary and recapitulation of the total amount of lumber delivered under the contract, and the total amount of lumber No. 2 shop and better. That it was settled and agreed by plaintiff and defendants, by the facts hereinbefore in this paragraph stated, that plaintiff had delivered to defendants 2,225,905 feet of lumber of the grade No. 2 shop or better, according to the contract, and defendants acknowledged that such number of feet was correct, and the same was agreed to by defendants as the amount of lumber for which they were liable to pay, after deducting the just credits to which they were entitled.

"(6) That defendants, on and after January 12, 1906, were, by virtue of said estimate or determination, pursuant to said agreement of December 20, 1905, liable to pay plaintiff for 2,225,905 feet of lumber at the rate of $24 per thousand, amounting to $53,421.72. That defendants are entitled to credits of $45,765.09. That the defendants have never fully performed said agreement of December 20, 1905, and have paid plaintiff no moneys pursuant to the said agreement."

From the facts so found the court concluded as matter of law:

"That plaintiff is entitled to judgment against defendants, W. E. Kelley and Allan H. Daugharty, as copartners, for the sum of $7,656.63, and interest thereon from June 5, 1906, and costs of suit."

Judgment was entered accordingly against the defendants, who have brought the case here.

Burke Corbet, J. R. Selby, and J. F. Bowie, for plaintiffs in error.

Perry & Dailey, George O. Perry, and John J. Dailey, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the case as above). As will be seen from the foregoing statement, the plaintiff sued for the balance alleged to be due for 2,297,175 feet of California sugar and white pine lumber of the grade of No. 2 shop and better, alleged to have been delivered to and received by the defendants under and pursuant to the terms of the written contract between the parties. The trial court found as a fact (and which finding appears to be in accordance with the evidence) that, although the plaintiff delivered under the contract 2,779,276 feet of lumber at places designated by the defendants, a large amount of the lumber so delivered was of a lower grade than No. 2 shop and better and "was not sorted so that the lumber of a quality of No. 2 shop or better was separate from that of inferior

quality at the time said lumber was delivered by plaintiff and unloaded at the places designated by defendants."

The trial court further found, in effect, the facts to be that of the lumber so delivered by the plaintiff the defendants sorted out 1,774,648 feet of No. 2 shop and better, which was all of that grade so delivered by the plaintiff, and which 1,774,648 feet the defendants shipped under the contract and paid the plaintiff therefor in full; that a large amount of the 2,779,276 feet delivered by the plaintiff was rejected by the defendants as not being No. 2 shop and better, and was piled separately; and that of the lumber so rejected the plaintiff sold 19,000 feet to one Cunningham prior to November 9, 1905, and also a large number of feet of it to one F. W. Warren.

In view of these findings of fact upon the issues raised by the pleadings, it is impossible to sustain the judgment in the plaintiff's favor, for it is a cardinal rule that a plaintiff in an action at law must recover upon the allegations of his complaint or not at all.

In view, however, of the findings in respect to the oral contract between the parties (concerning which the complaint is entirely silent), and of what was done under it, we think it proper to remand the case for a new trial, with leave to the respective parties to amend their pleadings, should they so desire.

The judgment is reversed, and the case remanded to the court below for a new trial.

SOUTHERN RY. CO. v. SUTTON.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,014.

1. RAILROADS (§ 401*)—INJURIES TO PERSONS ON OR NEAR TRACKS—TENNESSEE STATUTE—PERSONS "BEYOND STRIKING DISTANCE."

Shannon's Code Tenn. §§ 1574–1576, relating to railroads, provides for the keeping of a lookout on all locomotives, and that when any "obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident," and, as construed by the Supreme Court of the state, imposes an absolute liability on the railroad company in case of failure to comply with its requirements whether or not the damage or injury results from such failure and without regard to the question of contributory negligence, which can be considered only as affecting the amount of damages recoverable. Also, as construed by such court, the statute applies in every case where a person appears upon the track, or so near thereto as to be within "striking distance" of the train. Plaintiff was walking on or beside the track of defendant's road, when a train approached from behind, and he was struck and injured by some part of the side of the engine. Those on the engine testified that they saw plaintiff on the track and sounded the whistle and applied the brakes, but that plaintiff then stepped off the track to one side, and the speed of the train was resumed. *Held*, that an instruction, having reference to such testimony, was correct which charged the jury that plaintiff did not pass "beyond striking distance," so as to absolve defendant from the duty of stopping the train, so long as he was still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there was still a reasonable probability or likeli-

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

hood that he might fall or be thrown against the side of the engine or train as it passed him.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

2. STATUTES (§ 241*)—RULES OF CONSTRUCTION—PENAL LAWS.

Although penal laws and statutes in derogation of the common law are to be strictly construed and not extended beyond their plain meaning, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

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

Action by Lincoln Sutton against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, who was the plaintiff below, recovered verdict and judgment against the plaintiff in error on account of injuries suffered by the plaintiff through collision with defendant's railway engine. Defendant's liability was predicated upon sections 1574 to 1576 of Shannon's Code of Tennessee. The evidence was undisputed that plaintiff, a laborer not in defendant's employ, was shortly before the accident walking on defendant's right of way on his way to work. Defendant's freight train, running at a speed of 12 to 15 miles an hour, as testified to by defendant's trainmen, was behind plaintiff and going in the same direction. It is conceded that the engineer as well as the conductor, who was in the cab with the engineer, saw the plaintiff when about 150 yards ahead of the train. The engineer and conductor testified that when they first saw the plaintiff he was walking between the rails; that as soon as he was seen the whistle was blown and the speed of the train slackened; that immediately upon the giving of this signal, the plaintiff looked around at the train, and while the engine was still about 50 yards from him stepped to the left, beyond the cross-ties, and beyond the reach of the train, whereupon the former speed of the train was resumed; that plaintiff remained standing and facing toward the train until the engine was within 40 or 50 feet from the plaintiff, at which time the view of the occupants of the cab was obstructed by the front of the engine. The plaintiff testified that he was not walking between the rails, but on the ends of the cross-ties at the left of the rails; that no whistle was blown or alarm given; and that he was ignorant of the approach of the train until he was struck, while still walking on the ends of the cross-ties. That plaintiff was struck by the engine is undisputed. The testimony indicated, however, that he was struck not by the pilot beam (which is the widest part of the engine except the cylinders, which project about two inches beyond the pilot beam), nor by the cylinders, but that he was first struck by the second driving wheel. The trial judge expressed to the jury his opinion that the plaintiff "was not on the cross-ties and had passed from off the cross-ties before he was struck," submitting, however, the question of fact. The judge charged the jury that as the plaintiff had appeared "as an obstruction on the track, and as the railroad undoubtedly did not do everything that could be done to stop the train, it is liable in this case for some measure of damages, unless the plaintiff had moved from the track, after appearing as an obstruction, into such a position that the railroad employés were no longer required to observe the statutory precautions." After stating the theories of the respective parties as to the cause of the collision, the court said:

"Now, I charge you, as a matter of law, that if he passed beyond the cross-ties, the question of liability in the case, if he stepped from the side of the track at all, would depend upon the distance that he stepped to one side of the track, under all of the circumstances of the case. If the employés running a railroad train see a person ahead on the track as an obstruction, and

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

sound the alarm, and he seeing it, or for any other reason, on learning that the train is approaching, steps from the track, completely out of striking distance, and into a position of safety, and then afterwards from some other reason falls against the train, the railway company would not be liable. In other words, the railway company has to take every precaution under the statute to avoid the accident; but, if a person has stepped from the track beyond striking distance and in a place where there is no danger, then of course the railway company does not have to stop its train. It may go on and carry its passengers or discharge the mission on which it is engaged."

No part of the charge thus far given was excepted to. Immediately following the instruction last quoted, the court gave the following instruction, which is the only part of the charge excepted to, viz.:

"But I charge you, gentlemen, that passing outside of striking distance, within the rule that I have laid down, so as to excuse the railway company from further observance of the statutory precautions, does not simply mean passing to merely an inch beyond where a person could be struck, if he was standing still; it does not mean simply passing beyond where he could be barely struck by the front of the train if he was standing absolutely still. In other words, a person does not pass out of striking distance, so as to excuse the railway from observing the statutory precautions, while he is still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there is still a reasonable probability or likelihood that he may fall or be thrown against the side of the engine or train as it passes him; and, so long as he has not passed to such a distance from the track as to be safely out of striking distance, so that, all things being considered, the speed of the train, distance, etc., there is no reasonable probability of his falling, or being thrown against the side of the train as it passes him in its onward motion, he is not outside of striking distance in such sense as to justify the railway in ceasing to observe the statutory precautions.

"Of course, as I have said, if he had passed to such a distance from the track that there was no reasonable probability or likelihood that he might not, in the exercise of the instinct of self-preservation, have fallen or been thrown against that train as it passed him, then the railway was absolved from further duty. That is the question which you will have to consider, even if you shall find that when he was struck he was not actually on the cross-ties, namely: Had he passed outside of striking distance, as I have defined it, before the railway employés stopped using the statutory precautions?

"The burden of proof on that point is on the railway. It must show by a preponderance of the evidence, in order to justify it in the action of its employés in not going ahead in their effort to stop the train, that he had passed to such a distance from the track. If it has shown you by a preponderance of the evidence, and you believe from a preponderance of the evidence that he had passed to such a distance from the track, then I charge you that there is no liability whatever in this case, and it would be your duty to return a verdict for the defendant. If you find that he had not passed to that distance and was struck by the train as a result of that failure and by being still within that distance while the train was going ahead, and that on account of his being still within that distance he fell or was thrown against the side of the engine, there would be liability on the part of the railway company."

The correctness of the definition of "striking distance," contained in the instruction last quoted is the only question presented for review.

W. L. Welcker, for plaintiff in error.

G. W. Pickle, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). The statute upon which the plaintiff relies requires that a lookout shall be kept upon the locomotive, and that when any "obstruction appears

upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." A railroad company failing to observe these precautions is made responsible for all damages resulting from collision. Observance of this precaution relieves from liability in the cases to which the statute is held to apply. Shannon's Code Tenn. §§ 1574, (4), 1575, 1576. It is the settled rule declared by the Supreme Court of Tennessee, and adopted by this court, that the liability created by the statute is absolute, and not dependent upon proof that the injury resulted from the failure to observe the statutory requirement; and that the liability resulting from such failure is not defeated by the contributory negligence of the person injured. Such contributory negligence may, however, be considered in the mitigation of damages. Railroad Co. v. Walker, 11 Heisk, 383; Railroad Co. v. Burke, 6 Cold. 45; Railway Co. v. Howard, 90 Tenn. 144, 150, 19 S. W. 116; Railroad Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Byrne v. K. C., Ft. S. & M. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530; Rogers v. C., N. O. & T. P. R. Co., 136 Fed. 573, 69 C. C. A. 321. It is equally well settled that the statute applies in every case to a person appearing upon the track, or so near thereto as to be within striking distance of the train; but that it is only when the obstruction so appears, either upon the track or within striking distance of the train, that the duty of employing the statutory precaution is imposed. Louisville, N. & Gt. So. R. Co. v. Reidmond, 11 Lea (Tenn.) 205; Railway Company v. Howard, supra; N. C. & St. L. R. Co. v. Seaborn, 85 Tenn. 391, 4 S. W. 661; Railroad Co. v. Crews, 118 Tenn. 65, 99 S. W. 368; Byrne v. K. C., Ft. S. & M. R. Co., supra; Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530; Louisville & N. Ry. Co. v. Truett, 111 Fed. 876, 50 C. C. A. 42; Rogers v. C., N. O. & T. P. R. Co., 136 Fed. 573, 69 C. C. A. 321; Virginia & S. W. R. Co. v. Hawk, 160 Fed. 348, 87 C. C. A. 300. That in this case a situation arose demanding the employment of the statutory precautions is clear. It is also clear that the defendant did not employ every possible means to stop the train and prevent an accident. And it follows that if, when the defendant's engineer suspended his precautions and restored the normal speed of the train, the plaintiff was still within "striking distance" of the train, the defendant is liable. The apparent improbability that the plaintiff was struck while still walking upon the crossties is not material to the present inquiry. If the jury disbelieved the plaintiff's testimony in this regard, they might still well find that he had not passed to a place of safety.

The defendant contends that the statute is penal and must be strictly construed; that under such strict construction of the statute it should be held that the plaintiff was not within striking distance, unless he was in position to be struck by the front of the engine; that if he was in such a location that, had he remained fixed and immovable, he would not have been struck, he could not have been within "striking distance." This court has recognized the penal

nature of the statute in question (Byrne v. K. C., Ft. S. & M. R. Co., supra), and the statute is in derogation of the common law. But although penal laws and statutes in derogation of the common law are to be strictly construed, and not extended beyond their plain meaning, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; United States v. Dillin (C. C. A. 6th circuit), 168 Fed. 813, 817, 818, 94 C. C. A. 337; United States v. Illinois Central R. R. Co. (recently decided by this court) 177 Fed. 801.

The Supreme Court of Tennessee has more than once declared that the statute should be rigidly enforced. Railroad Co. v. Scales, 2 Lea, 688; Railway Co. v. Howard, 90 Tenn. 144, 148, 19 S. W. 116.

The question presented on this review is not, as suggested by plaintiff in error, whether the railroad company shall be held liable for not putting on the brakes and stopping the train in a case where the person passed by the train, after being once out of striking distance, shall fall or be thrown against the side of the train. The real and decisive question is whether, after a situation has arisen requiring the railroad company to observe the statutory precautions, and after it has entered upon their observance, it may properly suspend or ignore them so long as the person entitled to the protection of the statute is "still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there is still a reasonable probability or likelihood that he may fall or be thrown against the side of the engine or train as it passes him." The question is merely one of definition; that is to say, when one shall be held to be "beyond striking distance." We find nothing in the decisions of the Supreme Court of Tennessee directly decisive of this question. It must be answered in the light of reason, having in mind the object of the statute, the mischief it aims at, and the construction generally put upon the statute by the Supreme Court of Tennessee. As said by that court in N. & C. Railroad Co. v. Carroll, Adm'r, 6 Heisk. at page 368:

"The question of what is, or what is not, an obstruction on a railroad track, is not a question on the terms used in art, nor within any of the rules laid down on this subject. It is a simple question of fact, and can only mean that which may obstruct or hinder the free and safe passage of the train, or that which may receive an injury or damage, such as would be unlawful to inflict, if run over or against by the train, as in the case of stock, or a man approaching on the track."

The decision of this court in Louisville & N. R. Co. v. Truett, 111 Fed. 876, 50 C. C. A. 42, is pertinent. In that case a horse on which plaintiff's decedent was riding, when about to cross the track, became frightened by the train and unmanageable. It was plaintiff's contention that while the horse was whirling about in his fright the decedent was thrown against one of the cars in the train. The question was, therefore, whether, although decedent "and his horse had appeared upon the track, he had yet gotten far enough away from the

running room of the train as to be passed safely by." Judge Severens, with respect to this contention, said:

"Accepting as correct the construction of the statute to be that where one who has appeared upon the track, and then gets away from it under circumstances which indicate that he is able to keep out of the way, but afterwards gets back into collision with the train, there can be no recovery, we do not think that that consequence would follow if the man appears upon the track in such circumstances as that it is seen that he may be carried by a force beyond his control out of and into the danger line, only momentarily disappearing from the track. * * * We are unable to accept the proposition which seems to be contended for in the brief for plaintiff in error that if, at the time when the engine passed, Truett was out of striking distance, that would relieve the company from the obligations imposed by the statute, but think that, as before indicated, the circumstances might be such as to justly induce the expectation that before the train could pass it might come into collision with the party who had been seen upon the track but seen to be unable to control his own movements."

In our opinion, taking into account the attracting and disturbing force of a swiftly passing train, a person "still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there is still a reasonable probability or likelihood that he may fall or be thrown against the side of the engine or train as it passes him," is as clearly within striking distance of the train as was the decedent in the Truett Case. We find nothing in the Tennessee decisions out of harmony with this construction.

We think the trial judge rightly interpreted the statute in the definition given by him of striking distance.

The judgment of the Circuit Court is, accordingly, affirmed.

LONABAUGH et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 18, 1910.)

No. 2,698.

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 150*)—CONSPIRACY—OVERT ACT—STATUTE OF LIMITATION.
   While under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), the gravamen of the offense is the conspiracy, there also must be an overt act to make the offense complete, and so the period of limitation within which it may be prosecuted must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them, of which there is appropriate allegation and proof.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*]

2. CONSPIRACY (§ 33*)—OVERT ACT—"OBJECT OF THE CONSPIRACY."
   Under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), making criminal a conspiracy "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose" when one or more of the conspirators do some "act to effect the object of the

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

conspiracy," it is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of another object; it must be directed to the attainment of the object which brings the conspiracy within the class made criminal; and when that object is attained "the object of the conspiracy," in the sense of the statute, is effected, and there cannot be a further overt act.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

3. PUBLIC LANDS (§ 114*)—PATENTS—WHEN TITLE PASSES—"PERFECT AND EFFECTIVE PATENT."

Under the public land laws of the United States, a patent becomes perfect and effective when it is executed and is recorded in the office of the recorder of the General Land Office at Washington, and no further act is essential to pass the title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314–322; Dec. Dig. § 114.*]

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

Ellsworth E. Lonabaugh and others were convicted of conspiracy to defraud the United States, and they bring error. Reversed.

For opinion of lower court, see 158 Fed. 314.

John W. Lacey and John M. Waldron, for plaintiffs in error.

Timothy F. Burke, U. S. Atty., and Sylvester R. Rush, Special Asst. Atty. Gen.

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

VAN DEVANTER, Circuit Judge. Ellsworth E. Lonabaugh, Robert McPhillamey, and E. M. Holbrook were tried and convicted in the district court upon an indictment, found April 3, 1907, wherein they were charged with having entered into a conspiracy to defraud the United States of the possession and title of certain of its public lands by means of fraudulent entries under the public land laws, and with having done certain acts to effect the object of the conspiracy.

Briefly stated the case made by the evidence, when interpreted most favorably for the government, was as follows: The defendants entered into the conspiracy on or before June 13, 1903. The fraud was to be effected by means of entries which were to be apparently regular, but actually fraudulent, in that they were to be secured by submitting to the local land office proofs falsely stating that the entrymen severally were making the entries solely for their own use and benefit, when in truth they were making them for the use and benefit of a corporation, and were obligated to convey the lands to it when the entries were secured; and the purpose in so falsifying the proofs was to induce the officers of the Land Department to allow the entries and to pass them to patent, neither of which lawfully could be done if the proofs disclosed the true facts. The entries actually were secured by the submission of false proofs as was contemplated; the entrymen, with

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

a single exception, then executed and delivered to the corporation warranty deeds for the lands entered by them, and the remaining entryman then likewise conveyed the lands entered by him to an individual grantee designated by the defendants. Later the officers of the Land Department at Washington, acting upon the false proofs submitted when the entries were secured, issued to the entrymen patents for the lands (by which it is meant that the patents were duly signed, sealed, countersigned, and recorded in the office of the recorder of the General Land Office at Washington), and still later the defendants, or some of them, sought and obtained a physical delivery of the patents, and then caused them and the deeds to the corporation to be recorded in the county clerk's office in the county where the lands are situate. And after the issuance of the patents the defendants or some of them also caused the title to the land which had been conveyed to an individual grantee, as before stated, to be passed to the corporation. But the dates of the several acts here recited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents by the officers of the Land Department at Washington or some of the acts subsequently done by one or more of the defendants can be regarded as such an act.

At the conclusion of the evidence, the defendants severally requested the court to direct a verdict of acquittal upon the ground that the case made by the evidence was one the prosecution of which was barred by the statute of limitation. The request was denied for reasons indicated in United States v. Lonabaugh (D. C.) 158 Fed. 314, exceptions were reserved, and the ruling is now assigned as error.

The statute defining the offense is Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), which reads:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not 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."

And the statute of limitation is Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725), which declares:

"No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed."

While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U. S. 62, 76, 25 Sup. Ct. 760, 50 L. Ed. 90); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. Lorenz v. United States, 24 App. D. C. 337, 387; s. c. 196 U. S. 640, 25 Sup. Ct. 796,

49 L. Ed. 631; Ware v. United States, 84 C. C. A. 503, 154 Fed. 577, 12 L. R. A. (N. S.) 1053; s. c. 207 U. S. 588, 28 Sup. Ct. 255, 52 L. Ed. 353; Jones v. United States, 89 C. C. A. 303, 162 Fed. 417, s. c. 212 U. S. 576, 29 Sup. Ct. 685, 53 L. Ed. 657.

Passing the question of their appropriate allegation in the indictment, we proceed to consider whether any of the acts shown to have occurred within the three years can be regarded as an overt act within the meaning of section 5440. But as a preliminary to so doing it should be observed that no act can be so regarded unless it was a positive rather than a passive one, was the act of one or more of the conspirators, and was done to effect the object of the conspiracy.

Of the issuance of the patents little need be said. It was not the act of one or more of the conspirators, but of the officers of the Land Department at Washington who were acting solely in behalf of the United States. And while it doubtless was induced by what the conspirators had done in giving to the entries a lawful appearance, when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found.

The subsequent acts are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured; and as to the right of possession, it is enough to say that it passed from the United States in a qualified sense when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? To this there can be but one answer, which is that given in United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167. In that case the Secretary of the Interior, upon becoming satisfied that the grantee named in an undelivered patent was not entitled to the land purporting to be conveyed thereby, canceled the patent, but it was held that the title had passed to the grantee, and was not recalled by what was done, the court saying:

"The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. * * *

"In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the lands in controversy, is not effectual for that purpose for want of delivery. That

though signed, sealed, countersigned, and recorded, and then sent to the register of the land office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee. * * *

"We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the land office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument. * * *

"The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partially wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title. * * *

"The acts of Congress provide for the record of all patents for land in an office, and in books, kept for that purpose. An officer, called the 'recorder,' is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'title by record'; and, when this is done, the grantee is invested with that title."

Other decisions to the same effect are Bicknell v. Comstock, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; Noble v. Union River Logging Co., 147 U. S. 165, 176, 13 Sup. Ct. 271, 37 L. Ed. 123; McCormick v. Aultman, 169 U. S. 606, 608, 18 Sup. Ct. 443, 42 L. Ed. 875.

And that there is no distinction in this respect between patents which are issued upon bona fide entries and those which are issued upon fraudulent entries is illustrated in Colorado Coal Co. v. United States, 123 U. S. 307, 313, 8 Sup. Ct. 131, 31 L. Ed. 182, where it was said:

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it was not such a fraud as prevents the passing of the legal title by the patents."

Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective. And, recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was effected when the title passed from the United States, and, therefore, that what was done thereafter was not done to effect that object.

But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute. Section 5440 does not interdict all conspiracies, but only those whose object is "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," and then only when one or more of the conspirators do some "act to effect the object of the conspiracy." It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained "the object of the conspiracy," in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See United States v. Keitel, 211 U. S. 370, 391, 29 Sup. Ct. 123, 53 L. Ed. 230.

It follows from what we have said that the case made by the evidence was one that was barred by the statute of limitation and that the request for a directed verdict of acquittal should have been granted.

The judgment therefore is reversed, with directions to set aside the verdict and to take such further proceedings as may be in conformity with law.

PHILIPS, District Judge, concurs in the result and in all of the opinion save the sentence which reads:

"And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found."

HOWLAND PULP & PAPER CO. v. ALFREDS.

(Circuit Court of Appeals, First Circuit. May 25, 1910.)

No. 857.

1. COURTS (§ 276*)—JURISDICTION OF FEDERAL COURTS—DISTRICT OF TRIAL—WAIVER.

A corporation, sued by a nonresident in the Circuit Court for the Maine District as organized in that state, although in fact a citizen of another state, with the right to object to the jurisdiction of the court in that district, waives such right by entering a general appearance; and, as it has full knowledge of the facts it cannot avail itself of the objection after plaintiff has amended his declaration to correctly allege its citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*

Waiver of right as to district in which suit may be brought, see notes to Memphis Savings Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

2. TRIAL (§ 238*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

The fact that language found in a requested instruction was copied from a judicial opinion does not necessarily render it error to refuse the request, since, as used in the opinion, it may be qualified by the text, and may not be correct as a general proposition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 552, 562; Dec. Dig. § 238.*]

3. MASTER AND SERVANT (§ 267*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

In an action by an employé to recover for an injury received while tending a machine in defendant's paper mill, the admission of evidence that defendant's superintendent refused to allow plaintiff to go into the mill after the injury to examine the machinery *held* not error, under the circumstances of the case.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 267.*]

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

Action by Tor Alfreds against the Howland Pulp & Paper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward C. Stone, for plaintiff in error.

Howard R. Ives, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This was an action of tort brought in the Circuit Court for the District of Maine. The plaintiff below was injured while tending a paper-making machine. It is convenient to call the plaintiff below the plaintiff, and the defendant below the defendant. The verdict was for the plaintiff, and the defendant sued out this writ of error.

The first question we have to meet is one of jurisdiction depending on the citizenship of the parties. The writ and declaration originally described the defendant as the Howland Pulp & Paper Company and as a corporation organized under the laws of Maine. There was a corporation organized under the laws of Maine whose name was Howland Paper Company. The corporation sued was organized under the laws of Vermont. There is no question as to identity. The one or-

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

ganized under the laws of Vermont was the one intended to be sued, and the one which employed the plaintiff.

The writ was returnable at Portland on the third Tuesday of April, 1909. On the return day, the Howland Pulp & Paper Company entered a general appearance to the suit. If the writ and declaration had alleged that the defendant was organized under the laws of Vermont, the defendant, if it had seen fit, might have obtained a dismissal of the suit, because it would then have appeared of record that neither party was a citizen of Maine; but, in accordance with the settled determinations of the Supreme Court, inasmuch as the question of jurisdiction thus involved would not have been a constitutional one, all objections would have been waived by the entry of a general appearance.

As the case stood, for some reason the plaintiff, after the appearance was entered, amended his writ and declaration according to the fact, showing that the defendant corporation was organized under the laws of Vermont. Ordinarily this would entitle the defendant to make such amendment as was necessary to meet the change of the case which the plaintiff had thus brought about. The defendant sought to accomplish what was in fact an amendment of the state of the pleadings by filing a motion to dismiss for the want of jurisdiction, which motion was overruled.

If, under other analogous circumstances, the plaintiff had in his writ and declaration alleged himself to be a citizen of Maine and the defendant a citizen of Vermont, thus on the face showing a case judiciable in the district of Maine, to which the defendant would have been bound to answer on the merits, and if afterwards the plaintiff had sought to amend his writ by showing that he was a citizen of New Hampshire, then the defendant would not ordinarily have been estopped by his general appearance, because he would not have been presumed to know the plaintiff's citizenship, and would have been entitled to have the suit dismissed. In the case at bar, however, when the defendant filed its general appearance, it must be held to have waived all the facts which it knew, including the fact of its own place of incorporation. Therefore the amendment made by the plaintiff brought in nothing which was in truth new, and nothing which the defendant did not know when it filed its general appearance. Consequently the defendant must be held to have waived whatever was involved in the erroneous description of itself.

On the merits the only question submitted to us is to the effect that the plaintiff had not been properly warned of the dangers to which he was subjected. The question is, not what we might hold if we had full jurisdiction of the facts, but that of our power to reverse the finding of the jury. The proposition which ultimately engaged our attention was the defendant's claim that the mechanism and the operation of the mechanism were of a character plainly visible to any person of ordinary intelligence, either with or without experience. The plaintiff's hand was caught in broken paper which was emerging from between the calenders of the machine. Normally, everything was visible to a person of ordinary intelligence; but it is claimed by the plaintiff that his hand was caught by the giving way of the embryo paper

and the consequent bunching of it in a way not so unusual as not to be known to experts, but not happening so frequently that an inexperienced person would have been bound to anticipate it. It is needless to elaborate the proofs on a question of this character. It is enough to say only that the circumstances were such that we cannot substitute ourselves for the jury in reference to them.

There are altogether 15 alleged errors assigned. We think we have covered those that raise any substantial question. If such is not the fact, it is because there are so many alleged errors treated without any references to the pages of the record as required by our rules, and without sufficient statements to enable us to perceive their specific bearings with regard to the particular phases of the case. The eleventh illustrates peculiarly what we mean. A certain requested instruction was given, omitting the following words at the close of it, namely:

"Whether the employé in fact does or does not know of the risks is not the question, and is not material."

This clearly was not a correct statement of the law applicable in a general way. Whether the employé does or does not know the risks is, under many circumstances, very material; and here, without further explanation, it may or may not have been important. One reason why we use this as an illustration is because it is maintained that the words omitted were taken from McCafferty v. Lewando's Company, 194 Mass. 412, 414, 80 N. E. 460, 120 Am. St. Rep. 562. They are found there, not in connection with any instruction given to the jury, but as a part of the text of the opinion. The rest of the text explains what was intended; and, of course, as part of an opinion, it is always supported by what accompanies it, and does not require the completeness and accuracy demanded in a charge to a jury.

In like manner, referring to the twelfth alleged error, the requested instruction, which it is said was refused, is stated to have been copied from Stuart v. West End Street Railway, 163 Mass. 391, 393, 40 N. E. 180. In that case it is found in the body of the opinion, and nowhere else. Here it is not explained that it touches any issue raised in the case. General observations of this character apply to some of the other alleged errors; and on the whole none of this class requires further observation.

The admission, subject to the defendant's objection, of evidence in substance that the defendant refused to allow the plaintiff to go into the mill after the injury to examine the machinery where he got injured, should be considered. This was offered with the claim by the plaintiff that he wished to show the jury why he could not explain the circumstances of the injury better than he did. Quite likely it was admissible on that point; but, whether it was or not, there is no evidence of any claim or suggestion on the part of the defendant that any possible injury could have come to it by permitting the examination asked for, unless because it gave the plaintiff the usual opportunities to acquire the general information which would have come therefrom. The circumstances of the refusal were such as, being made to a stranger, would be regarded as merely discourteous. It is

not entirely unlike a refusal by a plaintiff to permit an examination by defendant's physicians of an alleged injured limb which could not be otherwise understood. Such an examination, independently of a statute, the plaintiff has an absolute right to refuse, and yet, if refused when requested in a proper way, the refusal may justly more or less influence a jury. It might unduly influence it, as the defendant suggests was done in the present case; but that would be a result for which no one would be responsible except the party who made the refusal. The fact is that, as the refusal related to the inspection of machinery, while the injury was caused by the bunching of the embryo paper, an examination could not have been of much consequence; and it was the right of the defendant to have had an instruction on this point if it had asked it, but it failed to ask it. Therefore, in any view, and whatever influence the evidence may have had on the jury, even if it was exaggerated, the defendant cannot complain. The plaintiff undertook to maintain that the sole objection raised by the defendant was because the application was made to the superintendent without any proof of the extent of the authority of the superintendent; but the broader objection preceded this particular proposition. On the other hand, it should be said in behalf of the plaintiff that the superintendent was prima facie the person to whom an application for examination of the machinery should be made. It is also to be observed that the reference by the plaintiff to his inability to explain the circumstances of the injury was incidental, and did not bar him from maintaining that the evidence as offered was within the customary practice of the courts, as pointed out by an observation of Mr. Justice Gray in Union Pacific Railway Company v. Botsford, 141 U. S. 250, 254, 11 Sup. Ct. 1000, 35 L. Ed. 734. If there had been any claim or suggestion on the part of the defendant of the kind we have referred to, especially of any necessity to guard the secrets of its trade, the case might have stood differently; but, in view of the circumstances as they appear in the record, we see no error here, whatever might have appeared if circumstances of a different and special character had been fully stated.

The judgment of the Circuit Court is affirmed, with interest; and the defendant in error recovers his costs of appeal.

HERMAN KECK MFG. CO. v. LORSCH et al.

(Circuit Court of Appeals, Sixth Circuit. March 10, 1910.)

No. 2,044.

1. BANKRUPTCY (§ 463*)—APPEAL—RECORD—AMPLIFICATION.

Where, on appeal from an involuntary bankruptcy adjudication, it appeared that the record did not contain all the evidence, though appellant's counsel claimed that it contained everything required for an examination of the questions sought to be reviewed, a motion to include additional matter will be granted, with the reservation of the right to determine which party should ultimately bear the expense thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 463.*

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

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

2. BANKRUPTCY (§ 463*)—APPEAL—EXHIBITS—COURT RULES.
An application to send to the Circuit Court of Appeals the original books and records kept in the business of the bankrupt was not within the rule providing that, where there are exhibits in the trial court which cannot be transcribed or brought up by proper representation, they may be ordered transmitted to the Circuit Court of Appeals as a part of the return to the appeal, in the absence of a showing that the books could not be transcribed or that representation by photographic copies, if necessary, could not be made.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 463.*]

3. BANKRUPTCY (§ 474*)—RECORD—PRINTING—PAYMENT BY RECEIVER.
Where an alleged bankrupt appealed from an involuntary adjudication, he was not entitled to an order requiring a receiver of his property to pay the costs of the transcript and the printing of the record out of the proceeds of the bankrupt's estate in his hands, because the bankrupt was without the means required for that purpose.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

4. COURTS (§ 405*)—APPEALS IN FORMA PAUPERIS.
An appeal cannot be taken to the Circuit Court of Appeals in forma pauperis.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

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

Involuntary bankruptcy petition by Albert Lorsch and others against the Herman Keck Manufacturing Company. From a bankruptcy adjudication, the debtor appeals. On motions with reference to the record. Allowed in part.

This is an appeal by the debtor from a judgment adjudicating it to be a bankrupt upon a creditor's petition. The record filed in this court contains about $2,000 typewritten pages. It appears from the certificate of the clerk that the transcript contains only such papers as the attorney for the appellant designated in a præcipe filed in the court below. Counsel agree that there is a large amount of evidence in the case which has not been transcribed or brought up to this court; but the appellant contends that it is not material on this appeal. The original books and records kept in the business of the appellant, and other exhibits, have not been copied or included in the transcript filed in this court.

C. W. Baker, Fred L. Hoffman and August H. Bode, Jr., for appellant.

Joseph W. O'Hara and Jonas B. Frenkel, for appellees.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

PER CURIAM. Three distinct motions were submitted yesterday relating to this matter.

The first motion is founded upon a suggestion that only a part of the record was brought here, and that the transcript does not include several things and matters which it is claimed are necessary in order to a satisfactory examination of the questions raised. That motion we are disposed to allow, with the reservation of power in this court to ultimately determine where the costs of that additional matter of the transcript should be placed, determinable upon the question whether or not it is necessary to be brought, in order to have a proper understanding. With this reservation, the motion will be granted; but for

special reasons, which we do not care to dwell upon, we further order that the charges incident to the supplying of this additional matter be paid by the appellees, and so of the cost of printing it, the ultimate liability for which is also to be determined hereafter.

Another motion was for an order requiring that the original books and records kept in the business of the Keck Manufacturing Company should be ordered to be sent here; it being claimed that there is something about the books which could not be adequately transcribed. This motion is denied. There is a rule, which we have taken from the Supreme Court rules, so far as this branch of it is concerned, that where there are exhibits in the record in the court below, such as cannot be transcribed or brought here by proper representation, as, for instance, models and the like, which have been made part of the evidence in that court, they may be ordered by the judge of the court below to be sent here as part of the return to the appeal. The rule applies generally to such matters as cannot be transcribed, so as to be exhibited to this court as they were exhibited to the court below. The application for an order to send up the original books and records is not within the scope of that provision. It is not shown that transcription, or representation by photographic copies, if necessary, cannot be made. Therefore no ground is made which would bring the case within the scope of the rule.

The other motion is that the receiver, who was appointed in the court below while this matter was pending there, has in his possession, according to the showing made, funds arising from the conversion of the estate. It is asked that an order be made upon him to advance and pay the costs of the transcript and the printing of the record, and the suggested diminution from funds in his hands, because the appellant is without the means necessary for defraying the expense of copying the transcript and printing the record. We think this motion cannot be granted. The fund, which is in the hands of the court, is subject to the disposition and control of the court by its decree. It is true that circumstances are such as to excite regret for the disability of the Keck Company; but there is no precedent for making such an order as this in such circumstances merely on the ground of the poverty or inability of the appellant to get the case heard. Along the same line is the practice in cases where the appellant seeks to prosecute an appeal in forma pauperis. It had been the practice in this court until recently to allow the appellant to prosecute an appeal in forma pauperis; but that practice was dropped upon the authority of a decision of the Supreme Court. The Supreme Court held that the provision in regard to allowing an appeal to be prosecuted in forma pauperis applies only to the court of first instance, and does not apply to the appellate court. With due respect to the Supreme Court, whose rule is the same as ours, we have changed the rule, so that now this court does not permit an appeal in forma pauperis. In re Bradford's Petition 71 C. C. A. 334, 139 Fed. 518. That being so, much less ought we to allow a proceeding to be financed by means to be supplied out of this fund, which it may ultimately be held, by the decree eventually to be made, ought to go to the benefit of creditors. These are, simply stated, the grounds upon which we deny this motion.

POLLET v. COSEL.

(Circuit Court of Appeals, First Circuit. May 18, 1910.)

No. 864.

BANKRUPTCY (§ 404*)—DISCHARGE—SECOND PROCEEDING.

Where a bankrupt failed to obtain a discharge, although his petition was dismissed for want of prosecution, and not on the merits, he is not entitled to a discharge in a second bankruptcy proceeding from the debts provable in the first.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. § 404.*]

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

In the matter of Robert S. Pollet, bankrupt. The bankrupt appeals from an order refusing a full discharge. Affirmed.

Marvin M. Taylor, for appellant.

Nathan B. L. Cosel, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This was an appeal by a bankrupt against an order of the District Court in bankruptcy giving him only a qualified discharge. The bankruptcy proceedings in the present case were commenced by a petition filed in the district of Massachusetts on August 6, 1908. The bankrupt petitioned for discharge, and the creditor, now the appellee, duly filed his specification of objections thereto, setting out the proceedings in a previous bankruptcy where he had been a creditor. The result was a judgment giving a limited discharge, the limitation being covered by the following words:

"Excepting also such debts as were provable in certain proceedings in bankruptcy in the District Court of the United States for the Southern District of New York, wherein on May 18, 1905, said Robert S. Pollet was duly adjudged a bankrupt."

This exception reserved from this discharge the debt of the appellee, as the same was not only provable in the prior proceedings described, but was therein duly proved. The present appeal arose out of this limitation.

In the prior proceedings the discharge was not in form refused, but the petition therefor was dismissed on the ground that the bankrupt had failed to prosecute, and to appear for examination; laches being apparently specifically assigned.

We are of the opinion that the judgment of the District Court appealed from was correct; and, aside from our own conclusions in the matter, we should feel called on to sustain it in accordance with our practice of following the Courts of Appeals in other circuits.

At the outset we note the fact that section 14 of the bankruptcy statute of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides that:

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

"Any person may, after the expiration of one month, within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge."

It also provides that, if it appears that the bankrupt was unavoidably prevented from filing his application within 12 months; "it may be filed within but not after the expiration of the next six months." Here is a positive limitation of 18 months given by statute within which an application for a discharge may be made. If the position of the bankrupt in this case is correct, it amounts to a repeal of this statutory limitation. The fact that it is by indirection, instead of by a delayed application in the original proceeding, is immaterial, because in the indirect form the result would be quite as effectual to the defeat of the clear letter and intention of the statute as if otherwise accomplished. However, we do not let the case rest on this proposition, because the authorities to which we will refer are conclusive on more general grounds.

The bankrupt relies on Bluthenthal v. Jones, 208 U. S. 64, 66, 28 Sup. Ct. 192, 52 L. Ed. 390, decided on January 6, 1908. There is nothing in it which helps him. It contains a declaration which is, of course, so far as this case is concerned, a dictum, but which is positively opposed to the appellant. There the creditor, who was the same creditor in both the first and second bankruptcy proceedings, failed to appear in the second proceeding to object to the discharge, as otherwise the creditor has done here. Therefore in the second proceeding there was a clean discharge. This was offered as a discharge in the state court against the creditor, and was held to be efficient. The Supreme Court sustained the judgment of the state court, but solely on the ground, to put it briefly, that there must be at least plea in legal proceedings. The opinion, however, used the following phraseology:

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, between those parties or privies to it, the facts upon which the refusal is based."

This as the expression of the learned judge who wrote the opinion, and of the other judges who concurred therein, would be sufficient to bar the appellant here, if there had been an adjudication on the prior proceeding, or anything beyond a mere dismissal. Where there is only a mere dismissal for want of prosecution, it is so often held that parties are not fully estopped thereby that the language we have quoted does not necessarily apply here. Nevertheless, the questions we have here, in one form or another, have been before Circuit Courts of Appeals in other circuits three times: First, in Re Fiegenbaum, in the Circuit Court of Appeals for the Second Circuit, decided on February 25, 1903, 121 Fed. 69, 57 C. C. A. 409; second, in Kuntz v. Young, in the Circuit Court of Appeals for the Eighth Circuit, decided on July 28, 1904, 131 Fed. 719, 65 C. C. A. 477; and, third, again in the Circuit Court of Appeals for the Second Circuit, in Re Kuffler, 151 Fed. 12, 80 C. C. A. 508, decided January 7, 1907. In the first case a discharge had been refused. In the second and third

cases the petition for a discharge had been dismissed for want of prosecution, the same as here. And yet the same result was reached practically in each case; all in support of the judgment of the District Court now appealed from. In the last case the precise form of discharge which was granted here was approved in advance. Therefore, both on principle and on authority, we accept the conclusions of the District Court.

The judgment appealed from is affirmed, and the appellee recovers his costs of appeal.

In re HARRALSON.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1910.)

No. 101.

BANKRUPTCY (§ 258*)—SALE OF MORTGAGED PROPERTY—LIABILITY OF MORTGAGEE FOR COMMISSIONS.

A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested, and if it undertakes to sell property which is subject to a mortgage, the validity of which is unquestioned, it is to be assumed that some benefit was expected to accrue to the general creditors, and if the proceeds are insufficient to pay the mortgage the holder is entitled to the full amount, without deduction for the commissions of the trustee and referee, where there is a general estate from which they may be paid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 258.*]

Petition for Review of Order of the District Court of the United States for the Eastern District of Missouri.

In the matter of Joseph H. Huggins, bankrupt. On petition by George G. Harralson, trustee, for review of an order of the District Court. Affirmed.

The following is the opinion of Dyer, District Judge, in the court below:

This is a proceeding for review of an order made by the referee in bankruptcy, directing the Ozark Cooperage & Lumber Company to pay to the trustee of the bankrupt estate the sum of $1,500, being the amount bid by it for a sawmill and hoop machinery sold by the trustee pursuant to the order of the referee. It appears from the certificate of the referee that at the time of the adjudication of bankruptcy the Ozark Cooperage & Lumber Company had a valid chattel mortgage upon the sawmill and machinery of bankrupt, securing an indebtedness of $1,640. The Ozark Cooperage & Lumber Company proved its claim for the debt due it before the referee, and the chattel mortgage securing such claim was adjudged valid by the referee, and the claim allowed as a secured claim. It was stipulated between the trustee and the Ozark Company that the property covered by the chattel mortgage might be sold by the trustee under an appropriate order of the referee free and clear of the lien of the mortgage, and the lien transferred to and held upon the proceeds of such sale. Pursuant to such stipulation the referee made an order authorizing the trustee to sell the property described in the chattel mortgage at public or private sale, such sale to be subject to the approval of the referee, and to deposit the proceeds of sale in a designated depository. In accordance with the order of the referee, the trustee offered the property for sale, and it was bid in by the Ozark Cooperage & Lumber Company for the

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

sum of $1,500. The sale was duly approved by the referee, who entered an order directing that the property be delivered to the purchaser upon the payment of "sufficient funds to meet expenses of sale and commissions, namely, $85."

It appears that in the first instance the trustee only demanded that the Ozark Company, in carrying out its bid, pay him $70 for his commissions and $15 for commissions of the referee, making an aggregate of $85. (See report of trustee, Exhibit F.) Afterward the trustee insisted that the Ozark Company pay him in money $1,500, being the full amount of its bid for the property purchased. The Ozark Company declined to pay the purchase price of $1,500, or any other sum, in money, but insisted upon its right to fulfill its bid by entering a credit of $1,500 upon its secured claim of $1,640, which had been adjudged by the referee to be a valid first lien upon the proceeds of the property purchased. The referee thereupon made an order directing the Ozark Company to appear and show cause "why they persistently refuse to pay the purchase money for the property." The Ozark Company filed a return to the order to show cause, in which it set up that it had a first lien upon the proceeds of the property purchased by it, that it had informed the trustee of its willingness to have the amount of its bid credited upon the secured claim, and that it was advised by its counsel "that it is entitled to credit the full purchase price upon its said secured claim, and that it cannot be compelled to pay the purchase price in cash." The referee thereupon made an order directing the Ozark Company to pay the trustee the sum of $1,500, the amount of its bid, on or before May 25, 1909. Upon the petition of the Ozark Company, duly filed, this order has been certified to the court for review.

Under the facts here presented, I am of opinion that the referee's order was erroneous and should be set aside. The Ozark Company had a first lien upon the property bid in by it, and the validity of this lien was not only undisputed, but had been expressly adjudicated in the bankruptcy proceedings. There appears to have been other property out of the proceeds of which the costs and expenses of the bankruptcy proceeding could be met; but, whether this was the case or not, the secured creditor was entitled to the entire proceeds of the property upon which it had a lien until its debt was fully satisfied, and no part of such proceeds could properly be withheld from it to pay commissions of the trustee and referee or other costs of the bankruptcy administration. Smith v. Twp., 17 Am. Bankr. Rep. 745, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; Matter of Anders Telephone Company (D. C.) 13 Am. Bankr. Rep. 643, 136 Fed. 995; Mills v. Virginia-Carolina Lumber Company, 20 Am. Bankr. Rep. 750, 164 Fed. 168, 90 C. C. A. 154, 21 L. R. A. (N. S.) 901. Furthermore, the Ozark Company was entitled to credit the amount of its bid in partial satisfaction of its secured claim, and the referee erred in making an order which deprived it of this right. In re Saxton Furnace Company (D. C.) 14 Am. Bankr. Rep. 483, 136 Fed. 697; In re Waterloo Organ Company (D. C.) 9 Am. Bankr. Rep. 427, 118 Fed. 904.

It may not be out of place to say that a referee in bankruptcy should not permit a trustee in bankruptcy to undertake the administration of property upon which there are incumbrances, the validity of which are not disputed, unless there appears to be some reasonable probability that there will be realized from the incumbered property some surplus for distribution to general creditors. Where no benefit can result to general creditors from the administration of incumbered property, it is usually the wiser course to permit lien creditors to enforce their liens by appropriate proceedings outside of the bankrupt court. In the present case the controversy is really over the right of the trustee and referee to commissions on the proceeds of the incumbered property, and this dispute would have been avoided if the mortgage creditor had been permitted to foreclose his mortgage in the ordinary manner outside of the bankruptcy court.

The order of the referee of May 17, 1909, will be vacated and set aside, and an order entered directing the trustee to deliver to the Ozark Cooperage Company the property purchased by it, upon its entering satisfaction of its secured claim and crediting the sum of $1,500 upon its claim heretofore allowed against the bankrupt estate.

Frank Kelly, for petitioner.
George B. Webster, for respondent.

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

HOOK, Circuit Judge. The trustee in bankruptcy complains of an order of the District Court sustaining the right of a lien creditor, who purchased the incumbered property at trustee's sale, to have the purchase price credited on his allowed claim, instead of requiring him to make payment in cash, and denying the trustee and referee their commissions out of the proceeds.

Among the assets of the bankrupt was a sawmill which was subject to a mortgage securing a note for $1,640. It was admitted the mortgage was valid and a first lien. The mortgage creditor's claim was accordingly allowed as a secured one. The trustee and the creditor joined in a petition to the referee that the property be sold free of the mortgage and that the lien be transferred to the proceeds. The petition was granted, and at the sale duly made by the trustee the creditor became the purchaser. The purchase price was $1,500, and the creditor asked that it be credited upon his allowed claim without deduction. The referee ordered him to pay the price in full to the trustee, or to pay their commissions on the sale, amounting to $85. The creditor declined to do either, and upon his petition for review he was sustained by the District Court. The trustee complains of the action of the court.

A court of bankruptcy should not assume charge of incumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lienholders or others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors, and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted incumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure cases, where, if possible, the judgment lien creditors are paid in full, and if a deficiency results from deducting the costs from the proceeds it goes as a judgment against the debtor. It appears here that there was a general estate of the bankrupt out of which the commissions might be paid. Therefore we need not determine what should be done in case of a sale by a trustee in bankruptcy at the instance or with the concurrence of a lien creditor, a deficit of proceeds, and no general estate.

The creditor was entitled to have the purchase price credited on his

allowed claim. It would have been a useless ceremony for him to pay the $1,500 into court and then have it repaid him after credit on his allowed claim.

The petition to revise is denied.

RICHARD T. GREEN CO. v. YOUNG.

(Circuit Court of Appeals, First Circuit. May 27, 1910.)

No. 870.

MASTER AND SERVANT (§ 116*)—MASTER'S LIABILITY FOR INJURY TO EMPLOYÉ —DEFECTIVE "WAYS, WORKS, OR MACHINERY."

Under the Massachusetts employer's liability act (Rev. Laws, c. 106, § 71), as construed by the state courts, a staging built by a shipbuilding company under the direction of its superintendent around a vessel under construction for the carpenters and caulkers to work upon and required for that purpose is a permanent structure which constitutes "ways, works, or machinery," within the meaning of the statute, and a defect in its construction by a failure to spike one of the cross-pawls to the uprights may authorize a recovery against the company for an injury to an employé resulting therefrom.

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

For other definitions, see Words and Phrases, vol. 8, pp. 7420, 7421.]

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

Action by Hebron E. Young against the Richard T. Green Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Milfred O. Garner, for plaintiff in error.

Endicott P. Saltonstall (Sanford H. E. Freund, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is a writ of error for review of the rulings of the Circuit Court in an action to recover damages for personal injuries.

The Richard T. Green Company, defendant below, is a corporation engaged in the business of shipbuilding; and early in 1909 it had begun the construction of a vessel 172 feet in length at its yard in Chelsea. In February, 1909, a staging was built around the vessel, upon which the carpenters and caulkers worked. In the following June, Young, the plaintiff below, who had been employed by the company as a caulker since February, fell from the staging, and was injured. At the time of the accident he was engaged in raising one of the planks to a cross-pawl higher up on the staging, when the lower cross-pawl on which one of his feet rested turned or tilted, and he fell to the dock below.

The case was submitted to the jury on two counts under the Massachusetts employer's liability act (Rev. Laws, c. 106, § 71); the second

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

count alleging that the injury complained of was caused by reason of a defect in the "ways, works, or machinery" of the defendant.

In regard to this count, the defendant asked the Circuit Court for a ruling that there was no evidence that the staging in question was ways, works, or machinery within the meaning of the statute; and the principal exceptions are based upon the refusal of the Circuit Court to make this ruling.

We find no error in this ruling, since it is clear, in our opinion, that there was evidence upon which the jury might find that this staging was ways, works, or machinery within the meaning of the statute, as construed by the Massachusetts courts. There was evidence that the business of the defendant required the use of staging; that this particular staging was built under the direction of the defendant's superintendent; that the defendant furnished the material for this express purpose; and that this staging was a permanent structure in the sense in which the word "permanent" has been applied to similar structures by the state court. There was also evidence of a defect in the construction of the staging by reason of the failure to spike the cross-pawl upon which the plaintiff rested his foot to the uprights, as well as the upper cross-pawl over which he was leaning at the time he fell.

The case at bar cannot be distinguished in principle from Prendible v. Connecticut River Manufacturing Company, 160 Mass. 131, 35 N. E. 675, Donahue v. Buck & Co., 197 Mass. 550, 83 N. E. 1090, 18 L. R. A. (N. S.) 476, Doherty v. Booth, 200 Mass. 522, 86 N. E. 945, and Foster v. New York, New Haven & Hartford Railroad Company, 187 Mass. 21, 72 N. E. 331. The other class of cases upon which the defendant relies relate to temporary stagings put up by the workmen themselves. Burns v. Washburn, 160 Mass. 457, 36 N. E. 199; Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199; Reynolds v. Barnard, 168 Mass. 226, 46 N. E. 703.

We have considered what seems to us the only substantial question raised by the exceptions. The other requests for rulings were plainly not warranted by the facts in the case, or were not a full and correct statement of the law, and were therefore properly refused by the Circuit Court.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

KNITTER v. CHICAGO, L. S. & E. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1910.)

No. 1,576.

MASTER AND SERVANT (§ 180*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RAILROADS—NEGLIGENCE OF FELLOW SERVANT—WISCONSIN STATUTE.

St. Wis. 1898, § 1816, as amended by Laws 1903, c. 448, which makes a railroad company liable for an injury to an employé "while engaged in the line of his duty as such and which shall have been caused by the

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

carelessness or negligence of any other * * * employé while in the discharge of, or failure to discharge his duty as such, provided that such injury shall arise from a risk or hazard peculiar to the operation of railroads," abolishes the fellow servant doctrine only in case of injuries to employés of common carriers while engaged in the line of their duty "as such," and the statute has no application to the case of an injury to one of the crew operating an engine used solely in moving slag cars on the premises of a steel company from a blast furnace to the dumping grounds, although the crew were employés of a railroad company which hired them and the engine to the steel company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 363; Dec. Dig. § 180.*]

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

Action by Frank Knitter against the Chicago, Lake Shore & Eastern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The facts are stated in the opinion.

Hugh Ryan, for plaintiff in error.

Clarke M. Rosecrantz, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

The plaintiff in error (plaintiff below) brought this action to recover for personal injuries received by him under the following circumstances: Defendant in error is a common carrier, operating a railroad, a portion of which is in the State of Wisconsin. The Illinois Steel Company has a blast furnace in the City of Milwaukee, in that State, adjacent to the railroad, and connected therewith by the necessary switches. A track leads from this blast furnace, over the grounds of the steel company, to some dumping grounds on the lake shore, also within the grounds of the steel company; said track being used exclusively to remove the waste product of the steel company, known as "slag," from the furnace to the dumping grounds. Incidentally, this track is connected with the defendant in error's tracks by a switch. The only cars used on the track are what are known as "rubbish buggies," peculiarly constructed for the removal of slag. The defendant in error, for a certain stipulated price per day, furnished the locomotive and crew that hauled these rubbish buggies back and forth between the furnace and the dumping grounds; and at the time of the accident, the plaintiff in error was one of this crew. The accident was due to the fact that the engineer of the locomotive, without notice, started his engine while plaintiff in error was engaged in cleaning some slag off the track in front of the engine. Except for a statute of the State of Wisconsin, the relation of plaintiff in error and the engineer was admittedly that of fellow servants.

The statute (section 1816, St. Wis. 1898, as amended by chapter 448, Laws 1903) is as follows:

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

"Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employés without contributory negligence on his part:

"1. * * *

"2. When such injury is sustained by an officer, agent, servant or employé of such company, while engaged in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other officer, agent, servant or employé while in the discharge of or for failure to discharge his duty as such, provided, that such injury shall arise from a risk or hazard peculiar to the operation of railroads."

The statute, when analyzed, clearly shows that it was the intention of the legislature to confine the abolition of the fellow servant doctrine to injuries sustained by employés of a common carrier, only while engaged in the line of their duty "as such," and when caused by the negligence of other fellow servants while engaged in the discharge of their duty "as such," the particular injury itself to arise from a risk or hazard "peculiar to the operation of railroads" as common carriers. Indeed, it was necessary to thus limit the application of the statute to save it from being unconstitutional. Kiley v. C., M. & St. P. Ry. Co., 138 Wis. 215, 120 N. W. 756; McKivergan v. Lumber Company, 124 Wis. 60, 102 N. W. 332.

The furnishing of a locomotive and a crew to move these slag buggies between the furnace and the dumping grounds involves, in our judgment, no risk or hazard "peculiar to the operation of a railroad," and the crew engaged therein are not, for the time being, engaged in the line of their duty as employés of a common carrier "as such." Such work is not, in any sense, the operation of a railroad. A team of horses, or a road engine, hauling these buggies, would be just as much the operation of a railroad as was the matter under consideration; and the mere fact that the motive power furnished was the property of the railroad company, and that the crew operating it were employés of the railroad, no more makes it the operation of a railroad, within the meaning of the statute—differentiating a railroad in its relation to the public from other enterprises in this respect—than would the fact that the horses or the road engine belonged to the railroad, make the hauling of the buggies by the horses or the road engine the operation of a railroad; or the fact that any other labor done by railroad employés, not connected with its operation as a common carrier, would make the matter of which the employment was a part, an operation peculiar to railroads, or the employment one in line of the employé's duty to a common carrier as such. McKivergan v. Lumber Company, supra. The case presented, therefore, was not one coming within the statute.

The judgment will be affirmed.

RIPPER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 10, 1910.)

No. 2,868.

1. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—NECESSITY OF REQUEST.
An accused cannot object to the court's failure to charge on a legal issue, in the absence of a request therefor.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

2. CRIMINAL LAW (§ 827*)—INSTRUCTIONS—REQUESTS TO CHARGE—SUFFICIENCY.
A bare exception to a charge given is not equivalent to a request to charge.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 827.*]

3. CRIMINAL LAW (§ 1186*)—APPEAL—REVERSAL.
Where the record fails to disclose proof of all the essential elements of an offense, or evidence from which the jury might have found them, the Circuit Court of Appeals may set aside the conviction, though the appropriate objection has not been made.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

On petition for rehearing. Denied.

For former opinion, see 178 Fed. 24.

P. H. Cullen, Thomas T. Fauntleroy, and Shepard Barclay, for plaintiff in error.

HOOK, Circuit Judge. The conviction and sentence of Ripper for violations of the oleomargarine act (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]), was affirmed by this court. 178 Fed. 24. A petition for rehearing has been presented. Some of the grounds set forth have already been fully considered and we do not think the conclusions reached should be disturbed. Of the others there is but one that need be noticed.

One of the counts in the indictment charged a violation of section 13 of the act, which provides that whenever any stamped package containing oleomargarine is emptied it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon, and imposes a penalty for the willful neglect or refusal to do so. Complaint is now made that the trial court refused to instruct the jury that in order to convict it was necessary they should find the neglect to destroy the stamps was willful, and that this matter was assigned as error, but was not considered in our former opinion. It is said in the petition for rehearing that counsel for the accused requested such an instruction, and it was refused. The record does not disclose that any requests whatever were made of the trial court. At the conclusion of the charge counsel merely excepted to it upon a number of grounds, among which was one that the court failed to instruct that the neglect to cancel the stamps must have been willful. This exception is the sole basis for the statement that a request was made and refused. It is the settled rule that if a party desires an instruction upon the law

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

he must ask for it. Texas & Pacific Railway v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Isaacs v. United States, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343; Backus v. Depot Co., 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853; Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011. A bare exception to a charge is not equivalent to a request. If the record before us had failed to disclose proof of all the essential elements of the offense or evidence from which the jury might have found them, we might very properly set aside the conviction, though the objection was not raised in the appropriate way. Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465; Williams v. United States, 88 C. C. A. 296, 158 Fed. 30. But that was not the case. There was substantial proof of all of the elements of the offense and of the guilt of the accused.

The petition for rehearing is denied.

CAMPBELL v. AMERICAN SHIPBUILDING CO.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1910.)

No. 1,976.

1. PATENTS (§ 168*)—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE.
   Where an applicant for a patent acquiesces in the rejection of claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have surrendered and disclaimed what he thus conceded, and is bound by the limitations so imposed, and it is immaterial whether the office was right or wrong in rejecting the original claims.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. § 168.*]

2. PATENTS (§ 328*)—INFRINGEMENT—CARGO VESSEL.
   The Campbell patent, No. 675,812, for a cargo vessel, as limited by the proceedings in the Patent Office, *held* not infringed.

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

Suit in equity by James Campbell against the American Shipbuilding Company. Decree for defendant, and complainant appeals. Affirmed.

W. L. Pierce, for appellant.

Charles Neave, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. This is a suit for infringement of patent issued to James Campbell under date of June 4, 1901, No.

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

675,812, for improvement in navigable vessels. The answer comprises denials of utility, infringement, and the quality of invention, and averments of anticipation through various patents of the United States, Great Britain, and France, and also averments of amendments made of the application while pending in the Patent Office, whereby Campbell is estopped from claiming that defendant's vessels are within the scope of the patent. The latter defense was sustained in the court below, and the cause is pending here on appeal.

If the conclusion reached by the learned trial judge shall prove to be correct, it will be unnecessary to determine any of the other issues made in the pleadings. The patentee states in his specification:

"This invention relates to navigable vessels, its object being the construction at a moderate cost of a strong vessel capable of carrying heavy cargoes, and in particular iron ore, in such a manner that no part of the cargo shall be screened from the action of the discharging apparatus by any part of the hull. According to this invention a trunk or hopper is constructed in the vessel extending from the stoke-hold bulkhead of the machinery space, which preferably should be situated in the stern, or where a cross-bunker bulkhead is fitted from the forward cross-bunker bulkhead forward to the collision bulkhead, or as far forward as the form of the ship will permit. Where the engines are amidships, two or more longitudinal trunks or hoppers may be provided. To obviate the loss of strength which otherwise this construction would involve, owing to the absence of hold and deck beams, it is proposed to make the trunk or hopper bulkheads of substantial construction, by introducing into them heavy plating and numerous stiffeners, and also to connect these bulkheads to the main frames of the vessel and to the side plating by beams of heavy scantling and by thick deck-plating and stringers. There may be weather and partial 'tween-decks. It is preferred that the two sides of the ship alongside the trunk or hopper should be of sufficient strength in themselves and independently of the strength of the trunk to sustain all local stresses likely to be brought upon them. The spaces in the wings between the side of the trunk and the inner face of the skin-plating, being bounded by strong structures, can conveniently be utilized to contain water ballast, which may be placed above the partial 'tween-decks where desired. Hatch tie-beams of great depth securely, but in most cases removably, connected to the hatch coamings, which are of appropriate strength and connected to the weather deck, are provided at frequent intervals along the trunk to prevent it from separating or panting under the longitudinal stresses likely to be set up on the loaded vessel in a seaway. Plate hatch covers extending over the whole length of the trunk may also be employed to contribute to this end. In certain cases the interior of the trunk will be altogether unobstructed; but, if necessary, strong tie-beams or girders can extend across it—say about amidships—at the level of the partial 'tween-decks; these being protected from the action of the discharging gear or from the cargo during loading by sloping transverse bulkheads or deflectors."

It was plainly the object of the inventor so to design and construct a vessel as to avoid the need of stanchions, beams, and the like within the cargo hold and also of permanent hatch tie-beams. The loss of strength, which the omission of these supports would engender, was to be made up by strong trunk bulkheads, and by making the two sides along the trunk of substantial construction. In short, the idea was to construct one vessel of a given size within another of larger size, and so to strengthen the connections between them as to compensate for the omission of supports within the hold itself, and further to strengthen the whole structure by hatch tie-beams, in most cases removable, and by plate hatch covers when necessary. In the original specification the inventor included five claims, as follows:

"1. A cargo vessel substantially as described and illustrated in the accompanying drawings.

"2. In a cargo vessel, the combination with an open trunk, such as A, of strong sides, such, for example, as shown at D, E, and F, Fig. 3, capable without support from the trunk or center of the vessel of supporting all local stresses to which they are subject.

"3. In a cargo vessel, a trunk or hold, such as A, having clear side walls, such as E, whereby no part of the cargo therein is screened from the action of the discharging apparatus, substantially as described.

"4. In a cargo vessel, the combination of an open trunk, such as A, a double bottom, C, and double sides, such as D, E, substantially as described and illustrated in the accompanying drawings.

"5. In a cargo vessel, a double side, such as H, whereby the side itself is rendered sufficiently strong to sustain all local stresses likely to be brought upon it."

These claims were all abandoned, and in order to ascertain the true meaning of the letters patent, as finally issued, we shall have to trace the history of the application in the Patent Office. The application was filed August 27, 1900. The Commissioner rejected all the claims on September 18, 1900, upon reference to the Shone patent, No. 424,508, dated April 1, 1890. On January 23, 1901, Campbell filed three amendments in the Patent Office; two relating to the specification, and the third substituting a new single claim for the five claims rejected. The first amendment as inserted at the time is shown within brackets as follows:

"A represents the trunk or hopper [having continuous vertical and parallel side walls, and] which, as shown by Figs. 1 and 3, is entirely open and accessible, though it may, if desired, be provided with fixed or removable hatch ties, B, as indicated in Fig. 2."

The second amendment was inserted at the end of the original specification, and is as follows:

"From this construction it results that in unloading the cargo the discharging bucket or other apparatus can pass up the vertical side walls of the hold without meeting any overhanging obstruction, so that any cargo lying close against these side walls can be readily got at. It will be seen, also, that the side walls of the hold being parallel throughout their length, the hatchway coamings may be utilized as rails for a traveling discharging apparatus, or rails may be secured to the deck beside these coamings, so that the apparatus may travel without interruption from end to end of the cargo space."

The third amendment, consisting of the new claim, was inserted under direction of Campbell to "erase the (original) claims and insert" instead:

"A cargo vessel having the double sides and bottom, and a central longitudinal trunk or hold unobstructed from front to rear, and having vertical parallel side walls, substantially as and for the purpose set forth."

On January 29, 1901, the Commissioner rejected this claim, with this statement:

"The claim presented in the amendment of recent date is believed to be met by Corey et al., No. 100,606, March, 1870, 'Ships, Building,' in connection with the patent to Shone, of record, which shows double-bottomed sides. Corey et al. shows a central, longitudinal hold, unobstructed from front to rear and having vertical parallel side walls, and also a series of elastic air tubes forming a double bottom and hull, and to make these continuous, as shown by Shone would not involve a matter of invention, for which reason said claim is believed to be met in terms and is accordingly rejected."

Thereupon, February 5, 1901, Campbell instructed the Commissioner to amend the new claim by erasing the word "parallel" and inserting after the words "side walls" the words "parallel throughout their entire length." On February 14, 1901, the claim as thus amended was rejected on reference to the Shone patent in connection with Jones patent, No. 221,412 of November 11, 1879. On March 16, 1901, Campbell again amended the claim by directing the insertion, immediately after the amendment of February 5th, of the words "and unobstructed from bottom to top." The claim was thereupon allowed by the Commissioner, and as so finally amended is as follows:

"A cargo vessel having the double sides and bottom, and a central longitudinal trunk or hold unobstructed from front to rear, and having vertical side walls parallel throughout their entire length and unobstructed from bottom to top, substantially as and for the purpose set forth."

What, then, is the true significance of the amendments? What, if any, limitations and restrictions do they impose? The rejection of the original claims was based upon the Shone patent, as before stated. That patent provides for a ship with an outer and inner hull, with intervening space in which either water or freight may be carried. The regular cargo hold is within the inner hull, with vertical sides, and with a number of cross bulkheads. This hold is given the shape of the bow as it approaches that portion of the vessel; in other words, it has not parallel sides throughout its length. This was met by the first amendment of the specification, which provided for continuous vertical and parallel side walls. The second amendment of the specification discloses two distinct features. One is that the unloading device "can pass up the vertical side walls of the hold without meeting any overhanging obstruction." The other is "that, the side walls of the hold being parallel throughout their length, the hatchway coamings may be utilized as rails for a traveling discharging apparatus, or rails may be secured to the deck beside these coamings, so that the apparatus may travel without interruption from end to end of the cargo space."

Two amendments of the new claim, were, however, exacted and made before the examiner appears to have been satisfied that it was in correspondence with the features just pointed out. The first amendment of the new claim required that the side walls of the cargo hold should be vertical and parallel, not merely part of their length, but "throughout their entire length," and the second one required that the side walls should be "unobstructed from bottom to top." When these amendments are read in connection with the first amended claim, it will be seen in the first place that the shape of the new hold is defined with exceptional clearness and imperative exaction. It must be a "central longitudinal trunk" extending "from front to rear," with "vertical side walls parallel throughout their entire length." In the next place, freedom from obstruction is made equally peremptory. The hold shall be "unobstructed from front to rear," and the side walls shall be "unobstructed from bottom to top." Since the mere form of a thing patented can be made of its essence, it would be difficult to conceive of language more clear and distinct, or more calcu-

lated than this is to accomplish such a purpose. Werner v. King, 96 U. S. 218, 230, 24 L. Ed. 613.

These latter requirements, like the others, were based on references to specified patents. These, in the judgment of the examiner, like the Shone patent in the first instance, were sufficient to warrant his rejections, and the effect was to induce Campbell to meet them with satisfactory amendments. It is not necessary to examine those patents with any purpose either of defining the prior art or of otherwise justifying the action of the Patent Office. It is sufficient that Campbell acquiesced in the rulings, instead of taking the prescribed course of appeal.

In Safety Oiler Co. v. Scovill (C. C.) 110 Fed. 203, 205, Judge Coxe said:

"The contention that the patentee was not called upon by anything in the prior art to limit the claim as stated is wholly immaterial, where there is no escape from the conclusion that he has so limited it. The law in such circumstances is too plain to admit of doubt."

In Brill v. St. Louis Car Co. (C. C. A., 8th Cir.) 90 Fed. 666, 668, 33 C. C. A. 213, 215, Judge Thayer said:

"It is immaterial, we think, whether the Patent Office was right or wrong in rejecting the complainant's original claims on the ground that the invention therein described was anticipated by the prior art. By amending his specification and claims, the complainant admitted, in effect, that some limitations were necessary; and it is now too late to assert that he was entitled to his original claims, or that the claims as finally allowed are as broad as the original claims."

In American Stove Co. v. Cleveland Foundry Co. (C. C. A., 6th Cir.) 158 Fed. 978, 983, 86 C. C. A. 182, 187, Judge Severens said:

"The applicant had a long struggle in securing his patent, and was constrained to trim away, modify, and otherwise define his specifications and claims to meet the references made by the office until they were brought within very narrow limits, before his patent would be allowed. He must be deemed to have surrendered and disclaimed what he conceded, and to have imposed such definitions upon the language of the patent as he attributed to it in order to secure the grant."

In Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 629, 38 L. Ed. 500, Mr. Justice Brown stated the rule thus:

"It is insisted in this connection, however, that under the words 'substantially as described' the patentee is entitled to claim a band of oval or oblong shape, and that, looking at his specification and drawing in connection with the claim, it is obvious that the latter should be so limited. But the patentee having once presented his claim in that form, and the Patent Office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto."

See, also, American Graphophone Co. v. Universal Talking M. Mfg. Co., 151 Fed. 595, 605, 81 C. C. A. 139.

It inevitably follows that the language into which the grant of the present patent was ultimately resolved must be interpreted with constant reference to the limitations and restrictions imposed, and with re-

spect to the matters distinctly excluded through rejection and amendment. As said by Justice Blatchford (if, indeed, further citation were necessary), in Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, 99, 33 L. Ed. 382:

"This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it."

Again, in Shepard v. Carrigan, 116 U. S. 593, 597, 6 Sup. Ct. 493, 495, 29 L. Ed. 723, it was said:

"Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent."

We may now consider the question of infringement. Defendant, as its name indicates, is a shipbuilding company. The type of boats constructed by that company, which are said to infringe the patent in suit, are in many respects similar to the boat described in the Campbell patent. We understand it to be conceded that no vessel has ever been constructed according to the Campbell patent, and we must therefore refer to the letters patent for purposes of comparison. Apart from some obsolete boats of defendant, which do not seem to be in controversy, none of defendant's boats has a cargo hold with "vertical side walls parallel throughout their entire length." The holds of all the boats in dispute converge towards the bows. If nothing else were said, it is plain that the hatchway coamings could not "be utilized as rails for a traveling discharging apparatus," nor could rails "be secured to the deck beside these coamings," so that the apparatus might "travel without interruption from end to end of the cargo space."

This would be equally true, if, as claimed, the engines were placed amidships (assuming this to be still allowable) and two longitudinal trunks or hoppers were maintained; for surely each of two holds, no less than one hold, would have to conform to the requirement mentioned, and yet the portion of the hold converging at the bow would quite as clearly prevent the use aforesaid of the coamings or adjacent rails as the same portion would if a single hold were provided and the engines were placed, as it is stated they preferably should be, either forward or aft of the cargo hold. It cannot be rightfully said that the plan described for carrying the discharging apparatus along the coamings or adjacent rails is unimportant, because it will be recalled that this feature was definitely described in the first amendment made. Furthermore, the first amended claim specified "a central longitudinal trunk or hold unobstructed from front to rear." It is true, as before shown, that in rejecting the first amended claim the examiner in substance stated that the Corey patent shows a central longitudinal hold unobstructed from front to rear having vertical side walls, and that to make these continuous as shown by Shone would not involve a matter of invention; but, in view of the fact that this form of unobstructed

trunk was retained in the claim after it was further so amended as to satisfy the examiner, it can hardly be said that such a trunk is not an essential element of the Campbell combination as finally amended.

This amended provision was for one hold, not for two or more holds. It might therefore be hard to reconcile it with the old provision allowing the engines to be placed amidships. But still assuming that right construction might, despite the contradiction, admit of two holds, one forward and one aft of the engines, there is another feature of all of defendant's boats, except the Wolvin, which we think must differentiate them from Campbell's amended design. Those boats all have transverse vertical bulkheads, dividing the holds into a number of cargo compartments. It would be manifestly impracticable to operate any discharging apparatus along the coamings or adjacent rails with such bulkheads interfering at frequent intervals. It is said, however, that the clam-shell grabber could be used to unload the vessels; but that device could be employed for the same purpose respecting a single hold, as well as a plurality of holds. Besides, the contention ignores the obvious purpose of inserting the requirement, at the time the amendment was made, concerning the use of a discharging apparatus to be carried along the coamings or adjacent rails. The insistence of counsel concedes that bulkheads might have been used under the original and rejected claims; but it ignores the fact that one of the reasons for the first rejection must have been that the Shone patent provided for compartment bulkheads, and so anticipated Campbell's original application in this very particular. As pointed out in some of the decisions before cited, Campbell could not, in order to secure his patent, surrender the right to maintain bulkheads and cargo compartments, only to lay claim to the same right after the patent was issued.

But there is another distinction between defendant's boats and the Campbell design that must be noticed. It is found in the last amendment. It will be remembered that one of the amendments required the side walls of the hold to be vertical and parallel throughout their entire length, and that the exaction of the last amendment was that they should also be "unobstructed from bottom to top." This was made necessary, in the opinion of the examiner, by reason of a prior patent. When this provision is considered, in connection with the other provisions of the claim as amended finally, it clearly discloses a purpose to have the hold unscreened and open at the top, certainly when being unloaded. This would be necessary, as shown, also, in the opening paragraph of the original specification before quoted, when operating the discharging apparatus along the coaming or adjacent rails.

Above all, an open trunk is made necessary by the amendment which reads:

"From this construction it results that in unloading the cargo the discharging bucket or other apparatus can pass up the vertical side walls of the hold without meeting any overhanging obstruction, so that any cargo lying close against these side walls can be readily got at."

Now, all of defendant's boats, including the Wolvin, have what is called an "overhang" extending along each side of the cargo hold. It

is testified without apparent contradiction that part of the cargo in the trunk lies underneath this overhang; also that a discharging bucket or other apparatus would not pass up the side walls of the hold without encountering this overhanging construction. Moreover, all of defendant's boats have at frequent intervals deck or tie beams, which form part of the permanent construction and extend across the holds from side to side to strengthen the vessels. Clearly the holds of such vessels could not be converted into open troughs like those described in the Campbell design. Even though the removable hatch tie-beams of the latter design were intended to be and still could be permanently fastened to the sides of the holds, no continuous overhang like that in each of defendant's boats would be present. But enough has been said to differentiate defendant's boats from the Campbell design, unless it be the Wolvin.

The design of the Wolvin is in all respects like that of the rest of defendant's boats, with these exceptions: While its plan contemplated eight bulkheads, only six were originally put in place, and none of these were compartment bulkheads. Two of defendant's witnesses testified that bulkheads were built into the cargo hold later; but the date, if not the fact, of doing this is disputed. We think, however, the preponderance of evidence shows that they have since been put in place; and since the Wolvin possesses other features of difference we regard the temporary omission of the bulkheads as unimportant. The only other difference is that the walls of the Wolvin's cargo hold are not vertical. The hold is narrower at its floor than it is at its top. A projection extends along each side of the hold from the floor for some distance upward, where it slopes outwardly to the sides and widest portion of the hold.

It is earnestly insisted that the fact that the side walls of the Wolvin are not vertical is of no importance. Ordinarily this would be true, as in principle laid down in one of the cases relied on by plaintiff's counsel. Winans v. Denmead, 15 How. 330, 14 L. Ed. 717. No rejection or amendment, however, was made of the application in that case, and consequently no restriction imposed in that way upon the language of the patent had to be considered. But, in view of the other differences between the Wolvin and Campbell's design, we need not pass upon the one relating to the side walls of the cargo hold. Indeed, careful consideration both of the facts and the law constrains us to hold that the history of this application in the Patent Office requires the invention to be limited to the design described in the patent, and that, yielding to it validity for the purposes of this decision, there is no infringement.

The decree below must be affirmed, with costs.

LONDON v. EVERETT H. DUNBAR CORPORATION.

(Circuit Court of Appeals, First Circuit. June 21, 1910.)

No. 861.

1. PATENTS (§ 224*)—FALSELY MARKING ARTICLE AS PATENTED—ACTION FOR PENALTY.

Rev. St. § 4901 (U. S. Comp. St. 1901, p. 3388), which imposes a penalty for every offense of marking upon or affixing to any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, does not prescribe a distinct penalty for each individual article marked, but merely for the offense of marking; and, in order to authorize the recovery of more than a single penalty, the proof must go further than to show the marking of a number of articles, and must be sufficiently specific as to time and place and circumstance to show a number of distinct offenses of marking, although it need not show the specific date of each.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 354, 355; Dec. Dig. § 224.*]

2. PATENTS (§ 224*)—FALSELY MARKING ARTICLE AS PATENTED—ACTION FOR PENALTY.

To authorize the recovery of the penalty imposed by Rev. St. § 4901 (U. S. Comp. St. 1901, p. 3388), for marking upon or affixing to an unpatented article a word importing that the same is patented, for the purpose of deceiving the public, such purpose must be proved, and where the article is sufficiently like that described in a patent to permit of an honest belief that it is within the patent, although on a construction of the patent the court is required to rule that it is not, the question of the intent of defendant in marking it as covered by the patent is one for the jury.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 355; Dec. Dig. § 224.*]

3. PATENTS (§ 224*)—FALSELY MARKING ARTICLE AS PATENTED—LIABILITY OF CORPORATION—"PERSON."

A corporation is a "person," within the meaning of Rev. St. § 4901 (U. S. Comp. St. 1901, p. 3388), which imposes a penalty on "every person" who marks an unpatented article with any word importing that the same is patented for the purpose of deceiving the public, and may be convicted of such offense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 354; Dec. Dig. § 224.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

4. WITNESSES (§ 297*)—PRIVILEGE—OFFICER OF CORPORATION.

An officer of a corporation is not privileged from giving testimony as a witness because it may tend to convict the corporation of a penal offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1026, 1031; Dec. Dig. § 297.*]

5. WITNESSES (§ 307*)—PRIVILEGE—PERSONS ENTITLED TO CLAIM PRIVILEGE.

The claim that a witness is privileged from answering a question cannot be asserted on behalf of a third person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058–1060; Dec. Dig. § 307.*]

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

Action by George G. London against the Everett H. Dunbar Corporation. Judgment for defendant, and plaintiff brings error. Reversed.

Charles W. Lovett and N. D. A. Clarke, for plaintiff in error.

William Quinby (Marcus B. May, on the brief), for defendant in error.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in a qui tam action, brought under the third paragraph of section 4901, Rev. St. (U. S. Comp. St. 1901, p. 3388), to recover a penalty or penalties for affixing to an unpatented article the word "patent," or a word importing that the same is patented, for the purpose of deceiving the public.

"Sec. 4901. Every person who, in any manner, marks upon anything made, used or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor without the consent of such patentee, or his assigns or legal representatives; or

"Who, in any manner, marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee, or his assigns or legal representatives; or

"Who, in any manner, marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offense, to a penalty of not less than one hundred dollars, with costs; one half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any District Court of the United States within whose jurisdiction such offense may have been committed."

The declaration contains 100 counts, each claiming a penalty of $100, one-half to the use of the United States and one-half to the plaintiff; the time and place of the alleged offense being set forth in the following language in each count:

"At Lynn, in the county of Essex and commonwealth of Massachusetts, within said district of Massachusetts, on or about the 10th day of August, 1908."

The only variation in the counts is in the numbering and in the use of the expression "a certain unpatented article" in count 1, and "a certain other unpatented article" in all the other counts.

At the argument before us it was contended by the plaintiff in error, and conceded by the defendant in error, that the statute does not prescribe a distinct penalty for each individual article marked, but merely a penalty for the offense of marking, and that, therefore, where the marking is all done on the same day and at the same time, so that it is practically a single, continuous act, but one offense is committed and only a single penalty is recoverable, though more than one article may have been marked. This is in accordance with the ruling in Hotchkiss v. Samuel Cupples Wooden Ware Co. (D. C.) 53 Fed. 1018–1021. See, also, Hoyt v. Computing Scale Co. (D. C.) 96 Fed. 250.

A like construction was given to section 4963 (page 3412), which provides a similar penalty for impressing a notice of copyright upon an article for which the offender has not obtained a copyright. Opinion by Brewer, J., in Taft v. Stephens Lith. & Eng. Co. (C. C.) 38 Fed. 28. See, also (C. C.) 39 Fed. 781.

In the act of July 8, 1870 (16 Stat. 198, c. 230), "An act to revise, consolidate, and amend the statutes relating to patents and copyrights," similar penalties were prescribed in section 39, relating to patents, and in section 98, relating to copyright; section 39 corresponding in substance to section 4901, Rev. St., and section 98 to section 4963, Rev. St. Decisions construing section 4963, therefore, seem applicable in construing section 4901. As section 4901 is not compensatory, but penal, a fair doubt whether it was the intent of Congress to make the marking of each individual article a separate offense subject to a distinct penalty, or to provide that a continuous marking of several articles at the same time should constitute but a single offense, should be solved in favor of a construction which will avoid imposing very unequal pecuniary punishment for the same offense. Patented articles are so varied in kind and in value that, if we construe the statute to make each distinct article the unit for imposing the penalty, the result may follow that the false marking of small or cheap articles in great quantities will result in the accumulation of an enormous sum of penalties, entirely out of proportion to the value of the articles, while the marking of expensive machines used in limited numbers may result in the infliction of penalties which are comparatively slight in relation to the pecuniary value of the articles.

As the penalty is not measured by the extent of publication of the false statement, the statute must be read as making the fraudulent purpose or intent to deceive the public the gravamen of the offense, and the marking as the overt act whereby the intent is made manifest.

A fraudulent design maintained throughout the continuous marking of a number of articles cannot be divided into as many distinct fraudulent purposes as there are distinct overt acts of marking. Though the marking of each article makes a distinct instrument for the publication of a false statement, this cannot be a proper ground for multiplying penalties. The statute does not measure the penalty by the extent of publication, but affixes the penalty regardless of the fact of publication. It can hardly have been the intent of Congress that penalties should accumulate as fast as a printing press or stamping machine might operate. See U. S. Condensed Milk Co. v. Smith, 116 App. Div. 15, 101 N. Y. Supp. 129.

It follows that a plaintiff, in order to recover more than a single penalty, must go further than to prove the marking of a number of unpatented articles. The proof must be sufficiently specific as to time and circumstances to show a number of distinct offenses, and to negative the possibility that the marking of the different articles was in the course of a single and continuous act.

It follows also that, though a single violation of the statute may be proved by general evidence that the article was falsely marked within the period of the statute limitations, yet concerning an article of the character in question in this suit there can arise no presumption that

each act of marking was so separated from the others as to constitute a distinct offense. Assuming that there was evidence sufficient to show the marking of 100 articles within the statutory period, without evidence of separate acts of marking, it could not be known whether these false markings were all parts of one continuous offense subject to one penalty, or were each a part of a distinct offense. In order to prove distinct offenses, however, it was not essential that the plaintiff should be able to prove the specific date of marking. It was sufficient if the evidence showed such divergence of time and circumstances as to make one act of marking separable and distinct from other acts of marking. For example, proof of one act of marking in June, and of a distinct and separate act of marking in July, might be sufficient to show two offenses, though the plaintiff were unable to fix the exact date in either month.

The commission of a single offense could be proved by evidence that the marking was done within the period of limitations. The ruling that the plaintiff was bound to prove some specific date of marking, and could not recover without doing so, was error.

The excluded question which is the subject of the second assignment of error was too broad, in that it was not limited to the period of the statute of limitations. The court, however, ruled in substance that, even if limited to this period, the question was too general. As bearing upon the plaintiff's right to recover several penalties, the question, so limited, was perhaps too general; but we are of the opinion that it was competent for the purpose of proving the commission of a single offense, and that its exclusion was error.

For reasons substantially similar we are of like opinion as to the third, fourth, fifth, and sixth assignments of error. Concerning these it may be said that evidence not sufficiently specific to prove the commission of several different offenses was yet competent evidence upon the question whether a single offense had been committed.

The article marked with the words "Dunbar's Foot Support, Pat. Feb. 27, 1900," was an instep arch supporter designed to be worn as a corrective of flat-foot, and to afford a rigid support. The Dunbar patent, No. 644,412, February 27, 1900, is for a cushioning device, consisting of a plate provided with rubber studs interposed between the plate and shoe, to reduce the shock or pounding caused by interposing an unyielding body between the foot and ground.

In our opinion the instep arch supporter would not infringe the Dunbar patent, since it is substantially different both in structure and in function from the combination of that patent.

We are of the opinion that there was error in the ruling that Exhibit 2, the instep arch support, was covered by patent No. 644,412, and also in the ruling that, even if said arch support was unpatented, there was no evidence sufficient to warrant a verdict on any count.

The evidence was at least sufficient to require the submission to the jury of the question whether the plaintiff was entitled to the recovery of a single penalty.

Of course, it does not follow, from the fact that the article was unpatented, that there was necessarily a purpose to deceive the public in marking it patented. The purpose to deceive the public is an essential

element of the offense, and the burden is upon the plaintiff to establish this purpose, as well as the fact that the article is unpatented. The statute does not extend to one who has an honest, though mistaken, belief that upon a proper construction of the patent it covers the article which he marks. The question of guilt does not depend upon such close or exact construction of the patent as is usual upon bills for infringement where the issue is as to the extent of a patentee's right under letters patent. Where the article marked is obviously very remote from the patent referred to in justification of the marking, this difference alone may be sufficient to show an intention to deceive; but where the difference is slight, and the question of the breadth of the invention or of the claims is so close as to permit of an honest difference of opinion, then it may become necessary for the plaintiff to adduce testimony additional to the fact that the article is unpatented, in order to show guilty knowledge as distinguished from erroneous opinion.

We are of the opinion that in the present case the court should have ruled as a matter of law that the article marked was not patented under the Dunbar patent. This follows from a construction of the terms of the patent and an attempt to read its claims upon the article marked. But, though the article was without the terms of the patent, the question of the defendant's good faith in assuming it to be within the patent was a question of fact for the jury. There was not so great a difference between the device of the patent and the article marked as to require the court to rule that no reasonable man could have entertained an opinion that the article marked was covered by the Dunbar patent, and it was for the jury to determine whether the article was marked for the purpose of deceiving the public.

The defendant contends that this offense is one that cannot be committed by a corporation; but we are of the opinion that this objection is without merit, in view of the decisions of the Supreme Court of the United States in New York Central & Hudson River Railroad Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613, and in United States v. Union Supply Co., 215 U. S. 50–54, 30 Sup. Ct. 15, 54 L. Ed. —.

The defendant corporation objected to testimony offered for the plaintiff from the treasurer of the defendant corporation. The defendant objected upon the ground, first, that the witness was privileged as an officer of the corporation from giving any testimony tending to connect it with the alleged acts complained of. This was clearly unsound. See Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. And, further, that he was privileged from answering any inquiry the answer to which might subject him to a penalty; but this privilege was not claimed by the witness on his own behalf, but claimed by counsel for the defendant on behalf of the defendant corporation. It is unnecessary to cite authority to sustain the proposition that such a claim of privilege cannot be asserted by a third person. This exclusion of testimony was erroneous.

The judgment of the District Court is reversed, the verdict directed by the District Court for the defendant is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers costs of this court.

YOST ELECTRIC MFG. CO. v. PERKINS ELECTRIC SWITCH MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,015.

1. PATENTS (§ 26*)—INVENTION—NEW COMBINATIONS OF OLD ELEMENTS.
There is no invention in bringing old elements into new combinations where each performs the same service as it did in the earlier art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

2. PATENTS (§ 16*)—INVENTION—CARRYING FORWARD OLD IDEA.
The mere carrying forward of an original conception, patented, involving only change of form, proportion, or degree, or the substitution of equivalents doing the same thing as did the original invention by substantially the same means with better effects, is not such invention as will sustain a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14-25; Dec. Dig. § 16.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMP SOCKETS.
The Perkins patent, No. 626,927, for an incandescent lamp socket, *held* valid and infringed by one structure which had been made and sold by defendant, but not infringed by other styles.

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

In Equity. Suit by the Perkins Electric Switch Manufacturing Company against the Yost Electric Manufacturing Company. Decree for complainant, and defendant appeals. Reversed in part.

R. H. Parkinson and W. A. Owen, for appellant.

Hubert Howson and Charles Howson, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this case, which was filed by the appellee, complains of the infringement by the appellant of rights secured by letters patent No. 626,927, granted to Charles G. Perkins, as assignor of the appellee, June 13, 1899, for improvements in incandescent lamp sockets. "This invention," the patentee says in his specification, "relates to a receptacle for incandescent lamps having a switch mechanism inclosed in a chamber that is insulated from the shell, and from the chamber containing the parts forming the other side of the circuit through the socket." The answer denies that Perkins was the first inventor of any material part of the thing patented, and cites 17 former American and English patents on which reliance is made to prove anticipation. And the answer also denies infringement. Eleven claims are included in the patent in suit. The Circuit Court found and held that the claims numbered 3, 4, 6, and 9 were valid and were infringed by the manufacture and sale by appellant of certain forms of such sockets which are identified

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

by numbers given them in the testimony and in the decree. Upon this finding the court entered the usual decree in favor of the complainant.

The specifications disclose a socket having an outer shell, lined with an insulating sheet, inclosing two blocks of insulating material placed one above the other and of a diameter equal to the space inside the lining of the shell. The meeting faces of the blocks are made to closely fit each other, except that on the two opposite sides of the blocks at their juncture a portion of each is taken out so as to form chambers on each side completely insulated from each other by the material of which the blocks are made. These chambers are much alike, except that one is larger than the other. The larger one contains not only a binding post, a connecting plate, and other parts making a connection of the positive circuit wire with the lamp, but also a switch mechanism for closing the circuit. The smaller chamber contains like parts for the transmission of the return current, but no switching apparatus. The wires bearing the current are each brought into these chambers through grooves or openings in the periphery of the upper block on the same opposite sides as the chambers. Fig. 3 of the drawings, here inserted, gives a general idea of the structure:

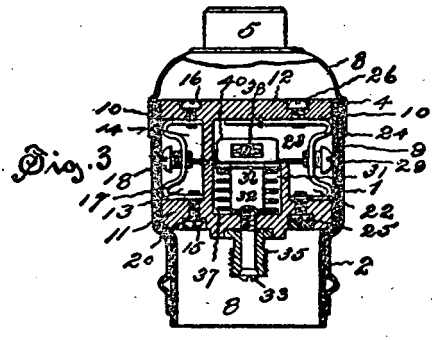

Fig. 3

23 and 14 show the larger and the smaller chambers, 24 and 17 show the connecting plates, and 40 is the switch-block. This goes far enough into detail for the present purpose.

The claims of the patent on which the decree was founded are as follows:

"3. In combination in a lamp-socket, a cap, a shell, two blocks of insulating material with recesses arranged to form two insulating-chambers, a plate with a binding-screw located in one of the chambers and having its ends secured to the respective blocks, a plate with a binding-screw located in the other of the chambers and having its ends secured to the respective blocks, and grooves in the edges of the upper block for the passage of the circuit-wires of the respective binding-screws, substantially as specified.

"4. In combination in a lamp-socket, a shell, two blocks of insulating material with recesses arranged to form insulated chambers, a plate with a binding-screw located in one of the chambers, a plate with a binding-screw located in the other of the chambers. and a switch-block located in one of the chambers and adapted to make contact with the end of the plate in the same chamber, substantially as specified."

"6. In combination in a lamp-socket, a cap, a shell, an insulating-lining fitting the shell, two blocks of insulating material with recesses arranged to form two insulated chambers, a plate with a binding-screw located in one of the chambers, a plate with a binding-screw located in the other of the chambers, and a switch-block located in one of the chambers and adapted to make contact with the end of the plate in the same chamber, substantially as specified."

"9. In combination in a lamp-socket, a cap, a shell, two blocks of insulating material located within the shell, insulated chambers formed by recesses

in the insulation, and plates bearing outwardly-extending binding-screws located in the recesses and having their ends secured by screws to the respective insulating-blocks, substantially as specified."

From the preceding statement of the inventor's announcement of the object he had in mind and the terms of each of these claims, it is perceived that the dominating feature of his invention was the provision of means for the insulation of the two chambers from the shell and from each other. The other elements associated in the combinations were incidental and appropriate to an organization which should effect his main purpose. The other features were found in earlier disclosures of the same art. There could have been no invention in bringing these old elements into a new combination, where each would perform the same service as they did in the earlier art. Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Florsheim v. Schilling, 137 U. S. 77, 11 Sup. Ct. 20, 34 L. Ed. 574. We have on several occasions recognized and applied this rule. Burnham v. Union Mfg. Co., 110 Fed. 765, 49 C. C. A. 163; Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., 102 Fed. 957, 43 C. C. A. 80; Campbell Printing Press Co. v. Duplex Printing Press Co., 101 Fed. 282, 41 C. C. A. 351. The novel idea was to have two separate chambers, one for the apparatus connected with the wire carrying the positive current, and the switch to close the circuit, and the other for the apparatus connected with the negative wire, and to completely insulate both of the chambers. There was nothing new in lining the shell of the socket with an insulating sheet, nor in the use of connecting plates, nor in bringing the wires into the socket at a comparatively safe distance from each other. The objection to former structures which the inventor proposed to avoid were dangers arising from exposing the apparatus connecting the wire to the filament of the lamp to the close proximity of those connecting the other wire. It was known that in the operation of former devices sparks were sent off by the sudden opening of the switch, that stray strands of the wire at its terminus, resulting from careless binding, would get too near the other wire or its connections and establish short circuits, and that arcs were liable to be formed in the socket from exposed surfaces of the wires at near distances. And the conception of the inventor was to use two chambers and build an insulating wall to separate them and which would absolutely prevent the danger of such occurrences. And the proof satisfactorily shows that he was the first person who conceived this idea of complete insulation, or rather, he was the first to disclose such an idea in a practical way. But others had come so near it that it was but a step from them to his own conception. And there is a temptation to say that the step was in the same direction and was indicated by what had been done before, and to recall what has been said of such conditions by able judges expert in patent law. In Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566, the law was formulated, and it has been followed ever since. In Smith v. Nichols, 21 Wall., at page 119 (22 L. Ed. 566), it was held that a mere carrying forward of an original conception patented, a new and more extended application of it, involving only change of form, proportion, or degree, the substitution of

equivalents doing the same thing as did the original invention by substantially the same means with better effects, is not such invention as will sustain a patent. Some of the decisions of the Supreme Court are: Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267; Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Ansonia Co. v. Electrical Supply Co., 144 U. S. 19, 12 Sup. Ct. 601, 36 L. Ed. 327; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307.

In several earlier patents the objections above referred to were recognized, and devices to mitigate them were shown. We shall refer to only a few of them which are sufficient to show the state of the art at the date of the Perkins invention. A patent to Hubbell, No. 565,541, dated August 11, 1896, showed all the elements of the Perkins combination except that, instead of two chambers, there was but one which filled the whole interior of the socket. The respective congeries of apparatus connecting the respective wires with the lamp were located as far apart as might be. But there was only air insulation between them. In a patent to Wirt, No. 560,667, dated May 26, 1896, there was one entire insulating block instead of two, and the respective parts of the connecting apparatus were lodged in peripheral recesses on opposite sides of the block. But Wirt did not sufficiently guard the metallic parts em ɔyed by him from getting in contact, one side with the other. Then, there was a patent to Pass and Seymour, No. 568,919, dated October 6, 1896, for a "Socket for Incandescent Electric Lamps," which shows an upper and lower block of insulating material and the other features of the Perkins patent, except that the two chambers were not completely insulated from each other. In their specification the patentees dwell at length upon the dangers attending the use of former devices in the particulars above recited, and stated how they proposed to obviate them. They say that they arrange the wires as far apart as possible. And of their construction they further say:

"The wires and other metallic parts are all positively separated from each other, so that accidental contact of the wires or of detached strands is prevented by walls or projections formed in the porcelain"

—which is the insulating material. And, further, they locate their contact piece on the negative side in a depression in the upper face of the lower block and guard it from the other side by a "semi-circular wall." This wall between the chambers does not go up to the bottom of the upper block and is not long enough to go quite around to the wall of the chamber. The purpose of this depression and of this wall is evident. It was to shield the parts in one chamber from those in the other. Apparently they thought they had made the wall high and long enough to practically effect their purpose. What Perkins did was to carry the wall quite up to the bottom of the upper block and quite around to the inside of the wall. By this construction there would be no possibility of the apparatus in one chamber being disturbed by what was happening in the other.

The Third Circuit Court of Appeals in a suit for infringement brought by one Buchanan against the appellee, 135 Fed. 90,[1] held the Perkins patent to be valid, upon the ground that Perkins had devised

[1] 67 C. C. A. 564.

a more complete and effective separation and insulation of the chambers than had been done before him. Out of respect for that court and the comity due to it, and notwithstanding the doubt implied from what we said on a former page of this opinion, we are disposed to follow the decision of the Third Circuit Court of Appeals. We are not certain in regard to the structure which was there held to be an infringement, but we infer from the opinion written by Judge Gray that it possessed the feature of complete separation and insulation of the chamber. This feature of complete insulation is present in all the claims of the Perkins patent here in question, and we need not refer to them in detail.

We come, then, to the question of infringement. Several styles of sockets, numbered from 1 to 4, are exhibited as made and sold at different times by the appellant. No. 1 of these, about which we will speak later, is clearly an infringement. It contains the two chambers separated and insulated from each other by a solid wall of insulating material, and both are insulated from the shell. The other elements are substantially equivalents. The other types have two chambers, but they are not completely separated from each other. There is a wall, but it is not entire. It is open in one of them for a space large enough to see through one chamber into the other and enable the operator to blow through it, and in others there is scarcely any division of the chambers. As to the first of these, it is contended that the breaking away of the wall is a mere subterfuge to differentiate the sockets from the Perkins patent. If this were so, if the opening in the wall were so small as to be negligible and to serve no useful purpose, we should think the contention ought to be sustained. But it is to be said that the opening is substantial. It differs from that of Pass and Seymour only in degree; and we have distinguished the Pass and Seymour patent from that of Perkins only by the fact that the wall of the former did not completely separate and insulate the chambers one from the other, while the latter does. Then, it appears, and in this we are confirmed by expert testimony, there is a substantial utility in being able to look into the socket without taking it apart and especially in being able to blow out the dust and débris that gathers in the socket by use. In the other types the difference is still more manifest. We are therefore constrained to hold that the appellant does not employ the feature which distinguished the Perkins patent, and on account of which that patent was granted. It seems impossible to doubt that but for it, and in view of the earlier patents, these claims of the patent could not have been granted.

As to the appellant's socket No. 1, before mentioned, these facts appear: The appellant for two or three months at a period of about one year before the bill was filed, made and sold some of these sockets; that they then discontinued the use of that form and adopted the later numbered styles. It does not appear that the appellee was notified of the discontinuance of the infringing style or had any knowledge that it had been discontinued. We cannot say that it had no reason for apprehending that its use would be discontinued, or would not be renewed. In these circumstances, the appellee was entitled to file its bill for an injunction.

The decree will be reversed in all other respects, with costs of this court to the appellant, but affirmed in respect to appellant's socket No. 1. The controversy over the socket No. 1 is of so small account that the general rule in regard to costs should not be varied.

BERNARD v. FRANK et al.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 239.

PATENTS (§ 326*)—INJUNCTION AGAINST INFRINGEMENT—VIOLATION.

A corporation organized by a defendant, who has been enjoined from infringement of a patent, for the sole purpose of escaping the consequences of the injunction, and of which such defendant is an officer, is bound by the injunction, and may be punished for contempt for its violation, although not formally made a party to the suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. § 326.*]

Appeal from and in Error to the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Leo Frank and Israel De Keyser against William Bernard, heard on appeal and writ of error by William Bernard, Incorporated, to review an order of the Circuit Court, entered September 22, 1909, holding William Bernard, Incorporated, guilty of contempt of court for making and selling articles in violation of an injunction issued July 25, 1904, and fining the said corporation $500, half to the United States and half to the complainants. A petition of appeal filed by the corporation was also allowed. Affirmed.

The original order to show cause, the affidavit upon which it was granted, the affidavits in opposition thereto, the opinion of the Circuit Court, the order under review, the petition for a writ of error, the assignment of errors and the petition on appeal are all entitled in an action against William Bernard as an individual. William Bernard, Incorporated, appears for the first time as a party to the action in the assignment of errors presented with the petition on appeal. How the corporation became a party to the action, if it ever did, does not appear. The injunction was served on William Bernard July 27, 1904. It has not been served upon the corporation, except as it was served upon Bernard individually, and, apparently, no injunction addressed to the corporation was ever issued.

Previous decisions growing out of this controversy are reported in (C. C.) 131 Fed. 269; 135 Fed. 1021, 68 C. C. A. 566; (C. C.) 146 Fed. 137; (C. C.) 171 Fed. 117.

Bernard Cowen, for plaintiff in error.

O. Ellery Edwards, Jr., for defendants in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). It is not necessary to add to the extended discussion which every branch of

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

this controversy has received. The validity of the patent and its infringement are no longer debatable questions between the complainants and Bernard. The only question is whether the consequences of infringement can be avoided by the formation of the corporation "William Bernard, Incorporated."

It is true that the corporation is not expressly named as defendant, but it could not have had more direct and explicit notice of the injunction if it had been so named. It was cited by an order of the Circuit Court to appear and show cause why it should not be punished for contempt in violating the injunction and was given full opportunity to purge itself. In organizing the corporation Bernard was the moving spirit. That it was organized for the purpose of escaping the consequences of the infringement of the patent which Bernard had sold and assigned to the complainants, is too plain for controversy. That Bernard, as its treasurer, fully represented the corporation cannot be doubted and if the formality of a separate action had been deemed necessary, service on Bernard, the individual, would have been binding on Bernard, the corporation. A person who, with full knowledge of its provisions, has violated an injunction may be punished for contempt, although not a party to the suit. In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

The order is affirmed, with costs.

SHAWNEE MILLING CO. v. TEMPLE, U. S. Dist. Atty., et al.

UPDIKE MILLING CO. v. SAME.

(Circuit Court, S. D. Iowa, C. D. May 10, 1910.)

Nos. 2,490, 2,492.

1. INJUNCTION (§ 85*)—SCOPE OF RELIEF—ENFORCEMENT OF CRIMINAL OR PENAL STATUTES.

A bill for injunction to restrain the enforcement of a criminal or penal statute is allowable when the statute is unconstitutional or invalid, where, in an attempt to enforce it, property rights are invaded, or where oft-repeated attempts to enforce it would create a multiplicity of suits, in themselves oppressive.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*

Restraining criminal proceedings, see note to Arbuckle v. Blackburn, 51 C. C. A. 133.]

2. INJUNCTION (§ 85*)—CIVIL PROCEEDINGS.

Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), declaring that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law, prohibits the filing of a bill in equity to enjoin the enforcement of a valid statute by civil proceedings.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

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

3. EVIDENCE (§ 7*)—JUDICIAL NOTICE—QUALITIES AND PROPERTIES OF MATTER.
Judicial notice will be taken of the fact that good, sound wheat of the best variety, properly and timely harvested, put through the sweat in the stack, well ground and bolted, makes nutritious, wholesome, and white flour.

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

4. FOOD (§ 22*)—BLEACHED FLOUR—INJURY TO HEALTH—QUESTION FOR JURY.
Whether flour, bleached by the use of nitrogen peroxide under the Andrews' patent, or pursuant to the Alsop process, is flour so treated that inferiority is concealed, or contains added poisonous ingredients which may render it injurious to health, in violation of National Pure Food Law June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), is a question of fact for determination by a jury, or by the court if a jury is waived.

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

5. COMMERCE (§ 33*)—REGULATION—NATIONAL PURE FOOD LAW—VALIDITY.
The national pure food law (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) prohibiting transportation in interstate commerce of any article of food so treated, whereby its inferiority is concealed, or containing added poisonous ingredients which may render it injurious to health, was not an exercise of police power within the exclusive jurisdiction of states, but was within the jurisdiction of Congress, as a proper regulation of interstate commerce.

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

In Equity. Bills by the Shawnee Milling Company and the Updike Milling Company against Marcellus L. Temple, United States District Attorney, and Frank B. Clark, United States Marshal, and others, to restrain them from seizing complainants' flour in interstate shipments under the national pure food law (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]). Bills dismissed.

Ed P. Smith, A. E. Helm, and Bruce S. Elliott, for complainants.

Pierce Butler, Asst. U. S. Atty. Gen., and Marcellus L. Temple, U. S. Atty., for respondents.

SMITH McPHERSON, District Judge. Each of these two cases is by a bill in equity, practically the same. One of complainants, Updike Milling Company, is a corporation under the laws of Nebraska, there engaged in the business of manufacturing wheat into flour both for domestic use and for shipments into Iowa and other states for sale and consumption. The other complainant, Shawnee Milling Company, is a corporation under the laws of Kansas, there engaged in a like business, sales, and shipments.

The defendants are the United States attorney and marshal for this district, and the relief sought is to enjoin the respondent officers from having issued, or serving process for seizing complainants' flour in interstate shipments under the national pure food statute of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]).

The allegations are that complainants' flour is whitened and aged by a process, and that the same is not harmful, but is more nutritious, wholesome, and attractive for making bread. It is not alleged in the bill of complaint in terms that the flour is bleached by the Alsop pro-

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

cess as covered by certain English and American patents, as set forth by the Circuit Court of Appeals for this circuit in the case of Naylor v. Alsop Process Company, 168 Fed. 911, 94 C. C. A. 315; but all the arguments, both by briefs and orally, were on that state of facts. Counsel for the United States have appeared for the defendants, thereby in effect making the cases controversies between the United States government, on the one side, and western flour mill owners, on the other, who bleach their flour by the agency of nitrogen peroxide gas under the Alsop patent process.

A literal reading of the bills of complaint will show that they are fairly subject to criticism; that the allegations as to the aging, whitening, and improving the flour are largely by the use of adjectives and adverbs, instead of reciting just what is done, how the flour is aged, how whitened, how made more nutritious, why not harmful, and why better by the use of some agency not named nor described. But this criticism need not be elaborated. The cases are now for determination on demurrers to the bills of complaint, and sufficient allegations appear to cover the rulings now to be made.

A bill in equity in which the writ of injunction can issue to enjoin the enforcement of a criminal or penal statute is allowable only when: (1) Such statute is unconstitutional or otherwise invalid; (2) in the attempt to enforce such invalid statute, rights of property are invaded and trampled on; or (3) the often repeated attempts to enforce such invalid statute creates a multiplicity of actions which are of themselves oppressive.

The important and recent case of Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, illustrates this, in which case it was held that a bill in equity would confer jurisdiction because of the oppressive penalties if an effort should be made to protect the rights of property. In City of Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333, the Circuit Court of Appeals for this circuit held that an injunction should issue against the prosecution of cases under an invalid ordinance requiring an illegal license, which would be followed by many criminal prosecutions. In Dobbins v. Los Angeles, 195 U. S. 223, 241, 25 Sup. Ct. 18, 22 (49 L. Ed. 169), the holding was clearly and tersely stated:

> "It is well settled that, where property rights will be destroyed, lawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

But if property rights are not invaded, then a court of equity ordinarily will not interfere, because the defense as to the invalidity of the statute can be urged in the criminal or penal action or special proceeding. Thus, in the case of In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, it was held that proceedings for the ouster of a city officer could not be enjoined for the alleged invalidity of the law under which the proceedings were being conducted. And of like holdings are the cases of Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, and Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535. And if the proceedings for seizure are to be regarded as civil, then section 723, Rev. St. (U. S. Comp. St. 1901, p.

583), will prohibit the filing of a bill in equity to enjoin the enforcement of a valid statute.

In the one case now before the court, the bill of complaint recites that several seizures of flour were made in this judicial district, and, after a number of efforts by the complainant to have the cases submitted to the court with or without a jury for a hearing on the merits, the government dismissed the cases, after the flour thus seized had deteriorated in quality and value. In the cases now before the court, as property rights are involved, bills in equity will be entertained, provided the statute under which the government claims the rights to proceed is not a valid one. Herein is the question in the case, that is to say: Is the pure food statute of June 30, 1906, a valid enactment? Did Congress have the power to enact it? Is it within the commerce clause of the Constitution, or is it a mere police regulation, garbed and cloaked as a regulation of commerce?

Good, sound wheat of the best variety, properly and timely harvested, put through the "sweat" in the stack, well ground and bolted, makes nutritious, wholesome, and white flour. This fact is so generally known that courts will take judicial notice of the fact.

It is said that flour made from new and poorer wheat, not "sweated," and made by the process covered by the English patent of Andrews, or the American patent of Alsop as illustrated in the patent decision hereinbefore referred to (168 Fed. 911, 94 C. C. A. 315), will also be equally white. This is quite likely true. But is it equally pure, equally nutritious, or is it adulterated and poisoned?

This court in these cases is not to decide those questions. Nitrogen peroxide gas under the Andrews patent is produced by combining nitric acid with a metallic compound. Under the Alsop patent it is produced by subjecting atmospheric air to a flaming electric arc. It is claimed by some that nitrogen peroxide is the agent for bleaching flour under both patents, while others claim that it is the ozone that does the effective work, while the nitrogen peroxide is a by-product when the ozone is thereby created.

Whatever the truth is as to what does the bleaching, it is both claimed, and denied, by chemists who ought to be able to agree, that the flour is poisoned by such process. But it is known that, after the air is thus subjected to continuous flaming electrical discharges, the resultant gas is conveyed by means of pipes to a compartment, and there is commingled with the flour agitated or in a cloud, and thus subjected to said treatment it becomes dry and white. The result of it all is that new wheat and of an inferior quality is converted into flour with the appearance of flour from a better wheat that has been aged by time.

The government contends that flour thus bleached is flour in the language of the statute "whereby inferiority is concealed," and that "it contains added poisonous ingredients which may render such article (flour) injurious to health." The patentees and the millers deny this.

Here is a question for determination by a jury, or by the court if a jury is waived, and not to be determined in this case if the statute is valid.

Several of the states within the past few years have enacted pure food statutes. Congress, June 30, 1906, enacted the statute in question. All these statutes were enacted to cure evils well nigh intolerable that had grown up during this age of greed and avarice and commercialism that has made money getting the prime object of life with so many. The evils were such that much of the foods we ate, whether meats of any kind, including fish and poultry, or fruits in all forms, and breadstuffs, were so adulterated and "loaded" or "doctored" as to deceive the consumer. And the same was true of flavors and condiments. The evil as to confectionery and extracts was as great. Still greater was the evil as to drugs and medicines. In fact, the evils were everywhere present, as to food and medicine, and other things. And to eliminate some of these evils, and to enable the purchasers to receive what they ordered and paid for, many states passed statutes aimed at those frauds. But it was soon found that the states in some instances were disposed to condone as to some articles of local manufacture, and in many other instances the states were powerless to work out a remedy. Thereupon Congress, acting upon the theory that the evil was of national concern, enacted the statute in question. The debates in Congress show that the measure was earnestly fought as being one of paternalism, and a police regulation with which the states only could act.

The Secretary of Agriculture, Mr. Wilson, performed his duty both in letter and spirit when he submitted the question as to flour bleached by nitrogen peroxide to the board of food and drug inspection; and that board, the secretary concurring, after a hearing given to all parties in interest, found that such flour is in contravention of the statute. Such finding is not binding as against the parties thus bleaching flour. But it is conclusive as against all criticism for making the seizures and bringing the question before the courts for determination.

Congress is given the power to provide for the general welfare of the United States. But without doubt, if this legislation is sustained, it is because of that provision of the Constitution which provides that the Congress shall have the power to regulate commerce among the several states. That provision is the life of the nation, and to adopt which was the great concern of the Convention of 1787. Important as it is, it is ever before the courts. It gives great comfort to all who believe in one common country, and yet is antagonized oftener than any other provision of the Constitution, by those whose shield of defense is articles 9 and 10 of the amendments, as to the reserved power of the states.

No one claims that Congress can be the sole judge of its powers. All thoughtful persons concede that any court having jurisdiction in the first instance must pass upon the question of the powers of Congress, and that it is for the Supreme Court in the end to finally set the matters at rest. But so careful have our Congresses and Presidents been, that for the first hundred years of our government the Supreme Court found it necessary to hold that Congress had exceeded its powers in only 20 instances. See Appendix to 131 U. S. ccxxxv. And of those 20 statutes thus held void not one related to commerce. Since then, the Supreme Court has held three congressional enact-

ments void. One was a statute making a judgment of conviction conclusive evidence against a party in another case. Kirby v. U. S., 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 809. Another was the income tax case. Pollock v. Farmers' Loan Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. The other, and only one from the organization of our government to date as to commerce, is that of the employer's liability statute, enacted under the claim that the commerce clause would sustain it. Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. If other enactments of Congress have been held void by the Supreme Court, such cases have been overlooked, and it is believed there are none other. There are almost innumerable decisions touching the power of the states with reference to commerce. It would be to no purpose to discuss many of these authorities. And it would be a needless waste of energy to discuss the many decisions relating to the use of the mails, for the obvious reason that a distinct clause of the Constitution empowers Congress to control our postal system, and there is not the slightest difference whether the mails thus carried are state or interstate.

Neither the court nor the parties are aided by a review of those matters. It must be and is conceded that police regulations alone are for the state, and not for Congress, to deal with.

But it does not follow that, if the subject-matter to be regulated is one of commerce, it is for the state alone to deal with, because such subject-matter is also one that pertains to the morals, health, or good order of the community.

Thus, when the question arose as to the inspection of meats for food, Legislatures claiming that they alone could determine when and to what extent police regulations should be carried, the Supreme Court decided that such inspection also impinged upon the rights of commerce and were therefore void. Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862.

It will serve no purpose to discuss the principle upheld in Wilson v. Black Bird Creek Company, 2 Pet. 245, 7 L. Ed. 412, that the state can regulate certain interstate commerce of a local character, if Congress has not acted, nor of that other principle upheld by Congress that the state can legislate with reference to liability of a party when doing an interstate business when Congress has not acted. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819. The complete answer to those suggestions is that in the matter now before the court Congress has acted. The question now for consideration is not as to the power of the states relating to commerce, as held in Smith v. Alabama, 124 U. S. 465, 18 Sup. Ct. 564, 31 L. Ed. 508, upholding a state statute requiring a locomotive engineer even though operating an interstate train to submit to tests for color blindness.

The question here is as to the power of Congress over articles of interstate commerce, even though such articles in the end become subject to state statutes. No one doubts but that wheat and flour, as well as all articles of food, are subjects of commerce, and, when carried over and across state lines, are subject to be regulated by Congress.

And it is no answer to say that when adulterated, or wrongly labeled, because in the end they will fall under a state statute, they when being shipped cannot be covered by a congressional enactment. The liquor cases illustrate this, because of all the subjects of commerce there is no one thing more peculiarly and distinctly and appropriately subject to regulation by the state, even to the extent of prohibition, than are intoxicating liquors. And yet Congress legislates with reference to liquors. The Wilson act of 1890 (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) provided that when liquors arrived in a state they should be subject to state laws. This statute was upheld in the case In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, thereby modifying the practical effect of the holding in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, that the state could not interfere by legislation as to liquors shipped interstate as long as the liquors were in the original packages; while in Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, it was held that the liquors must be in fact and actually delivered to the purchaser before the state laws became effective as to such interstate shipment. No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the state by a police regulation can control.

If liquors do not sufficiently illustrate the question, lottery tickets will. The Louisiana Lottery was conducted by men of high repute and much renown. But it became a national scandal. It was struck at by denying it the use of the mails. The Legislature of the state gave it encouragement, even its life. But Congress provided in addition that it should be a crime to carry lottery tickets from one state to another by means other than through the mails. Can any person doubt but that the Louisiana Lottery was or could have been made subject to the laws of Louisiana? And yet this congressional enactment was upheld in the Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. But little need be said of that case. It was argued by counsel of great eminence. It was argued upon two separate occasions. It received the fullest consideration by the Supreme Court. Apparently no other case that was ever before that court received more attention and fuller consideration. Counsel for complainants herein concede all these things. And the only answer that has been made, or that can be made to that case, is in the statement that the case was decided by a divided court; four justices dissenting. It may be, or it may not be, that that weakens the case as an authority. It is barely possible that later on, that court changing as to its personnel, the decision may be overruled. But such reasoning is a mere speculation. On the other hand, the fact that the court was so divided emphasizes the fact that the court gave great consideration to the question. But be these things as they may, it is not for this court to usurp the prerogative by blindly declining to follow that decision. That decision stands, and as long as it stands it is the law of the country, and this court not only must, but does, cheerfully observe it in all of its phases.

Much more could be said. Cases commencing with Gibbons v. Ogden, and then to date, could be reviewed. The question could be illus-

trated in many ways. But all that would be to no purpose; it would be academic.

Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs. Congress has enacted the live stock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of live stock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted a second employer's liability act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute above referred to. Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c. o. d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package. These statutes, police regulations in many respects, are alike in principle to the act of June 30, 1906, under consideration. Can it be possible they are all void?

This statute by its title, and by its every provision, plainly shows that it is with reference to commerce, and that it is not with reference to local police regulations.

It is also contended that so much of section 7 of the statute as relates to food is void because no standard has been fixed. That argument is made because drugs are fixed by a standard recognized by the United States Pharmacopœia or National Formulary, and as to confectionery a standard is fixed by declaring what confectionery "shall not" contain; whereas, as to foods no standard has been fixed. It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted wholly or in part for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added. And so on more in detail than herein enumerated. These provisions present questions of fact as to every alleged contraband article. This objection is without merit.

This case was argued upon both sides with most signal ability, displaying much learning, and was argued at great length.

The case has received from this court the fullest consideration, and the conclusions are that these bills in equity cannot be maintained, and therefore will be dismissed.

In re POTEE BRICK CO. OF BALTIMORE CITY.

(District Court, D. Maryland. May 31, 1910.)

1. FIXTURES (§ 27*)—LANDLORD AND TENANT—LEASE.
Where a lease provided that the improvements which it was contemplated the tenant would erect on the premises should not be removed therefrom until the rent was paid, such provisions precluded the tenant's right to remove articles annexed to the freehold which would otherwise be removable as trade fixtures.
[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 22; Dec. Dig. § 27.*]

2. BANKRUPTCY (§ 140*)—ERECTIONS ON REAL ESTATE—REMOVAL—MORTGAGEE.
Where a lease of real property to the bankrupt contemplated that the bankrupt would erect on the premises certain improvements which should not be removed until the rent was paid, there was no right in the bankrupt, his trustee or mortgagee, to remove any of the property annexed to the freehold unless and until all the rent in arrears had been paid, whether such property so annexed constituted trade fixtures or not.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 199, 218; Dec. Dig. § 140.*]

3. LANDLORD AND TENANT (§ 157*)—IMPROVEMENTS BY TENANT—REMOVAL.
Where a bankrupt held over with the consent of the landlord and remained in possession under a lease providing that improvements which the tenant erected on the premises should not be removed until the rent was paid, and receivers were appointed at the instance of the landlord, who continued possession awaiting the election of a trustee in bankruptcy, the termination of the lease by forfeiture or expiration of the term did not necessarily terminate the bankrupt's right to remove fixtures after payment of the rent in arrear.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 577, 578; Dec. Dig. § 157.*]

4. LANDLORD AND TENANT (§ 248*)—SECURITY FOR RENTS—CHATTELS—RIGHTS OF CREDITORS.
An agreement that chattels on the premises shall be at the disposal of the landlord as security for rent is not valid as against creditors of the lessee before entering.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1003; Dec. Dig. § 248.*]

5. BANKRUPTCY (§ 191*)—LANDLORD AND TENANT—DISTRAINT.
A landlord has no lien on distrainable property passing into the hands of a bankrupt's trustee unless he has levied his distraint before the filing of the petition in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 290; Dec. Dig. § 191.*]

6. LANDLORD AND TENANT (§ 269*)—DISTRAINT—PROPERTY LEVIED ON.
A landlord could not distrain against property of the bankrupt tenant levied on under a judgment in favor of the tenant's chattel mortgagee.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1094; Dec. Dig. § 269.*]

7. EXECUTION (§ 324*)—LEVY—RIGHTS OF LANDLORD—NOTICE TO SHERIFF.
Where a tenant's mortgagee having recovered judgment and levied an execution on the tenant's distrainable goods, the landlord was authorized by St. 8 Anne, c. 14, to give notice to the sheriff of rent in arrears and of the landlord's right to distrain under which he would be entitled to

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

receive from the sheriff of the proceeds of the goods not exceeding one year's rent.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 963; Dec. Dig. § 324.*]

8. BANKRUPTCY (§ 191*)—DISTRESS—LEVY—"LIEN BY LEGAL PROCEEDINGS."
A landlord within four months before the filing of a petition in bankruptcy may levy his distress and thereby acquire a lien which a subsequent bankruptcy adjudication would not render void or voidable, the lien thereby secured not being under the law of Maryland a lien secured "by legal proceedings" within Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 290; Dec. Dig. § 191.*]

9. BANKRUPTCY (§ 194*)—LIENS—CREDITORS' BILLS—"LIEN BY LEGAL PROCEEDINGS."
A lien on a bankrupt's assets secured by the filing of a creditor's bill within four months prior to the filing of a bankruptcy petition is a lien secured "by legal proceedings," which by Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 541 (U. S. Comp. St. 1901, p. 3449), is avoided by the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 289; Dec. Dig. § 194.*]

In the matter of Potee Brick Company of Baltimore City, bankrupt. Proceedings to determine the rights of the Curtis Bay Company, landlord, as against James O. Dickinson, mortgagee of the bankrupt's property. Judgment for the Curtis Bay Company.

Isidor Rayner and John F. Williams, for the landlord.

C. Howard Millikin and Myer Rosenbush, for petitioning creditors appearing on behalf of the bankrupt estate.

ROSE, District Judge. In this opinion, for brevity, the Curtis Bay Company of Anne Arundel county will be spoken of as the "landlord"; the Potee Brick Company of Baltimore City will be called the "bankrupt"; and James O. Dickinson and Robert Moss, his attorney and assignee, will be called the "mortgagee."

The questions which are now to be decided relate to the relative rights of the landlord, the bankrupt's estate, and the mortgagee to certain property which now and at the time of the filing of the petition in bankruptcy were on the property which the bankrupt held as tenant of the landlord.

The lease was made March 1, 1904, for one year. While it said nothing as to renewal of the term, it did contain provisions which seem to show that the parties expected the lease to last longer than one year.

By the terms of the lease the property was to be used by the bankrupt for the manufacture of bricks. The bankrupt was authorized to take clay and other brick-making material from the soil. The rent covenanted to be paid was in the form of a royalty of 50 cents a thousand on the bricks manufactured, with the proviso that the rent should in any event amount to at least $400 per annum.

On March 1, 1909, and at all times thereafter, up until the institu-

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

tion of the bankruptcy proceedings, the bankrupt owed the landlord for rent in arrear $3,567.76, of which $494.03 was due for the year beginning March 1, 1908, and ending March 1, 1909.

On September 27, 1904, the bankrupt mortgaged to the mortgagee all its brick kilns, sheds, machinery, tools, brick office, small frame houses, and all other bricks, machinery, goods, fixtures, or equipments that might be then in possession or hereafter acquired by the bankrupt, to secure the payment of $5,000 one year after date.

On July 28, 1909, the mortgagee having brought suit at law against the bankrupt for the same debt secured by the mortgage, recovered a judgment against him of $5,500 debt and $17.20 costs, upon which judgment the mortgagee gave credit for $1,008.

On the 31st of July, 1909, the mortgagee caused execution to issue on this judgment and a levy to be made on the property of the bankrupt on the premises leased from the landlord. The sheriff's return shows that the property levied upon was substantially the same property as that described in the mortgage.

On the 6th of August, 1909, the landlord gave the sheriff notice in writing, under the statute of 8 Anne, c. 14, that the bankrupt was a tenant of the landlord and was largely indebted to it for rent due and in arrears. Nothing further appears to have been done under this levy, nor was the property ever removed by the sheriff or sold by him.

Some time after September 20, 1909, the mortgagee under the power contained in the mortgage advertised the mortgaged property for sale on October 20, 1909.

On October 13, 1909, the landlord filed a bill of complaint in the circuit court of Anne Arundel county in equity against the bankrupt and the mortgagee. The bill was filed by it for itself and any other creditors of the bankrupt who might come in and become parties complainant and contribute to the costs and expense. It recited, substantially, all the facts above set forth, and asserted that by the levy the landlord was deprived of its right to distrain. It said that the debt for which the judgment had been given was the same debt for which the property was about to be sold under the mortgage; that the property being held by the sheriff, and the landlord being thereby deprived of its right to distrain, a sale under the mortgage and a removal of the property would deprive the landlord of its lien for rent due and in arrears. It asserted that the mortgagee should be required to pay the rent due and in arrears before making sale of the property or removing it. It said that the landlord was alone entitled as the owner of the freehold to everything which belonged to the freehold, and that as lessor and under its distraint it was entitled to priority upon all the goods and chattels upon the premises. It prayed for the appointment of a receiver, for an injunction to restrain the bankrupt from further dealing with its property and the mortgagee from selling any of it, that the bankrupt might be dissolved, and its assets applied to the payment of its liabilities, and for other and further relief.

On the same day the bankrupt answered neither admitting nor denying the allegations of the bill, but consenting to the appointment of a receiver.

The mortgagee answered that it would be to the interests of all parties concerned to have a receiver appointed; but it expressly denied that the landlord had any rent claim which took priority over the mortgage claim.

On the 14th of October, 1909, the circuit court for Anne Arundel county appointed receivers for the bankrupt.

On the 24th of November, 1909, within less than four months from the recovery of the judgment, four creditors of the bankrupt filed a petition in this court to have the bankrupt so adjudicated. On the 15th of December the adjudication was made.

The landlord in its argument at the hearing and in the brief afterwards submitted on its behalf claims under the terms, covenants, and conditions of the lease absolute title to all the property situated on the premises and annexed to the freehold, whether such property be trade fixtures or not.

By the terms of the lease the bankrupt covenanted to deliver possession of the premises at the end of one year from March 1, 1904. If the covenants of the lease were not carried out, or if possession was not delivered at the expiration of the lease, the lessee was to be considered a tenant at will or by sufferance, and the landlord might take possession without any proceedings whatever.

The lease provided that at the expiration of the term and the payment of all money due and owing by the bankrupt to the landlord, and the fulfillment of all the conditions of the lease, either express or implied, the bankrupt should have three months' time within which it might remove from the premises all improvements erected thereon by it. It was expressly provided that there was no obligation on the part of the landlord to pay for any improvements which might be left on the property in the event of the forfeiture of the lease or after the expiration of the same, and that any improvements left on the premises should belong absolutely to the lessor.

The provisions of the lease above summarized show that the parties to it intended that the improvements which it was contemplated that the bankrupt would erect on the premises should not be removed therefrom until the rent was paid.

When such an agreement is made between the parties, it controls the right to remove the articles annexed to the freehold otherwise removable as trade fixtures. O'Brien v. Mueller, 96 Md. 137, 53 Atl. 663; 13 Amer. & Eng. Enc. of Law, 657; Taylor on Landlord & Tenant, § 554; Simpson Brick Press Co. v. Wormley, 61 Ill. App. 460.

As is said in Ex parte Morrow, 1 Lowell, 386, Fed. Cas. No. 9,850, the right of a tenant to remove trade fixtures may well enough be called rather a "privilege" than a "property." It is one which may be lawfully waived or modified by the terms of the lease. As against the bankrupt and the bankrupt's trustee, when one shall be elected, there is, I think, no right to remove any of the property annexed to the freehold until and unless all the rent in arrears shall be paid, whether or not such property so annexed properly belongs to the class property described as "trade fixtures."

I do not think that the mortgagee stands in any better position with reference to such fixtures than does the bankrupt.

It is urged by the counsel for the landlord that the lease ended more than three months ago either by forfeiture or by the expiration of the term, and that the bankrupt's right, even if the rent were paid, to remove the fixtures, has ceased.

Under all the circumstances of this case, I do not think that this contention can be sustained. The bankrupt held over obviously with the consent of the landlord and remained in possession, as the agreed statement of facts filed in the case shows, until receivers were appointed by the circuit court for Anne Arundel county. Those receivers were appointed at the instance of the landlord, and they are in possession awaiting the election of a trustee in bankruptcy. But, as stated, I am of opinion that neither the bankrupt nor his trustee has any right to remove such of the fixtures as are annexed to the freehold without paying the rent in full.

The question is probably of no practical importance in this case, as the state of affairs disclosed by the schedules would seem to indicate that it would be impossible for the trustee to pay the rent.

The landlord further contends that by the terms of the lease the chattels on the property belonging to the tenant, and which were not so annexed to the freehold as to be fixtures, are by the terms of the lease subject to the claim of the landlord for rent. That view I think cannot be sustained. An agreement that chattels on the premises shall be at the disposal of the lessor as security for rent is not valid against creditors of the lessee before entering. Ex parte J. H. Morrow, 1 Lowell, 386, Fed. Cas. No. 9,850; Bleakley v. Sullivan, 140 N. Y. 175, 35 N. E. 433; Beers v. Field, 69 Vt. 533, 38 Atl. 270.

The landlord further claims that, as a result of the filing of the bill in equity in the circuit court for Anne Arundel county, it acquired an equitable lien upon all the bankrupt's property on the premises. I cannot agree with this view. Either the landlord had the right to distrain or it had not. If it had the right, it had not exercised it, and under the decision of Judge Morris in the case of In re Southern Company of Baltimore City the landlord has no lien upon distrainable property passing into the hands of a bankrupt trustee unless he has levied his distraint before the filing of the petition in bankruptcy. The learned counsel for the bankrupt at the hearing expressly admitted that Judge Morris' decision correctly stated the law of Maryland. But the landlord answers that it could not distrain because of the levy of the execution under the judgment of the mortgagee. That is true, it could not. But what consequences so far as the landlord's rights are concerned follow from the levy of the execution? Simply these: That under the statute of 8 Anne, c. 14, in force in Maryland, it had the right to give notice to the sheriff that its rent was in arrear; that it had the right to distrain and to notify him not to remove the goods. Under this notice by the terms of the statute the landlord was entitled to receive from the sheriff out of the proceeds of the goods sold on execution not exceeding one year's rent. In this case the last year's rent to accrue is the rent which became due on March 1, 1909, and the

amount due for that year under the terms of the lease was $494.03. By the notice given to the sheriff by the landlord, the landlord acquired the right to be paid out of the proceeds of the property taken under execution such sum of $494.03. The subsequent filing of the creditors' bill by the landlord could not operate to extend its lien for any greater sum than the $494.03.

If the levying of a distraint is the securing of a lien by legal proceedings, the adjudication in bankruptcy within four months after the levy would make such lien void or voidable.

A landlord may within four months before the filing of a petition in bankruptcy levy his distress, and he may thereby acquire a lien which the subsequent adjudication does not render void or voidable; but that is because the lien he thereby secured under the law of Maryland was not a lien by legal proceedings within the meaning of section 67c of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). If the purpose or effect of the bill filed on the equity side of the circuit court for Anne Arundel county was to secure a lien which had not up to that time been secured, any lien so acquired would be such a lien as that section of the bankruptcy act declares shall be avoided in the event that bankruptcy proceedings are instituted within four months.

I conclude, therefore, that the fixtures annexed to the freehold become the property of the landlord, unless the trustee shall be in a position within 15 days after his election as trustee to pay all the rent in arrear, including the rent which would have accrued since the institution of the proceedings in bankruptcy, and that the landlord has a lien to the amount of $494.03 on the distrainable chattels on the premises passing into the possession of the trustee. If the trustee in bankruptcy and the landlord shall find it impracticable to agree as to what articles of property on the premises are annexed to the freehold, so that under this decision they become the property of the landlord, they may apply for further directions.

I do not find that the pleadings in this case are now in such shape as to make it proper that I should pass on any of the questions which may conceivably arise between the mortgagee, whether in his capacity as mortgagee or as judgment and execution creditor, and the bankrupt estate. If such questions do arise, they will be disposed of upon proper proceedings had to that purpose.

PATTON v. ILLINOIS CENT. R. CO.

(Circuit Court, W. D. Kentucky. May 20, 1910.)

1. MASTER AND SERVANT (§ 125*)—INJURIES TO SERVANT—ACTIONABLE NEGLIGENCE—DEFECTIVE APPLIANCES—KNOWLEDGE OF DEFECTS.

Where, in an action for injuries to a brakeman by the breaking of a ladder rung on the side of a car, there was no proof that defendant knew of the defect in time to have repaired it before the accident, or that its condition had lasted so long that it could have been discovered by defend-

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

ant's use of reasonable care and prudent inspection, actionable negligence was not shown.

Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243–251; Dec. Dig. § 125.*]

2. COURTS (§ 372*)—FEDERAL COURTS—RULES OF DECISION.

Whether the doctrine res ipsa loquitur applies to an action for injuries to a servant by the breaking of a ladder rung on the side of a freight car is a question of general jurisprudence, and not of local law, as to which federal courts are governed by their own decisions and not by those of the state in which the court is sitting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977–979; Dec. Dig. § 372.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

In an action for injuries to a brakeman by the breaking of a ladder rung on the side of a freight car, the burden is on plaintiff to prove actionable negligence, and is not shifted to the defendant under the doctrine res ipsa loquitur by plaintiff's proof of the accident without evidence of defendant's actual or implied knowledge of the defect within a time sufficient to have enabled it to have repaired the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*

Application of doctrine of res ipsa loquitur in actions for injuries to servants, see note to Carnegie Steel Co. v. Byers, 82 C. C. A. 121.]

At Law. Action by Andrew Patton against the Illinois Central Railroad Company. On plaintiff's motion for a new trial. Overruled.

Hendrick & Corbett, for plaintiff.
Wheeler & Hughes, for defendant.

EVANS, District Judge. The plaintiff claims relief against the defendant for injuries which he says were inflicted by the negligence of the defendant. In his petition he states that he was a brakeman in the defendant's service, and that while acting in the line of his duty on a freight train, and while the train of the defendant on which he was employed was being side-tracked to allow another train to pass, he started down the ladder attached to one of the cars in the train, for the use of the brakemen in ascending and descending, when one of the rungs in the ladder broke or gave way and threw him to the ground, some 10 or 12 feet below, with great force and violence, inflicting a large and painful wound on his head and rendering him unconscious; that when he sufficiently recovered from the fall and injury to walk he started to do so, but was in a dazed and bewildered condition, and had not gone far when he suddenly became sick and blind and fainted from loss of blood and fell on the company's main track, and while he remained there in a helpless and unconscious condition another of defendant's trains ran over him and so broke and mangled his left foot and leg as to make amputation necessary within a few hours thereafter. He then further states:

"That it was the duty of the defendant company to furnish him a reasonably safe place in which to work, and reasonably safe appliances with which to work and perform his duties while acting for it in the capacity of its servant as aforesaid; but he says that said company, with gross negligence, failed

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

and refused to furnish him reasonably safe appliances with which to work and perform his duties, one of which appliances was the aforesaid ladder, which was on the date aforesaid furnished to him; but he states that same was in a defective and dangerous condition, and was known to be by the defendant company, its agents or servants superior in authority to this plaintiff, or by the exercise of reasonable care could have been known by it, and that the said defective and dangerous ladder was the direct and proximate cause of his injuries, and but for said dangerous, defective ladder, as hereinabove stated, his injuries would not have occurred. He states that he did not know, at the time, of the dangerous, defective condition of said ladder, and could not, by the use of ordinary care and diligence, have known of said defects. He further states that by reason of said injuries he has been damaged in the sum of at least $15,000."

After hearing all the testimony, the court was of opinion that the plaintiff had not met the requirements of the onus probandi, and sustained the defendant's motion for an instructed verdict in its favor. The plaintiff has moved the court for a new trial, and his counsel have presented an able and interesting argument in support of the motion.

At the trial it was clearly enough proved that while the plaintiff was descending the ladder one of its rungs broke or gave way, and that he was thereby precipitated to the ground, and that the injuries complained of occurred; but precisely what was the matter with the rung was not shown, and counsel for the plaintiff frankly answered the inquiry of the court made at the time by admitting that there was no testimony in support of the averments of the petition to the effect that the defendant knew of the defect in the rung in time to have repaired it before the accident, or that the condition thereof had lasted so long as that it could have been discovered by the defendant by the use of reasonable care and prudent inspection.

The plaintiff's petition would probably have been demurrable if it had not contained an averment charging the defendant with actual knowledge of the defect in the ladder or with the constructive knowledge of it which should be inferred from a long existence of a defect. These being essential allegations in an action by a servant against a master, the burden was upon the plaintiff to prove them; but, as we have said, his counsel, entirely justified by the facts, confessed at the trial that there was no direct or positive testimony in their support. Nevertheless it is contended by the learned counsel for the plaintiff, when the occurrences connected with the injury were proved, that, and upon the doctrine res ipsa loquitur, such proof, per se, showed that the defendant had been guilty of negligence, and that, under the doctrine of the Kentucky Court of Appeals announced in the case of Morgan v. C. & O. Ry. Co., 105 S. W. 961, 32 Ky. Law Rep. 330, 15 L. R. A. (N. S.) 790, the onus at once shifted to the defendant, which, in order to exonerate itself, must show that it had used due care to inspect and keep in good order the ladder in question. If we assume that that case upholds the doctrine indicated, nevertheless, as this is a question of general jurisprudence and not of local law merely, we must follow the rules, if any, laid down for us by the Supreme Court or by the Circuit Court of Appeals of this circuit. Preliminary to an effort to ascertain whether there is such a rule, it may be proper to note as settled propositions that a master is not bound to insure the absolute

safety of his servant, nor is he bound to do more than use all reasonable care and prudence for his safety by providing appliances and machinery reasonably safe and suitable for the uses to which they are to be put. Bailey, in his work on Master's Liability for Injuries to Servants, at pages 508, 509, says:

"The fact of the happening of an accident has no tendency to prove negligence, for the very good reason, if for no other, that negligence, or the facts from which it is to be inferred, must be affirmatively proven. This statement of a rule must not be so understood as to deny that an accident itself may not reveal the cause, and thus furnish competent and sufficient proof of negligence. It may show defects of such a character, and of such long standing, that it may well be said that the exercise of ordinary diligence might and would have discovered them."

In substance this is the doctrine of the federal courts as well as that of the state courts, whose decisions are noted by Bailey in support of his text. It was explicitly so held by the Circuit Court of Appeals in this circuit in Moit v. Illinois Central R. R. Co., 153 Fed. 356, 82 C. C. A. 430, and by other Circuit Courts of Appeals in Omaha Packing Co. v. Sanduski, 155 Fed. 899, 84 C. C. A. 89, 19 L. R. A. (N. S.) 355, Southern Pacific R. R. Co. v. Carr, 153 Fed. 112, 82 C. C. A. 240, and in cases cited in those opinions.

In C., N. O. & T. P. Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 324, 1 L. R. A. (N. S.) 533, the Circuit Court of Appeals of this circuit had before it a case where the doctrine of res ipsa loquitur was much discussed, and, while distinguishing cases to which it applied, at page 536 of 139 Fed. the court remarked:

"It has been said that, in action by employés for negligence injuries, evidence of an accident carries with it no presumption of negligence. Ill. Cent. R. Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101; Patton v. T. & P. R. Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; T. & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. The reason is the peculiar contract of such an employé by which he assumes the risks incident to his employment, including the negligence of his fellow servants. He must therefore show that the injury of which he complains was the result of a risk he did not assume."

Under some circumstances the fact of the injury of itself may, under the doctrine referred to, so speak as to make out a prima facie case of negligence which calls for an explanation from the defendant, and in this way, in effect, shift the burden of proof to the defendant. It would be difficult, however, to find a case in the federal courts where the doctrine of res ipsa loquitur has been applied in a case between master and servant. The leading case in which the distinction between cases where the plaintiff is a passenger, for example, and cases where he was a servant, is drawn, is Patton v. Texas & Pacific Ry. Co., 179 U. S. 663, 21 Sup. Ct. 277, 45 L. Ed. 361, where Mr. Justice Brewer, in delivering the opinion of the court, clearly stated the rule as follows:

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (Stokes v. Saltonstall, 13 Pet. 181 [10 L. Ed. 115]; Railroad Company v. Pollard, 22 Wall. 341 [22 L. Ed. 877]; Gleeson v. Virginia Midland Railroad, 140

U. S. 435, 443 [11 Sup. Ct. 859, 35 L. Ed. 458]), a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617 [17 Sup. Ct. 707, 41 L. Ed. 1136]. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In Carnegie Steel Co. v. Byers, 149 Fed., at page 669, 82 C. C. A., at page 117 (8 L. R. A. [N. S.] 677), the Circuit Court of Appeals of this circuit met the very question involved here by saying:

"We shall not stop to consider the objections to this charge based upon the fact that the plaintiff was an employé, and that, as between servant and master, there is no presumption of negligence from the mere proof of the happening of this accident. In such a suit it is not enough to show that there was a defective tool or machine and that the injury was due to such defect. The servant must go further, and show that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Illinois Cent. Railroad Co. v. Coughlin, 132 Fed. 801, 802, 65 C. C. A. 101. In Cincinnati, etc., Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, we gave elaborate consideration to the circumstances under which the fact of negligence may be inferred from the nature of an accident, and noted the distinctions to be observed in applying the rule of res ipsa loquitur in suits between employers and servants and those in which liability to passengers or strangers is involved. It was not enough to show that this accident had occurred through an erratic and unexplainable rising of the elevator. That might have made a prima facie case of negligence in favor of a passenger or stranger; but the plaintiff was an employé, and the burden was upon him to show that this sudden erratic upward movement was due to some defect in the mechanism which was known, or should have been known, to the Carnegie Company, and which they had neglected to repair. The distinction referred to is pointed out in the cases cited above. The pinch of the case was, not only whether the plaintiff had shown a defective valve which might have produced such an unexpected and rapid movement as that described by the plaintiff, but also whether the defect was known or might have been known if ordinary care had been exercised."

In other words, the court there held that the onus did not shift when the fact of the injury was proved, but that the plaintiff must go further and prove his other allegations in order to entitle him to recover. Doubtless one reason for the rule we have been discussing, especially in suits brought by railroad employés, is that some appliance attached to some part of some car in a freight train is liable to get loose or out of condition during almost any long trip, and the train employé is presumed to have taken the risk of such an accident. As to such cases, the general doctrine that the master is to provide rea-

sonably safe appliances for the use of his employés, while by no means abolished, is modified by the qualifications indicated in the cases we have cited. Or probably it might be more accurate to say that an averment of negligence in failing to provide safe appliances made against the master by an employé is not sustained unless there is substantial evidence that the master had actual knowledge of a defect in time to have repaired it before the injury, or that the defect had existed so long that knowledge of it should be imputed to the master if it were such that reasonably careful inspection would have developed its existence.

We do not find anything inconsistent with these views in the two cases cited by the plaintiff's counsel of Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141, and Baltimore & Potomac R. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. The former of these was a suit by a passenger as to whom the carrier was bound to take the utmost care, and in the latter the question we are discussing was in no way involved.

My great sympathy for the unfortunate victim of this accident, who testified before me, has led me to an industrious re-examination of the questions involved. The result is that I find this case added to the long list of those where there was a failure of substantial evidence of actionable negligence.

The motion for a new trial must be overruled.

JENKINS et al. v. ATLANTIC COAST LINE R. CO.

(Circuit Court, D. South Carolina. May 18, 1910.)

1. CARRIERS (§ 306*)—INJURIES TO PASSENGERS—COMPANIES LIABLE—CONTRACTS—"PRIVITY."

Where C., owning a roadbed, leased rolling stock from the A. Co., at a specified mileage rental, the C. Company having control of the trains, operators, etc., while on its tracks and being primarily and solely responsible for the damages to property or injuries to passengers arising from any accidents to the trains while on its line, there was a privity between the two companies in so far as they were liable to a passenger for injuries; the term "privity" being used to denote mutual or successive relationship to the same right of property, or those so connected with the parties in estate as to be identified with them in interest, and consequently affected by them (citing 6 Words and Phrases, pp. 5606–5611).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249–1251; Dec. Dig. § 306;* Railroads, Cent. Dig. §§ 812, 841.]

2. ACTION (§ 53*)—CAUSES OF ACTION—SPLITTING.

Where a passenger was injured by the carrier's neglect of duty to carry her safely, there was but one cause of action, which she could not split.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549–623; Dec. Dig. § 53.*]

3. JUDGMENT (§ 828*)—RES ADJUDICATA—PARTIES—PRIVITY.

The C. Railroad Company operated equipment belonging to the A. Company, for which a mileage rental was paid, the C. Company having complete control of the operation of trains over its tracks and as between

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

it and the A. Company, liable for injuries to persons and property resulting therefrom. *Held* that, where a passenger injured on such track brought suit in a state court against the C. Company, in which judgment was rendered in its favor, such judgment was res judicata against the passenger's right to sue the A. Company in a federal court for injuries arising out of the same accident.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*

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

At Law. Action by Martha A. Jenkins and her husband against the Atlantic Coast Line Railroad Company. On motion to strike the second defense from the answer. Denied.

J. J. McSwain, for plaintiffs.
Willcox & Willcox and Lucian W. McLemore, for defendant.

BRAWLEY, District Judge. This is a motion to strike out the allegations contained in the answer setting up a second defense. In substance, this second defense is that the plaintiff herein commenced and prosecuted an action in the court of common pleas for Laurens county against the Columbia, Newberry & Laurens Railroad Company, wherein she sought to recover damages for the same injuries as are set forth in the complaint in this action, and that by reason of the relation and privity existing between this defendant and the said Columbia, Newberry & Laurens Railroad Company, the judgment rendered in that cause by a court of competent jurisdiction operates as a bar to this action. The answer sets forth the contract between the two companies, and alleges that by the terms of said contract the Columbia, Newberry & Laurens Railroad Company is primarily and solely responsible for any and all damages for injuries arising from the operation of all trains of the defendant company while upon its line of railroad, and by express terms is liable over to this defendant for any sum or sums that may be recovered for such injuries. It further alleges that the train upon which the plaintiff was riding was not operated by this defendant; that the ticket upon which she was riding was not purchased of it, nor did this defendant receive any portion of the charge for the carrying of the plaintiff as a passenger. I do not consider it necessary upon this motion to decide all the questions that might arise under this contract. It is sufficient to say that it shows a privity between the Columbia, Newberry & Laurens Railroad Company and the defendant company. The roadbed is owned by the first-named company, and the rolling stock by the defendant company, which was operated under the contract referred to. This contract is in the nature of a lease by the Atlantic Coast Line Company to the Columbia, Newberry & Laurens Company of its rolling stock, etc., the conduct of the trains, their officers, operatives and cars while upon the Columbia, Newberry & Laurens Railroad, to be under the rules, orders, and control of that company, which was to receive the total revenue, paying as compensation to the Atlantic Coast Line Com-

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

pany 19 cents a mile for each mile of the run and a stipulated car hire; the Columbia, Newberry & Laurens Railroad Company to be primarily and solely responsible for all damages to property or injury to persons arising from any accident to said train while on the line of said company, between Columbia and Laurens.

I find the following definitions of privity and privies in Words and Phrases:

"The term 'privity' denotes mutual or successive relationship to the same right of property."

"Privies," as defined by Bouvier, are "persons who are partakers, or have an interest in any action, or thing, or any relation to another." "Privies" are "those whose relationship to the same right of property is mutual and successive. Privies are classified as those of blood, in law or in estate." "Privity of estate is that which exists between lessor and lessee, tenant for life and remainderman or reversioner, etc., and their respective assignees, and between joint tenants and copartners." "Privies are those so connected with the parties in estate as to be identified with them in interest, and consequently affected by them." By all the definitions it seems to me clear that there existed the relation of privity between the Atlantic Coast Line Company and the Columbia, Newberry & Laurens Railroad Company. The fact that the learned counsel for the plaintiff has brought two successive actions against these companies arising out of the same accident seems to concede that in his opinion there was such privity. Conceding, for the sake of this motion, that the plaintiff, a passenger, had a right of action against either of these companies, or against both, how does the case stand? Her cause of action is that of the passenger against the carrier for the negligence of the carrier in not safely carrying her. In her action against the Columbia, Newberry & Laurens Railroad Company she alleged that she bought a ticket from that company and became a passenger on September 7, 1908, on her way from Newberry to Laurens, and thence to Greenville, leaving Newberry between 12 and 1 o'clock; that when said train was approaching Gary's Lane she noticed the train was running very fast; that she was thrown violently forward by reason of a sudden jerk, jolt, and shock to the coach in which she was sitting. It was for the injuries thus received that she claimed damages in the sum of $15,000. This cause was tried in the court of common pleas at Laurens. I have examined the record of that case, consisting of 191 pages of testimony; the charge of the presiding judge; the motion for new trial; and the order of the judge denying the same. This was a court of competent jurisdiction, and there seems to have been a fair trial upon the merits. A jury, after considerable deliberation, and repeated instructions, found for the defendant company. A new trial was moved and refused, and that, it seems, ought to be the end of the case. "Justice requires that every cause be once fairly and impartially tried, but the public tranquility demands that, having been once tried, all litigation of that question between those parties should be closed forever." 1 Greenleaf, Ev. § 522.

In a well-considered case in the Supreme Court of Maine (Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627), where it was held that a party could not be permitted to bring action against a principal for alleged trespass, and after failing upon the merits to subsequently bring one against the servant, who acted by the order of the principal, the court said:

"In such case the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so as to admit it when the same question has been decided, and judgment rendered between parties responsible for the acts of others."

The contention of the plaintiff here is that in the suit in the former action the allegations of negligence were that the defendant company had a defective track and defective trucks, and that the specific acts of negligence in this action are that the defendant company furnished inexperienced servants, and violated slow orders. In examining the testimony in the case at Laurens, it appears that one of the points upon which testimony was offered was that the engineer in charge of the train was inexperienced upon that track, that being his first trip over it. It also appears that in the trial the question whether slow orders were given or observed was a subject upon which considerable testimony was given, and it appears from the report of the trial that after the jury had retired and deliberated for some time, it came back into the courtroom, and the foreman said:

"We came out to ask for a charge on the subject, and it is this: In this special case, if the railroad failed to observe slow-down orders in this specific case at this time, at the time of this wreck, would they be responsible if damage occurred in this wreck, at this specific time?"

The court in charging the jury referred to the specific acts of negligence stated in the complaint, and said:

"Now, you can take into consideration in reference to the safety of the track—you can take into consideration—whether the track would be safe for a train to run at one speed or another, just as you see proper; you can take that in reference to the safety of the track—in other words, Mr. Foreman, in considering the question of the safety of the track, you would have a right to consider whether or not it is safe to run, whether the track might be safe at one speed and unsafe at another. You would have a right to consider those questions in connection with the allegations of the complaint."

Thereupon Mr. McSwain, attorney for plaintiff there and here, said:

"Would your honor permit this suggestion: That if the jury find that an act of negligence complained of, combined with another act of negligence not complained of, have produced the injury as a proximate cause, that would seem to be the proximate cause as to the injury complained of? The Court: Yes, sir; that would be true. Mr. Foreman, you can take into consideration, as I said, the question of speed, all those sort of * * * questions, in connection with the allegations of negligence, safety of the track, and so on."

So, it appears that the question of the speed of the train at the time of the accident was a question, which was directly in issue in that trial. Whether that was so or not, a party who has a cause of action growing out of a tort, cannot be permitted to divide the tort, and make it the subject of different suits.

The plaintiff's cause of action here is that as a passenger she had

a right to safe carriage. That is her primary right, and there is a corresponding primary duty devolving upon the carrier to safely carry her. It was for this neglect of duty—this delict—resulting, as she alleged, in injury to her, that she claims damages against the carrier. This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items. Some remarks of the Vice Chancellor in the case of Henderson v. Henderson, 3 Hare, 100, have been cited more than once by the Supreme Court of the United States as to the necessity of having the subject of particular litigation as a whole at once before the court, and not by piecemeal, and nowhere is the law more correctly stated. They are as follows:

"In trying this question, I believe I state the rule of court correctly that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res adjudicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

The question actually litigated and determined in the former action in the court of common pleas for Laurens county was the negligence of the railroad company, and the resulting injuries to the plaintiff. It appears from the testimony in that case that she was a passenger riding in the passenger coach; that the tender attached to the engine was derailed, causing the stoppage of the train with a sudden jerk and jolt, which the plaintiff alleged caused her injuries. Testimony was offered tending to show that there had been heavy rains some days prior to the accident; that the engineer was not familiar with the road, and that the train was running too fast, considering the condition of the track. The same questions arise in the present action, and the same testimony would probably be offered on both sides. The plaintiff has had her day in court in a forum of her own choosing, wherein every element tending to show negligence upon the part of the carrier was or could have been presented, and a court of competent jurisdiction has decided against her. To use a phrase of Mr. Justice Campbell, in the Supreme Court of the United States:

"Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation."

The same thought is expressed in the Latin phrase:

"Interest republicæ ut sit finis litium."

The motion is refused.

SIMS v. UNITED WIRELESS TELEGRAPH CO. et al.

(Circuit Court, D. New Jersey. May 9, 1910.)

1. EQUITY (§ 166*)—PLEADING—DOUBLE OR SEPARATE PLEAS.
Double or separate pleas are never allowed in equity without special leave of court, and then only in exceptional cases where special hardship and inconvenience would otherwise result.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 393, 400, 404; Dec. Dig. § 166.*]

2. EQUITY (§ 166*)—PLEAS—DUPLICITY.
Where, in a suit by a minority stockholder against a corporation and the majority stockholder to restrain the foreclosure of a chattel mortgage and the enforcement of a judgment, and for other relief for fraud, the majority stockholder filed a plea without answer and without leave of court, first attacking complainant's capacity to sue, and then setting up two different defenses, denying plaintiff's right to attack the mortgage, the plea was bad for duplicity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 404; Dec. Dig. § 166.*]

3. COURTS (§ 500*)—CONFLICTING JURISDICTION—APPOINTMENT OF RECEIVER BY STATE COURT.
Appointment of a receiver for a corporation by a state court does not prevent a suitor in another forum, who began his suit before such appointment, from prosecuting it to judgment.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1408; Dec. Dig. § 500.*
Conflict of jurisdiction with state courts, see note to 22 C. C. A. 356.]

4. CORPORATIONS (§ 671*)—FOREIGN CORPORATIONS—RECEIVERS.
Appointment of a receiver for a foreign corporation by a state court does not prevent the corporation from exercising its franchise elsewhere, nor from continuing alleged fraudulent practices in matters not pertaining to the property within the state where the receiver is appointed.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2644; Dec. Dig. § 671.*]

5. CORPORATIONS (§ 671*)—FOREIGN CORPORATIONS—INJUNCTION—RECEIVERS—STOCKHOLDERS' RIGHTS.
Where a receiver was appointed for a foreign corporation in New Jersey, and its powers were limited to the corporation's property located within the state, an injunction issued only restrained the use of the corporation's franchises in New Jersey and did not prevent a minority stockholder from suing to prevent the fraudulent exercise of the corporation's franchises in other states and to restrain the foreclosure of a chattel mortgage, and the execution of a judgment for fraud.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2643; Dec. Dig. § 671.*]

6. CORPORATIONS (§ 211*)—STOCKHOLDERS' BILL—PLEA—ANSWER IN SUPPORT.
Where a minority stockholder's bill alleged a fraudulent exercise of the corporation's franchises, and prayed an injunction restraining the enforcement of a chattel mortgage and judgment against the corporation for fraud, it pleaded a cause of action within equity rule 94, providing for stockholders' bills, so that a plea thereto not accompanied by an answer fortifying it, and explicitly denying the fraud as required by equity rule 32, was insufficient.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 823; Dec. Dig. § 211.*]

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

In Equity. Bill by W. Scott Sims against United Wireless Telegraph Company and another. On motion to strike out defendant's pleas. Granted.

Frederick W. Garvin, Solicitor (George C. Lay, of counsel), for complainant.

Francis X. Butler, for defendant United Wireless Telegraph Company.

RELLSTAB. District Judge. The complainant is a minority stockholder, and the defendant United Wireless Telegraph Company (hereinafter called the Wireless Company) the majority stockholder, of the defendant International Telegraph Construction Company (hereinafter called the International Company) a New York corporation.

The original bill was filed September 6, 1909. Both it and the amended bill were filed on behalf of the minority stockholders, and charge fraud. The amended bill alleges that before the Wireless Company became a stockholder of the International Company they were competitors, each being engaged in the manufacture, sale, and installation of patented devices and electrical machines used in the art of wireless telegraphy throughout the United States and foreign countries; that since, the Wireless Company has dominated the other company; that it elected four of its own directors to the directorate of five of the International Company, and manipulated it to prevent competition; that it has taken possession of the factory and the letters patent and other properties of the International Company, and is using them without compensation in furtherance of its own business and to wreck the business of the International Company, and to defraud the rights and interests of such minority stockholders; that it is seeking to wrest from the International Company its property by a forced sale under a chattel mortgage and a judgment, both of which are alleged to have been fraudulently obtained, the latter during the time that its directors were the directors of the International Company, and that it is futile to seek any redress from such directors acting in such dual relation. It prays for a decree, inter alia, setting aside the chattel mortgage as fraudulent; setting aside or perpetually staying the said judgment; for an accounting by the Wireless Company of profits made in the use of the International Company's patents and other properties; that it be declared to be a trustee for the minority stockholders of the International Company; that it be required to restore to the International Company its property and to make full and complete discovery of all transactions and business between it and the International Company, concerning the use made of said patents, etc. A decree pro confesso was taken against the International Company. The Wireless Company filed no answer, but pleaded three distinct defenses. The first is to the whole bill. It alleges the appointment on the 27th day of September, 1909, of a receiver for the International Company, in a suit instituted in the state Court of Chancery on the 4th day of said September, by a creditor and a stockholder respectively, in which the present complainant intervened, and challenges his standing to maintain this bill upon the ground that the cause of action al-

leged therein is now vested in and can only be maintained by such receiver. The other two defenses relate only to the parts of the bill pertaining to the chattel mortgage, the first of which is that such mortgage was given before the complainant became a stockholder in the International Company, and that none of his shares devolved upon him by operation of law; and the second is that before the commencement of this suit proceedings had been begun in the state Court of Chancery to foreclose said mortgage, and that by reason thereof said court had obtained complete and exclusive jurisdiction of said chattels. The motion to strike these pleas from the files of the court is based upon the following grounds:

"First. That the plea is invalid for duplicity by uniting three separate pleas without leave of court.

"Second. That the pleas are not accompanied by an answer denying the fraud and combination charged in the amended bill of complaint as required by rule 32 of the equity rules."

As to the first ground: The defendant's contention is that it has filed but one plea. The paper is so entitled, certified, and sworn to; but however framed, it is in legal effect three pleas. "A plea may contain an averment of several facts, but they must all conduce to a single point of defense. Double pleas or separate pleas are never allowed without special leave of court, and then only in exceptional cases where special hardship and inconvenience would otherwise result." Miller & Lux v. Rickey et al. (C. C.) 123 Fed. 604; 16 Cyc. 290. In the present suit the first plea attacks the capacity of the complainant to maintain any part of this action. The other two present different defenses, but they are limited to a denial of the complainant's right to attack the chattel mortgage in question. Different defenses may be raised in an answer, but not in a plea, unless special leave be obtained from the court. No leave has been asked in this instance, and the plea is bad for duplicity. The first plea is also bad because the mere appointment of a receiver by the state court does not prevent a suitor in another forum, who began his suit before such appointment was made, from proceeding in that cause to judgment.

In Cooper v. Philadelphia W. Co. (N. J. Ch.) 57 Atl. 733, it was held:

"While no person can sue a corporation after a receiver has been appointed, without the consent of the court, actions pending at the time of the appointment may be prosecuted to judgment, in the absence of an injunction or a legislative act to the contrary, even without making the receiver a party, though he may be substituted for the corporation on his application therefor."

Nor does the appointment of a receiver by a state court, of a corporation organized in another state, prevent that corporation from exercising its franchise elsewhere or from continuing its fraudulent practices in matters not pertaining to the property within the state. The New Jersey act concerning corporations makes the remedies thereby provided in cases of insolvency applicable to foreign corporations only so far as the same can be applied thereto. Act 1896 (P. L. p. 307) § 96.

In Minchin v. Second Nat. Bank, 36 N. J. Eq. 436–440, the Chancellor said:

"Obviously, there are provisions of the act which cannot be applied to such corporations; for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more. * * * In the language of the New York Supreme Court, in De Bemer v. Drew, 57 Barb. 438, this court cannot regulate the internal affairs of foreign corporations, nor enforce any remedy beyond the limits of this state. It cannot annul or forfeit their charters, but it can and ought to provide for the collection of debts against them, when they or their property are brought within the jurisdiction of the courts of this state. The foreign corporation doing business here is subject to the provisions of our statute, so far as its property in this state is concerned." See, also, 34 Cyc. 100.

The state of the pleadings in this case shows that the International Company is a corporation organized under the laws of the state of New York, and is the owner of valuable patents—monopolies which may be enjoyed and made pecuniarily valuable throughout the whole United States. The receiver appointed by the state court may not prevent the exercise of such patent rights in other states. Their enjoyment is still left to the foreign corporation, and it is particularly with reference to the manipulation of these patent rights, and the property of the International Company employed in exploiting them, that the present bill alleges the fraudulent conduct to have been perpetrated. The order appointing the receiver for the International Company limits his powers to the property of such company, having a situs within the state of New Jersey; and the injunction issued against such company and its officers and agents, only restrains the use of the company's franchises within the state of New Jersey, and the restraint imposed upon their power to receive or to dispose of any of its properties is limited to such as have a situs within the state. Furthermore, the receiver in the state court could not maintain a bill of such comprehensive character as the one in this suit, and therefore the complainant could not obtain the relief therein sought by acting through the receiver. This plea is, therefore, legally insufficient as a bar to complainant's right to maintain this suit.

As to the second ground: None of these pleas deny the complainant's allegations of fraud. The allegations of the bill bring it within the ninety-fourth equity rule; and, as the effect of the pleas is to admit the truth of these allegations, this ground is controlled by the thirty-second equity rule, which requires that:

"In every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination and the facts on which the charge is founded."

Since this rule went into effect many of the technicalities and refinements indulged in by the courts in distinguishing between the various pleas in equity, which would or would not have to be supported by an answer, have vanished. Where a bill charges fraud and prays for a discovery, the plea to the whole bill, under this rule, must be supported by an answer denying the fraud and giving the complainant discovery. Jahn v. Champagne Lumber Company (C. C.) 152 Fed. 669. This is equally so when the plea is only to a part of the bill,

where such part, as in the present case, is founded on fraud. The bill specifically charges that the chattel mortgage was given without consideration and in furtherance of the fraudulent purpose already mentioned, and as the second and third pleas deal only with such mortgage, and are unaccompanied with an answer fortifying them and denying the fraud, this ground is also sustained as to such pleas.

The motion is granted, and the pleas struck from the files.

W. A. GAINES & CO. v. ROCK SPRING DISTILLING CO. et al.

(Circuit Court, W. D. Kentucky, at Owensboro. May 2, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 91*)—INTERVENTION.

In a suit for infringement of a trade-mark, a party was not entitled to intervene on the allegation that it owned the trade-mark in contest, and that it was used by defendant as petitioner's agents under its authority, especially where petitioner was bound by a contract to defend the suit on defendant's behalf and in fact was doing so.

[Ed. Note.—For other cases, see Trade-Marks and Trade Names, Dec. Dig. § 91.*]

2. JUDGMENT (§ 678*)—ESTOPPEL—PERSONS IN PRIVITY.

An estoppel by judgment obtains as well in favor of those who are in privity as for or against those actual parties to the litigation in which the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195–1199; Dec. Dig. § 678.*]

3. EQUITY (§ 213*)—PLEA.

Where complainants elect not to reply to defendant's plea, but instead, have the case set down for argument as authorized by equity rule 33, the averments of the plea are taken as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 486; Dec. Dig. § 213.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 45*)—JUDGMENT—CONCLUSIVENESS—SUBSEQUENT REGISTRATION.

Where, in a prior suit for infringement of a trade-mark, complainants were found not to be the rightful owners thereof, and it was determined that H. & Co. had previously used the trade-mark and were entitled thereto, the conclusiveness of such adjudication as between the parties and their privies was not affected by complainants' subsequent registration of the trade-mark in ex parte proceedings under Act Cong. Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1909, p. 1275), notwithstanding section 16 of that act declares that registration of a trade-mark is itself prima facie evidence of ownership.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 53; Dec. Dig. § 45.*]

5. EQUITY (§ 422*)—HEARING BILL AND PLEA—FINAL DECREE.

Where a case is set down for hearing as authorized by equity rule 33 on the bill and plea, and the plea is held sufficient to meet all the allegations of the bill, defendants are entitled to a final decree.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 422.*]

In Equity. Bill by W. A. Gaines & Co. against the Rock Spring Distilling Company and others. On petition of the Hellman Distilling

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

Company to intervene, and on sufficiency of defendants' plea. Petition denied, and plea sustained.

James L. Hopkins, for complainant.
Luther Ely Smith and Sweeney, Ellis & Sweeney, for defendants.

EVANS, District Judge. In its bill the complainant avers that it is the owner of a trade-mark consisting of the words "Old Crow," which for a long time it has used in connection with whisky; that as such owner in the year 1909 it applied for and obtained from the Commissioner of Patents a registration of said trade-mark pursuant to the act of Congress in that behalf; and that the defendants at and before the filing of the bill were using the said trade-mark in connection with whisky, thus infringing complainant's rights greatly to its injury. An injunction and an accounting were prayed. The defendants filed a joint plea wherein they averred that the matters and claims set up in the bill had previously been finally adjudicated in and by another court of competent jurisdiction. The complainant set the plea down for argument, and meantime the Hellman Distilling Company filed its petition asserting that it was the real owner of the trade-mark "Old Crow," that it had been adjudged to be so in a suit brought by the complainant, and that the defendants were using it solely as its agents and under contract with it, and thereupon it prayed that it might be admitted as a party to the action, so that it might defend its title to the trade-mark. Both the plea and the petition were argued at the same time.

Petition for Leave to Intervene.

The petition for leave to intervene is based, as we have stated, upon the ground that the petitioner owns the trade-mark in contest, and that it is being used by the defendants as its agents and under its authority. With the petition is tendered a plea to be filed should the petition be granted. It was avowed at the argument, and no doubt correctly, that the petitioner was bound by contract to defend this suit on behalf of the defendants thereto, and that in fact it is defending it. This greatly modifies if it does not remove any particular necessity for the intervention asked. As an original proposition I certainly should strongly feel the stress of the request for leave to intervene, but I am not prepared, as yet, to clearly see a way to avoid the force of Judge Lurton's ruling in Toler v. East Tennessee Railway Co. (C. C.) 67 Fed. 170, although it may not have been intended to apply to such a case as this. Besides, it is elementary that an estoppel by judgment works as well in favor of or against those who are in privity as for or against those who were actual parties to the litigation in which the judgment was rendered. It is asserted that the defendants Rock Spring Distilling Company and Silas Rosenfeld are in privity with the petitioner, and we may assume without at present so deciding that that is true, but if so, then they have as much right to plead the estoppel of the judgment settling the proprietorship of the Old Crow brand in bar of complainant's claim thereto as the petitioner in person would have.

For these reasons the petition of the Hellman Distilling Company will be denied, and in consequence its motion to file a plea herein will also be denied.

Sufficiency of Defendants' Plea.

Choosing not to reply to the joint plea of the defendants, the complainant has set it down for argument under equity rule 33. It thus admitted that the averments of the plea are true. Rhode Island v. Massachusetts, 14 Pet. 257, 10 L. Ed. 423; United States v. California, etc., Co., 148 U. S. 39, 13 Sup. Ct. 458, 37 L. Ed. 354. This being so, the question is, Is the plea good? It states, in detail, the facts relied upon in bar of complainant's action. Disregarding the details, we think the facts stated in the plea are as follows, to wit: (1) That heretofore, viz., in 1904, the complainant instituted its action in equity in the Circuit Court of the United States for the Eastern District of Missouri against Abraham M. Hellman & Moritz Hellman, partners doing business as A. M. Hellman & Co., in which the complainant alleged itself to be the owner of the trade-mark "Old Crow" for whisky, and that it was being used and that complainant's rights therein were being infringed by the firm of A. M. Hellman & Co.; (2) that relief appropriate to such a state of fact was prayed; (3) that in said action the complainant also charged the said A. M. Hellman & Co. with unfair competition in respect to the use of the brand "Old Crow" on whisky, and also prayed for relief appropriate to that charge; (4) that said defendants appeared in the action and contested the same on the merits; (5) that in the said action such proceedings were had as resulted finally, under the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, in a judgment on the merits that the complainant's action should be and that accordingly it was dismissed by the judgment of the said Circuit Court on the 10th day of July, 1908, and that the said Circuit Court of Appeals directed the entry of the judgment aforesaid upon the ground that there had been a use, in good faith, of the brand "Old Crow" on whisky by the defendants in that action and their predecessors prior to any adoption thereof as a trade-mark by the complainant or its predecessors; (6) that while the said action was pending in the said Circuit Court of Appeals for the Eighth Circuit, viz., on June 27, 1907, a supplemental bill was filed therein by the complainant by which the Hellman Distilling Co., as the successor of the firm of A. M. Hellman & Co., was made defendant in said action; and (7) that the final judgment therein stands in full force and unreversed.

In addition, it is also shown that the defendants, who are charged in the bill of complaint in this case with using and infringing the trademark "Old Crow" on whisky, are doing so only as the agents or employés of the Hellman Distilling Company, and for its use alone, and upon these facts the plea avers that there is privity between the firm of A. M. Hellman & Co. and the Hellman Distilling Company, the successor of said firm and the defendants Rock Spring Distilling Company and Silas Rosenfeld. In our opinion this conclusion is justified.

The bill of complaint in this action is based, in large measure, upon a registration of the trade-mark "Old Crow" secured by the com-

plainant under the act of Congress approved February 20, 1905. Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1909, p. 1275). It appears therefrom that on February 26, 1909, the complainant made its application under the act as owner of the trade-mark, and the Commissioner of Patents allowed the registration on July 20, 1909. This, of course, was long after the final judgment above described. There is no intimation in the bill that the application for the registration was otherwise than ex parte, and we shall assume that it was entirely so. We think that assumption is a fair one, and we think it is equally fair to assume that the complainant in its application made no allusion to the judgment of the court in the previous litigation. Nevertheless, under section 16 of the act the registration is, itself, prima facie evidence of ownership. Under these circumstances what effect should the registration and the resulting prima facie evidence of ownership have on the previous judicial determination that prior to the adoption by the complainant and its predecessors of the words "Old Crow" as a trade-mark the defendants in the previous litigation and their predecessors had used the words "Old Crow" as descriptive terms in connection with their business as dealers in whisky is a question of importance. It would be difficult to maintain the proposition that Congress intended or that the courts should hold that a final adjudication as to the ownership of a trade-mark, or a plea of res adjudicata based thereon could be evaded or made insecure by a subsequent registration by the losing party upon an ex parte application unless there is an express averment that the rights of the winning party had been purchased before the registration. Nevertheless the question is not altogether free from doubt because, while the court's opinion does, the final judgment entered does not, in express terms, mention the matter of ownership—the phrase used in the judgment being that the bill be dismissed for want of equity. But when the pleadings are considered, so far as we can ascertain their substance from the plea, there is satisfactory assurance that the question of the ownership of the trade-mark was put in issue and vigorously contested. That issue was originally decided in favor of the complainant by the Circuit Court, but its judgment thereon was reversed on appeal with directions to dismiss the action. The grounds for this direction were stated in the opinion of the Circuit Court of Appeals, and were to the effect that there had been a prior use, in good faith, by the defendants and their predecessors of the brand "Old Crow" on whisky several years before any adoption of it as a trade-mark by the complainant or its predecessors. We think the necessary effect of this fact was the defeat of the complainant's claim of ownership, and that this was the basis of the direction to the Circuit Court. As the very same question must be the vital one to be determined in this case, every reason upon which the salutary doctrine of estoppel by former adjudication is based must apply, and it seems to the court that the effect of the judgment pleaded cannot and should not be avoided, as between the parties to this action by the subsequent registration in the absence of a showing that previous thereto complainant had acquired the rights of its late opponents. Otherwise the registration was wholly ineffective as to

them. What effect it may have upon other persons we need not inquire. Confining its effect to the parties to this suit, and those to whom they stand in privity we have concluded that the plea should be allowed. And not only so, but as the plea in all substantial respects seems to meet and satisfy all the claims of the bill it ought, in law and equity, to avail the defendants so far as to require a final decree in their favor. Horn v. Detroit Dry Dock Co., 150 U S. 625, 14 Sup. Ct. 214, 37 L. Ed. 1199.

Unless some other course is shown to be proper a final judgment may be prepared.

In re BALLANTINE.

(District Court, E. D. Pennsylvania. June 1, 1910.)

No. 3,079.

ASSIGNMENTS (§ 52*)—EQUITABLE ASSIGNMENTS—CONSTRUCTION.

A bankrupt having assigned his interest under certain wills to a finance company to secure repayment of $50,000, certain French creditors attached the interest of the bankrupt in the hands of the executors, and in order to procure a release of the attachment, so that the finance company might receive certain payments from the executors, a letter, approved by the bankrupt, was written to the foreign creditors' attorney by the president of the finance company, agreeing that after payment of the amounts due it, including liens and actual disbursements, expenses, and counsel fees in certain suits, the finance company would pay to such attorney from the money coming into its hands on account of the bankrupt the full amount of the claims which he represented, and which were fully specified therein, on the faith of which the attachment was released. *Held*, that such letter constituted an equitable assignment of the bankrupt's interest in such estates; the intention being to make over the bankrupt's interest pro tanto in satisfaction of the claims.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 107–111; Dec. Dig. § 52.*]

In the matter of bankruptcy proceedings of George A. Ballantine. On certificate of referee rejecting claims. Reversed.

Samuel W. Cooper and Alfred W. Varian, for claimants.

Reynolds D. Brown, for trustee.

J. B. McPHERSON, District Judge. The controlling question in this case is whether the agreement of the bankrupt with the claimants was an equitable assignment of his life interest under the last wills of his father and his grandfather. At the time the agreement was made, the New York Finance Company was the holder of two assignments of the bankrupt's interest under these wills. These assignments were in form an absolute transfer of all his interest, with a collateral clause securing the repayment of $50,000, and by virtue of their provisions the trustees of the two estates had for several years been paying over to the Finance Company the income that belonged to the bankrupt. This being the situation, the claimants issued foreign attachments and levied upon the bankrupt's interest. The trustees thereupon refused

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

to continue payments to the Finance Company, and various embarrassments arose, or at least were believed either to exist or to be threatened. A suit was then pending in the United States Circuit Court for the District of New Jersey, in which the court was asked to declare that the bankrupt's interest was an absolute estate, and not merely for life. It was apparently believed that the foreign attachments might in some way affect the decision unfavorably. At all events, the parties who are immediately interested in the present dispute agreed that the attachments should be withdrawn, and that the claimants should be provided for in a different way. Accordingly, on February 1, 1907, the agreement in controversy was made. It is contained in a letter, which was addressed to Mr. Varian, the attorney for the claimants, and was delivered to him by Mr. Depue, the president of the Finance Company, in the presence of the bankrupt.

"New York, February 1st, 1907.

"In re Ballantine.

"Alfred W. Varian, Esq., 44 Pine Street, New York—Dear Sir: Confirming understanding between our Mr. Depue and you with reference to certain claims represented by you against George A. Ballantine, we beg to state that after the payment of amounts due by George A. Ballantine to New York Finance Company and to New York Finance Company as trustee, and also the payment of any other actual liens which may exist upon said George A. Ballantine's interest in the estates of Peter Ballantine, deceased, and Peter H. Ballantine, deceased, and after the payment of actual disbursements, expenses and counsel fees in re suit brought for the construction of the wills of said decedents, we will pay to you as counsel for the claimants mentioned below and from the money coming into our hands for account of said George A. Ballantine, the full amount of said claims as follows:

"Worth, with interest from 1899, 8,615 francs.

"Laferriere, with interest from 1904, 14,598.50 francs.

"Guillot & Cie, with interest from 1905, 1,117.35 francs.

"Yours very truly, New York Finance Company,

"Arthur W. Depue, President.

"I have read the above letter, and hereby authorize the New York Finance Company to carry out the provisions therein contained, which I hereby approve. George A. Ballantine."

A month afterwards the Circuit Court refused to adopt the desired construction of the wills (Ballantine v. Ballantine [C. C.] 152 Fed. 775), and decided that the bankrupt did not take an absolute estate. This decision was affirmed in February, 1908, by the Court of Appeals for the Third Circuit (Ballantine v. Ballantine, 160 Fed. 927, 88 C. C. A. 109), and a rehearing was denied on March 26th. Thereupon a petition in bankruptcy was filed against Ballantine, and upon his admission of insolvency an adjudication was entered on March 30. In June, 1909, a sale of the bankrupt's life interest was confirmed, and part of the purchase money was directed to be paid to certain preferred creditors. The remainder is now in the hands of the trustee in bankruptcy, and the dispute arises over its distributon. Certain facts pertinent to the controversy have been agreed upon by the parties, and are as follows:

"That prior to the 1st day of June, 1906, the said Maison Laferriere, the said firm of Worth, and the said Guillot & Cie, each forwarded their respective claims for collection to one Alfred W. Varian, Esq., an attorney at law, having an office and practicing in the city, county, and state of New York.

"That between the 1st day of June, 1906, and the 1st day of January, 1907, the said Varian made repeated efforts to locate the said George A. Ballantine without success, and on or about the last-mentioned date turned the said several claims over to Edward K. Luce, an attorney and counselor at law, residing and practicing in the state of New Jersey, with instructions to attach the interests of George A. Ballantine in the estates of his father and grandfather, viz., the estates of Peter H. Ballantine, deceased, and Peter Ballantine, deceased, in actions to be instituted by said Luce on behalf of the said creditors Worth, Laferriere, and Guillot.

"That the said Luce duly caused the interests of the said George A. Ballantine in the said estates of Peter Ballantine and Peter H. Ballantine, deceased, to be duly attached on behalf of said creditors, as instructed.

"That immediately upon said attachments being levied the executors of the estates of Peter Ballantine and Peter H. Ballantine notified the said George A. Ballantine thereof, and also the New York Finance Company, a corporation whose interest is hereinafter described and set forth.

"That the principal ground of the attachment was that the said George A. Ballantine was a nonresident debtor.

"That theretofore, and on or about the 30th day of December, 1902, the said George A. Ballantine, for the purpose of securing certain indebtedness of George A Ballantine to the New York Finance Company, duly made, executed, acknowledged, and delivered two separate assignments, whereby he granted, bargained, sold, assigned, transferred, conveyed, released, and set over to the New York Finance Company, as trustee, its successors and assigns, any and all his estate, right, title, and interest of any kind, form, or description whatsoever, in and to the principal and income of the estates of said Peter Ballantine, deceased, and said Peter H. Ballantine, deceased, to which he was then, and might thereafter become, entitled under and by virtue of said wills of Peter Ballantine and Peter H. Ballantine, deceased, or either of them, or in any other way whatsoever, copies of which assignments are annexed to this statement, and made a part hereof, and marked Exhibits A and B.

"That said assignments mentioned in the last paragraph continued in full force and effect to the filing of the petition in bankruptcy herein, except that certain payments had been made by the executors of said estates to the said New York Finance Company during the said period.

"That on or about the date of levying of the attachments by the said Luce on behalf of the said creditors, Worth, Laferriere, and Guillot & Cie, as above mentioned, the said George A. Ballantine and the said New York Finance Company were daily expecting a payment on account of income from the estates of Peter Ballantine, deceased, and Peter H. Ballantine, deceased.

"That the executors of the said estates, in notifying the said George A. Ballantine and the New York Finance Company of the said attachments, advised the said George A. Ballantine and the New York Finance Company that, in view thereof, the said executors could not safely proceed to make any payments to any one pending the adjustment of the claims of the respective parties to said fund.

"That on or about the 29th day of January, 1907, Messrs. Grey & Archer, attorneys and counselors at law, of the city of Camden, N. J., then representing the said George A. Ballantine, wrote a letter to the said Luce, the attorney in New Jersey for the attaching creditors, requesting that said attachments be released.

"The said letter of Messrs. Grey & Archer was forwarded by said Luce to the said Varian, who replied thereto, a copy of which reply is annexed hereto and marked Exhibit C.

"That on or about the 1st day of February, 1907, the president of the New York Finance Company, the assignee of the interests of George A. Ballantine in said estates, called upon said Varian in reference to the attachments levied against the interests of the said George A. Ballantine, at which interview he called attention to the assignments above mentioned, and stated that George A. Ballantine would make any arrangement to protect the several claims represented by said Varian, but wanted the attachments vacated, so as to release

certain moneys about to be paid from the said estates, and that any arrangement that could be agreed upon would be approved by Mr. Ballantine.

"Thereafter certain letters were duly exchanged between the parties, which indicated the terms and the intent of the agreement between the said Varian, representing said creditors, and the said George A. Ballantine and the New York Finance Company. One is a letter dated February 2, 1907, from the said Varian to the New York Finance Company, which attempts briefly to confirm the verbal understanding of February 1st, 1907. This letter is annexed hereto and marked Exhibit D.

"That in the meantime there had been prepared and duly executed the several letters and papers, dated February 1, 1907, signed by the New York Finance Company and George A. Ballantine, which are annexed to the proofs of claim and marked Exhibits B–1, B–2, and B–3.

"These papers, viz., Exhibits B–1, B–2, and B–3, were delivered in person by said George A. Ballantine and Arthur W. Depue, president of the New York Finance Company, to the said Varian at his office in the borough of Manhattan, city of New York, on the 4th day of February, 1907.

"That the said Varian thereupon instructed the said Luce to withdraw the attachments and duly notify the said New York Finance Company that he had done so, as per letter annexed hereto and marked Exhibit E.

"That the said attachments were duly withdrawn, and the interests of the said George A. Ballantine in said estates were duly released therefrom, and thereafter the said New York Finance Company and the said George A. Ballantine received from time to time various sums of money from the said estates on account of the interests of said George A. Ballantine, which had been attached as aforesaid.

"That, as further evidencing the intent of the parties hereto, there is annexed a letter from the said Varian to the said New York Finance Company, dated February 28, 1908, which is marked Exhibit F, and a further letter from Charles H. Burr, an attorney of the New York Finance Company, and also one of the attorneys for George A. Ballantine, to the said Varian, dated January 25, 1908, and marked Exhibit G.

"That the petition in bankruptcy herein was filed on the 28th day of March, 1909.

"That since the filing of the petition in bankruptcy the interests of the said bankrupt in the estates of said Peter Ballantine, deceased, and Peter H. Ballantine, deceased, were duly sold for the sum of $128,000. That about $100,000 of said sum passed to the New York Finance Company and other creditors holding assignments of the interests of George A. Ballantine in the said estates, and made prior to February 1, 1907.

"That it was not disclosed to the said Varian and said Varian was not informed nor aware of the existence of any other assignments of the interest of George A. Ballantine in or to said estates until after the filing of the petition in bankruptcy herein.

"That the said Varian, nor the said creditors whom he represented, knew that the said George A. Ballantine was indebted to others, except to the New York Finance Company.

"That the trustee in bankruptcy has received the sum of $25,968.44 out of the $128,000 paid upon the sale of the interests of the said George A. Ballantine in the said estates.

"This stipulation is made without prejudice to the said creditors producing evidence of additional facts deemed by them to be material."

As it seems to me, the meaning of the February letter is more likely to be correctly understood if all the negotiations between the parties are considered; and this is also the view necessarily implied in the agreed statement of facts. It would be proper, therefore, to take into account the other letters referred to in that statement, for I think they throw some useful light on the situation. But, even if attention be directed solely to the letter of February 1st, it satisfactorily appears from that writing that all the parties thereto contemplated that the

Finance Company was not only to receive enough of the bankrupt's income to pay its own claim of $50,000, but was to continue receiving the income until the expenses incurred in the suit of Ballantine v. Ballantine were also repaid—the Finance Company had evidently been advancing these expenses in whole or in part—and was then still to continue the receipt until the present claimants should be paid in full. The bankrupt's assent to this arrangement was, I think, an equitable assignment of so much of his interest as was necessary to discharge the claims in dispute. This may appear more plainly if it be supposed for the moment that on February 1st there was already enough money in the hands of the Finance Company to carry out all the provisions of the agreement—to pay its own $50,000, to pay the expenses of the New Jersey suit, and to pay the French claimants. In that event no room for controversy would exist. The agreement then would have operated immediately, and would have transferred in equity a part of the fund to the claimants. The fact that the whole of the fund was not yet in the Finance Company's hands, but was to reach that company gradually and by installments, does not, I think, change the situation essentially. The parties treated the fund as potentially there already, and they dealt with it on that assumption. The claimants had an apparently valid lien on the bankrupt's property in New Jersey, and they gave up this advantage on the distinct understanding that they were to be as fully protected in New York, although the method of protection could not be the same.

The subject need not be further pursued. The arguments of counsel have been considered, but it seems to me that the decision of the present case depends wholly upon the intention of the parties as it may be drawn from the facts agreed upon and otherwise in proof, and in my opinion the intention was to make over the bankrupt's interest pro tanto in satisfaction of these claims.

The order of the referee is reversed, and it is now decreed that the agreement of February 1st was an equitable assignment of the bankrupt's interest.

In re KAUFMAN.

(District Court, W. D. Kentucky. June 1, 1910.)

1. ATTORNEY AND CLIENT (§ 20*)—CREDITORS—BANKRUPT'S ATTORNEY—QUALIFICATIONS.

   While judicial policy discourages the practice of attorneys at law acting as attorneys at the same time for the bankrupt and his creditors, there is no statutory provision forbidding a creditor to employ as his attorney the attorney who has acted as attorney for the bankrupt in the preparation of his consent to an adjudication.

   [Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 27, 29; Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 123*)—ATTORNEYS—APPOINTMENT—EFFECT.

   Where, by want of proper advice, creditors named as their agent and attorney a person who had acted for the bankrupt, and whom mere judicial policy discourages from acting for them, the creditors should not,

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

for that reason alone, be denied the right to a voice in the selection of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 123.*]

3. BANKRUPTCY (§ 125*)—ELECTION OF TRUSTEE—RIGHT TO VOTE—"CREDITORS PRESENT."

At the first meeting of creditors, the majority creditors were represented by an attorney who had represented the bankrupt in the preparation of his consent to an adjudication, and voted for one person for trustee, and the minority creditors voted for another. *Held*, that a ruling that the majority creditors were not present for the purpose of voting, because their attorney was disqualified to represent them, but were present for the purpose of being counted in determining whether the person voted for by the minority creditors had received the votes of a majority in number and value of the creditors present, was erroneous, since creditors are not to be counted as present merely because their claims have been allowed, but must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 125.*]

4. BANKRUPTCY (§ 127*)—TRUSTEE—ELECTION.

Where a referee in bankruptcy determined that the majority creditors were not represented by a qualified attorney, but that the person voted for by the minority had not received the vote of the majority of the creditors present, it was error for the referee to appoint a trustee of his own selection; but he should have continued the election to determine the true facts as to the qualification of the attorney, and to permit the creditors to appear by a new attorney or agent, if necessary, and then participate in the election of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 127.*]

5. BANKRUPTCY (§ 123*)—APPEARANCE BY CREDITORS—POWERS OF ATTORNEY—VALIDITY.

Powers of attorney, executed by creditors of a bankrupt to the attorney who had represented the bankrupt in preparing his consent to the adjudication, were not for that reason void per se, but were, at most, voidable under circumstances the existence of which could not be presumed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 123.*]

In the matter of David Z. Kaufman, bankrupt. On petition to review a referee's appointment of a trustee. Reversed, and proceeding remanded.

Gifford & Steinfeld, for petitioners.
E. M. Louis, opposed.

EVANS, District Judge. The referee presided at the first meeting of creditors. A great many claims had been proved against the bankrupt and allowed by the referee. Certain creditors, who composed what we shall call the "minority creditors," were represented by attorneys who cast all their votes for a person for trustee whom they had put in nomination for that position. Certain other creditors, whom we shall call the "majority creditors," were represented by an attorney who was or had been attorney for the bankrupt in this involuntary proceeding, and who had filed the consent of the bankrupt to the adjudication. Upon that ground, orally presented at the meeting, the minority creditors objected to the majority creditors voting through

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

that attorney. For some reason, which does not appear on the record, the majority creditors, through that attorney, also objected to the minority creditors voting; but this objection was overruled.

The first meeting of creditors is one peculiarly under their own control, and every general creditor whose claim has been allowed is entitled to vote, either in person or by duly authorized agent or attorney. This right should not be lightly disregarded. There is no statutory provision, either in the bankruptcy act or elsewhere, which forbids a creditor to have as his attorney or agent the person who had acted as attorney for the bankrupt in the preparation of his consent to an adjudication; but judicial policy greatly discourages a practice of attorneys at law acting as attorneys at the same time both for the bankrupt and for his creditors, because such a practice might lead to conduct and results which should be strongly condemned. If, however, by want of proper advice, creditors exercise their right to name and do name as their agent to act for them a person whom mere judicial policy discourages from so doing, the creditors should not, for that reason alone, be absolutely denied the right to a voice in the selection of a trustee. Here the majority creditors in fact voted through their attorney for one person for trustee, and the minority creditors voted for another. When the referee passed upon the objections, he held that the majority creditors could not be represented by the attorney they had named. He did so upon the ground indicated, and thereupon excluded their votes. Those creditors were not in fact present at the meeting, and were not otherwise represented thereat.

But the referee held that the majority creditors, though not permitted to be represented by the attorney of their choice, nevertheless had to be taken into the estimate when it came to be determined whether the person voted for by the minority creditors had received the votes of a majority in number and value of the creditors who were present and whose claims had been allowed. In thus ruling he must have regarded the majority creditors as being present for the count, but not present for the voting. The result was that he declared that there had been no election, and himself appointed another person as trustee. This result is not maintainable upon any ground. If the majority were present at all, they were present for all purposes. If they were not present, then the minority creditors who were present had the right to conduct the meeting, and as their candidate did receive the votes of the majority in number and value of the creditors present, the referee was without power to disregard that result, and especially was he without the power to disregard it upon the grounds upon which he acted. The creditors are not to be counted as present simply because their claims have been allowed. In order to be present they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not. Loveland, § 106.

While the referee may, for good cause, but not arbitrarily, disapprove a person whom the creditors elect as a trustee, he must do that thing expressly, and not merely by holding that there had been no

election, so that his ruling in that regard may be reviewed, if any creditor so petitions. The minority creditors have sought a review of the referee's order, but the majority have not done so.

We should by no means approve a practice which would permit an attorney to act at the same time for a bankrupt and for the bankrupt's creditors, and especially at the first meeting of creditors. Such disapproval would be much emphasized if the creditors, in making their selection of an agent, were influenced by the bankrupt himself and in his interest. But the relation of attorney for the bankrupt may have ceased in this case with the filing of the consent to the adjudication, or the creditors may have appointed their attorney and agent entirely upon their own desire and without any thought or suggestion of the interest of the bankrupt. These matters could hardly be fairly settled upon the mere oral suggestion at the meeting of the fact that the same man was the attorney who had appeared for the bankrupt, and who now appeared for the creditors. The creditors did not do an unlawful thing, but they did a thing which, under circumstances such as we have indicated, might meet with judicial disapproval. But those circumstances ought first to be inquired into, before they could be the basis of a fair decision.

Upon consideration of the matter, and upon reading such authorities as In re Kimball (D. C.) 100 Fed. 777, In re Cooper (D. C.) 135 Fed. 196, In re Columbia Iron Works (D. C.) 142 Fed. 234, and Loveland, § 41a, we have reached the conclusion that the proper practice in such contingencies as arose in this case would be to postpone an election for a day or two in order to get at the exact facts, instead of assuming anything to be true upon the mere fact alone that the same person appeared to be the attorney both for the bankrupt and for creditors. Peradventure his relations with the bankrupt may have ceased when the consent was filed. Prompt inquiry would develop the real facts, and, if necessary, the creditors might be given an opportunity to authorize a new agent. The attainment of a fair expression of the wishes of the creditors as to the control and management of a business which became theirs when the adjudication was made is abundantly worth the short time it will take to get it. The majority creditors have not petitioned for a review, and it has been a matter of some concern to ascertain and definitely fix the course which the referee should be directed to pursue after the unavoidable reversal of his action in disregarding the votes of the creditors and himself appointing a trustee.

While, on the one hand, the action of the referee was unauthorized, on the other, the minority creditors could not rightly elect a trustee if the majority had the lawful right to vote at the meeting through the attorney they empowered to vote for them. To direct the recognition of the election of the candidate voted for by the minority would ratify what I regard as a wrong to the majority creditors, because, in my view, their right to vote was not destroyed, even if they did make selection of a person as agent who ought not to have accepted the appointment—a question, however, which was largely between the court and one of its attorneys. Whether he ought to have accepted or not may have been a matter of ethics; but, as he did accept, and as the statute does not forbid his doing so, the creditors should not have

been disfranchised, unless, after fair inquiry into the facts upon proper notice, their powers of attorney were held not to confer a proper agency upon their choice. To hold otherwise might deny the rights of the majority creditors upon no ground except that their agent possibly did not have a nice sense of the proprieties of the situation. In short, we hold that such powers of attorney are not void per se. They at most are only voidable under certain circumstances, the existence of which cannot be assumed, but must be shown.

With reference to future cases, as well as this, we think the better course is to set aside the orders made by the referee on the 11th day of May, 1910, and to send the matter back to him, with directions to call, upon 10 days' notice, another meeting of creditors, to be held on the 13th instant, for the purpose of electing a trustee, and for such other matters as may be brought before it. True, there may be some inconvenience in this; but it is unavoidable, because of the error of the referee and the petition for a review of his order.

The referee's orders of May 11, 1910, are reversed and set aside, and upon the return of the case he will be directed to proceed in accordance with the views expressed in this opinion.

ELK GARDEN CO. v. T. W. THAYER CO.

(Circuit Court, W. D. Virginia. May 10, 1910.)

1. COURTS (§ 269*)—"LOCAL ACTION"—EJECTMENT.
   Ejectment is a local action such as can be maintained only in the district where the land lies (citing 5 Words and Phrases, 4202).
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

2. COURTS (§ 274*)—FOREIGN CORPORATIONS—PROCESS—SERVICE—"FOUND."
   A foreign corporation is "found" within a federal judicial district, within Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508) providing that no civil suit shall be brought by original process or proceeding in any other district than that whereof defendant is an inhabitant or in which he shall be "found" at the time of serving such process or commencing the suit, where process was served on an agent of such corporation within the district designated by the defendant for service of process under the state law.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*
   For other definitions, see Words and Phrases, vol. 3, p. 2927; vol. 8, p. 7666.
   Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

3. COURTS (§ 344*)—FEDERAL COURTS—JURISDICTION—"SUIT."
   The word "suit" includes an action at law as well as a proceeding in equity (citing 7 Words and Phrases, 6769), and should be so construed as used in Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901 p. 513).
   [Ed. Note.—For other cases, see Courts, Dec. Dig. § 344.*]

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

4. COURTS (§ 269*)—FEDERAL COURTS—JURISDICTION—LOCAL ACTION—NONRESIDENT DEFENDANT.

Act Cong. March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), provides that no civil suit shall be brought before either of the federal courts of original jurisdiction against any person or by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant. *Held*, that the restriction as to venue is not applicable to local actions, and hence ejectment can be brought in a federal court in the district where the land lay, though both plaintiff and defendant are foreign corporations and nonresidents of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

5. COURTS (§ 329*)—FEDERAL COURTS—AMOUNT IN CONTROVERSY—EJECTMENT.

Code Va. 1904. §§ 2750, 2751, provide that judgment in ejectment shall be that plaintiff recover the possession of the premises, except where there is filed with the declaration a statement of the damages which plaintiff means to demand showing the specific grounds for the claim, and the true nature thereof, so as to give the defendant reasonable notice of the extent and character thereof. *Held* that, where a declaration in ejectment in a federal court did not allege the value of the land, and no statement of damages accompanied the declaration, an allegation that defendant withheld possession to plaintiff's damage in the sum of $5,000 is demurrable for failure to show that the land is of greater value than $2,000, so as to confer federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*

Jurisdiction of Circuit Courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

Action of ejectment by the Elk Garden Company against the T. W. Thayer Company. On demurrer to declaration for want of jurisdiction. Sustained in the absence of amendment.

R. M. Page, J. C. Padgett, and J. I. Hurt, for plaintiff.
White & Penn, for defendant.

McDOWELL, District Judge. This is an action of ejectment brought originally in this court to recover a tract of land lying in this district. The plaintiff is a New Jersey corporation, and the defendant is a New York corporation. In accordance with the state statute the declaration and notice were served in this district on an agent of the defendant who had been designated by the defendant under the state law as its agent for the service of process. The defendant appears specially for the purpose, and demurs to the declaration for want of jurisdiction.

1. Ejectment is a local action (5 Words and Phrases, 4202; 4 Minor's Insts. [3d Ed.] 636), such as can be maintained only in the district where the land lies (Northern R. Co. v. R. Co., 15 How. 233, 242, 14 L. Ed. 674; Livingston v. Jefferson, Fed. Cas. No. 8,411; Newell, Ejectment, p. 101). The language of the eighth section of the judiciary act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), as contrasted with that of the act of June 1, 1872, c. 255,

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

17 Stat. 198 and section 738, Rev. St., leaves, I think, no doubt as to the intent to include suits at law, as well as in equity, "to enforce a legal or equitable * * * claim to * * * real property within the district." The act of 1872 read:

"That when in any suit *in equity* * * * to enforce any legal or equitable lien or claim against real or personal property. * * *" Section 13.

In Rev. St. § 738, in both editions, the language is:

"When any defendant in a *suit in equity* to enforce any legal or equitable lien or claim * * *"

In the act of 1875 the language is:

"That when *in any suit,* * * * to enforce. * * *"

As was said in Crawford v. Burke, 195 U. S. 176, 190, 25 Sup. Ct. 9, 12 (49 L. Ed. 147):

"* * * A change in phraseology creates a presumption of a change in intent."

The word "suit" is applicable to an action at law as well as to a proceeding in equity. 7 Words and Phrases, 6769. And that the word was thus used in the eighth section of the act of 1875 seems to follow from the language of the first section of that act:

"That the circuit courts of the United States shall have original cognizance * * * of all *suits* of a civil nature at *common law* or in equity. * * *"

Hence, if the defendant had not been found within the district, but had been served with a warning order outside the district, or had been advertised for, under the eighth section of the judiciary act of 1875 (4 Fed. Ann. St. 381 [U. S. Comp. St. 1901, p. 513]), there would seem to be no ground for objection to the jurisdiction based on the fact that neither party is a resident of this district. Dick v. Foraker, 155 U. S. 404, 411, 15 Sup. Ct. 124, 39 L. Ed. 201; Greely v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69. In the first mentioned of these cases, it does not appear how the defendant was notified of the pendency of the suit. In view of what had been said in Greely v. Lowe, it seems highly probable that the defendant was served with the warning order outside of the district of suit, or that the order had been published. In the case at bar the defendant was "found" within this district. Railway Co. v. Harris, 12 Wall. 65, 81, 20 L. Ed. 354; Ex parte Schollenberg, 96 U. S. 369, 377, 24 L. Ed. 853; New England Co. v. Woodworth, 111 U. S. 138, 146, 4 Sup. Ct. 364, 28 L. Ed. 379; Southern Pac. R. Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 942; In re Keasbey, 160 U. S. 221, 228, 16 Sup. Ct. 273, 40 L. Ed. 402; Spencer v. Stockyards Co. (C. C.) 56 Fed. 741.

In Greely v. Lowe, supra, 155 U. S. 74, 15 Sup. Ct. 28, 39 L. Ed. 69, it is said:

"* * * The entire object of the section [eighth of the Act of 1875] is to call in defendants who cannot be served within the district by reason of their absence or nonresidence."

And the eighth section of the act of 1875 in express terms applies only in case a defendant "shall not be an inhabitant of, or found within,

the said district." Consequently jurisdiction of the case at bar is not given by the eighth section. If this had been a transitory action the fact that neither party is a resident of this district would be fatal to the jurisdiction. McCormick v. Walthers, 134 U. S. 41, 43, 10 Sup. Ct. 485, 33 L. Ed. 833; Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pacific R. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; In re Keasbey, 160 U. S. 221, 229, 16 Sup. Ct. 273, 40 L. Ed. 402; R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; R. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078.

The first section of the judiciary act of 1875 as originally enacted contained this language:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving such process or commencing such proceeding,* except as hereinafter provided."

18 Stat. 470. As this part of this section was amended by the act of March 3, 1887 (c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]. See, also, Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), it reads:

"* * * And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, *suit shall be brought only in the district of the residence of either the plaintiff or the defendant.*"

The case at bar therefore presents a question which is worthy of at least some discussion. Confining our attention to a case where the sole plaintiff and sole defendant are citizens of different states, where neither is a resident of the district of suit, where the suit is strictly local in character, and where the defendant can be and has been found within the district of suit, which is the district where the property lies, did Congress intend by the change in the first section of the judiciary act made in 1887 to deprive the circuit court of said district of jurisdiction? In Spencer v. Stockyards Co., supra (C. C.) 56 Fed. 741 (an action of ejectment), the facts were essentially the same as in the case at bar, and it was there held that the court had jurisdiction. And it seems to me that the conclusion there reached should be followed. In omitting the clause "or in which he shall be found," and in providing that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant," Congress did not intend to forbid jurisdiction of local actions where neither party resides in the district of suit, and where the defendant is not found in the district. Dick v. Foraker and Greely v. Lowe, supra. It would therefore be so very anomalous to deny jurisdiction of a local suit to the federal court of the district where the property lies merely because the defendant is found and served with process in the district, that it seems proper to regard the amendment of 1887 as not intended to apply to local suits. The first dozen lines of the first section of the act of 1875 give the federal courts jurisdiction of all controversies of a civil nature, in-

volving over $2,000, between citizens of different states. The restrictions as to venue, as set out in the amendment of this section by the act of 1887, apply to transitory actions. But the very fact that the eighth section of the act of 1875 is expressly saved by the fifth section of the act of 1887, seems a sufficient reason for concluding that the restrictions as to venue do not apply to local actions. An intent to give jurisdiction of a local action where the nonresident defendant may be merely warned by publication, seems to clearly forbid the existence of an intent to deny jurisdiction to the same court of the same action if the defendant is served with process within the jurisdiction.

It is true that the language used in the first paragraph of the opinion in Central Trust Co. v. McGeorge, 151 U. S. 129, 132, 14 Sup. Ct. 286 (38 L. Ed. 98), may seem to throw some doubt on the conclusion above stated. But the first paragraph of that opinion is of the nature of a dictum, as the point which had the full attention of the court was the waiver of objection to the venue. Moreover, that suit was evidently not regarded as one falling under the eighth section of the judiciary act. If the complainant had so docketed its judgment at law as to obtain a lien on the real estate of the defendant, the fact is not stated. The suit was apparently regarded as one brought to wind up the affairs of the corporation, by a judgment creditor whose remedy at law was inadequate, as execution had been returned "nulla bona," which should regularly (as per Judge Putnam, Hutchinson v. American Co. [C. C.] 104 Fed. 182) have been instituted in the district of the domicile of the defendant company. It was clearly not treated as a suit brought to enforce a lien upon or claim to property within the district of suit, and is therefore not in point as respects the jurisdiction of a strictly local suit.

2. The declaration in this case does not allege the value of the tract of land sued for. It concludes, "* * * and still doth withhold said possession to the damage of the plaintiff $5,000; and therefore the plaintiff brings its suit." Except where there is filed with the declaration (Code Va. 1904, § 2751) a statement of the damages which the plaintiff means to demand ("showing the specific grounds for the claim and the true nature thereof, so as to give the defendant reasonable notice of the extent and character of the claim"—Witten v. St. Clair, 27 W. Va. 766; 2 Barton Law Pr. 1148), the judgment in ejectment for a plaintiff is (Code Va. 1904, § 2750) that he "recover the possession of the premises." In the case at bar it does not appear that there was filed any such statement of damages as is contemplated by section 2751. It follows that the claim of damages made in the declaration is an empty formality, and is not in any sense the "matter in controversy." Way v. Clay (C. C.) 140 Fed. 352, 353; Crawford v. Burnham, 1 Flip. 116, Fed. Cas. No. 3,366; Lanning v. Dolph, 4 Wash. C. C. 624, Fed. Cas. No. 8,073. And under these authorities the fact that the land described in the declaration and sued for is of greater value than $2,000 should be alleged in the declaration. In the last-mentioned case Mr. Justice Washington asserts that it is quite as essential that the value of the land sued for be alleged in the declara-

tion in ejectment as that diversity of the citizenship of the parties be stated. See, also, Thomas v. Board of Trustees, 195 U. S. 207, 210, 25 Sup. Ct. 24, 49 L. Ed. 160. The demurrer should therefore be sustained, unless the plaintiff so amends the declaration as to allege that the land demanded is of a value in excess of $2,000.

In re HOPP.

(District Court, E. D. Wisconsin. May 28, 1910.)

1. ALIENS (§ 62*)—NATURALIZATION—"GOOD MORAL CHARACTER."
"Good moral character," within the provision of the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 475]), requiring a finding that applicant for citizenship has behaved as a man of good moral character, is such character as measures up to the standard of the average citizen of the community in which applicant resides.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 124; Dec. Dig. § 62.*

For other definitions, see Words and Phrases, vol. 4, p. 3124.]

2. ALIENS (§ 62*)—NATURALIZATION—APPLICANT'S MORAL CHARACTER—SUFFICIENCY.
That applicant for citizenship keeps his saloon open in violation of the state Sunday closing act does not show want of the good moral character essential under the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 475]), where the law has never been enforced in his city on account of adverse public sentiment, and where he is willing to obey the law if insisted upon by the proper authorities.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 124; Dec. Dig. § 62.*]

Petition by Albert Peter Hopp to be admitted to citizenship. Applicant admitted.

H. K. Butterfield, U. S. Atty.
Julius Roehr and Christian Doerfler, for applicant.

QUARLES, District Judge. This is a case arising under the naturalization statute. Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 475). The applicant has complied with all the requirements of the law, and his proofs are satisfactory, unless his answers to certain questions propounded to him, which will be presently considered, are a bar to the application. The following facts were either established by the evidence or conceded upon the argument:

The applicant is a saloon keeper, whose place of business is in the city of Milwaukee, a city having approximately 350,000 inhabitants. It is estimated that 75 per cent. of the population are of foreign birth, and of this number a large proportion are of German extraction. There are, and for many years last past have been, more than 2,000 saloons doing business in Milwaukee. For more than 40 years the state statute, the "Sunday closing act," as it is called, has been

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

upon the statute book. During all of that time no effort has been made, either by the municipal or state authorities, to enforce that statute within the city of Milwaukee. During all this time these saloons have been kept open on the Sabbath Day, without concealment or disguise. The old German adheres with tenacity to the habits and customs of the fatherland. He wishes to have the saloon kept open on Sunday, not for the purpose of revelry or debauch, but as a meeting place for friends and neighbors, and he looks upon it as his club, where he may associate in a friendly way with acquaintances, sip his beer, and smoke his pipe. He views it purely as a social matter. During all these years no drunkenness or disorder has resulted. Ardent temperance people, seeing that no evil results follow this practice in this community, have ceased all agitation on the subject. In short, the public sentiment of the city is in harmony with the view suggested by the applicant in his testimony. The applicant testified that as a matter of personal preference he would much prefer to close up his place on Sunday, but that when his 2,000 competitors kept open he was obliged to do likewise or lose his patronage; that, if any effort were to be made on behalf of the municipality or the public to enforce the Sunday closing law, he would gladly acquiesce and close his place.

Upon the hearing the learned district attorney was forced to admit that, in view of the state of public opinion in the city of Milwaukee, it would be impossible for the executive branch of the state government to enforce the Sunday closing act in this community. Public sentiment is still the all-compelling power, as it was when the Roman maxim proclaimed that "the voice of the people is the voice of God." Any Legislature that establishes police regulations in defiance of public sentiment must suffer the humiliation of seeing their mandate disregarded. The question is whether, under all these circumstances, the court should find that the applicant has not behaved himself as a man of good moral character during the five years last past.

Let us now refer to the statute. This act requires that two witnesses shall depose that they each have personal knowledge that petitioner is a person of good moral character, and that he is in every way qualified in their opinion to be admitted as a citizen of the United States. By subdivision 4 of section 4 it is provided:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held, one year at least, and that during that time *he has behaved as a man of good moral character* and attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

It will thus be perceived that Congress has drawn the distinction between moral character as an ultimate fact and good reputation based on behavior, which must be an inference. The court merely passes upon *behavior,* for no human tribunal can search the heart where character is presumed to reside. What is meant by good moral character, as the terms are used in this act? What standard does the statute contemplate? It is plain that it does not require the highest

degree of moral excellence. A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Ordinary care is the test of liability in every case of negligence. This standard is arrived at, not by the overcautious or the reckless man, but by the average man, representing the great mass of men. So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people.

Applying this test to the particular case, we find that the views and behavior of the applicant are in accord with the overwhelming majority of the people in this community. It is not contended that the applicant must be able to rise to such moral elevation that he may analyze, criticise, and reject the prevailing opinions and settled convictions of his fellowmen, and in the clear blue of righteousness choose for himself a course of action dictated by his quickened conscience. To meet such a test a man must be a philosopher, while the statute is satisfied with a citizen whose behavior is up to the level of the average citizen. There is nothing in the mental attitude of the applicant, as disclosed by his examination, which would brand him as a deliberate lawbreaker. His willingness and desire to obey the law, if insisted upon by the constituted authority, distinguishes this case from the Illinois case [1] which has been pressed upon our attention. In that case the front door of the saloon was closed, indicating a knowledge of the law and a pretended desire for its enforcement, while the open back door indicated stealth and a deliberate purpose to circumvent the law. This was coupled with a solemn determination on the part of the applicant to adhere to his lawless course at all hazards.

It must be remembered that the act of keeping open one's saloon on the Sabbath is unlawful, not in and of itself, but merely because it has been prohibited by an arbitrary act of the Legislature. Men of the highest moral character always have and always will differ as to the proper enforcement of sumptuary and police regulations. I cannot see that the applicant should be denied citizenship because he has fallen in with the general public sentiment of the community in which he lives. There is in the conduct and attitude of the applicant no moral turpitude, and nothing evincing a calloused conscience, and it would not, in my judgment, be a fair construction of the act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen.

For these reasons, the objections will be overruled, and the applicant will be admitted to citizenship.

[1] United States v. Hrasky, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288.

UNITED STATES v. CHU HUNG.

(District Court, D. South Carolina. April 18, 1910.)

ALIENS (§ 32*)—CHINESE PERSONS—CITIZENS—EVIDENCE.

Evidence *held* to require a finding that a Chinese person was born in the United States, and therefore was not subject to deportation under the exclusion law.

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

Citizenship of Chinese persons, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

Deportation proceedings against Chu Hung. From a commissioner's deportation order, defendant appeals. Reversed.

Ernest F. Cochran, U. S. Atty., and Abial Lathrop, Asst. U. S. Atty.

Logan & Grace, for defendant.

BRAWLEY, District Judge. This is an appeal from an order of United States Commissioner Young, adjudging that the defendant, Chu Hung, is a Chinese person unlawfully within the United States, and directing the marshal with all convenient dispatch to transport him to China.

The only testimony for the government was that of Joe Lee, a Chinese interpreter, who testified that Chu Hung was a Chinese, and that he was in the laundry business at 142 King street. He said he did not know whether Chu Hung was born in this country or not. It appears that he had no acquaintance with the defendant. He had seen him only a few days before the hearing, and his conclusion that he was a Chinaman was solely due to the fact that he had a Chinese name and spoke the Chinese language. There is no doubt as to the correctness of this testimony; for the defendant, who appeared before me, manifestly has the appearance of a Chinaman. The defendant testified that he was 31 years of age; that he was born in San Francisco, his father being a Chinaman and his mother Irish; that he lived in San Francisco until he was 12 years old, on the second story of the building at 947 Dupont street; that he had a cousin who lived in New York, who sent for him to come to New York, and that after his arrival there he worked in a grocery, and after making some money invested it in the business, and he produced a certificate from the clerk of the Supreme Court of New York that he was a partner in the business; that the business was not very good, and that he came to Charleston six years ago and learned the laundry business, which he has been conducting since that time; that he is a Christian, and a member of the Grace Church Sunday School; that he still retains an interest in the business in New York. This is substantially all the testimony in the case.

The commissioner found that, inasmuch as the defendant "did not seem to be able to remember any facts by which the accuracy of this testimony could be tested," he was unconvinced that his story was

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

true, and therefore that he had failed to prove his right to be and remain in this country. In United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, the Supreme Court of the United States decided that a child born in the United States of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, had a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the fourteenth amendment of the Constitution. It is clear, therefore, that if Chu Hung has told the truth he is a citizen of the United States and entitled to all the privileges of a citizen.

The right to exclude or expel aliens absolutely or upon conditions is the inherent right of every independent nation, and deportation is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government has decided that his continuing to reside here shall depend. The acts of Congress under which this proceeding is brought, generally known as the "Chinese Exclusion Acts," apply to aliens only. In nearly all of the cases that have been cited, and which I have examined, there has been some proof justifying an inference of an unlawful entry into the United States. As an example, in one of the cases cited by the commissioner, Toy Tong v. United States, 146 Fed. 345, 76 C. C. A. 621, evidence was offered by the government that the defendants were in a railroad train in Canada on April 15, 1904, with tickets reading from Hamilton to Wind Mill Point; that they changed cars about 50 miles from the Niagara frontier, and the Chinese inspectors at Buffalo were duly warned to head them off. Five days later they were arrested at Hoboken, N. J. From the testimony before the United States commissioner it was clear that the respondents were not lawfully entitled to be and remain in the United States, and the respondents offered no testimony.

In the case of Chu Hung the government offered no testimony tending to show that he was at any time since his birth beyond the limits of the United States. The sole ground upon which the order of deportation rests is that the commissioner was unconvinced that the story of Chu Hung was true, because the respondent did not seem to be able to remember any facts by which the accuracy of his testimony could be tested. There is nothing in the story told by Chu Hung that is intrinsically improbable or unreasonable. Left an orphan of tender years, he, as he expressed it, "bummed" about in San Francisco until he was 12 years old, when he went to New York on the invitation from his cousin, was engaged in business there until 6 years ago, when he came to Charleston, where he has led an industrious and correct life, and there is no testimony tending to show that he was an untruthful person, and his counsel upon the hearing before me offered to produce evidence of his good character by our most reputable citizens; but inasmuch as upon the hearing the district attorney stated that he would not attempt to impeach his character it was not considered

necessary to take this testimony. When it is considered that the boy was only 12 years of age when he left San Francisco, an orphan and a waif, it is not surprising that he should not remember facts connected with his life there by which the accuracy of his statements could be tested. That is not enough to discredit him, for it would be a matter of wonder if he could. He told a plain, simple story, and his appearance and manner impressed me favorably, and I find no grounds to believe that the story is not true. A mere suspicion that he may not be truthful does not seem to me to be a sufficient reason for a sentence of banishment. If his story is true, he is a citizen of the United States, entitled to all of its privileges. As a citizen he could not be held to answer for any offense the punishment of which would be half so severe, without an indictment by a grand jury and a trial.

President Madison, in his comment on the Virginia resolutions concerning the alien and sedition laws, referring to the possibilities which attend the removal from the country, said:

"If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name applies."

It may well be that the respondent would be powerless to find any testimony in San Francisco to prove his citizenship. He left there as a boy, 18 or 19 years ago, and it is doubtful that he could find there any one who remembers him, and there is no provision in the law for summoning witnesses from a distance or for taking depositions. It would probably be an exaggeration to impute to him all or much of the feeling which a man of our own race attaches to the idea of country; but it is not exaggeration to say that to be forcibly taken away from his home and family and friends and business and property, and from the only country that he has ever known, and sent across the ocean to a distant land, where he is a stranger, would be most severe and cruel punishment.

The power to exclude aliens is not to be denied; but it is not to be believed that it was the intention of Congress to provide that a citizen, simply because he belongs to an obnoxious race, should be deprived of all the liberty and protection which the Constitution guarantees. No person can be lawfully convicted or punished for any offense unless his guilt is established beyond a reasonable doubt. Persons charged with the vilest crimes are entitled to a presumption of innocence. Arbitrary and despotic power cannot be exercised with reference to their persons or property, yet I am called on to send out of the country a person lawfully domiciled here, engaged in the ordinary pursuits of life, not suspected of being concerned in any treasonable machinations against the government, to execute what, in effect, is a legislative sentence of banishment of one who claims to be a citizen, who, if his story is true, is a citizen, and without any proof that his story is not true. This would be an exercise of arbitrary power incompatible with any principles of justice, inconsistent with the nature of our government, and in conflict with its Constitution.

The order of the commissioner, directing the deportation of Chu Hung, is reversed, and the marshal is directed to set him free.

UNITED STATES, to Use of VAUGHAN, v. STITZER et al.

(Circuit Court, E. D. Pennsylvania. May 31, 1910.)

No. 740.

LIMITATION OF ACTIONS (§ 182*)—PLEADING.

Act Cong. Feb. 24, 1905, c. 788, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), relating to contractors' bonds for public improvements by the United States, declares that, if no suit shall be brought by the United States on the bond within six months from the completion and final settlement of the contract, then the person or persons supplying the contractor with labor and materials shall be furnished a copy of the contract and bond, on which they shall have a right of action in the name of the United States for their use against the contractor and his sureties, provided that such suit shall not be commenced until after the complete performance of the contract and final settlement thereof, and shall be commenced within one year thereafter. *Held*, that the provision that a suit by the contractor's creditor on such bond shall not be brought within six months after completion of the contract and settlement with the contractor was in the nature of a statute of limitations, which must be formally pleaded in order to be availed of.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676–682, 695; Dec. Dig. § 182.*]

At Law. Action by the United States, to the use of William F. Vaughan, against James Herbert Stitzer and another. On motion by defendants for judgment notwithstanding the verdict. Denied.

Clarence S. Eastwick, for plaintiff.

Joseph P. Gaffney and Simpson & Brown, for defendants.

J. B. McPHERSON, District Judge. This case was tried out upon the merits, and the use plaintiff recovered a verdict. The present motion sets up a purely technical defense—that the suit was prematurely brought—and the only result of sustaining the defendants' position would be that the use plaintiff must bring a second suit and traverse again the same ground that has already been fully covered. It is in substance, therefore, a motion for a new trial, and in the interest of prompt procedure can hardly expect to be regarded favorably. Nevertheless, if the act of 1905, under which the suit is brought, denies to the use plaintiff the right to sue until after six months have elapsed from the complete performance of the original contract and the full settlement thereof, the defendant has a legal right to take this defense, and may insist that the suit has been prematurely brought, unless such technical legal right has been waived.

The facts are as follows: Stitzer had a contract with the United States to do certain work at Ft. Mifflin. The use plaintiff, Vaughan, had a subcontract under Stitzer, and the suit is brought to recover damages for Stitzer's failure to make payment as the subcontract requires. Stitzer's contract with the government was completed on March 25, 1909, but full settlement was not made until July 20th. The present suit was begun on October 21st, within six months from the date of final settlement, but more than six months from the date

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

when Stitzer's contract was completely performed. The government has brought no suit, and did not, and does not, object that Vaughan's action was prematurely begun. Whether a subcontractor may under any circumstances begin a suit on the principal contractor's bond until after six months have elapsed from the date of complete performance by the principal and full settlement made with him need not be decided in the present case. In some of its aspects this subject has been considered in United States v. Winkler (C. C.) 162 Fed. 398, Title Guaranty Co. v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 178, United States v. McGee (C. C.) 171 Fed. 209, and United States v. Fidelity, etc., Co. (C. C.) 171 Fed. 247; but the point now involved was not presented or decided in any of these cases. The relevant provisions of the act of 1905 (U. S. Comp. St. Supp. 1907, p. 709 [Supp. 1909, p. 948]) are as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit shall be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

Of course, a subcontractor's right of action at common law against the principal contractor is independent of the statute, and he may bring suit thereon at any time after the right accrues; but his right of action upon the bond depends upon the act of Congress, and can only be exercised in accordance with its provisions. If, then, the government had brought a suit upon the bond in question before

the subcontractor had begun an action thereon, the sole right of the latter would apparently have been to intervene in the proceeding instituted by the government, and to pursue that remedy to the end. And for the purposes of this case it may also be assumed—but without deciding the point—that an independent action by the subcontractor should have been deferred until six months had elapsed from July 20th, the date of final settlement. But it still remains to inquire whether the defendants are in a position to take advantage of this defect in procedure, and in my opinion their objection should not be allowed to prevail. The defendants are setting up what is essentially a statute of limitation. It differs only from the ordinary statutes in the unessential particular that by it a time is fixed before which suit may not be brought, while by their provisions a time is fixed after which such action may not be entertained. But it is well settled that the defendant cannot take advantage of a statute of limitations unless in some way it is formally set up as a defense. "The only way in which such statutes are available as a defense is when they are at the proper time specially pleaded." Gormley v. Bunyan, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086. The general rule is stated in 25 Cyc. 1401, and supported by a host of authorities cited in the notes:

"The general rule is that the statute of limitations must be invoked as a defense in some way, and if it has not been urged by demurrer, and the defense is not pleaded in the answer, the statute cannot be relied on, but is deemed to have been waived; and this is so even though the claim relied on is clearly barred by limitation."

In the present case the objection that is now urged was neither set up by demurrer nor by the affidavit of defense, nor was it formally pleaded, so that no notice was given to the use plaintiff before trial. The defendants' silence seems to me to be a clear waiver, and requires the court to deny the present motion.

The defendants' motion is therefore refused, and leave is given to the plaintiff to enter judgment upon the verdict. To this ruling an exception is sealed in favor of the defendants.

HAGSTOZ v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. June 3, 1910.)

No. 900.

1. COURTS (§ 274*)—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—ACTION AGAINST FOREIGN CORPORATION — DISTRICT OF RESIDENCE OF PLAINTIFF.

An action by a citizen of Pennsylvania may be properly brought against a foreign corporation doing business in Pennsylvania in the federal district of plaintiff's residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

2. APPEARANCE (§ 27*)—WITHDRAWAL—LEAVE TO WITHDRAW.

Where, in a suit against a foreign corporation doing business in Pennsylvania, plaintiff, after defendant's general appearance, amended the

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

præcipe and summons, so as to allege that plaintiff was a citizen and resident of New Jersey, instead of Pennsylvania, defendant would thereupon be permitted to withdraw its general appearance in order to attack the court's jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 161; Dec. Dig. § 27.*]

3. COURTS (§ 347*)—FEDERAL COURTS—DEMURRER—JURISDICTION.

The question of jurisdiction of a federal court may be raised by demurrer.

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

4. COURTS (§ 276*)—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—ACTION AGAINST FOREIGN CORPORATION—WAIVER.

A foreign corporation, by appointing a registered agent on whom summons could be served in Pennsylvania, did not thereby waive its privilege, conferred by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 507), to be free from suit in a federal Circuit Court of Pennsylvania, except where the plaintiff was a citizen and resident of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*

Waiver of right as to district in which suit must be brought, see notes to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

At Law. Action by Thomas B. Hagstoz against the Mutual Life Insurance Company of New York. On demurrer to the court's jurisdiction. Sustained.

A. T. Ashton and J. W. M. Newlin, for plaintiff.
D. Stuart Robinson, for defendant.

J. B. McPHERSON, District Judge. This suit was originally brought on March 1, 1910, in the Circuit Court for this district. In the præcipe and in the summons the plaintiff was described as a citizen of Pennsylvania and a resident of the Eastern district thereof, and the defendant was described as a corporation of New York doing business in the Eastern district of Pennsylvania. In obedience to the Constitution and laws of Pennsylvania the defendant—being a foreign corporation doing business in the state—has a duly registered agent here, and upon him the summons was served. On the face of the record, therefore, the suit was properly brought in this district; for the jurisdiction of the Circuit Court rests solely upon diversity of citizenship, and the suit was begun in the district of the plaintiff's residence. In that situation the defendant on March 7th entered a general appearance. On March 8th the plaintiff asked and obtained leave to amend the præcipe and summons by striking out the averment concerning his citizenship and residence in Pennsylvania, and inserting an averment of citizenship and residence in New Jersey. On March 11th he filed his statement of claim, which followed the amendment in these particulars, and thereupon the defendant filed a demurrer on March 22d denying the jurisdiction of the court on the ground:

"That the plaintiff is not entitled to the relief therein prayed for in this jurisdiction, in that neither party to this suit is an inhabitant or resident of the district wherein the suit is brought; the statement alleging that the plain-

tiff is a citizen of the state of New Jersey and residing therein, and that the defendant is a citizen and resident of the state of New York."

On May 2d the defendant moved for leave to withdraw the general appearance and to enter a special appearance for the purpose of objecting to the jurisdiction of the court. When this motion came up for hearing on May 6th the plaintiff filed an answer, averring that the defendant's state registry was a waiver of its privilege under the act of 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507]) to be free from suit in the Circuit Court unless one of the parties should be a citizen and resident of Pennsylvania, and averring, also, that the general appearance of the defendant was in itself a waiver of the privilege (if such privilege existed) not to be sued in this district by a citizen and resident of New Jersey. It was further averred that the act of 1888 appled only to natural persons, and not to corporations. The court granted the defendant's motion, the general appearance was withdrawn, and the special appearance referred to was duly entered. Thereupon the demurrer was argued, and an elaborate brief is now presented in support of the plaintiff's positions. It is my opinion, however, that they do not need elaborate discussion. The right of the court to permit the general appearance to be withdrawn and a special appearance entered under the facts already stated is so plain, I think, that reference need only be made to the following cases: United States v. Yates, 6 How. 605, 12 L. Ed. 575; Hohorst v. Hamburg Co. (C. C.) 38 Fed. 273; Jenkins v. York Cliffs Improvement Co. (C. C.) 110 Fed. 807.

The remaining question has been settled in the following decisions: Shaw v. Quincy Mining Co., 145 U. S. 448, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup Ct. 273, 40 L. Ed. 402. The question of jurisdiction was properly raised by demurrer. Peale v. Coal Co. (C. C.) 172 Fed. 639; Reinstadler v. Reeves (C. C.) 33 Fed. 308; Miller-Magee Co. v. Carpenter (C. C.) 34 Fed. 433. It is no doubt true that the defendant's privilege not to be sued here, except by a citizen of Pennsylvania and a resident of the Eastern district, may be waived; but no such waiver appears in the present case. The defendant took timely and proper advantage of the court's lack of jurisdiction, and it seems plain to me that the suit cannot be maintained. It is not necessary to discuss at length the question concerning the effect of the defendant's state registry. It is apparently contended that such registry made the defendant a resident of this district so completely that it may be sued therein by any plaintiff who may come into the district and serve a writ upon the statutory agent. Whatever may be the correctness of this position when the suit is brought in the courts of the state, it is clear, I think, that the argument is not sound when the suit is originally brought in the circuit court. The laws of Pennsylvania cannot enlarge the jurisdiction of the Circuit Court. This depends upon the acts of Congress, and I do not know of any statute that permits the maintenance of a suit like this in the face of the defendant's objection. The insurance company is a citizen of New York, and is not a resident of the Eastern district

of Pennsylvania in the sense in which that word is used by the act of 1888. It is no doubt liable to be sued in this district, but only when the suit is brought by a proper plaintiff and in a proper tribunal. When a citizen of Pennsylvania and a resident of the district brings the suit, the Circuit Court has jurisdiction, and process may be served upon the defendant's registered agent. But I have seen no case that permits a citizen of New Jersey to compel the defendant to answer a suit in the Eastern district of Pennsylvania.

The demurrer is sustained.

In re MAGEN et al.

(District Court, E. D. Pennsylvania. June 6, 1910.)

No. 3,641.

1. BANKRUPTCY (§ 229*)—CONTEMPT—PROCEEDINGS BY REFEREE.
   Where bankrupts have been guilty of contumacious behavior, the referee may certify the same to the court for punishment for contempt of his own motion, without notice to the bankrupts; they being given notice and an opportunity to be heard in the proceedings before the court.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

2. BANKRUPTCY (§ 229*)—CONTEMPT PROCEEDINGS—POWER OF REFEREE.
   While a referee in bankruptcy exercises a judicial office, he cannot himself punish the bankrupts for contempt.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

3. BANKRUPTCY (§ 229*)—CONTEMPT PROCEEDINGS.
   Where a referee does not act on his own motion in contempt proceedings against the bankrupt, but they are instituted by petition, the bankrupt should be accorded notice and hearing before the referee.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. § 229.*]

4. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPTS—CONTEMPT.
   Where bankrupts' examination before the referee showed that their affairs had been viciously conducted, and that they had been carrying on their business fraudulently for several months before their failure, and must have known many details, concerning which they professed ignorance or lack of recollection in their examination, they would be punished for contempt.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 405; Dec. Dig. § 241.*]

In the matter of bankruptcy proceedings by Morris Magen and another. Application to punish the bankrupts for contempt. Granted.

Julius C. Levi, for trustee.

Bernard Harris, for bankrupts.

J. B. McPHERSON, District Judge. At the trustee's request the referee has certified that the bankrupts' answers upon their examination were manifestly false and evasive, and recommends their punishment for contempt. They did not have notice of the trustee's petition,

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

or of the contemplated action thereon, and in this I think the proceeding was erroneous. I see no reason to doubt that the referee may certify such a state of affairs upon his own motion; but, if the proceeding is begun by an interested party, the bankrupts are entitled to notice, as of any other action that may affect them personally. The referee exercises a judicial office, and, while he cannot himself punish for contempt, he may take the needful preliminary steps to bring the bankrupt's conduct to the attention of the court; and he need not give notice of his intention so to do. The contempt is committed in his presence; and, in asking that the court investigate the matter further, he is acting on his official responsibility. The court will then give the bankrupt notice of the proceeding, and will afford him an opportunity to be heard. If, however, the referee does not choose to act upon his own motion, the situation is on a different footing. It is then an ordinary dispute between the party presenting the petition and the bankrupt, and the usual course of notice and a hearing should be followed.

After the present certificate was returned to the District Court, a day was fixed for the hearing, with notice to the bankrupts' counsel, who thereupon agreed to waive the previous irregularity. At the hearing the bankrupts produced a number of witnesses, who gave a good deal of additional testimony on their behalf, and the question in dispute was fully argued. There has been ample opportunity, therefore, for explanation or excuse, and the whole subject is now before the court. Since the argument a recent decision of the Court of Appeals for the Second Circuit has been published—In re Schulman, 177 Fed. 191—and I refer to it as an admirable statement of the reasons for giving great weight to the referee's opinion concerning the character of a bankrupt's answers, and for permitting a referee to report him as contumacious at any time during the examination. But, entirely aside from the referee's report in the present case, the cold record of the bankrupts' testimony—and I have read all the voluminous testimony that has been taken—abundantly justifies the conclusion that they were carrying on business fraudulently for several months before their failure, and must have knowledge now of many details about which they profess ignorance or lack of recollection. It would be useless to specify. The whole tone of the examination is sufficient, even if due weight be given to the earnest and very capable argument of their counsel, and due allowance be made for the vicious method, or lack of method, in which their affairs were conducted.

Upon consideration of all the testimony, I am of opinion that the trustee's complaint is well founded, and accordingly I adjudge both bankrupts guilty of the contempt charged. The marshal is therefore directed to arrest Morris Magen and Jacob Magen, and to commit them to the jail of this county for the period of 60 days.

REBER v. LOUIS SHULMAN & BRO.

(District Court, E. D. Pennsylvania. May 26, 1910.)

No. 1, Sept. Sess. 1909.

BANKRUPTCY (§ 303*)—PREFERENCE—BURDEN OF PROOF.

In an action by a trustee in bankruptcy against an accommodation indorser of the bankrupts' paper to recover an alleged preference, consisting of the bankrupts' payment of the debt to the holder of the paper within the statutory period relieving defendants from their contingent liability, the burden was on the trustee to prove by evidence establishing more than a suspicion that the bankrupts intended thereby to prefer defendants when the debt was so paid, and that defendants knew or had reasonable cause to believe that such preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 458; Dec. Dig. § 303.*]

Action by J. Howard Reber, trustee of J. Stern & Sons, bankrupts, against Louis Shulman & Bro. to recover a preference. On motions for a new trial and for judgment notwithstanding the verdict. Motion for judgment notwithstanding the verdict allowed.

Clinton O. Mayer, for plaintiff.

Samuel J. Gottesfeld, for defendant.

J. B. McPHERSON, District Judge. This is a suit to recover a preference, not of the usual kind where payment has been made directly to a defendant, but where the payment has been made to one person and another person has benefited thereby. Shulman & Bro. were accommodation parties to commercial paper, of which Charles Nemcof was the holder. The bankrupts were primarily liable, and paid the debt directly to Nemcof within the statutory period, thus relieving the defendants of their contingent liability. It was conceded at the trial that the bankrupts knew of their insolvency when payment was made, and also that the payment gave to Nemcof a forbidden advantage. This left for determination the questions (1) whether the bankrupts intended to prefer the defendants when payment was made to Nemcof, and (2) whether the defendants knew or had reasonable cause to believe that such a preference was intended. These were questions of fact, and the jury answered them in favor of the trustee; but it is necessary now to consider the preliminary question of law that was reserved at the trial, whether there was submissible evidence upon these points, and I have come to the conclusion that such evidence was not presented. In my opinion the evidence was too slight to carry the case to the jury upon the vital question whether the defendants knew or had reasonable cause to believe at the time when payment was made that the bankrupts intended to give them a preference. The testimony need not be discussed in detail. This has been fully done in the briefs that have been submitted upon these motions, and I shall content myself with the remark that the evidence upon which the trustee seems to rely leaves entirely too much to inference. The burden of proof was upon him to establish all the elements of the preference, and as it

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

seems to me he did no more than furnish some ground for suspicion that the defendants may have had cause to believe that the bankrupts were not in a satisfactory financial condition. Upon the equally vital point whether there was reasonable cause for the belief that the bankrupts intended the payment to be preferential, I think that the evidence can hardly be said to exist. At all events, it was so slight that no verdict based upon it should be permitted to stand. It is my duty, therefore, to sustain the motion for judgment notwithstanding the verdict.

The motion for a new trial is refused, and the clerk is directed to enter judgment in favor of the defendants upon the point reserved notwithstanding the verdict. To the entry of such judgment an exception is sealed for the plaintiff.

In re McCANN et al.

(District Court, E. D. Pennsylvania. May 14, 1910.)

No. 3,202.

1. BANKRUPTCY (§ 414*)—OFFENSES AGAINST BANKRUPT LAW—CONCEALMENT OF ASSETS.

Where a bankrupt, while insolvent, conveys property to a near relative without consideration, and afterwards fails to disclose the existence of such property in his schedules, he is prima facie guilty of concealing assets from his trustee, though the conveyance may have been made more than four months before the petition was filed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE OF BANKRUPT—GROUNDS FOR REFUSAL—CONCEALMENT OF ASSETS.

Where a bankrupt conveys property to a near relative without consideration, and fails to disclose it in his schedules, if the innocence of the transaction is made to appear, the conveyance and subsequent omission from the schedules will interpose no obstacle to the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 415*)—DISCHARGE OF BANKRUPT—HEARING—QUESTION OF FACT.

On proceedings for the discharge of bankrupts, the question whether an explanation offered by them of a transfer to a near relative without consideration and of the omission of the property from the schedules is credible is a question of fact.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

4. BANKRUPTCY (§ 415*)—DISCHARGE—GROUNDS FOR REFUSAL—CONCEALMENT OF ASSETS.

Where the finding of a special referee rejecting the explanation given by bankrupts of a conveyance to a near relative without consideration and of the omission of the property from the schedules is supported by the evidence, the discharge of the bankrupts will be refused.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

In the matter of the bankrupt estate of Joseph A. McCann and another, individually and trading as McCann Bros. Heard on excep-

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

tions to report of a special referee on objections to discharge in bankruptcy. Report confirmed, and discharge refused.

See, also, 171 Fed. 266.

Robert J. Byron and Edmund W. Kirby, for bankrupts.

G. Von Phul Jones, for objecting creditor.

J. B. McPHERSON, District Judge. The exceptants concede—and, indeed, the authorities would compel the concession—that if a bankrupt, while insolvent, conveys property to a near relative without consideration, and afterwards fails to disclose the existence of such property in his schedules, he is prima facie guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed. I say prima facie, because such a transaction as is thus supposed may no doubt have been innocent; and, if its innocence be made to appear, the conveyance and the subsequent omission of the property from the schedules will interpose no obstacle to the bankrupt's discharge. In the case now before the court the only question is whether the explanation offered by the bankrupts of such a transfer is credible, and this is, of course, a question of fact. The referee (Theodore M. Etting, Esq.) who heard the explanation offered by the witnesses disbelieved it, and rejected their testimony upon this subject altogether. This left the transaction without support, and justified the inference that the conveyance had been made for the purpose of concealing the property of the bankrupts, in order that they might in some way profit thereby. Following the well-known rule that gives great weight to a referee's judgment concerning the oral evidence of witnesses who have been examined in his presence, I can only say that it seems to me impossible to declare the findings in the case before me to have been clearly erroneous. Accepting them as true, the conclusion of the referee inevitably follows.

His report is therefore confirmed, and the discharge of the bankrupts, either individually or trading as the partnership of McCann Bros., is refused.

BROMMER v. PENNSYLVANIA R. CO. PENNSYLVANIA R. CO. v. HENDERSON. SAME v. BLOCKSON.

(Circuit Court of Appeals, Third Circuit. June 10, 1910.)

Nos. 6, 5, 4.

1. RAILROADS (§ 328*)—ACCIDENTS AT CROSSINGS—CARE REQUIRED OF AUTOMOBILE DRIVER—DUTY TO STOP, LOOK, AND LISTEN.

The duty of an automobile driver approaching a grade railroad crossing, where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1057; Dec. Dig. § 328.*]

2. RAILROADS (§ 328*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DRIVER OF AUTOMOBILE.

The driver of an automobile which was struck by a train at a grade crossing of railroad tracks was chargeable with contributory negligence which precludes his recovery from the railroad company for his injury, where, as he approached the crossing, his view of the tracks in the direction from which the train approached was obstructed by buildings and trees until he reached a point within 30 or 40 feet from the track, from which point he could have seen along the track for at least 500 feet, but he drove upon the crossing without stopping to look or listen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1058; Dec. Dig. § 328.*]

3. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—PERSON RIDING IN AUTOMOBILE DRIVEN BY ANOTHER.

One riding in an automobile by invitation of the owner and driver, with whom he sat on the front seat, equally with such driver was required to exercise care for his own safety, and where without objection or protest he permitted the driver to negligently drive upon a railroad crossing immediately in front of an approaching train without stopping to look or listen, exercising no care on his own part to ascertain whether the crossing was safe, although the view of the track was obstructed until they reached a point only a few feet distant, he is chargeable with negligence contributing to his own injury by the striking of the car by the train and cannot recover therefor from the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1055; Dec. Dig. § 327.*]

4. RAILROADS (§ 330*)—ACCIDENTS AT CROSSINGS—CARE REQUIRED OF PERSONS IN AUTOMOBILE.

The fact that there was a flagman at a grade crossing of a railroad, and that he gave no warning nor did any act of any kind to mislead those approaching the crossing in an automobile, did not relieve such persons of the duty to themselves exercise care before driving on the crossing by stopping to look and listen when they reached a point from which they could first see along the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1072; Dec. Dig. § 330.*]

5. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—OCCUPANT OF AUTOMOBILE.

A woman riding on the rear seat of an automobile, with two persons in the front seat and another in the seat beside her, at the time the car was struck by a train on a railroad crossing by which she was injured,

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

held not chargeable with contributory negligence as matter of law because she did not look nor listen for the train, in the absence of evidence that she could have seen, or that she knew or could have seen, that they were approaching the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1055; Dec. Dig. § 327.*]

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

Actions by Manuel Brommer, Charles D. Henderson, and Lillian Blockson, respectively, against the Pennsylvania Railroad Company. Judgment for defendant in the Brommer case affirmed on writ of error. Judgment for plaintiff in the Henderson Case reversed, and judgment for plaintiff in the Blockson Case affirmed on writs of error.

Wescott & Wescott, for plaintiffs.

J. H. Gaskill and T. L. Gaskill, for defendant.

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

BUFFINGTON, Circuit Judge. This opinion deals with three cases tried together in the lower court and so argued in this. One Brommer was driving his automobile over the Westfield avenue grade crossing in Camden, N. J., of the Pennsylvania Railroad Company, when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits. In the trial the court below held Brommer guilty of contributory negligence and directed a verdict against him. Verdicts and judgments were recovered by Henderson and Mrs. Blockson. To the entry of the judgment against him Brommer sued out a writ, and to the judgment entered against it in favor of Henderson and Mrs. Blockson the railroad sued out writs also.

We turn out attention first to the case of Brommer. A study of the entire testimony thereof and the fact that the tire marks on the ground, noted immediately after the accident, showed a deep swerve made by the automobile at the crossing, leaves us under the strong impression that Brommer attempted to make a flying dash over this crossing at a high rate of speed, and that this was the cause of the accident. We must, however, dispose of the case on the evidence given on the plaintiff's side, and on that alone we are clear the court below was right in holding Brommer guilty of contributory negligence. The crossing in question was a grade street one in the city of Camden, and Brommer had no previous knowledge of the approaches thereto. He came in sight of it when he passed over an elevation on Westfield avenue 170 feet back, and from there the avenue sloped to the crossing, to the sides thereof. The track, however, was shut out by hedges and house on either side of the avenue from his sight.

Henderson, a nephew of the plaintiff Henderson, who was called by plaintiff to prove the location, testified, in answer to the court's question:

"You could not see a train coming the way this train was coming until you got within 40 feet of the track."

McMullen, called by plaintiff for the same purpose, testified:

"As you approached the railroad track, how far down could you see on the left? A. I made no measurements. I should say that probably 30 feet from the railroad track you could see them for some distance; that is, down the track. Q. About what distance? A. Within about 30 feet of the railroad track, probably 500 or 600 feet, or maybe more. I don't know; I did not measure it."

And, as summed up by Brommer's counsel, "the evidence on both sides showed obstacles to vision up to within 30 or 40 feet of the track." Actual measurements and photographs testified to by defendant's witnesses show that at a point 30 feet back from the track there was a clear view to the left down the track for 1,400 feet. But taking the estimate made in plaintiff's proofs, there was a view point within 30 or 40 feet of the track for 500 or 600 feet.

Now, what was the duty of the driver of an automobile approaching a railroad crossing under such conditions? The question is, in a way, new, and we may therefore repeat in part what this court said in New York Central Co. v. Maidment, 168 Fed. 23, 93 C. C. A. 415 (21 L. R. A. [N. S.] 794):

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

Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the Maidment Case, supra, we said:

"The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it was conclusive of this case. Here, as there, the driver of the machine, when stopping, looking, and listening, would have prevented the accident, made chance, not stopping, the guaranty of his safety. It will not avail to say he looked and listened as he approached the crossing, and therefore there was no call to stop, for it is manifest either that he was going at such high rate of speed as to necessitate a deep swerve to avoid striking the flagman, or if he was approaching at the slow, two mile an hour rate, his witness says he was, he did not look, for if he had he would have seen this train 500 feet up the track, and with his machine under control, as the witness said it was, he would have stopped. "If a traveler," says Wharton's Law of Negligence, quoted with approval in Pennsylvania v. Righter, 42 N. J. Law, 186, "by looking along the road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or, looking, did not heed what he saw." To the same effect are authorities cited in Elliott on Railroads, § 1165. And the presumption of the law that he did not look when he came to this 30-foot vantage point is confirmed by the proof he produced. Helen Waters, who was about 100 feet from the crossing and saw the automobile coming, says that Brommer was about 15 feet from the track when he rose up on his seat and looked both ways. Mrs. Mowitz, another witness of plaintiff, was near the crossing and saw the automobile coming up to it. She shouted a warning just before it crossed. Her testimony, in explanation of why she did not do so sooner, clearly shows that she recognized the prudent and natural course was for Brommer to stop. Her testimony was:

"Q. Why was it, Mrs. Mowitz, that you did not holler when you saw the automobile going right up towards the track and saw the train coming along? A. Why, because I did not realize what was going to happen. Q. You thought the automobile was going to stop? Would you go across a railroad if you knew a train was coming? I thought it was— Q. (Repeated by stenographer) You thought the automobile was going to stop? A. I thought it would, naturally; there being a railroad there. * * * Q. They acted as if they did not see any railroad tracks, did they not? A. They did."

The plaintiff in error Brommer was clearly guilty of contributory negligence, and the court rightly gave binding instructions against him. His failure to stop, look, and listen, at a point where stopping and where looking and where listening would have prevented the accident, directly contributed thereto.

Brommer then being culpably negligent, was Henderson, who sat on the seat beside him, any less so? It is true there are cases, but this is not one of them, where a person hires a supposedly capable driver, and being regarded by the law as a passenger for hire, and as having no part in the management or control of the vehicle, is visited with no duty to help safeguard it. But this is a different case. Henderson was not a passenger, and Brommer was not a quasi carrier; but the whole party were united for a common purpose and had a common object in view. Brommer had no greater duty or obligation toward the others than they toward him. It is true he was running the machine; but if anything threatening the general safety of the party came within the knowledge of any of them, and he or she by timely warning was able to warn Brommer of such danger, and as a direct and proximate result of not doing so he or she suffered damage, how can it be said this was not negligence, and that thereby he or she did not contribute to causing the accident? The cases in each of the states in this circuit would hold such conduct negligent.

"The fact that the plaintiff was a guest did not relieve her from exercising ordinary care." Mittelsdorfer v. West Jersey Co. (N. J.) 73 Atl. 540.

"The testimony is wholly to the effect that the defendant (in the vehicle by invitation) committed himself voluntarily to the action of Fields (the owner and driver), that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by Crescent v. Anderson, 114 Pa. 643 [8 Atl. 379, 60 Am. Rep. 367]." Dean v. Penna. Co., 129 Pa. 524, 18 Atl. 721 (6 L. R. A. 143, 15 Am. St. Rep. 733).

"It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and to avoid it if practicable." Farley v. Wilmington, 3 Pennewill, 584, 52 Atl. 543.

Now, as we have before noted in Brommer's case, the proof is that Brommer was approaching the crossing at a two-mile gait (slower than a slow walk); that he was slowing up; that the machine was under control; that there was a place 30 or 40 feet back from the track where it could be seen for 500 or 600 feet. It is therefore clear that Henderson could safely have called on Brommer to stop, and that if he chose to allow him to make a running crossing, without knowledge of what he might encounter, he in fact joined him in testing the danger. Such being the situation, was Henderson under any obligations in the premises? The court below thought not and, in effect, held that Henderson and the rest of the party with Brommer, being there "by invitation," cannot be charged with his negligent act; adding thereto:

"Hence, as I have said, in order to have the negligence of Mr. Brommer imputed to the plaintiffs, the plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act their own; otherwise his negligence cannot be charged against or imputed to them."

But in our view the question before us is not whether Brommer's negligence is to be imputed to other occupants of the car, but whether they or any of them omitted that due care—and negligence is lack of due care—which under the circumstances they were bound to take. And to our view the court, in making the test of contributory negli-

gence that "the plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act their own," erred, for in Little v. Hackett, 116 U. S. 371, 6 Sup. Ct. 391, 29 L. Ed. 652, the Supreme Court held that acts of omission as well as commission might constitute contributory negligence, saying:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. Under the circumstances his duty was well stated in Davis v. Chicago Co., 159 Fed. 18, 88 C. C. A. 496, where it was said:

"Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observations of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury."

Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called on him to stop before attempting the passage. The machine was under control, by his own account, only moving at a two-mile rate. Under the circumstances he was called on to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident. The power, speed, and control of automobiles are new factors in the crossing of railroads. They tempt a reckless driver to make flying crossings. On the other hand, they afford elements of safety and convenience to a careful one. The law contributes to the rational enjoyment of the automobile, to the safety of its occupants, and to the welfare of the railroad traveling public, when, in these early cases, it holds the automobile drivers rigidly to the rule laid down in the Maidment Case that:

"The duty of an automobile driver approaching tracks where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

And because Henderson joined with Brommer in a deliberate violation of this salutary rule, we must hold him guilty of contributory negligence. We have not overlooked the fact that there was a flagman at the crossing. But in any view of the case his presence does not change our conclusion as above. If the proofs of the defendant are true, the flagman saw in time both train and automobile approaching, and stood in the center of the crossing waving his flag; but in spite of this warning the driver came on and over the crossing at so high a rate of speed that his car made a deep swerve from its course to avoid striking him. On the other hand, if the evidence contra be accepted, the flagman, who was standing near the crossing with his flag rolled up and his back to the approaching automobile, in no way misled Henderson or relieved him of his duty of due care. Indeed, as we view the situation, the plain neglect of duty by the flagman did not relieve the persons attempting to cross from the duty on their part of looking and listening (Berry v. Penna. R. R., 48 N. J. Law 141, 4 Atl. 303), while his presence made it possible for them to call to him and ascertain that the crossing was safe.

It remains to notice the case of Mrs. Blockson. While holding her to a due measure of care, in so far as her situation and surroundings enabled her to exercise it, we have no proof she did not exercise it, or that anything she saw or failed to see contributed in any way to the accident. On that the trial judge, in refusing a new trial, well summed up the situation:

"As to Mrs. Blockson, she frankly admits that she did not look for the reason that she was sitting in the back seat of the automobile, and, as it appears, on the opposite side from that from which the train approached. The only implication, if any, that can be drawn from this testimony, is that because she was on the back seat she could not see. There is no evidence to show she knew that they were approaching a railroad crossing, or that from the position she occupied, sitting behind the men on the front seat, she could have known it by the exercise of ordinary care. The construction of the automobile does not appear. It was not shown whether the front seat was higher or lower than the rear seat, or whether the automobile had a top, or whether the top, if there was one, was up or down, or had side curtains or not, or, if it had, whether they were up or down."

To this we may add there was no proof as to whether the rear of the car was shut off from communication with the driver. Under this state of the proofs, we have no facts upon which we can say, as a matter of law, Mrs. Blockson was guilty of contributory negligence.

The judgment in her favor must therefore be affirmed.

JONES v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1910.)

No. 1,731.

1. CRIMINAL LAW (§ 284*)—PLEA IN ABATEMENT—TRIAL.

Where a plea in abatement in a criminal case was submitted to the court and overruled, being determined as a question of law, it was not error, when it subsequently appeared that a question of fact was involved, to submit such question to a jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 655; Dec. Dig. § 284.*]

2. CRIMINAL LAW (§ 1035*)—APPEAL AND ERROR—NECESSITY OF OBJECTIONS IN LOWER COURT.

The objection that an issue of fact raised by a plea in abatement in a criminal case was submitted to the jury which tried the case on the merits cannot be made for the first time in the appellate court, since there can be no reviewable error in relation to a question which was not presented to nor ruled upon by the trial court, unless the error was plain and absolutely vital to the defendants' case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2643; Dec. Dig. § 1035.*]

3. CONSPIRACY (§ 43*)—INDICTMENT—VARIANCE—DESIGNATING KNOWN CONSPIRATOR AS UNKNOWN.

There is not a fatal variance between indictment and proof in a prosecution for conspiracy under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), because the indictment charges that defendants conspired with each other and with others to the grand jurors unknown, while the evidence shows that the name of another conspirator was in fact known, where the indictment fully sets out his connection with the conspiracy, and designates him by name, so as to clearly advise defendants of the charge against them.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 90; Dec. Dig. § 43.*]

4. CONSPIRACY (§ 45*)—TRIAL—EVIDENCE.

Evidence considered in a prosecution for conspiracy, and *held* to have a sufficient tendency to show the connection of other defendants with the conspiracy, to render letters written by them, charged in the indictment as overt acts, admissible in evidence against the defendants on trial.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 102; Dec. Dig. § 45.*]

5. CONSPIRACY (§ 47*)—TRIAL—SUFFICIENCY OF EVIDENCE.

In a prosecution under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy to defraud the United States, the government is not required to prove that all the overt acts alleged were committed, nor that all the defendants named in the indictment were engaged in the conspiracy, and, in such a prosecution, the fact that there was evidence tending to show that the conspiracy in which some of the defendants not on trial were engaged was separate from that in which those on trial were engaged did not entitle the latter to an acquittal.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107; Dec. Dig. § 47.*]

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

6. CRIMINAL LAW (§ 368*)—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR.
Declarations made by one conspirator while the conspiracy was in progress, and relating to its object, although not in furtherance thereof, are admissible as part of the res gestæ against each conspirator.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 812, 815; Dec. Dig. § 368.*]

7. CRIMINAL LAW (§ 369*)—EVIDENCE—COMPETENCY.
Where evidence is competent and relevant in a criminal case as tending to establish the guilt of defendant of the crime charged, it is not rendered incompetent because it may also tend to establish another offense or a breach of trust on his part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. § 369.*]

8. WITNESSES (§ 372*)—IMPEACHMENT—BIAS—CROSS-EXAMINATION—EVIDENCE OF OTHER OFFENSES—MOTION TO STRIKE OUT.
Where, on cross-examination of a witness for the prosecution in a criminal case, it was sought to discredit his testimony by showing his hostility to defendant, the fact that his answers, admitting and explaining such hostility tended to show that defendant had committed other illegal acts did not entitle defendant to have them stricken out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192, 1193; Dec. Dig. § 372.*]

9. CRIMINAL LAW (§ 423*)—EVIDENCE—CONSPIRACY.
In a prosecution for conspiracy to defraud the United States of public lands by fraudulently acquiring state lands, and having them included within a national forest reservation, thus acquiring the right to select in exchange public lands of the United States of greater value, where one of the defendants was at the time of the transactions Commissioner of the General Land Office, evidence that the reservation was established on his recommendation, that news of the fact was given out in advance of the official anouncement, and that his resignation was afterward requested by his superiors because of his conduct in relation to forest reservations was competent on the trial of a codefendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 989; Dec. Dig. § 423.*]

10. CRIMINAL LAW (§ 1169*)—REVIEW ON ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Testimony admitted on the trial of an indictment for conspiracy *held* competent and material, and its admission, even if erroneous, not prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

11. CRIMINAL LAW (§ 371*)—EVIDENCE—ACTS PART OF A SERIES SHOWING DESIGN—CONSPIRACY.
On the prosecution of defendant for conspiracy to defraud the United States of public lands by fraudulently acquiring state lands of little or no value, procuring their inclusion in a national forest reservation, and obtaining lieu lands of greater value from the government in exchange therefor, evidence of such fraudulent acquiring of state lands within the boundaries of the reservation subsequently established more than three years before the finding of the indictment, and the sale of which by the state had afterward been validated by an act of the Legislature, was nevertheless admissible as tending to prove the intent and design of the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

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

12. CRIMINAL LAW (§ 150*)—LIMITATION—CONSPIRACY.
Where an alleged conspiracy to defraud the United States contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime, and a prosecution is not barred until three years after the last overt act averred in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*

Commencement of period of limitations against prosecutions for continuing offenses, see note to Ware v. United States, 84 C. C. A. 519.]

13. CRIMINAL LAW (§ 371*)—EVIDENCE—SIMILAR ACTS SHOWING DESIGN.
On the trial of a defendant for conspiracy to defraud the United States of public lands, evidence that he had previously been engaged in the illegal acquisition of public lands elsewhere by a different method was admissible as bearing upon the questions of intent, purpose, and design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 832; Dec. Dig. § 371.*]

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

Willard N. Jones was convicted of a criminal offense, and he brings error. Affirmed.

S. B. Huston and Martin L. Pipes, for plaintiff in error.

Tracy C. Becker and Francis J. Heney, U. S. Sp. Asst. Atty. Gens.

Before GILBERT and MORROW, Circuit Judges, and FARRINGTON, District Judge.

MORROW, Circuit Judge. The plaintiff in error was charged by indictment in the Circuit Court for the District of Oregon with John H. Mitchell, Binger Hermann, John N. Williamson, Franklin P. Mays, and George Sorenson with the crime of conspiracy, alleged to have been entered into on the 15th day of February, 1902, between the parties named, "and with divers other persons to the said grand jurors unknown," to defraud the United States out of the possession and use of and title to divers large tracts of the public lands of the United States of great value, to wit, 200,000 acres of the public lands of the United States, lying in divers states and territories of the United States, of the value of $3,000,000. The indictment is framed under section 5440 of the Revised Statutes (page 3676, U. S. Comp. St. 1901) and contains but a single count. It is charged, in substance, that the conspirators named, in pursuance and by means of a fraudulent plan, were to obtain fraudulently from the state of Oregon title to and possession of a large quantity, to wit, 150,000 acres of school lands, lying within the counties of Crook, Grant, Harney, Malheur, Baker, Union, Umatilla, and Wallowa in the state of Oregon, still vacant by reason of the land being arid and worthless, and open to purchase from the state by residents thereof under the laws of the state of Oregon at $1.25 per acre, in quantity not exceeding 320 acres for each resident, upon application made to the proper authorities of the state of Oregon by a resident, supported by his affidavit showing his qualifications to make such purchase, and, amongst other things, his in-

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

tention to purchase such lands in good faith and for his own benefit, and that he had made no contract to sell the same; that said school lands were to be obtained from the state by making and filing with the state authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof in the names of persons not really desiring and legally qualified to purchase such lands. It is charged that the defendants would procure the use of the names of such persons for the purposes named by paying them respectively small sums of money; that the defendants would support such applications with fraudulent affidavits, known to the defendants to be false, in this, that they would purport to be the bona fide affidavits of the persons whose names were signed thereto, whereas in truth and in fact they would not be the bona fide affidavits of the persons whose names were signed thereto, because such affidavits would state that the affiants therein were persons qualified under the laws of the state of Oregon to make such applications and to purchase such lands, by reason, amongst other things, of their intending to purchase the same in good faith and for their own benefit respectively, and of their having no contract or agreement to sell the same, while in truth and in fact none of such persons were intending to purchase such lands in good faith for his own benefit or at all, but would be knowingly aiding and assisting the defendants in their fraudulent plan. It was further charged that the defendants, through the influence of said John H. Mitchell, who was then a Senator of the United States of and for the state of Oregon, and the said Binger Hermann, who was then the Commissioner of the General Land Office of the United States, to induce and procure the establishment of a forest reserve in the counties named, under the laws of the United States, which would include within its limits the school lands so to be fraudulently obtained from the state; and also a large quantity, to wit, 30,000 acres of such other school lands, lying in said counties which had theretofore been fraudulently obtained by the defendants from the state of Oregon by the same fraudulent means; and also a large quantity, to wit, 20,000 acres of poor timber lands, lying in the said county of Crook, which were to be fraudulently obtained by the defendant Williamson from the United States through purchases from the United States under the laws pertaining to the sale of timber lands, to be made, by his procurement, by persons who would be acting as his agents, and who would not be in good faith purchasing the same for their own use and benefit. It was further charged that the defendants would cause to be relinquished, assigned, and transferred to the United States the titles to and possession of such timber lands and school lands so fraudulently obtained and to be obtained from the United States and from the state of Oregon in exchange for public lands to be selected, and for titles thereto by patent to be obtained under the laws of the United States by and on behalf of the defendants from among the public lands of the United States open to such selection, lying outside of the limits of the forest reserve, so to be established in lieu of such timber and school lands so to be made to lie within the limits of such forest reserve. It is further charged that

the defendants, when so causing to be relinquished, assigned and transferred to the United States the titles to and exchanging the timber and school lands to be so fraudulently obtained from the United States and from the state of Oregon, for public lands of the United States, and for titles by patent thereto, well knowing such titles to timber and school lands to be as they would be, false, fraudulent, and worthless, and the possession acquired thereunder unlawful, and intending thereby and by afterwards selling and disposing of such public lands and patent titles to the general public and to persons having no knowledge of the fraud involved in the obtaining of the same from the United States, to defraud the United States out of the possession and use of and title to the public lands so to be selected, obtained and appropriated in lieu of such school lands, to the profit, gain, use, and benefit of themselves and prejudice of the administration of the public laws of the United States, and contrary to the true intent and policy thereof. The indictment then proceeds to charge certain overt acts alleged to have been committed by individual defendants in pursuance of the conspiracy and to effect its object.

1. It is charged that the defendant John H. Mitchell on February 22, 1902, at Washington, signed a letter addressed to Binger Hermann, Commissioner of the General Land Office, in which the writer said:

"On January 21, 1902, I wrote a letter to Hon. E. A. Hitchcock, Secretary of the Interior, forwarding petitions numerously signed, praying for the establishment of a forest reserve in Oregon to include all of the lands embraced in the following named contiguous localities, being parts of Grant, Malheur, and Harney Counties, state of Oregon, to wit: The entire watershed known as 'Strawberry Mountain'; the headwaters of the north and middle forks of the Malheur river and their tributaries; Silvies river and tributaries; Silver creek and tributaries; the south fork of the John Day river, and its tributaries. I subsequently received a letter from the Secretary saying he had transmitted the same to your office. I desire to know whether they have been received at your office, and what action, if any, has been taken. I earnestly urge early consideration of this matter."

2. It was further charged as an overt act that Binger Hermann on March 11, 1902, signed a letter addressed to S. B. Ormsby, Forest Superintendent, Salem, Or., in which the writer said:

"I inclose herewith copies of a letter from Hon. J. H. Mitchell, U. S. Senate, and petitions numerously signed by residents of Malheur and Harney counties, Oregon, praying for the early establishment of a forest reserve, in Oregon, to cover a continuous area in Grant, Malheur and Harney counties, designated as follows: [Then follows the description of the lands as in Senator Mitchell's letter.] I also inclose copy of a letter from Hon. Geo. W. McBride, dated at Portland, Oregon, July 29, 1900, protesting against the inclusion at any time within any reserve of townships 13 South, ranges 32, 33, 34, and 35 East, W. M., Oregon, and copy of similar protest presented by the Hon. Joseph Simon with his letters of July 30, 1900, dated at Portland, Oregon. It is desired that you make thorough examination and report in this matter at the earliest practicable date, with a view to determining as to the advisability of reserving the designated area, as requested by petitioners. Also report regarding present owners and settlers. Particular attention should be given, in your examination, to the advisable boundaries of the proposed reserve, and you are directed to make your report specific in this respect. You will give careful consideration to said protests if it be found that the four townships described therein are within the general area desired to be reserved. Advise

this office what is the earliest practicable date, in view of the other duties incumbent upon you, at which report in this matter may be made."

3. It was further charged as an overt act that the defendant Franklin P. Mays, during the month of March, in the year 1902, unlawfully conveyed and transferred to Salmon B. Ormsby, Forest Superintendent of the United States, detailed to investigate and report to the said Binger Hermann, commissioner as aforesaid, concerning the advisability of creating the forest reserve, and the limits thereof, two sections of the school lands which had so been fraudulently obtained from the state of Oregon, and this to induce the said Ormsby to make a report in favor of establishing the said forest reserve in the state of Oregon in such manner as to include within its limits the several kinds of lands so fraudulently obtained and to be obtained from the United States and from the state of Oregon by the defendants.

4. It is further charged as an overt act that Franklin P. Mays on the 15th day of July, in the year 1902, at the city of Portland, addressed a letter to Binger Hermann, at Washington, in which the writer said:

"I inclose clipping from to-day's Oregonian. The section therein referred to is immediately adjoining the proposed Strawberry Mountain Reserve, and emphasizes my previous recommendation of the great necessity for promptly making a temporary withdrawal of the land within the boundaries of the proposed reserve."

The newspaper clipping referred to in the letter contains a news item from Baker City, dated July 14th, headed:

"Timber Land Rush in Baker.
"Railroad Talk Causes Many to Take Up Claims."

The item recites:

"Timber lands in this section are being taken up rapidly. It is estimated that along the line of the proposed railroad into the counties of Malheur and Harney, 20,000 to 25,000 acres of land, well covered with timber, have been located since the 1st of March. Along this same proposed railroad there are numerous mining locations, both quartz and placer, that are only awaiting the advent of some means of cheap transportation so that the owners can proceed with their development. Some of the best prospects in Eastern Oregon are located in the heavily timbered country, or near it, and as lumber and ore will furnish freight for a railroad, there is every inducement to build the proposed line."

5. It is further charged as an overt act that the defendant John N. Williamson, on the 23d day of September, in the year 1902, addressed a letter to Binger Hermann at Washington. This letter recites at some length the reasons for the establishment of the proposed Blue Mountain Forest Reserve, and suggests a boundary for the proposed withdrawal in the southern part of Wallowa county. This letter also contained a newspaper clipping concerning matters relating to the land and the proposed reserve.

This indictment was presented and filed in court on the 13th day of February, 1905. The names of the witnesses who had appeared before the grand jury were indorsed upon the indictment, among others, the name of Salmon B. Ormsby, described in the indictment as a forest superintendent, to whom Binger Hermann addressed a letter

calling for an examination and report concerning the advisability of reserving the proposed area, and also the person to whom the defendant Mays conveyed two sections of school lands to induce the said Ormsby to make a report in favor of establishing the said forest reserve. Upon this indictment the defendant Jones was arraigned. On April 17, 1905, he filed a plea in abatement. The plea sets up, among other things, that George Giustin, impaneled and sworn as a member of the grand jury, and who had voted with the other grand jurors upon the filing of the indictment against the defendant, was not and never had been a citizen of the United States, and that Frank Bolter and Joseph Esner who were also impaneled and sworn as members of the grand jury, and who had acted with the other grand jurors in voting upon said indictment, were not taxpayers in the county in which they resided or in any county in the state of Oregon, nor was either of them upon the preceding assessment roll of any county in the state at the time they were impaneled as grand jurors, of which facts the defendant had no knowledge until after the filing of the indictment. A similar plea in abatement having been filed on behalf of the defendant Mitchell in another case, it was, on April 25, 1905, before Hon. Charles B. Bellinger, United States District Judge for the district of Oregon presiding in the Circuit Court, stipulated that the same objections which had been filed by the United States Attorney to the pleas in abatement in that case should be deemed and treated as filed in this case, and that the affidavit of Georgio Giustinianovich and a certified copy of the decree of the county court of the state of Oregon for Clatsop county be deemed and treated as offered in support of the objection to the plea in this case, and that the same proceedings, objections, exceptions, rulings, and decrees be deemed, considered, and treated as having occurred upon the hearing of the plea in abatement in this case. The court thereupon held that the plea challenging the qualifications of Bolter and Esner to serve as grand jurors was insufficient, and the same should be disallowed and dismissed, and that the plea alleging that Giustin was not a citizen of the United States should be tried by the court without a jury upon its merits, and the United States Attorney be permitted to file affidavits by himself and by Georgio Giustinianovich, and a certified copy of the decree of the county court of the state of Oregon for the county of Clatsop. The defendant was also permitted to file counter affidavits or produce oral testimony upon the issue raised by the plea; but this the defendant declined to do, on the ground that he was entitled to have the issue tried, if at all, by a jury. Thereupon the court found and decreed that said George Giustin was a citizen of the United States, and ordered and decreed that the plea in abatement denying his citizenship be disallowed. To this finding, order and decree the defendant objected and excepted. On July 28, 1906, before Hon. William H. Hunt, United States District Judge for the district of Montana presiding in the Circuit Court, the attorney for the United States moved for a severance of the defendants, and that the trial of the defendants Hermann and Williamson be continued for the term. The motion was granted. The defendant Jones thereupon demurred

to the indictment, and on August 20, 1906. the demurrer was overruled, and thereupon, upon motion of attorney for the United States, it was ordered that defendant's plea in abatement be tried by the jury to be impaneled for the trial of the cause upon its merits. To this order the defendant objected on the ground that the plea in abatement had already been tried and determined by the court, and that said decision had not been set aside or reversed. The objection as stated in the bill of exceptions is as follows:

"Whereupon counsel for defendants Willard N. Jones and George Sorenson each severally objected to the submission of said plea in abatement to said jury or the trial thereof by said jury or any jury."

The defendants Mays, Jones, and Sorenson being arraigned upon the indictment, pleaded not guilty. The trial of the charge of conspiracy as alleged in the indictment against these three defendants was then proceeded with, and on September 13, 1906, the jury returned a verdict of guilty against the three defendants. In submitting the case to the jury the court also submitted the issue raised by the defendant's plea in abatement. This the court did in the following language:

"Before proceeding to the consideration of the question of the guilt or innocence of the defendants under the indictment, I will remind you that there is an issue in the case raised as to the citizenship of George Giustin, who was a member of the grand jury, under the name of George Giustin, which preferred the indictment under which these defendants are on trial. The question is, was or was not George Giustin a citizen of the United States at the time he served as a grand juror? His naturalization papers show that he was admitted as a citizen at Astoria, Oregon, April 4, 1881, and that he received his papers as Georgio Giustinianovich which he says was his name in Austria, the country where he came from. He has testified that, for reasons of convenience, he dropped this name, and for many years in Portland has gone under the name of George Giustin. As the naturalization papers offered by him appear to be regular under the law, I charge you that if you are satisfied beyond a reasonable doubt that he is the same man who was naturalized as Georgio Giustinianovich, you should find upon this issue in favor of the United States."

Under this instruction the jury returned a verdict for the United States upon the issue of the citizenship of George Giustin, as follows:

"We, the jury in the above-entitled cause, find for the United States upon the issue of citizenship of George Giustin."

It is assigned as error that the court erred in submitting to the jury impaneled to try the cause defendant's plea in abatement, and in receiving proof by the United States upon the issue tendered by said plea; the said plea having theretofore by the court been overruled.

The objection to the two jurors concerning whom it was alleged in the plea in abatement that they were not taxpayers in the state of Oregon and not upon the preceding assessment roll of any county in the state appears to have been abandoned by the plaintiff in error as the question has not been preserved in the bill of exceptions or in the assignments of error. The remaining objection presented by the plea in abatement that George Giustin was not a citizen of the United States was first decided by Judge Bellinger adversely to the objection. When the case was reached for trial more than a year later by Judge Hunt of Montana, assigned to the district of Oregon to hold the Cir-

cuit Court, the attorney for the United States requested the court to submit this question to the jury together with the proof relating to the naturalization and citizenship of the juror. The objection was then made that this question should not be submitted to the jury to be impaneled to try the case or to any jury for the reason that the plea had already been overruled by the court. The court overruled this objection, and the question was submitted to the jury as a question of fact. We see no error in this proceeding as presented by the record before us. The question of the naturalization and citizenship of the juror appears to have been first presented to the court upon a certified copy of decree of court, and presumably was considered and determined by the court as a question of law. It subsequently appearing that there remained to be determined the question of fact involved in the identity of the name of the juror and the person naturalized, the question of fact was properly submitted to the jury for determination. The objection now urged that this question should have been submitted to another jury, and not to the jury impaneled to try the case should have been presented to the court below, and not the objection that it should not be submitted to that jury or to any jury. Had the matter been presented there as it has been here doubtless the issue would have been submitted by the court to another jury for determination; but as this was not done the objection as now made comes too late. Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938.

In an action at law this court is limited to the correction of the errors of the court below. Questions which were not presented to or decided by that court are not open for review here because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. St. Louis S. W. Ry. Co. v. Henson, 58 Fed. 531, 532, 7 C. C. A. 349; Board of Com. of Lake County v. Sutliff, 97 Fed. 270, 275, 38 C. C. A. 167; Mayor of the City of Helena v. United States, 104 Fed. 113, 115, 43 C. C. A. 429; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 140, 52 C. C. A. 95; City of Pittsburgh v. Jonathan Clark & Sons Co., 154 Fed. 464, 467, 83 C. C. A. 262; Dahl v. Montana Copper Co., 132 U. S. 264, 267, 10 Sup. Ct. 97, 33 L. Ed. 325; Morrison v. Watson, 154 U. S. 111, 115, 14 Sup. Ct. 995, 38 L. Ed. 927; Trust Co. v. Hensey, 205 U. S. 298, 306, 27 Sup. Ct. 535, 51 L. Ed. 811. In Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19 (47 L. Ed. 65), the province of the appellate court is stated in the following language:

"While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases de novo."

An exception to this limitation has been admitted in criminal cases where, if a plain error has been committed by the trial court absolutely vital to defendant's case, the court will feel itself at liberty to correct it, although not presented in the record by proper objections and exceptions. Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207,

221, 25 Sup. Ct. 429, 49 L. Ed. 726. But we do not find that it was a plain error vital to the defendant's case that the question of the citizenship of a grand juror who participated in finding the indictment should have been determined by a jury other than the one that tried the case upon its merits. The evidence of the naturalization and citizenship of the juror appears to have been full and complete, and no evidence was offered on the part of the defendant to the contrary. It was practically an admitted fact. The submission of the question of identity to the jury was therefore presumably out of abundant caution. We know of no reason why such a proceeding should be held to be error.

It is next contended that the allegation in the indictment that the defendants conspired "with divers other persons to the said grand jurors unknown" was a material averment, and that if it appeared that such other persons were known to the grand jury the court should have instructed the jury as requested to acquit the defendants. This alleged error is based upon the fact that one Salmon B. Ormsby, who was a witness before the grand jury that found the indictment, and who was also a witness on behalf of the United States upon the trial of the cause, in the course of his testimony stated facts and circumstances which it is conceded tended to show that he himself was a co-conspirator. The defendants offered to prove that he testified to the same facts before the grand jury that he did on the witness stand. Furthermore it was admitted by the attorney for the United States that Ormsby was a co-conspirator, and that his name had been left out of the indictment that he might be used as a witness upon the trial. The charge in the indictment is based upon section 5440 of the Revised Statutes which provided:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

In Bannon and Mulkey v. United States, 156 U. S. 464, 468, 15 Sup. Ct. 467, 469 (39 L. Ed. 494), the Supreme Court in referring to this statute said:

"At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. (Citing cases.) But this general form of indictment has not met with the approval of the courts in this country, and in most of the states an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved."

Aside from this statutory requirement the rule is that an indictment for conspiracy, like any other indictment, is sufficient if the facts stated fairly and reasonably inform the accused of the offense with which he is charged. Lanasa v. State, 109 Md. 602, 608, 71 Atl. 1058.

In Cochran and Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704), the Supreme Court, discussing the sufficiency of indictments, said:

"The true test is, not whether it might possibly 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."

Under this rule the indictment in this case is not only sufficient in general terms, but it is technically sufficient, for it apprises the defendant of the precise charge he is called upon to answer. It is true that Ormsby is not named as a defendant or charged as a co-conspirator, but what is of more importance to the accused in preparing his defense, the indictment informs him precisely what relation Ormsby had to the conspiracy. In two of the overt acts charged in the indictment Ormsby's connection with the conspiracy is fully and correctly stated. In the second overt act charged it is alleged that Binger Hermann, as Commissioner of the General Land Office, called upon Ormsby, as Forest Superintendent in Oregon, by letter requesting a report as to the advisability of making the proposed forest reserve. In the third overt act charged it is alleged that the defendant Mays bribed Ormsby to report in favor of establishing the reserve. An indictment of this character is to be commended rather than criticised. It answers fully the technical requirements of good pleading. To have charged Ormsby as a co-conspirator would undoubtedly have been sufficient, but it would have left the defendant uninformed as to the particular acts Ormsby was charged to have committed as a party to the conspiracy.

But what was the effect of the omission of Ormsby's name as a defendant from the indictment in view of the admission of the attorney for the United States that Ormsby was a conspirator and assuming that it was intended to include him in the allegation of the indictment as a person to the grand jurors unknown? Was it a fatal variance in the indictment that Ormsby was described as a person to the grand jurors unknown, when it appeared from the evidence that he was known? Plaintiff in error contends that it was, and cites Wharton on Criminal Evidence in support of this position. Section 97 of that work states the rule as follows:

"When a third person is described as 'a person to the grand jurors unknown,' and it turns out that he was known to the grand jurors, the variance is fatal."

In 10 Encyc. of Pl. & Pr., pp. 505–6, the rule is stated as follows:

"In many offenses the names of third persons necessarily enter for the identification as well as material description of the offense, and, under the rule in criminal pleading requiring such certainty as will notify the defendant of the nature of the charge against him, the names of such third persons should be alleged, and the defendant cannot be convicted if the names are so erroneously stated as to fail to identify the offense, though certainty to a common intent is generally sufficient. * * * If the name is unknown, that fact may be so stated. * * * But such a statement is only permissible where the names are in fact unknown, and, if that allegation be shown to be untrue, the defendant will be entitled to an acquittal."

A number of cases are cited in support of this rule, but they are cases where the name of the third person, if known, was essential to

the material description of the offense, as where the third person was either the victim of, or the principal actor in, the criminal act, and it was only when the name of such third person was unknown and could not be ascertained that the grand jury was permitted to so charge and the indictment would be held sufficient. Such cases were murder of an unknown person, adultery with an unknown woman, assaults upon an unknown person, receiving bribes from an unknown person, or receiving stolen goods from unknown persons, selling liquors to unknown persons, failing to provide slaves, whose names were unknown, with food, and similar cases where the name of the third person involved was a necessary part of the identification and a material description of the offense, and generally could be ascertained if knowledge of the offense itself could be obtained. But none of the cases cited charge the crime of conspiracy. In such a case we think the correct rule was declared in the leading case of People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, which was a case of conspiracy, and where it was held by the Supreme Court of New York that an indictment charging that the defendant with divers persons unknown to the jurors, conspired, combined, etc., was sufficient, notwithstanding that some of the conspirators described as unknown were in fact known to the grand jury. The same rule was followed in the recent case of People v. Smith, 239 Ill. 91, 107, 87 N. E. 885, 891, 892, where it was charged in the indictment that certain named defendants conspired and confederated together, "with divers other persons whose names were unknown," to obtain money and other property by false pretenses. It appeared upon the trial that a certain other person was known to the grand jury as a conspirator, and it was contended that he should have been specifically named in the indictment, and not referred to in the general description that he was unknown to the grand jury. It was held by the Supreme Court of Illinois that the fact that a conspirator was designated as unknown when the proof was that he was known to the grand jury was not fatal to the conviction of the others. The court in its opinion said:

"It is also said that the parties to the conspiracy are improperly described in the indictment; it being urged that Robert H. Howe was in the conspiracy, and that, as that fact was known to the grand jury, he should have been specifically named in the indictment and not been referred to under the general description that he was unknown to the grand jury. This phase of the argument proceeds upon the hypothesis that the persons who enter into a conspiracy so form a part of the offense as to be descriptive of the offense, and that a misdescription of the parties who are engaged in a conspiracy is fatal. The logic of this position is, if too many or too few are named in the indictment, there must be an acquittal of all. This cannot be the law. Clearly, if three persons are named in an indictment as conspirators, two may be convicted and one acquitted, and, if two or more are named in the indictment, it would be no defense to prove that some one not named in the indictment was a party to the conspiracy. We are satisfied the great weight of authority is to the effect that the persons engaged in a conspiracy are not so far a part of the offense as to be said to be descriptive of the offense, and the fact that a conspirator is designated in the indictment as unknown, when he is known, to the grand jury, is not fatal to a conviction."

We think these cases state the rule correctly where the charge is one of conspiracy. But we prefer to place our decision in the present

case on the ground that there was no variance between the proofs and the allegations of the indictment. The name of Ormsby and his connection with the case was known to the grand jury, and he and his acts were properly described in the indictment.

It is objected by plaintiff in error that there was no evidence tending to show that Hermann, one of the defendants, was a member of the conspiracy, and it is claimed that it was therefore error to submit to the jury the letter of Hermann's to Ormsby charged in the indictment as an overt act; the letter itself not being evidence of a conspiracy. The plaintiff in error refers to certain other official letters written by Mr. Hermann in the course of official business as Commissioner of the General Land Office concerning the proposed Blue Mountain Forest Reserve, and the testimony of one Callahan concerning the conversation he had with Mr. Hermann in his office in Washington about November 10, 1902, upon the same subject. Plaintiff in error says "that the testimony of Mr. Callahan was that he talked with Mr. Hermann about the proposed Blue Mountain Forest Reserve, and that he suggested the school lands should not be included; that Mr. Hermann urged that the school lands should be included as it would benefit the people of the state of Oregon in the sale of the school lands; that Mr. Hermann knew that the school lands had been taken by individuals, but said to let it go; that it would be citizens of Oregon who would be beneficiaries as well as the state." It is claimed by plaintiff in error that with the official letters referred to this was all the evidence against Mr. Hermann, and that it did not tend to show that he was involved in the conspiracy. We do not think that this evidence should be laid aside as entirely colorless and without significance in showing Hermann's relation to the conspiracy, particularly in view of other testimony we find in the record. The testimony of the witness Callahan appears to be more significant than the brief summary made by the plaintiff in error would indicate. The witness says that in the conversation with Mr. Hermann, the latter referring to the fact that the school lands in the proposed reserve were in the hands of individuals and the witness had urged that that land should be eliminated, said to witness:

"Callahan, why bother about it? It don't amount to very much; it only amounts to about 200,000 acres, and it is citizens of Oregon that will be beneficiaries in the matter as well as the state"

—and then Hermann went on to name several citizens that were interested in the matter. He (the witness) did not know all of them at the time. Hermann named among others Mr. O'Dell and Mr. Mays, and some two or three other persons whose names the witness could not recall.

Here was testimony to the effect that Hermann favored the proposed reserve; that he knew the quantity of school lands within its proposed boundaries; that these lands were in the hands of individuals, and that citizens of Oregon, including the defendant Mays, were to be the beneficiaries in having such lands included in the reservation. From such testimony the jury had the right to infer that Hermann had something more than an official interest in establishing a reserve

which would include 200,000 acres of school lands for which lands of much greater value could be selected outside of the reservation by the individuals who had obtained the school lands in anticipation of the reserve being made.

We are also of opinion that the testimony of the witness S. A. D. Puter tends to connect Mr. Hermann with the conspiracy. His testimony cannot be reduced to a brief enough form to be incorporated in this opinion, but it is sufficient to say that he was familiar with the fraudulent character of some of the lieu land selections in Oregon, having been engaged in that business himself and he knew something of the work of the defendant Mays in having the Blue Mountain Forest Reserve established. The witness testified that in a conversation with the defendant Mays he said to him:

"'Mays, how about this forest reserve that you are creating?' He says: 'What do you want to know about it?' I said: 'You recollect some time ago in conversation with me on the street you told me you wanted me to raise ten or fifteen hundred to help pay your expenses to Washington City; that you expected to apply for something big, and I would be in on it.' I said, 'I have just heard you bought some twenty or thirty thousand acres of school lands, and is this the way you let a fellow in?' And Mr. Mays said that he thought I had all the irons I could attend to then in the fire."

This witness also testified that in April, 1902, he went East from Portland with Mr. Mays, and had a conversation with him in relation to the Blue Mountain Reserve. "I asked Mr. Mays," says the witness, "what big thing he expected to 'pull off' while in Washington City, that he spoke to me about some several weeks before. He said he had several propositions in view; the principal one was the creation of a timber reserve. I asked him where he expected to create a timber reserve, and he said in the Blue Mountains, and I then said: 'Don't you think you will have a good deal of opposition from that?' He said: 'Not at all. I don't expect any.' He says: 'You know I have a good deal of influence in Washington now. Senator Mitchell is there to help me out, and you know how Binger Hermann stands in, and I don't anticipate any trouble about creating the reserve.' And then I spoke to him about what he thought of annexing a few townships on the west side of the reserve. He thought it was a pretty good plan if we could get any scrip land."

We think this testimony tended to show that Hermann was involved in the conspiracy to establish this reserve for the benefit of individuals, including the defendants.

It was objected that there was no evidence tending to show that Mitchell, one of the defendants, was a member of the conspiracy, and it is claimed that it was, therefore, error to submit to the jury the letter of Mitchell to Hermann, charged in the indictment as an overt act; the letter itself, like the letter of Hermann to Ormsby, not being evidence of a conspiracy. Mitchell was at that time United States Senator from Oregon. The testimony against him is of a similar character as that against Hermann. It consists of a letter signed by Mitchell and addressed to Hermann, informing him that he had forwarded to the Secretary of the Interior petitions numerously signed praying for the establishment of a forest reserve in Oregon. This

letter is charged as an overt act in the indictment. There was also introduced in evidence a letter signed by Mitchell addressed to the Secretary of the Interior, transmitting petitions for the establishment of the forest reserve in Oregon, and the stenographic notes of letters dictated by Mitchell and taken down by his private secretary and written out by typewriter, signed and mailed to the parties to whom they were addressed. These letters referred to the proposed forest reserve; but it is said that they were such letters as any senator might write to his constituents with relation to matters before the department, and do not show that he was involved in the conspiracy. Read in the light of the other testimony in the case this explanation is not satisfactory. The evidence is full and complete that the defendants Mays and Jones conspired together to secure the establishment of the Blue Mountain Forest Reserve; that when they were assured that such action would be taken by the Land Department of the government they would acquire the state title to the school lands within the proposed reserve, and after the reserve had been established they would have the right to select lands outside of the reserve in lieu of these school lands within the reserve. It appears that they could obtain the title to the school lands from the state for $1.25 per acre; that after the establishment of the reserve the right to make selections outside of the reserve in lieu of the school lands within the reserve would be worth from $3.50 to $4.50 per acre. It was for the purpose of obtaining this profit of from $2.25 to $3.25 per acre that the conspiracy was formed and promoted. Among the stenographic notes of letters introduced in evidence was one from Senator Mitchell dated June 15, 1902, and addressed to George H. Cattanach, attorney at law, Canyon City, Or., from which it appears that Cattanach had objected to the proposed reserve. To this letter of objection Senator Mitchell replies informing Cattanach that an application had been filed for the establishment of such a reserve, and that the application had been referred to a special agent for investigation and report, and his impression was that it had been referred to S. B. Ormsby, Superintendent of Forest Reserves in Oregon. The letter says:

"I note your objections and will see to it that they are brought to the attention of the proper department, and will see to it that all parties have full opportunity to be heard."

On the same day Senator Mitchell sent a letter to the defendant Mays at Portland, Or., as follows:

"I beg to hand you the inclosed letter from friend Cattanach in strict confidence, in order that you may know just what some people are thinking about in his end of the state in regard to the proposed reserve. Please return to me after having read. I simply want you to know what is being done. I inclose you a copy of my answer, which of course is the only thing I could do. I don't know whether any report had been made yet or not. I thought if you had knowledge of this move it might be of benefit to you. But under no circumstances permit it to be known by any one that I have shown you this letter."

It is evident that this letter contained important information for the conspirators. If there was opposition to the establishment of the reserve it was vital to the scheme that they should be informed at once

so that they could meet, and, if possible, overcome it. Senator Mitchell promptly furnished this information to one of the conspirators in strict confidence, thinking, as he said, that the knowledge of this move might be of benefit to him. The sending of such a letter was something more than the service that a senator is ordinarily called upon or expected to render to a constituent, and the jury was clearly entitled to give it such consideration in that respect as all the surrounding circumstances seemed to warrant. The indictment charged that 20,000 acres of poor timber lands lying in the county of Crook was to be fraudulently obtained by the defendant Williamson from the United States by persons who would be acting as his agents, and who would not be in good faith purchasing the same for their own use and benefit. This land, like the school land, was to be within the boundary of the Blue Mountain Forest Reserve and after its establishment the land would be exchanged under the law for land outside the reserve. In connection with this charge the last overt act alleged in the indictment was the sending of a letter of John N. Williamson from The Dalles, Or., to Binger Hermann at Washington recommending the creation of the Blue Mountain Forest Reserve with certain described boundaries and the reasons why the reserve should be established: This letter was introduced in evidence together with the answer of Binger Hermann declining to include certain areas described in the Williamson letter in addition to the previous temporary withdrawal, but stating that the reasons favoring the reservation of the general areas would be of value in the pending consideration of the proposed reserves. Upon the trial the government offered no proof tending to show the acquisition of any such timber lands as alleged in the indictment relating to these lands, and the charge was withdrawn from the consideration of the jury, and the jury instructed to disregard the averment of the indictment relating to such lands.

The indictment also charged that 30,000 acres of other school lands had theretofore been fraudulently obtained by the defendants from the state of Oregon by the same fraudulent means as had been described, and these lands were to be exchanged for public lands outside the reservation. The court instructed the jury, with respect to the evidence in support of this charge, that the defendants could not be convicted with any fraud connected with the alleged acquisition of the 30,000 acres which might have been acquired by the defendants or any of them prior to February 27, 1901; but instructed the jury that the testimony concerning the acquisition of these 30,000 acres had been and was relevant as bearing upon the question of the intent and knowledge or design of the defendants against whom such evidence had been offered, in the acquisition of other school lands, which the testimony goes to show were acquired in 1902. The court informed the jury that the defendant Mitchell was dead; and that Hermann and Williamson were not on trial; and that the only verdict the jury was called upon to render was whether the defendants Mays, Jones, and Sorenson, or any of them, were guilty or not guilty of the conspiracy charged in the indictment. The question of the guilt or innocence of Williamson on this indictment was therefore not before the

jury. It is nevertheless contended that the court was in error in refusing to give the following instruction requested by the plaintiff in error:

"If the jury believe from the evidence that the defendant Williamson was in a conspiracy, such as is described in the indictment, with Boggs or other persons not mentioned in the indictment, and that the defendants Mays, Jones, and Sorenson, or any of them, either with one another or other persons not mentioned in the indictment were in a conspiracy, but that there was no common understanding or agreement between the two groups, but that each group was acting for itself and independent of the other, then you must find the defendant not guilty."

That the court was correct in refusing this instruction was obvious. The government was not required to establish every allegation contained in the indictment. It was not required to prove that all the overt acts alleged were committed, nor was it required to prove that all the defendants named in the indictment were engaged in the conspiracy. It was sufficient to constitute the conspiracy charged in the indictment to show that there was a combination of two or more persons to defraud the United States and that one or more of such parties did an act to effect the object of the conspiracy charged. If the evidence tended to show that Williamson and others were engaged in a separate and distinct conspiracy as the plaintiff in error seems to contend, the indictment remained good as against those charged with the conspiracy alleged in the indictment, and the defendants were not prejudiced by the fact that the evidence relating to another conspiracy was not proven and not submitted to the consideration of the jury.

The witness S. B. Ormsby was asked by the attorney for the United States the following question:

"Captain, before you went up on May 5, 1902, to look over this land, did you inform your son you had received this letter of instructions of March 11, 1902?"

—referring to the letter of Binger Hermann as Commissioner of the General Land Office to S. B. Ormsby as Forest Superintendent requesting an examination and report as to the advisability of making the proposed reserve. It was objected to this testimony that it was incompetent, immaterial, and irrelevant, as the declaration of a supposed conspirator. The objection was overruled, and the witness answered, "No"; but subsequently corrected his testimony by saying that he returned from the Dalles about March 22, 1902, and a day or two after he had a conversation with his son at Salem; no one else was present. His son said that he had heard there was going to be a reserve established, or there was a movement made to establish a reserve in Eastern Oregon. The witness said to his son, "Yes, there is going to be." It was objected that this testimony was immaterial and irrelevant, and called for the declaration of a supposed conspirator. The objection was overruled and an exception allowed. It is contended that this conversation between the witness and his son in the absence of the defendant Jones was immaterial and irrelevant, and assuming that Ormsby was a conspirator, as the evidence on the part of the prosecution tended to show, it is contended by the plaintiff in error that it was not admissible, for the reason that acts and declara-

tions of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy which did not appear to be the fact with respect to this statement. The rule to which reference is here made is a rule that has been stated in relation to the time when the declaration is made or act done. It must be a declaration made or act done during the pendency of the conspiracy to be admitted in evidence. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator by way of narrative of past facts is not admissible in evidence as against the others. This rule as stated in Greenleaf on Evidence (16th Ed.) § 184a (111), is as follows:

"The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is therefore original evidence against each of them. * * * But * * * care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects."

Are we to understand that this last clause of the rule qualifies the rule as first stated, requiring that the declaration to be admitted in evidence must, like the act, have been in furtherance of the object of the conspiracy? If so, then an admission or statement not in furtherance of the object of the conspiracy would not be admissible although part of the res gestæ.

In Logan v. United States, 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429, and in Brown v. United States, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010, the rule was thus stated as excluding the admissions made by a co-conspirator after the conspiracy had ended, but for no other purpose. The admissions having been made after the conspiracy had come to an end, they were not admissible as part of the res gestæ; but in the present case the statement was made while the conspiracy was in progress, related to the object of the conspiracy, and was therefore part of the res gestæ.

In United States v. Gooding, 12 Wheat. 460, 469, 6 L. Ed. 693, the declarations of a master of a vessel engaged in the slave trade relating to the object of a voyage then in progress were admitted in evidence against the owner as part of the res gestæ.

In American Fur Co. v. United States, 2 Pet. 358, 364, 7 L. Ed. 450, the Supreme Court stated the rule as follows:

"Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the rest gestæ, may be given in evidence."

In Nudd v. Burrows, 91 U. S. 426, 438, 23 L. Ed. 286, it was held that the declaration of a bankrupt made at and prior to the payment of money to a creditor pursuant to a conspiracy to give the creditor a fraudulent preference was admissible in evidence as part of the res gestæ, although made in the absence and without the knowledge of the creditor.

In St. Clair v. United States, 154 U. S. 134, 149, 14 Sup. Ct. 1002, 1008 (38 L. Ed. 936), the defendant with others was charged with the

crime of murder on board an American vessel. The acts, appearance, and declarations of two of the conspirators relating to the crime were admitted in evidence against the defendant as part of the res gestæ. The court, in discussing the exception taken to the admission of this testimony, said:

"The acts, appearances, and declarations of either, if part of the res gestæ, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence. 'These surrounding circumstances constituting part of the res gestæ,' Greenleaf says, 'may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.' 1 Greenleaf (12th Ed.) § 108. See, also, 1 Bishop's Cr. Pro. §§ 1083–1086. 'The res gestæ,' Wharton said, 'may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand on immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.'"

In Wiborg v. United States, 163 U. S. 632, 657, 16 Sup. Ct. 1127, 1137 (41 L. Ed. 289), the indictment charged certain persons with a violation of the neutrality laws in setting on foot, providing and preparing the means for a military expedition against the territory of a foreign prince with whom the United States was at peace. One of the questions in the case was as to the destination of the expedition, and as evidence of this fact declarations of members of the party during the voyage as to their purposes were introduced in evidence. The testimony was held admissible under the rule stated in American Fur Co. v. United States, supra. To this rule the court added this:

"The declaration must be made in furtherance of the common object, or must constitute a part of the res gestæ of acts done in such furtherance."

Under the rule as thus stated there can be no question but that the testimony of Ormsby as to the statement he made to his son while the conspiracy was in progress, that a reserve would be established, was part of the res gestæ, and was properly admitted in evidence.

There was testimony tending to show that one H. A. Smith was a member of the conspiracy described in the indictment. He died on the 18th of May, 1902, and as the indictment was not filed until February 13, 1905, he was not named as a defendant. Smith left a will in which the plaintiff in error and one E. F. Flegel were named as

executors. The executors qualified and took possession of the estate of the deceased. Flegel was called as a witness on behalf of the United States, and as part of his testimony the United States offered in evidence a certified copy of an inventory of the Smith estate. The inventory contained amongst other things an appraisement of a one-third interest in certain lands represented by school certificates, covering about 25,000 acres in the proposed Blue Mountain Reserve. The certificates were held by F. P. Mays as collateral security for moneys advanced by him to decedent. The interest of the deceased in these certificates was appraised at $9,000. The plaintiff in error had told the witness that the interest of decedent in the land was as represented in the inventory, and the witness had prepared the inventory from information supplied by the plaintiff in error. The witness had talked with Mays about it and arranged with Mays for the sale of Smith's interest in the property. Mays consented to the arrangement. It was necessary to sell some of the property in the estate to pay the debts, amongst others, the debt due to Mays. When he sold Smith's interest it was necessary to segregate it. It was preferable to sell the land in a different method from an ordinary executor's sale, and the Smith heirs consented to the segregation of the interest. The agreement was that out of the whole acreage a certain portion of it should be deducted to cover expenses of the transaction. There were six sections deducted from the whole 25,000 acres, and one-third of the balance was set aside from the Smith estate to be sold and was sold. The plaintiff in error conducted the sale which was made about November 13, 1902. The sale was made for over $10,000, and the money was received and placed to the credit of the executors. The witness said that all of the land was within the limits of the proposed forest reserve; that plaintiff in error had said nothing specific at all concerning the amount and character of the expenses which had been incurred in acquiring the 25,000 acres; that the sections taken out of the 25,000 acres were, as the witness understood, for the future expense of getting the title. The number of acres sold was 6,720 acres. The witness identified a paper as the objections on the part of B. F. Smith to the final account of the executors on account of the sale of the school-land certificates, but testified that he never saw the paper before, the paper having been filed on June 23, 1905. B. F. Smith was a son of the deceased. The plaintiff in error objected to this paper on the ground that it was incompetent, immaterial, and irrelevant. The objection was overruled; to which ruling the plaintiff in error excepted. This paper was an objection by B. F. Smith to the final account reciting that the inventory showed a one-third interest in about 25,000 acres of school land; that the executors had sold 6,780 acres; that the land was worth $5 per acre in open market; that the interest of Smith in the land was worth in the open market $41,666.65; that the executors had accounted for $7,660.80; that they should be charged with the real value of the land. B. F. Smith was subsequently called as a witness on behalf of the United States, and testified that he had made the objections referred to in the writing; that he had not consented to the sale of the land or the segregation of the said sections

for expenses. The admission of this testimony concerning the objection to the final account is assigned as error.

The objection is that it tended to show that the plaintiff in error had been guilty of a breach of trust, or had not properly performed his duties as executor of the estate of H. A. Smith, deceased. There is nothing in the record indicating that the testimony was introduced for any such purpose, nor does it appear that it was ever suggested that it had any such aspect. When it was offered it was stated by the counsel for the prosecution that the document setting forth the objection to the final account was not offered as evidence of the truth of the recital, but simply to show that the objection was made. The witness Flegel testified that the objection was never urged; that the lands were sold under the order of the county court, the final account of the executors was approved, and the estate distributed. It appears further from the testimony of the witness that B. F. Smith did not appear in court when the final account was settled. The objection was never served on the witness, and he had no knowledge of it until the morning he appeared on the stand; and no issue of fact raised by the objection was tried in settling the account. It appears from the testimony that in settling up the partnership interest in these school-land certificates between Mays, the deceased, and the plaintiff in error, six sections were deducted from the whole lot of certificates representing about 25,000 acres for the purpose of paying certain expenses incurred in acquiring the land. The effort of the prosecution was to ascertain what these expenses were, and to bring out this fact the objection to the deduction in the final account was called to the attention of the witness. Two sections had been given to Ormsby for his services in creating the reserve, and the effort was to obtain from the witness information as to the use made of the other four sections. The effort does not appear to have been successful, but the quest was a proper procedure and we do not see how the fact that the testimony might tend to establish a breach of duty on the part of the plaintiff in error in some other relation rendered the evidence inadmissible in this case. In State v. Adams, 20 Kan. 311, 319, Mr. Justice Brewer, afterwards a Justice of the Supreme Court of the United States, said:

"Whatever testimony tends directly to show the defendant guilty of the crime charged is competent; though it also tends to show him guilty of another and distinct offense. A party cannot by multiplying crimes diminish the volume of competent testimony against him."

As stated by the Supreme Court in St. Clair v. United States, supra:

"Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence." See, also, Wigmore on Evidence, § 216.

S. A. D. Puter, a witness for the United States who had been indicted, tried, and convicted in 1904 for a conspiracy with certain named defendants to defraud the United States out of certain public lands, testified as to transactions he had with the defendant Mays and the

plaintiff in error in relation to public lands. This testimony tended to show that he had been engaged with them in various fraudulent transactions relating to public lands, and that after his conviction they had shown a disposition to abandon them, refusing to furnish him with a bail bond pending a motion for a new trial in his case. On cross-examination on behalf of the defendant Jones, the witness was asked:

"Q. Mr. Puter, you said you had quite a feeling against Mr. Mays? A. Yes, sir. * * * Q. You went to see him to see if he would not get bonds for you? A. Yes, sir; when I was in charge of the marshal. The marshal stood outside the door, and I went in and had a conversation with Mays of half an hour, and this is when he passed me up like a white chip, didn't know me—had nothing to do with me. I says, 'Mr. Mays, all you have to do—you don't have to be mixed up in it, you know hundreds of people in town; just give me the names and telephone them. I have got three parties now; all I want is another extra thousand dollars, and I want some consideration from you, Mr. Mays. You are in this deal with me—you are in all of my deals—and I don't want to be treated like this. All I want is justice to show your good faith with me.' He passed me up; wouldn't have anything to do with me. He was my attorney right up to three days before that. So I went out and telephoned home for the money and put up my bonds, and that is when I went out, and Mr. Jones came up to the hotel and spoke to me. Q. From the time he refused to furnish you bonds or to get anybody else to do so you resolved to get even? A. The conversation was enough after being twelve years partners in all kinds of schemes, and an attorney during that time; and when he saw that I was down, convicted, and out, and slandered, he concluded the only way he could do was to pass me up and have nothing to do with me. He was an attorney, state senator, well up in politics, and he could ride over and clear himself, and my word would not go. He showed that in his actions; actions, a good deal, speak louder than words. I think I had good reason then, and I have now, and all I regret now is that I was not mixed up in the Blue Mountain deal, so that I could tell a great deal more than I have already told. I have only told what I know. If I was in the deal, I would tell it all. Q. You are very sorry that you could not tell more? A. Yes, sir; I think I have good reason. Q. You said you were very angry at Mays and others. Does that include Jones? A. Yes, sir; I thought Jones, being a partner with me for two years in the biggest kind of a steal over here, and in with him and Mays, that he ought to come to my rescue. * * * *"

On redirect examination the attorney for the United States asked the witness the following question:

"Q. As to that question in regard to Jones, what was this steal that you referred to that you were in with Jones on?"

Counsel for the defendant asked:

"Q. I would like to know, Mr. Puter, what time this transaction you have just referred to occurred; how long ago? A. It was just about the second or the first day after I had given the bonds. Q. You do not understand me. You referred to being in a steal with Mr. Jones. A. Oh, that was during our partnership. Q. How long ago was that? A. That was during the time Gov. Pennoyer was Governor of the state for two years."

To which evidence and the whole thereof the defendant objected, and moved to strike out as incompetent, immaterial, and irrelevant, and as not relating to any transaction in this indictment and as incompetent against one defendant charged with conspiracy. The court ruled that the answer of the witness should stand, but the defendant could bring out what he meant by the use of the word "steal." The

defendant insisted upon his motion to strike out, which, being overruled, is assigned as error.

It is contended that the answer was not responsive to the question asked, and was thrown into the case by the witness to gratify his malice against the plaintiff in error. The purpose of the cross-examination was to discredit the witness before the jury on the ground that he was biased and prejudiced against the defendant, and the testimony did undoubtedly tend to show that fact. It tended to show further that he was actuated by a spirit of revenge against the defendants Mays and Jones in appearing as a witness for the prosecution, but that was precisely what the defendant was endeavoring to show by the cross-examination of the witness that his testimony might be discredited. The objection that the statement had reference to a steal committed many years before, and not related to any transaction alleged in the indictment, did not reach the real question before the court. It was not something that the prosecution was trying to prove. It was a reply to a question on cross-examination explaining why a friendship of long standing with the defendant Jones had been turned to anger. We see no error in the ruling of the court allowing the answer of the witness to stand.

There was introduced in evidence a letter of Binger Hermann, Commissioner of the General Land Office, dated July 22, 1902, addressed to the Secretary of the Interior recommending the creation of the Blue Mountain Forest Reserve and the temporary withdrawal of the lands proposed to be included within the reserve; also a letter of the Acting Secretary of the Interior dated July 24, 1902, addressed to the Commissioner of the General Land Office, directing the withdrawal of lands as recommended by the Commissioner of the General Land Office, and evidence that the withdrawal was given out and published in a paper in Portland, Or., a day in advance of the withdrawal. Evidence was also introduced tending to show that Binger Hermann resigned the office of Commissioner of the General Land Office in November or December, 1902, upon the request of the Secretary of the Interior, with the approval of the President; that the Secretary of the Interior informed the Commissioner that his administration of the affairs of the Land Office was unsatisfactory, and that the matters coming to his knowledge regarding certain maladministration were of such grave character as to render his continuation under him, a large bureau of the department, unsatisfactory; that he had submitted the matter to the President, and the President had authorized him (the Secretary) to request Mr. Hermann's resignation. It was objected to this testimony that it was incompetent, immaterial, and irrelevant, and not the best evidence, and was hearsay. The objection was overruled, and the testimony was admitted. The action of the court in admitting the testimony is assigned as error.

The indictment charged Binger Hermann as one of the conspirators in the scheme to defraud the United States out of lands in the creation of the Blue Mountain Forest Reserve. He was the official under whose administration of the General Land Office the scheme could be carried out if he was friendly, but which might fail if he was un-

friendly. The testimony tends to show that he was friendly and recommended the creation of the reserve and the withdrawal of the lands within its proposed boundaries for that purpose. It was important to those interested in securing the school lands within the proposed reserve that they should know in advance when the lands for the reserve were to be withdrawn and the boundaries of the reserve. This information could be obtained from the Commissioner of the General Land Office. Clerks in the Land Office were not permitted to give out news nor were reporters permitted to ask them for such information. The fact that the defendants Mays, Jones, Smith, and others purchased a large quantity of school lands within the proposed reserve upon the knowledge that the lands were to be within the boundaries tended to show that someone connected with the General Land Office had furnished the desired information. The evidence tended to show that the furnishing of this information in advance of the actual withdrawal was a violation of the rule of the Department of the Interior. Testimony was also introduced tending to show that Hermann's removal as Commissioner of the General Land Office was due to dissatisfaction on the part of the Secretary of the Interior because of the fact that Hermann did not give him certain information in regard to the creation of forest reserves, and that in July, 1902, the Secretary was watching the matter of the creation of forest reserves very closely. In this state of the evidence we do not think the court erred in admitting evidence tending to show that Mr. Hermann did not resign voluntarily, but because the Secretary of the Interior was dissatisfied with his administration of the office of Commissioner in failing to give the Secretary information in regard to the creation of forest reserves and that his resignation was requested by his superior.

W. Scott Smith, a witness for the United States, was the private secretary to the Secretary of the Interior. He testified as to the business methods and procedure of the land divisions of the Interior Department. He was asked on cross-examination as to the number of clerks employed in these various divisions. His reply was that in the forest division there were 30 or 40; in the law division, 12 or 15; in the lands and railroad division, 10 or 12; and in the geological department, several hundred. He was asked if these various clerks were not importuned by reporters to get anything they could in the way of public news, to which the witness replied, "Not if it was known." He further answered that they were not permitted to give out news, nor were they permitted to ask for it. The object of this cross-examination was obviously for the purpose of showing that, when the creation of a forest reserve was contemplated by the department, information of this fact could be obtained in advance from the clerks of the department as well as from the Commissioner of the General Land Office. At this state of the examination the attorney for the United States said to the witness:

"They (referring to the clerks) might be bribed? You have known of them being bribed by Hyde and Benson, haven't you?"

The witness answered:

"Yes. Q. In order to get these very things? A. Yes, sir. Q. In regard to giving our forest reserves? A. Yes, sir."

The defendants objected to this testimony, and moved to strike out the questions and answers on the ground that the evidence was incompetent and immaterial, not the best evidence, and hearsay. We think the questions and answers were both competent and material and not subject to the other objections. The testimony up to this point tended to show that information had been given out at the General Land Office or Interior Department concerning the proposed creation of the Blue Mountain Forest Reserve. The effort on the part of the prosecution was to show that this information had been given out by Commissioner Hermann or Senator Mitchell or both. The effort on the part of the defense was to show by the cross-examination of this witness that this information could have been obtained by the newspaper reporters from the clerks in the department, but his testimony was not aiding this defense; on the contrary, it was tending to close that door effectively when the attorney for the United States suggested that the clerks might be bribed to furnish this information as they had been by Hyde and Benson. The effect of these questions, although probably not so intended, was to bring out testimony wholly inconsistent with the theory of the case as maintained by the prosecution against all of the defendants, and particularly against the theory of the case as against the defendants Mitchell and Hermann. Under this state of the evidence and the theory of the prosecution we do not see how we can speculate as to the probability of the jury believing that the defendants bribed the clerks in the department. The probability is altogether too remote. There is nothing in the case to support it. We do not see how the answers of the witness under the circumstances prejudiced the case of the defendants.

The testimony showed that the plaintiff in error had purchased a large amount of school lands from the state of Oregon in the year 1900; that these lands were purchased through dummies, and the titles were therefore fraudulent. The plaintiff in error contends that this was long prior to the date of the alleged conspiracy mentioned in the indictment; that the sale of these lands had been ratified by an act of the Legislature; and that the purchase was therefore valid. The court instructed the jury upon this feature of the case as follows:

"The indictment also charged that there were 30,000 acres of school lands, which, it is alleged, had been previously fraudulently obtained by the defendants from the state of Oregon by fraudulent means like those by which the other school lands were to be obtained, as alleged; but after consideration of the legal questions presented in the argument had before me at the close of the evidence, I instruct you that you cannot convict the defendants, or any of them, of any fraud connected with the alleged acquisition of the 30,000 acres which may have been acquired by the defendants or any of them prior to February 27, 1901. * * * The testimony, however, concerning the acquisition of these 30,000 acres is admitted before you, and is relevant as bearing upon the question of the intent and knowledge or design of the defendants, against whom such evidence is offered in the acquisition of other school lands, which the testimony goes to show were acquired in 1902."

The lands here referred to were school lands which the defendants Jones and Mays caused to be included within the Blue Mountain Forest Reserve. But it is contended on the part of the plaintiff in error that as these lands were acquired from the state prior to February 27,

1901, when their sale by the state was ratified by the Legislature, the evidence relating to these lands should have been excluded by the court from the consideration of the jury, not only as evidence of fraud connected with their acquisition, but as bearing upon the question of intent and knowledge or design. The objection is that there was no evidence to indicate that there was in the year 1900 any intention on the part of any one to create the Blue Mountain Forest Reserve, or any knowledge that such a reserve would be created; that the earliest date when the scheme to create this reserve began to take shape was in October, 1901, when H. A. Smith, one of the alleged conspirators, proposed to one A. G. King, at that time clerk of Malheur county, to circulate petitions in Malheur and Harney counties for the creation of the reserve. The evidence tends to show that Smith introduced King who was then in Portland to the defendant Mays; that Smith and Mays thereupon agreed with King that the latter should employ some one to circulate the petitions; that the persons so employed should be paid $4 a day, and King was to receive a half-section of school land for his services. We think that the evidence that the plaintiff in error had purchased school lands in the section of the country where the reserve was afterwards established was itself evidence tending to show that such reserve was in contemplation and the conspiracy being formed for that purpose. The scheme was not a new one, and there is not a particle of testimony that this school land in place had any other value than as a base for lieu land selections elsewhere; but to give them this value they had to be included within the boundaries of an established forest reserve. The evidence therefore tended to prove the formation of a conspiracy to defraud the United States out of lands of a greater value than those purchased by Jones from the state, but as these acts were committed more than three years before the finding of the indictment the evidence was not admissible to prove such overt acts as criminal offenses. They were, however, admissible and properly admitted to prove the intent and design and guilty knowledge of the defendant with respect to the scheme to defraud the United States charged in the indictment.

We see nothing in the fact that by an act of the Legislature of Oregon of February 27, 1901 (Gen. Laws 1901, p. 304), authorizing the board of commissioners for the sale of school lands to bid in certain lands sold under foreclosure of mortgage, there was a provision that all sales of land previously made by the board were ratified and confirmed. This provision would seem to indicate that it was known at that time that these sales were illegal and void, and this was an effort on the part of some one interested in the lands to give them a valid title under the law of the state, and, as far as the state is concerned, it may be conceded that it did so, but that did not relieve the defendant Jones of his fraudulent intent and purpose nor did it relieve the scheme of its fraudulent character as against the United States. The evidence was therefore properly admitted.

It is objected that the statute of limitations had run against the offense charged in the indictment because it appeared that the conspiracy was formed and overt acts were committed in furtherance thereof

more than three years prior to the finding of the indictment. This objection was considered by this court in Jones v. United States, 162 Fed. 417, 426, 89 C. C. A. 303, 312. It was there held that:

"Where the alleged conspiracy contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, then each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime."

Under this rule the overt acts alleged in the indictment and established by proof continued the conspiracy to the time within the statute of limitations.

It was objected that evidence was admitted tending to show that the defendant Mays had been engaged in a fraudulent and illegal acquisition of public lands in another part of the state and by a different method from that described in the indictment upon which the defendants were being tried. This evidence was admitted as bearing upon the question of the intent, purpose, and design of the defendant Mays as shown by his acts and doings of a kindred character—that is to say, with respect to his acts and doings in defrauding the United States of its public lands. This question was considered by this court in the case of Van Gesner v. United States, 153 Fed. 46, 55, 82 C. C. A. 180, 189, and the evidence held admissible. The question was also considered by the Supreme Court in the case of Williamson v. United States, 207 U. S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278, and the evidence held properly admitted.

The judgment of the Circuit Court is affirmed.

MAYS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1910.)

No. 1,723.

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

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States of public lands is not one charging a conspiracy to do an act not unlawful in itself, because there is no separate statute making it a crime to defraud the United States, so that it is necessary to set out criminal or unlawful means to charge an offense, but the statute itself makes a conspiracy to defraud the United States a distinct crime, and no further offense need be averred nor proved.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 97; Dec. Dig. § 43.*]

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

An indictment for conspiracy to defraud the United States of public lands by fraudulently obtaining the title to worthless state lands, securing the establishment of a forest reserve including such lands and then exchanging the same for public lands of the United States under the law authorizing such exchange, is not bad because it does not describe the state lands to be so acquired, further than to state the counties in which

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

they are situated, where they had not been obtained and no further description was possible.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 97; Dec. Dig § 43.*]

8. CONSPIRACY (§ 45*)—CONSPIRACY TO DEFRAUD THE UNITED STATES—EVIDENCE—MATERIALITY.

In a prosecution for conspiracy to defraud the United States of public lands by fraudulently acquiring state lands and exchanging them under the forest reservation laws for lands of the United States, evidence of the fraudulent acquisition of the state lands was material as showing the foundation on which the conspiracy was based and the method of procedure adopted to carry it into effect.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 100; Dec. Dig § 45.*]

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

Franklin P. Mays was convicted of a criminal offense, and he brings error. Affirmed.

W. Lair Hill, for plaintiff in error.

Tracy C. Becker, U. S. Sp. Asst. Atty. Gen.

Before GILBERT and MORROW, Circuit Judges, and FARRINGTON, District Judge.

MORROW, Circuit Judge. The plaintiff in error was one of the defendants charged with the conspiracy alleged in the indictment under consideration in the case of Willard N. Jones v. United States (just decided) 179 Fed. 584. The two cases come here on separate writs of error. The material question in this case not discussed in the Jones Case is the sufficiency of the indictment. The indictment charged a conspiracy in violation of section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which provided as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all of the parties to such conspiracy shall be liable."

It is contended by the plaintiff in error that, as there is no statute of the United States making it an offense to defraud the United States, the indictment cannot be held as charging a conspiracy to accomplish a criminal or unlawful purpose. If it charges anything it must be a purpose not in itself unlawful, but a purpose to be accomplished by criminal or unlawful means. To charge a conspiracy of this class it is said the unlawful means must be fully set forth, and as this was not done in this case the indictment was insufficient. The case of Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, is cited among others as authority for this proposition. In that case an injunction had been issued by the United States Circuit Court restraining the defendants from in any manner interfering with the complainant in any of its work in and about a certain mining claim. The indictment charged a conspiracy to commit an offense against the United States in violation of section 5440 of the statutes,

but did not in terms charge that it was the purpose of the conspiracy to violate the injunction referred to in the indictment or to impede or obstruct the due administration of justice in the Circuit Court. What the indictment did charge was that the defendants conspired together to commit an offense against the United States, and this offense was to be committed by intimidation to compel the officers of the mining company to discharge their employés and the employés to leave the service of the company. The court said that this conspiracy was not an offense against the United States, and in this connection stated the general rule with respect to indictments charging an offense, namely, that all the material facts and circumstances embraced in the definition of the offense must be stated, and if any essential element of the crime is omitted such omission cannot be supported by intendment or implication. The application of the rule in that case is obvious; but in this case the charge is that the defendants conspired together, not to commit an offense against the United States, but to defraud the United States out of the possession and use of and title to divers large tracts of the public land of the United States, and this is made a distinct offense by the statute itself. No further offense is alleged, and no further offense is required to be alleged or proven. Furthermore it is not charged and it was not intended to charge that the United States was actually defrauded out of any of its public lands, or the title to or the use or possession of any of such lands. The conspiracy alleged was to fraudulently obtain from the state of Oregon the title to and possession of certain school lands still vacant by reason of being arid and worthless, secure the establishment of a forest reserve which should include these school lands, and then exchange these arid and worthless lands for public lands of the United States open to selection and lying in divers states and territories of the United States.

The objection is that the indictment failed to set forth the means employed in carrying out the conspiracy, in this: That it contained no description of the school lands which the defendants were to exchange for public lands of the United States, whether such school lands had already been obtained or were thereafter to be obtained. With respect to those school lands which had been obtained, they were described as lying in certain designated counties of the state, but further than this the statute of limitations had run as against the act of acquiring these lands, and the court instructed the jury that they could not convict the defendants or any of them of any fraud connected with the alleged acquisition of such lands. Without holding that any further description of these lands was necessary, it is sufficient to say that the lack of a description worked the defendants no injury. With respect to the school lands to be thereafter obtained they were described as lying in certain designated counties of the state, and no further description could be obtained for the reason that they had not been purchased from the state, and could not, therefore, be identified. It was part of the conspiracy to obtain the school lands within these designated counties, and a more particular identification was therefore immaterial. In Dealy v. United States, 152 U. S. 539, 543, 14 Sup. Ct. 680, 682, 38 L. Ed. 545, the court said:

"Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified."

The rule here stated with respect to the description of public lands to be afterwards acquired is applicable to the description of school lands in the present indictment. A description was given identifying the lands as far as such identification could be ascertained, and a more particular description was not required. "While the rules of criminal pleading require that the accused shall be fully appraised of the charge made against him, it should, after all, 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." Evans v. United States, 153 U. S. 584, 590, 14 Sup. Ct. 934, 937, 38 L. Ed. 830.

The plaintiff in error asked the trial court to instruct the jury that the fraudulent acquisition of school lands, if it was fraudulent, would not constitute an offense against the United States, and unless connected with an intent to defraud the United States such evidence would be wholly immaterial. The court properly refused to give this instruction. The evidence was material as showing the foundation upon which the conspiracy was based and the method of procedure adopted by the defendants for carrying the conspiracy into effect. As said by this court in Perrin v. United States, 169 Fed. 17, 21, 94 C. C. A. 385, 389:

"The machinery of the state land office was to be used as an instrument to carry out the purpose of the conspiracy and secure the title to certain lands of the United States, and it is no answer to this view of the acts of the parties to contend that the state was entitled to the lands as selections in lieu of other lands lost to the state."

In our opinion the indictment is sufficient, and there was no error in refusing the requested instruction.

The judgment of the Circuit Court is affirmed.

STANDARD OIL CO. OF NEW YORK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 199.

1. CARRIERS (§ 38*)—VIOLATION OF INTERSTATE COMMERCE ACT—INDICTMENT OF SHIPPER FOR RECEIVING CONCESSIONS.

An indictment of a shipper for receiving rebates or concessions in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), prohibiting the granting or receiving of any rebate or concession whereby property shall by any device whatever be transported in interstate commerce for less than the filed and published rates, which charges that defendant received a concession from such rates on a specified shipment, is sufficiently specific and need not specifically charge the actual payment of the unlawful lower rate, which is a matter of proof.

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

2. COMMERCE (§ 33*)—SUBJECTS OF REGULATION—TRANSPORTATION OF GOODS—INTERSTATE COMMERCE ACT—SHIPMENTS MADE UNDER "COMMON ARRANGEMENT."

Under the provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), that "the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property * * * under a common control, management or arrangement for a continuous carriage or shipment from one state * * * to any other state," as a general rule a "common arrangement" is established by proof of a shipment under a through bill of lading and a continuous interstate carriage thereunder, coupled with proof of concerted action among the connecting carriers with regard to the payment of the charges and the receipt and movement of the traffic, even if an agreed division of a single through rate is not shown.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

3. COMMERCE (§ 33*)—SUBJECTS OF REGULATION—TRANSPORTATION OF GOODS—INTERSTATE COMMERCE ACT—"THROUGH BILL OF LADING."

A bill of lading which acknowledges the receipt of merchandise consigned to a point in another state, names the route and railroads over which the shipment is to be made, contains an agreement by the initial carrier to deliver to the next connecting carrier, and provides that as to each carrier upon the route the service is to be rendered in accordance with the conditions stated therein, is a "through bill of lading," having reference to the usual method in use by connecting carriers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

4. CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—CONCERT OF ACTION AMONG CARRIERS.

Evidence considered, and *held* sufficient to support a finding that there was a concert of action among the connecting carriers transporting an interstate shipment of merchandise in respect to the charges and the through movement of the traffic, the entire carriage having been made under a "blind" bill of lading issued by the initial carrier, which did not name its own nor a through rate.

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

5. CARRIERS (§ 30*)—INTERSTATE COMMERCE ACT—JOINT TARIFFS—APPLICATION.

A tariff rate between two points on different railroads, filed and published by one company and concurred in by the other, which does not

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

designate any particular route, must be held as a matter of law to apply to the natural and direct route over the lines of the two companies between the designated points, and to constitute the lawful rate over such route.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

6. CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—PROSECUTION OF SHIPPER FOR RECEIVING CONCESSIONS—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support a verdict finding that defendant knowingly accepted concessions as a shipper from the lawful rates established by railroad companies in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138).

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

7. CARRIERS (§ 51*)—BILLS OF LADING—"BLIND BILLING."

The act of shipping without stating the charges is called "blind billing."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 51.*]

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

The Standard Oil Company of New York was convicted of a criminal offense, and it brings error. Affirmed.

See, also (D. C.) 158 Fed. 536.

Writ of error to review a judgment of the District Court, Western district of New York, entered upon the verdict of a jury finding the defendant guilty of violations of the act to further regulate commerce of February 19, 1903, commonly known as the "Elkins Act." Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138). In the following statement and opinion the parties are designated as in the court below.

There are 40 counts in the indictment and the offense charged in each of them is the acceptance of a concession from published and filed tariffs on the interstate transportation of petroleum. Each count covers the transportation of a car load of oil on a date between August 15, 1904, and May 17, 1905. In 28 counts the transportation is between Olean, N. Y., and Rutland, Vt., and in the remaining 12 counts, between said Olean and Bellows Falls, Vt. The allegations of a typical indictment are, in substance, that the Pennsylvania Railroad Company, the New York Central & Hudson River Railroad Company, and the Rutland Railroad Company were common carriers engaged in the transportation of property over their connecting railroads from Olean, N. Y., to Rochester, N. Y., thence to Norwood, N. Y., and thence to Rutland, Vt., under a common arrangement for continuous carriage; that the published and filed tariff and, consequently, the lawful rate of the Pennsylvania and New York Central Railroads for the transportation of petroleum was 26½ cents from Olean to Norwood, and that the rate of the Rutland road from Norwood to Rutland was $28 per tank car; that the defendant knew the foregoing facts; that the said common carriers, at the defendant's request, unlawfully transported over said route a car load of oil in a tank car at a rate lower than that named in said tariff; and that thereby the defendant knowingly accepted and received a concession in violation of the statute.

The following is a statement of the facts in the case which are undisputed, although the parties draw different inferences therefrom:

The shipments in question were made on orders sent to the Vacuum Oil Company, a corporation doing business at Olean, N. Y., by the defendant through its agents in Vermont. The shipments were delivered by the Vacuum Company to the Pennsylvania Railroad at Olean. With each shipment the Vacuum Company delivered to the railroad agent a shipping order and bill of lading; one being a duplicate of the other. The agent retained the shipping order and signed the receipt on the bill of lading and returned the lat-

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

ter to the Vacuum Company. The Vacuum Oil Company indicated in its shipping order and bill of lading the route which the transportation should take, viz., by the Pennsylvania to Rochester, by the New York Central to Norwood, and by the Rutland Railroad to Rutland.[1] At the time of each shipment a postal card was sent by the Vacuum Company to the defendant's agent at the place of destination notifying him of the shipment. These notices stated the aforesaid route as that over which the shipments would move.

The waybill contained no statement of the rate, but did contain the following direction: "Agent N. Y. C. and H. R. R. R., Rochester, N. Y., prepay charges from Rochester to Norwood and charge to the Standard Oil Company of New York." This method of billing, without stating the charges, is called "blind billing."

When the car arrived at Rochester it was transferred from the Pennsylvania to the New York Central tracks, and a transfer card was delivered from the one railroad to the other. Thereupon the New York Central's agent made out a waybill covering the transportation from Rochester to Norwood, and sent the same to the Central's agent at Norwood. This waybill stated the rate and the aggregate freight charge for the transportation between Rochester and Norwood. At Norwood the car was switched from the Central's tracks to the tracks of the Rutland Railroad, and by that road was hauled to the Vermont points and delivered to the defendant's agents.

The rate charged by and paid to the Pennsylvania for the transportation from Olean to Rochester was 9 cents per barrel; to the New York Central for the transportation from Rochester to Norwood, 9 cents per hundred pounds, and to the Rutland Railroad for the transportation from Norwood to Rutland, $28 per tank car. This 9 cents per barrel rate of the Pennsylvania road was under a rate order in force at the time of the shipments which was marked "not to be posted," and was not published or filed. The 9 cents per hundred pounds rate of the New York Central was under an unpublished rate order also marked "not to be posted," and which was in force at the time of the shipments. This rate, however, applied only to shipments destined to points on the Rutland road beyond Norwood. No tank shipments were made to Norwood, and the rate upon all shipments which stopped at Norwood was higher. The rate paid the Rutland road was in accordance with its lawfully filed tariff.

The tariff upon petroleum and its products from Olean, N. Y., to Norwood, N. Y., as published and filed with the Interstate Commerce Commission by the Pennsylvania Railroad in April, 1904, was at the rate of 26½ cents per hundred pounds. A concurrence in this rate was duly filed with the Commission by the New York Central Railroad. No revocation of this tariff or of the concurrence therein had been made prior to the shipments in ques-

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1 The following is a copy of the material parts of a bill of lading:

"Received from Vacuum Oil Co., by Pennsylvania Railroad Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and designated as indicted below, which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.

"It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder, shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and assigns as just and reasonable. Upon all the conditions, whether printed or written herein contained, it is mutually agreed that the rate of freight from ———— to ———— is to be in cents per 100 pounds.

* * * * * * * * * * * * * * *

"Consignee, Standard Oil Company,
"Destination, Rutland, Vt.
"Penna. RR—Roch—NYC—Norwood—Rut. R. R.
"Agent Olean, N. Y. Blind Bill to Rochester, N. Y.
"Description of Articles

* * * * * * * * * * * * * * *

"Tanks Refined Oil UTL 7295

"Agent Rochester, N. Y., prepay through to Norwood and charge to Standard Oil Co. of New York.

* * * * * * * * * * * * * * *

"The conditions upon which the above mentioned property is received for transportation are printed on the back hereof."

tion, and no other tariffs of the Pennsylvania and Central roads concerning rates for the transportation of oil between Olean and Norwood, or by either road for part of the distance, were filed with the Commission during the time of such shipment. It did not appear, however, that any shipments of oil had ever been made from Olean to Norwood at the 26½-cent rate. This rate upon the shipments in question amounted to much more than the rate actually charged and paid.

There were two possible routes over which shipments could have moved from Olean to Norwood. One was the fairly direct route by way of Rochester which the shipments actually took. Another was a more roundabout route over the Pennsylvania from Olean to Buffalo, and thence over the New York Central by way of Suspension Bridge and Charlotte, N. Y., to Norwood. The published tariff did not designate the route which shipments made thereunder should take, but contained the following statement: "Route in accordance with agreed percentages and as designated within." It did not appear that any oil was ever carried over the route by way of Buffalo.

Other material facts are stated in the opinion.

Kenefick, Cooke & Mitchell (Daniel J. Kenefick and Martin Carey, of counsel), for plaintiff in error.

S. Wallace Dempsey, Special Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The question raised by the defendant in this case may be conveniently considered in the order stated in its brief. In the first place, the defendant contends that the indictment was insufficient in that it failed to allege payment of the alleged unlawful rate, and that proof of the payment of such rate was erroneously received. This question was raised by demurrer, and was preserved on the trial by motions to dismiss. Evidence of payment of the rate was offered upon the trial and was received over the defendant's objection and exception.

The statute under which the indictment was framed (section 1 of the act of February 19, 1903, known as the "Elkins Act") as it existed at the time of these transactions, is printed in the footnote.[2]

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[2] "Section 1. * * * The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges required by said acts or strictly to observe such tariff until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of 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 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 amendatory thereto whereby 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 amendatory 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 on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisidiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted, and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

The portions especially relevant to the questions now under consideration are these:

"It shall be unlawful for any * * * corporation to * * * accept or receive * * * any concession * * * in respect of the transportation of any property in interstate * * * commerce by any common carrier * * * whereby 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."

The indictment in the several counts charges that the common carriers transported the property in question for the defendant; that its transportation was interstate commerce; that the transportation papers showed a rate and charge less than the lawfully filed rate for such service, and that the rate charged to the defendant was less than the lawful rate which it should have paid. The indictment then charges that the defendant, in the manner stated, "did knowingly accept and receive" from the common carriers a concession in respect to the transportation of its property in interstate commerce.

It will be observed that the indictment follows, substantially, the language of the statute. The gist of the offense charged was the receipt of the concession, and that is expressly alleged. The other statutory elements of the offense are also fully stated. The indictment fairly informed the defendant of the offense charged against it, and of that which it was called upon to meet at the trial. Acts are set forth with reasonable particularity of time, place, and circumstance. The indictment seems clearly to be sufficiently definite and certain to enable a conviction under it to be pleaded in bar of any subsequent prosecution for the same cause. While it is not always enough to charge statutory offenses in the language of the statute, and while it may not be sufficient to charge violations of this statute in its language alone, we think this indictment states the offense charged with all the particularity required.

In the very recent case of Armour Packing Co. v. United States, 209 U. S. 56, 83, 28 Sup. Ct. 428, 436 (52 L. Ed. 681)—a prosecution under the Elkins act—the Supreme Court said:

"It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that in statutory offenses every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecution and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place and circumstance. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars. United States v. Hess, 124 U. S. 483 [8 Sup. Ct. 571, 31 L. Ed. 516]; Evans v. United States, 153 U. S. 584 [14 Sup. Ct. 934, 38 L. Ed. 830]. But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient."

And in the still later case of New York Central R. R. v. United States, 212 U. S. 481, 497, 29 Sup. Ct. 304, 308 (53 L. Ed. 613)—another prosecution under the same act—the Supreme Court said:

"Objections were made to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Section 1025 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 720) provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. Connors v. United States, 158 U. S. 408, 411 [15 Sup. Ct. 951, 39 L. Ed. 1033]; Armour Packing Co. v. United States, 209 U. S. 56, 84 [28 Sup. Ct. 428, 52 L. Ed. 681]. An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense."

But it is urged that the Circuit Court of Appeals for the Seventh Circuit in the case of Standard Oil Company of Indiana v. United States, 164 Fed. 376, 90 C. C. A. 364, held that the consummation of the offense of accepting a concession is the payment of the alleged unlawful rate; that payment is an essential ingredient of the offense and that the present indictment is insufficient because it fails to specifically aver that payment of the unlawful rate was made. We are inclined to think that payment must necessarily be inferred from any reasonable interpretation of the language of the indictment. But it is unnecessary to so decide. As already shown, the offense charged was the acceptance of a concession. Proof of payment might be necessary to show the fact of the concession. There might be no concession established until payment should be shown. But it does not follow that it was necessary in charging the concession, to plead the evidence required to prove it. And we think the decision referred to entirely consistent with these views. In that case Judge Grosscup said (p. 385):

"The offense denounced in the statute, and charged in the indictment, is the accepting by the plaintiff in error of a concession in respect to the transportation of property in interstate commerce, whereby such property was transported at a less rate than that named in the tariffs published and filed. * * * And there is no basis in the statute for holding that in the case of accepting a concession the transaction is consummated, and the door of repentance is closed, at any earlier moment than in the case of accepting a rebate. So proof that a shipper has agreed to accept a concession—stopping there—whether the proof be embodied in way bills, or book entries, or formal contracts, will not support an indictment for accepting a concession, until the intended wrong becomes an accomplished fact. Of course the irrevocable may be reached and the transaction consummated in other ways than by money settlements, as by the offsetting of mutual accounts. The point is that the transaction, as a transaction, must be consummated."

It is evident that what the court was considering was the "proof" required to establish the concession alleged in the indictment to have been accepted. There is no intimation that it was necessary to plead such proof. The court said that evidence of payment of the unlawful rate was necessary to show a consummated transaction, and, consequently, the evidence of payment which was offered in the present

case was properly received. There was no error in overruling the demurrer or in admitting the evidence.

The second contention of the defendant is that the proof failed to establish that the carriers engaged in this transportation under a common arrangement for the continuous interstate carriage and shipment of the oil. The Elkins act applies only to common carriers subject to the provisions of the act to regulate commerce, and the first section of the latter act, as it existed at the time of the transactions in question, provided:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment, from one state * * * of the United States * * * to any other state * * * of the United States."

It is not contended that the carriers in this case were under any "common control or management." So the inquiry is whether there was a "common arrangement" among them within the meaning of the statute. And this involves at the outset an inquiry as to the meaning of the phrase "common arrangement."

In the very recent case of Mutual Transit Co. v. United States (decided by this court April 4, 1910) 178 Fed. 664, we had occasion to consider the meaning of this phrase. In that case the question was whether a water carrier had entered into a common arrangement with railroad carriers for the transportation of certain freight. We stated that the evidence might have been sufficient to establish a common arrangement had it not been shown that the real antecedent contract was entirely inconsistent with the inferences naturally to be drawn from such evidence. With respect to the meaning of the phrase we said:

"The phrase 'common arrangement,' in view of its context, evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise and the charges and the division of the charges to be made therefor. * * * It is not necessary that a 'common arrangement' should be established by proof of formal concurrences in tariffs and division sheets. In the absence of a prior special agreement we think that a 'common arrangement' might be established by receiving and carrying freight under a through bill of lading stating a division of the charges."

The case, however, which is more applicable to the facts in this case is the leading case of Cincinnati, New Orleans & Texas Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 184, 193, 16 Sup. Ct. 700, 704, 40 L. Ed. 935, commonly called the "Social Circle Case." In that case it was held that when a state railroad whose road lies within the limits of a state enters into the carriage of foreign freight by receiving the goods on foreign through bills of lading, and participates in through rates and charges, it becomes a party to a common arrangement for continuing interstate carriage and is subject to the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), Mr. Justice Shiras said:

"All we wish to be understood to hold is that when goods shipped under a through bill of lading, from a point in one state to a point in another, are

received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested."

See, also, Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309.

But while these decisions say that a common arrangement may be shown by shipments under a through bill of lading and an agreed division of the charges, it is clear, as pointed out by Mr. Justice Shiras, that such an arrangement might be shown in other ways. Even if an agreed division of a single through rate were not shown, we are satisfied that, as a general rule, a common arrangement would be established by proof of a shipment under a through bill of lading and continuous interstate carriage thereunder coupled with proof of concerted action among the connecting carriers with regard to the payment of the charges and the receipt and movement of the traffic. We approve the language of the Circuit Court of Appeals for the Eighth Circuit in Chicago, Burlington, etc., R. R. v. United States, 157 Fed. 833, 85 C. C. A. 194:

"In the concert of action, in the successive receipt and movement of the traffic by the connecting carriers under through bills of lading for continuous carriage, is manifested the 'common arrangement' contemplated by the act of Congress."

We shall therefore consider the question whether there was evidence to warrant the jury in finding a common arrangement in this case along the following lines: (1) Were the shipments made upon through bills of lading? (2) Was there continuous interstate carriage of the freight? (3) Was there concert of action among the carriers with respect to the charges and the interstate movement of the traffic?

As already shown, the bill of lading in this case (one being typical of all) acknowledges the receipt of the oil by the initial carrier at Olean, N. Y., and contains its agreement to deliver to the connecting carrier upon the route. It provides that as to each carrier upon the route the service is to be performed in accordance with the conditions stated therein. The consignee named is the Standard Oil Company. The destination is Rutland, Vt. The route is by the Pennsylvania road to Rochester, by the New York Central Railroad to Norwood, and by the Rutland road to destination. Several conditions on the back relate entirely to transportation over connecting roads. Now, in the extract from the decision in the "Social Circle Case" already quoted, Mr. Justice Shiras said:

"When we speak of a through bill of lading we are referring to the usual method in use by connecting companies."

As thus described, we have no doubt that the bill of lading in this case was a through bill of lading. We are satisfied that it was in the form usually employed by connecting railroads and it was the only bill of lading which covered the shipment from its beginning in the state of New York to its end in the state of Vermont. We think that a bill

of lading in which the initial carrier should agree to carry the freight through to its destination beyond its own road—which the defendant contends is the only possible through bill of lading—would be unusual in its nature, and that the application of the decisions to which we have referred is not confined to cases of such bills. Indeed, even if we use exact terms, we are not at all certain that a bill of lading covering a shipment from point of origin to place of destination is any less a through bill of lading because it limits the liability of the initial carrier. In Houston Navigation Co. v. Insurance Co. of North America, 89 Tex. 1, 8, 32 S. W. 889, 891 (30 L. R. A. 713, 59 Am. St. Rep. 17), the Supreme Court of Texas said:

"It has been generally held that where a carrier in one state receives a commodity for shipment by a continuous trip over its own line and connecting lines, giving a through bill of lading to the point of destination with the provision that its own liability shall cease upon delivery to its connecting line at a point within the state where it was received, such transportation is to be considered as interstate commerce, and the carrier is but one of several agencies employed."

Upon the question whether there was a continuing carriage of this freight from Olean to Rutland, there is little room for discussion. It is not disputed that each tank car was hauled in the condition in which it was when delivered to the initial carrier to the point of destination continuously and without any unnecessary delay.

We have it, then, undisputed that a continuous interstate transportation service was rendered under what, as a matter of law, amounted to a through bill of lading, and the next inquiry is whether there was evidence to warrant the jury in finding the necessary concerted action among the carriers.

It is clear that there was evidence to warrant the finding that there was an agreement between the defendant and the different carriers before the shipments were made. The shipments were "blind billed"; i. e., no rate was designated by the Pennsylvania from Olean to Rochester, which must have been the result of a previous arrangement. The charges of the New York Central were marked "prepaid" when they were not in fact prepaid, which would have required an antecedent agreement. So the freight charges were marked for settlement through the general officers of the railroad, which was unusual. So, too, the fact that the Rutland rate on oil was a commodity rate and that the shipments of the Vacuum Company were the only shipments likely to take it was proper to be considered in determining whether there had been a previous arrangement with that road. There was other testimony in the record with respect to methods of shipment and manner of payment likewise tending to show an antecedent agreement between the defendant and the different carriers.

The testimony indicated, showing an antecedent agreement between the defendant and the carriers, tended also to show agreement or, at least, concert of action among the carriers themselves. There was also much other evidence to the same effect. The testimony with respect to the making and collecting of the charges goes far to show concerted action. The Pennsylvania road sent its shipments "blind billed." It neither named its own rate nor stated a through rate. It accepted

the shipments under an order to the agent of the New York Central to pay through to Norwood. The New York Central and the Rutland received the freight under the single through bill of lading and issued no bills of lading of their own. The New York Central gave a rate for the carriage from Rochester to Norwood which, as we have seen, applied only to through shipments. All the roads treated the shipments as through, and not as local, shipments and they rendered the entire transportation service without other direction or instruction than the original shipping order to the Pennsylvania road. The method of forwarding at junction points and the manner of settlement of accounts also indicated an understanding among the carriers. Without reviewing the evidence in detail, we are satisfied that there was sufficient to warrant the jury in finding that there was concert of action, if not express agreement, among the carriers with respect to the continuous carriage of this freight, and, consequently, that a common arrangement was established.

The third contention of the defendant is that the trial court erred in holding that the 26½-cent rate between Olean and Norwood was the lawful rate applicable to these shipments. As shown in the statement of facts, the tariff filed with the Interstate Commerce Commission by the Pennsylvania road and concurred in by the New York Central fixed the rate on petroleum and its products from Olean to Norwood at 26½ cents per hundred pounds. The tariff provided that the "route should be in accordance with agreed percentages and as designated within." The tariff, however, did not designate the route, and no percentage sheets were filed with the Commission. Under these circumstances, we think that the route to which the tariff applied was the natural and direct route from Olean to Norwood by way of Rochester, which the shipments in question took. That seems to have been the only real route between the two points. The route by way of Buffalo was roundabout, and required the hauling of the freight for a considerable distance in a direction opposite from Norwood. It was rather a possible way than a route, and it did not appear that any petroleum had ever been moved over it. We think that shippers in general had a right to rely upon the published rate as the lawful rate over the direct and natural route between the designated points, and that it was binding upon the railroads for such route.

It must be clearly borne in mind that the primary purpose of the act to regulate commerce in requiring the filing of tariffs with the Interstate Commerce Commission was to fairly apprise shippers of the rates to be paid and to secure uniformity in charges. It is to be presumed that carriers in filing tariffs will act in good faith to carry out those purposes. It cannot be assumed that they will file schedules to serve as devices to evade the law. We are unwilling to assume that the carriers in this case filed the 26½-cent rate from Olean to Norwood merely to afford a basis for discriminations to favored shippers. Still, if no oil ever moved by way of Buffalo, if the Buffalo route were really not a route at all, and if the published rate were intended to apply over it alone, leaving the direct and natural route without any filed rate, it is difficult to see any object in filing the rate consistent

with the obligations which the railroads owed the public. But if the object were to deceive, it is sufficient to say that, in our opinion, the carriers did not go far enough to accomplish it—that the rate which they filed in the manner in which they filed it made it applicable, even if not intended, to the real and direct route between the two points. That it might also have been applicable to the Buffalo route is immaterial.

The situation is not materially different if we assume that the references to agreed percentages required shippers to look up the unfiled percentage sheets. There was, in our opinion, nothing upon those sheets sufficiently clear and certain to fairly apprise an intending shipper that the tariff upon petroleum was inapplicable to the direct route, but did not apply to a route over which petroleum was never hauled.

The defendant contends that the published tariff was not sufficiently definite and complete to constitute a lawful tariff. It urges that a shipper who desired to ascertain whether the tariff was applicable by way of Rochester could obtain no information upon the subject from the files of the Interstate Commerce Commission. In our opinion, however, as already stated, the fair presumption would be—and the shipper could rely upon it—that the filed route applied to the natural and direct route over the two roads which was via Rochester.

The defendant also urges that the question whether the 26½-cent rate applied to these shipments should have been submitted to the jury. But the construction of the documents was for the court, and we think that the court was right in ruling that the 26½-cent rate was the lawful rate applicable to these shipments; that it was the published and filed rate which the carriers having filed were bound by, and which, under the Elkins law, a person or corporation could be found guilty of accepting a concession from.

The fourth contention of the defendant is that the trial court erred in ruling that the rate paid to the Pennsylvania Railroad for the transportation from Olean to Rochester and the rate paid to the New York Central Railroad for the transportation from Rochester to Norwood were not the lawful rates so far as the defendant was concerned. As shown in the discussion of the last point the lawful rate, so far as the carriers were concerned, for these transportation services, was the published and filed rate. As it is admitted that the defendant had knowledge of this published rate, it was also the lawful rate so far as the defendant was concerned. We think this contention of the defendant without foundation.

The fifth contention of the defendant is that the evidence was insufficient to warrant the jury in finding that the defendant knowingly committed the offense charged. The defendant also contends that the trial court made erroneous rulings and gave erroneous instructions upon this feature of the case. Now, without reviewing it, it seems sufficient to say that, in our opinion, there was evidence in the case which, with all the circumstances and the inferences properly to be drawn therefrom, warranted the jury in finding: (1) That the defendant before these shipments were made had entered into an arrangement with the carriers with respect to the billing, the rates, the payment of the freight, and the continuous interstate carriage of the oil. (2) That

the defendant knew that the rates which it paid in accordance with its arrangement with the carriers amounted to less than the published and filed rate for the transportation service.

It follows, then, that if the defendant regarded the published rate as applicable to the route over which the oil, with its knowledge, was shipped, it knowingly accepted a concession from such rate. And if it did not so regard the published rate, if the filing of the rate and the entire course of dealing between the defendant and the carriers amounted merely to a device to circumvent the law, to mislead other shippers and to discriminate in favor of the defendant, still none the less, as we have shown, was the published rate the lawful rate applicable to the shipments and none the less was the concession therefrom a concession in violation of the statute.

In our opinion, the evidence was sufficient to warrant the jury in finding that the defendant knowingly accepted a concession, and we find no error in the rulings or instructions regarding the defendant's guilty knowledge.

With respect to the remaining contentions of the defendant, it is enough to say that we have carefully examined and considered them all, and we find no prejudicial error in the rulings or charge of the trial court complained of.

The judgment of the District Court is affirmed.

NOTE.—The following is the opinion of Hazel, District Judge, in the court below:

Hazel, District Judge. This is a motion by defendant for a new trial and in arrest of judgment upon claimed insufficiency of the indictment and exceptions to the ruling of the court and its refusal to instruct the jury as requested. The indictment contains 40 counts, and charges the acceptance by the defendant of concessions on interstate transportations of petroleum and its products from a published and filed tariff of rates, in violation of section 1, Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), commonly known as the "Elkins Act." Upon all the counts the jury returned a general verdict of guilty as charged in the indictment. Various reasons are assigned on behalf of the defendant why a new trial should be granted; the principal one being that the Circuit Court of Appeals for the Seventh Circuit, in Standard Oil Company of Indiana v. United States, 164 Fed. 376, 90 C. C. A. 364, has, since the trial of this case, definitely decided that the gist of an offense of this character is the payment or settlement of the carrying charges at a lower rate than that filed and published with the Interstate Commerce Commission. If failure to specifically allege payment in the indictment is a substantial omission, then the objection which was first raised in the present case on demurrer is well founded and necessarily leads to a discharge of the defendant. But, on consideration and examination of the authorities, I adhere to my original ruling on demurrer in so far that the indictment is not fatally defective for failing to specifically allege the unit of the offense or the specific payment or settlement at a concession rate, and that the carriers were bound to carry the merchandise at the lawful rate notwithstanding the conceded fact that the initial carrier had facilities for transporting it over different routes. The proofs are that the lower rate of transportation of the commodity specified in 40 separate counts was actually paid by the defendant in 10 monthly payments or settlements, and accordingly it is scarcely conceivable wherein its substantial rights have been prejudiced by the decision on demurrer unless it is true, as contended, that failure to allege payment at the lower rate was a fatal or prejudicial omission. In Standard Oil Company of Indiana v. United States, supra, upon an indictment charging the defendant

"with accepting and receiving a concession," the learned court held, Judge Grosscup writing the opinion, that "the gist of the offense is the acceptance of the concession irrespective of whether the property involved was carloads, trainloads or pounds," and that it was necessary that the transaction should have been consummated by payment or settlement. This holding by an appellate tribunal is entitled to great respect, and, as there are no conflicting decisions, it should be followed by the Circuit and District Courts in other districts in cases where the facts are precisely the same. Hale v. Hilliker (C. C.) 109 Fed. 273. From a careful reading of the opinion, however, I am persuaded that payments at the concession rates, though not directly charged in the indictment, are included in the allegation that the defendant knowingly accepted and received from the carriers a concession in respect to the transportation of certain of its property in interstate commerce. This allegation, if it stood alone, probably would not charge the crime with sufficient directness, but, when it is considered and given effect with the other averments showing the lawful rate and shipment at a lower rate, the offense of accepting a concession is fairly charged. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Smith v. United States, 157 Fed. 721, 85 C. C. A. 353; Evans v. United States, 153 U. S. 588, 14 Sup. Ct. 934, 38 L. Ed. 830. Moreover, it is well settled that a statutory offense may be described in the words of the statute leaving it for a defendant to show in what respect he may be prejudiced by reason of the failure to allege in the indictment an element of the offense. Such is the holding of the authorities binding upon this court (Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Armour Packing Co. v. United States, 209 U. S. 83, 28 Sup. Ct. 428, 52 L. Ed. 681), and, accordingly, I hold that the paragraph at the end of the indictment read in connection with the more specific allegations sufficiently charges the essential ingredients of the offense. Such allegations were sufficient in my opinion to acquaint the defendant with the particular matters upon which the prosecution would rely at the trial and also as to the character of the evidence which the defendant would be called upon to meet. In entire consonance with this rule is the recent decision of the Supreme Court in New York Central & Hudson River Railroad Company v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613.

It is true that the trial proceeded against the defendant upon the theory that the interstate transportation of each car load lot of petroleum constituted separate and distinct offenses, and that payment was not the principal element, although, as stated, it was proven at the trial that the offenses were consummated by 10 monthly payments at a rate lower than the established rate. It is also true that the court in effect instructed the jury that it was in their power to convict the defendant of 40 separate and distinct offenses, or, at their option, to convict the defendant of such counts only as the proofs warranted, and also that it was in their power to find the defendant guilty as charged in the indictment. Giving effect to the subsequent decision of the Circuit Court of Appeals for the Seventh Circuit, it follows that in the present case the defendant could not be convicted of more than 10 offenses as evidenced by the payment of the concession rates which included different shipments over the same route at different times. In United States v. Central Vermont Railway (C. C.) 157 Fed. 291, the indictment alleged in many counts different agreements for the payment of rebates, and it appeared that the actual payment covering such agreements was made on the same day. The question arose whether there was one offense charged in the indictment or whether each agreement constituted separate and distinct violations of the statute. It was substantially held by Judge Hough that the indictment was not subject to criticism, but that in the event of conviction the defendant could not be penalized upon separate and distinct counts, charging the agreement to accept rebates, but only for the actual payment. Such was also the holding of Judge Knappen in United States v. Stearns Salt & Lumber Company (D. C.) 165 Fed. 735, and of Judge Trieber in United States v. Bunch (D. C.) 165 Fed. 736. Moreover, it is quite evident that the jury would have convicted the defendant of the offenses as evidenced by the payments of the concession rate, and therefore it is difficult to see how the defendant was prejudiced by the asserted theory upon which the case was submitted to the jury.

The next point is that the court should have submitted to the jury as a question of fact whether tariff sheet, I. C. C. No. 459 (Exhibit No. 41), containing the 26½-cent rate plus $28 per tank car for transportation from Olean, N. Y., to Rutland, Vt., applied to the route over which the commodity was transported. In this connection the court was requested by the defendant to instruct the jury as follows: "That the defendant is chargeable only with such knowledge as to whether tariff 459 was applicable to these shipments as could have been obtained upon reasonable, diligent inquiry."

And again: "That the undisputed evidence is that such reasonable and diligent inquiry of the officers and employés of the Pennsylvania Railroad and the New York Central Railroad who issued these tariffs and who had to do with the quoting of rates to shippers would have informed the shipper that the tariff was not applicable over the route which these shipments took, and the jury may take that into account in determining whether there was any intention on the part of the defendant to violate the law." Compliance with this request would have been inconsistent with the instructions of the court that as a matter of law the 26½-cent rate plus the $28 rate was the lawful rate, and that the routing over the lines of the carrying railroad companies via Rochester and Norwood to the point of destination was covered and included by such tariff. The court substantially instructed the jury that as a matter of law the published and filed rate was the lawful rate, and that it included all the routes available to the initial carrier for transporting the product to the point of destination.

It was proven, and the defendant admitted, that it had in its possession at the time of the transportation the tariff sheet, I. C. C. No. 459, which, under the instructions of the court, covered the transportation in controversy. No testimony was offered to show that the defendant in any endeavor to ascertain the lawful rate had difficulty in so doing on account of any ambiguity arising from the printing on the cover of the tariff sheet of the words "route in accordance with agreed percentages." The defendant did not make inquiries of the carrying companies regarding the tariff of rates on the transportations specified in the indictment or whether tariff sheet I. C. C. No. 459 applied to the transportation in controversy. If inquiries had been made by the defendant, it no doubt would have been informed by the employers of the carriers that tariff sheet I. C. C. No. 459 did not apply to the Rochester-Norwood route in the absence of an agreement between the carriers as to percentages. But, as no information on this subject was sought, the defendant was not in my opinion entitled to the instructions to the jury above quoted. That, in the estimation of the employés of the carriers, the Rochester-Norwood route was not included in the established tariff, can have no material bearing upon the defendant's intention to violate the statute if it had knowledge of the lawful rate. The case of Armour Packing Company v. United States, supra, instructively bears upon the intention to violate the statute. There the shipment was under special contract as to the carrying rate; the contract carrying charges being the same as the published and filed rate. The court held that the special contract as to the rate charges was subject to later changes, and that the defendant could not claim that he believed he was acting within his legal rights in insisting upon the goods being carried at the contract rate. The Supreme Court, speaking of the defendant's knowledge and guilty intent, says: "The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles." So here the defendant was claimed to have knowledge of the established rate and the jury so found. If such rate included the route by which the property was carried as charged by the court, the defendant cannot be heard to say that it did not believe such rate applied, but believed it applied to another route. The defendant cannot assert its ignorance of the law in order to obtain relief from its provisions. Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Jacobson v. Mass., 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643.

It is next contended that the exclusion of the 19-cent tariff for transporta-

tion of petroleum between Olean and Rutland by way of Rotterdam Junction, thence by the Boston & Maine Railroad to the White Creek Junction, was prejudicial to the substantial rights of the accused. To show an absence of criminal intent, it is argued that no shipper would be expected to use the 26½-cent rate as far as Norwood plus $28 per tank car to Rutland when he could transport his goods to the point of destination over another route at an appreciably less sum, and the decision of the Circuit Court of Appeals for the Seventh Circuit is cited as an express authority that such 19-cent through rate concededly in force at the time of the transportation should have been submitted to the jury. I think, however, that the situation in the present case is conspicuously different. Save in a single instance, there is a substantial disparity between the 19-cent rate and the rate paid, a difference of about $7 to $22 per car and aggregating $478.73 on the entire transportation, while in the case cited the excluded rate of another carrier was practically the same as that paid by the shipper who offered to show that it had frequently transported property between the points of carriage over the route of such other carrier. These are important features which distinguish this case from the Standard Oil Case of Indiana, and in my estimation the exclusion by me of such testimony, assuming it to have been error, was not harmful to the accused.

It is finally contended that the defendant should have been permitted to show that it gained nothing by the asserted concession, inasmuch as such testimony bore on the improbability of the defendant's intentional violation of the law. It must be conceded that the evidence is open to inference that the arrangement for the transportation of the commodity and payment of the concession rate through the general office was made by the carriers with the defendant, and, further, that the method of billing the merchandise was prearranged between the carriers and the defendant. It must be assumed that the jury found as a fact that the rate was paid with knowledge that it was lower than the lawful rate. The defendant was presumed to have known as a matter of law that to accept a concession from the carrier was an act prohibited by statute. The case of Perkins v. Moss, 187 N. Y. 411, 80 N. E. 383, 11 L. R. A. (N. S.) 528, relied upon by the defendant in support of its contention that because it gained nothing by the concession there was no intention to violate the statute, was not a case where at the time of the commission of the act such act was a wrong prohibited by statute, for, if it had been, the Court of Appeals says: "An honest belief that it (the act committed) was right would not absolve the defendant from indictment."

The motion of the defendant for a new trial and in arrest of judgment must be denied.

SINGER SEWING MACH. CO. OF NEW JERSEY v. BENEDICT, Treasurer of the City and County of Denver et al.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1910.)

No. 3,328.

1. APPEAL AND ERROR (§ 870*)—QUESTIONS IN LOWER COURT—SUFFICIENCY OF PRESENTATION.

The objection that a bill states no ground of equity jurisdiction when first taken by demurrer, and on the overruling of the demurrer by answer, may be raised in an appellate court on an appeal from final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3506, 3507; Dec. Dig. § 870.*]

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

2. TAXATION (§ 608*)—INJUNCTION AGAINST COLLECTION OF TAX—GROUNDS OF RELIEF.

Unless a complainant can invoke some recognized ground of equity jurisdiction, the mere illegality or irregularity of a tax complained of gives no right to injunctive relief against its collection.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

3. TAXATION (§ 608*)—INJUNCTION AGAINST COLLECTION OF TAX—EQUITY JURISDICTION.

Where a state statute requires notice to a property owner of the raising of his assessment, the failure to give such notice renders the action of the taxing officers in levying a tax on the increase without jurisdiction and void, and it is subject to collateral attack whenever any claim of right is asserted under it which excludes the jurisdiction of a court of equity to enjoin collection of the tax on the ground that there is no adequate remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 608.*]

4. TAXATION (§ 608*)—INJUNCTION AGAINST COLLECTION OF TAX—EQUITY JURISDICTION.

Where the only methods of collecting a personal tax provided by statute are by distraint of property or by ordinary suit, a bill by a taxpayer alleging facts which show that a tax against him was levied without jurisdiction and is illegal and void, and its illegality could therefore be pleaded in defense to an action for its collection, and such action removed into a federal court if desired, but which does not allege that he has any property subject to distraint, does not state any ground which gives a federal court of equity jurisdiction to grant an injunction restraining the collection of the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 608.*]

Sanborn, Circuit Judge, dissenting.

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

Suit in equity by the Singer Sewing Machine Company of New Jersey against James F. Benedict, Treasurer of the City and County of Denver, and others. Decree for defendants, and complainants appeal. Affirmed.

R. H. Gilmore, for appellant.

Charles R. Brock (Milton Smith, on the brief), for appellees.

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

ADAMS, Circuit Judge. The Singer Sewing Machine Company, a foreign corporation, made a return of taxable personal property for the year 1905 to the assessor of the city and county of Denver disclosing a value of $3,800. The assessor increased that amount, adding $62,500 more in value of personal property. A tax list or warrant authorizing the collection of taxes from the company on the total amount of $66,300 was afterwards made out and delivered to the city and county treasurer whose duty it became to collect the taxes assessed thereon. Afterwards the company tendered to the treasurer $136.30, the amount of taxes with accrued interest due on $3,800

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

worth of property as returned by it for taxation, and refused to pay the taxes assessed against the increase of $62,500 on the ground that they were unlawfully imposed and illegal. This was a suit to enjoin the treasurer from proceeding to collect this additional tax, which, it was alleged, he threatened to do.

The real controversy was whether certain moneys, notes, and contracts, which in the regular course of business of the company were temporarily detained at its local office in Denver on their way to their ultimate destination, the home office of the complainant, were taxable in Denver. It was on an average value of these that the assessor based the increase in valuation made by him.

Complainant stated in its bill as reasons for invoking the aid of a court of equity that no notice of an increase in its taxable property was given to the company; that it was thereby deprived of an opportunity to make application to the assessor for redress or appeal to the district or county court for a review of the assessor's action as provided by sections 5639 and 5640 of the Revised Statutes of Colorado; and that it had no adequate remedy at law against the collection of the tax assessed on the increase.

There are no averments in the bill showing any fraud, accident, or mistake which conduced to the overvaluation, any cloud upon title to real estate, or danger of multiplicity of suits, or any averments planting complainant's right to relief upon any other head of equity jurisdiction excepting inadequacy of legal remedy.

We are met at the threshold with the objection that the present bill cannot be sustained because it presents no cause of equitable cognizance, but rather one for which the law courts afford an adequate remedy.

Complainant endeavors to forestall a consideration of this objection on the ground that defendant answered and went to trial on the merits. For that reason it is urged it is now too late to object to the jurisdiction in equity over the subject-matter. The following authorities are cited and relied upon by the complainant's counsel: 1 Daniell's Chancery Pleading & Practice (5th Ed.) pp. 555, 600, et seq.; Wylie v. Coxe, 15 How. 415, 420, 14 L. Ed. 753; New Orleans v. Morris, 105 U. S. 600, 26 L. Ed. 1184; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021.

An examination of these and other cases discloses that the rule invoked prevails only when the objection is made for the first time in the appellate court. In the present case jurisdiction in equity was challenged in limine by a demurrer on the specific ground that the bill contained no matter of equity, and upon that being overruled the same objection was again taken by answer. Until the final decree was passed no appeal lay, and the question of jurisdiction over the subject-matter could not before then have been reviewed. Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961, 964. In such cases an appeal after final decree presents for review the entire record, and if for any reason the decree below was right it will be affirmed.

The objection to our consideration of the jurisdictional question is untenable.

Does the bill disclose a right to the injunctive relief sought? In other words, does it disclose that complainant did not have an adequate remedy at law? These are questions which if answered in favor of defendant render consideration of the merits of the case unnecessary.

The law is well settled that, unless a complainant can invoke some recognized head of equity jurisdiction, the mere illegality or irregularity of a tax complained of gives no right to injunctive relief against its collection. Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. Ed. 231; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; Pittsburgh, etc., Ry. Co. v. Board of Pub. Works, 172 U. S. 33, 19 Sup. Ct. 90, 43 L. Ed. 354; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350, 357; Hallett v. Arapahoe County, 40 Colo. 308, 90 Pac. 678.

In the Hannewinkle Case, supra, which was a bill to enjoin the collection of a tax claimed to be illegal, the Supreme Court, speaking by Mr. Justice Hunt, said:

"It has been the settled law of the country for a great many years that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In State Railroad Tax Cases, supra, Mr. Justice Miller, speaking for the court, after quoting from the Hannewinkle Case, said:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction."

In Indiana Mfg. Co. v. Koehne, supra, Mr. Justice Peckham, speaking for the court, made these observations:

"It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law; but it must appear that the party has no adequate remedy by the ordinary process of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."

From the analysis already made of the bill it appears that it is not grounded upon an equitable foundation like fraud, mistake, avoidance of multiplicity of suits, removing cloud from title to real estate, or any like matter. It rests practically upon the propositions that the tax was illegal and that complainant had no adequate remedy at law to prevent its collection. The claim to equitable relief is stated in the bill in the following words:

"And the plaintiff further says that by reason of the neglect and omission of the county assessor to notify the plaintiff, as provided by the said revenue act, that he had changed the valuation of the plaintiff's personal property as fixed by the plaintiff in its tax schedule from $3,800 to $66,300, and of the other matters and things hereinbefore alleged, the plaintiff is deprived of any remedy at law to redress the wrong imposed upon the plaintiff in this case; that by reason whereof the plaintiff has no speedy and adequate remedy at law, and the threatened proceeding of the defendant, if executed, would work an irreparable injury to the plaintiff, unless restrained by the order of this court, and the plaintiff is compelled to invoke the protection of a court of equity to prevent such threatened injury."

It is said the assessment of complainant's property by the assessor, at a valuation above that returned by it, was an adjudication of the legality of the tax and unassailable except by some direct proceeding like the present bill.

We may concede all that is claimed to follow from a failure to give the notice prescribed by sections 5639 and 5640, Rev. St. 1908; that the notice was a prerequisite to the exercise of jurisdiction to tax the increase made by the assessor. He and other officers acting with him in extending the tax on that increase and issuing the warrant for its collection acted as a special judicial tribunal, and if their judgment was within their jurisdiction it is not subject to collateral attack; but if without their jurisdiction it is subject to such attack. Stanley v. Board of Supervisors, 121 U. S. 535, 550, 7 Sup. Ct. 1234, 30 L. Ed. 1000; McLeod v. Receveur, 18 C. C. A. 188, 71 Fed. 455, 458. Like all judgments in personam whether of special tribunals or courts of general jurisdiction in which there is an absence of service of process or notice or appearance requisite to confer jurisdiction, the assessment in this case was simply void and may be attacked collaterally whenever any claim of right is asserted under it. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, and cases cited.

This leaves the sole remaining inquiry whether the bill and proof disclose that in other respects the complainant had no adequate remedy at law for the wrong and injury alleged to have been threatened by the defendant.

The statute of Colorado (section 5750, Rev. St. 1908; section 202, Revenue Act, Approved March 22, 1902, Sess. Laws Colo. 1902, p. 146) providing that the board of county commissioners shall refund to the taxpayer any erroneous or illegal taxes which he may have been compelled to pay has been held by this court (Atchison, T. & S. F. Ry. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456, 470) not to afford an adequate remedy to a taxpayer who has been required to pay an illegal tax, and we therefore omit further consideration of that statute as a basis for legal relief.

Sections 5682 and 5768, Rev. St. 1908 (sections 135 and 220, Revenue Act, 1902, as amended by Act April 11, 1903, Sess. Laws Colo. 1903, p. 407), empowered the treasurer in certain circumstances to enforce collection of taxes upon personal property by distraint and sale of any personal property of the debtor.

But there is neither charge nor proof that complainant had any personal property of any kind in the city or county of Denver at the time this suit was brought, and there are no allegations or proof that com-

plainant would be injured or embarrassed by any distraint or sale of its personal property, or that any such action was threatened by the defendant. The only threat proved at the hearing was contained in a letter of date October 1, 1906, three weeks before this suit was brought, written by the treasurer to complainant, as follows:

"Denver, Colo., Oct. 1, 1906. Singer Sewing Machine Co.: Your personal tax for the year 1905, amounting to $2284.05, is delinquent, and unless paid at once I will be obliged to enforce collection of same according to law. If you compel this course the expense will greatly exceed the amount now demanded. Your attention is directed to the charges and penalties prescribed by law, and printed on the back of this notice, to which you will be subject if it becomes necessary to enforce a collection of your unpaid personal taxes."

Accordingly, we may eliminate any threatened distraint of personal property as a ground upon which injunctive relief is predicated. Even if we could not do so, we do not think the threat to seize personal property for the satisfaction of an illegal tax would by itself entitle the owner to an injunction in equity. It would amount to a trespass for which the injured party could have proper redress in an action at law.

The only other method of collecting the tax in question was by an ordinary suit by the treasurer against the delinquent taxpayer. This was a method provided by section 5677, Rev. St. (Sess. Laws 1902, p. 112), in case the treasurer could not find the property upon which the tax had been levied or any other property sufficient for the satisfaction of the tax, interest, and penalties. If such a suit had been threatened and instituted, complainant would have had an adequate remedy at law to make any defense based upon the illegality of the tax; and this could have been made either in the state court where the action might have been brought or in the federal court by the process of removal if desired by the defendant in the action. We have held that when one has a right to resort to the federal court for the redress of an injury the fact that he may have a remedy at law in a state court is not an adequate remedy within the meaning of the equitable rule under consideration. National Surety Co. v. State Bank, 56 C. C. A. 657, 120 Fed. 593, 602, and cases cited.

Giving the complainant the benefit of that rule, we are of opinion that, whatever action may have been contemplated in the so-called "threatening letter" of the treasurer, the complainant would have had a complete and adequate remedy at law so far as this record discloses for any injury it might have sustained if the threat had been actually put into execution.

Learned counsel for complainant urges that this court in Atchison, T. & S. F. Ry. Co. v. Sullivan, supra, made pronouncements which justify his present contention. We, however, do not think so. That was a case for injunctive relief against unjust, systematic, and intentional discrimination in the valuation of the property of the railway company for the purpose of subjecting it to an undue proportion of the public burden. We were there met with the objection to equitable relief now made by the defendants in this case. That was disposed of by the court, Sanborn, Circuit Judge, speaking for it, in the following language:

"Finally, counsel for the defendant invoke the conceded rule that some recognized ground of equity jurisdiction, and the fact that the complainant has no adequate remedy at law, in addition to the fact that the tax is excessive and illegal, are essential to the maintenance of a suit in equity for injunctive relief, and they insist that no such foundation for this suit has been laid by the proof. * * * Fraud and mistake are ancient heads of equity jurisdiction. The Board of Equalization made a plain mistake, demonstrable by the mere division of their assessment of the corporate plant of the company in the state by the number of miles of railroad they found the company controlled therein, when it certified to the county of Bent its overassessment of the company's property in that county. The systematic and intentional omission of watches, clocks, and jewelry, credits and fat stock by the county assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law."

The conclusion cannot be avoided that in that case the rule already laid down in this case that actions of this kind must be grounded upon some recognized head of equity jurisdiction in addition to the mere fact of illegality or erroneousness in the tax sought to be collected was fully recognized and acted upon. The learned judge said the rule here laid down was a "conceded one" and proceeded to demonstrate that the action in that case was founded upon one of the best recognized grounds of equity jurisdiction, namely, actual mistake or intentional fraud.

We have no occasion or disposition to criticise the doctrine of that case; but it has no application to the pleadings or facts of this case.

The burden rested on complainant to aver, and if necessary to prove, facts showing that it had no adequate remedy at law for the wrong threatened to be perpetrated against it.

After a careful consideration of the pleadings and proof, we are satisfied that it has failed in this respect.

The decree of the Circuit Court dismissing the bill must, therefore, be affirmed.

SANBORN, Circuit Judge (dissenting). Propositions of law and fact assumed by the majority and conceded to be sound which condition the decision of this case are these: The mere excess or illegality of a tax will not sustain a bill in equity to avoid it or to restrain its collection in the absence of any ground of equity jurisdiction such as fraud, accident, mistake, or threatened multiplicity of suits and of inadequacy of the remedy at law. One may not be deprived of his property without due process of law by the levy and collection of an illegal tax any more constitutionally than he may by any other proceeding without such process. The due process of law prescribed by the statutes of Colorado, by which the assessment or valuation of the complainant's property that formed the foundation of the tax here in question was to be fixed and adjudicated, was that the complainant should make and deliver to the assessor a schedule of its taxable property and of its value under oath (Rev. St. Colo. 1902, §§ 5573, 5582, 5615), that "the assessor shall, prior to the first Tuesday in August of each year, mail to each person, association or corporation, whose property has been assessed at a valuation other than that given in the schedule filed by such person, association or corporation, a statement of any such

change in valuation, and shall give notice by publication * * * that on the day to be therein named he will sit to hear any and all objections to the assessment roll," that he should hear such objections on that and succeeding days until all grievances were heard (section 5639), that from any decision of the assessor overruling any of its objections to the increase of its assessment the complainant might appeal to the board of county commissioners which might hear all testimony produced and subpœna witnesses to testify, and that from an adverse decision of the board the complainant might appeal to the district court, where the issue should be tried de novo on its merits (section 5641). The complainant filed its verified schedule according to the law, in which it stated that the assessment or valuation of its taxable property was $3,800. The assessor arbitrarily and without good reason raised this assessment to $66,300, but gave the complainant no notice of, and it did not know, that fact so that it had no opportunity to contest this raise before the assessor, before the board of county commissioners, or before the district court. Upon this increased assessment, which was confirmed and sent forward by the assessor without notice, the tax in question has been levied, and it is a perpetual lien on all the personal property upon which it was laid. Section 5676.

The majority are of the opinion that the rational deduction from these assumed or conceded propositions of law and fact is that there is no equity in the bill, while it seems to me that they present good ground for the relief sought by the complainant.

Under the statutes of Colorado, which have been quoted, the assessment roll after the time for a hearing upon the increased assessment passed, and after the roll was confirmed and sent forward by the assessor for the levy, was an adjudication of the assessment of the complainant's property by the quasi judicial tribunal, the assessor, the board of county commissioners, or the district court, empowered by the law to determine its amount.

Does this case present any ground of equitable cognizance? Due process of law is as essential to the taking of one's property by taxation as by a judgment of the court, or by any other proceeding, and due process of law must give "notice to the defendant of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought from the court if the claim is sustained." In re Wood and Henderson, 210 U. S. 246, 254, 52 L. Ed. 1046;[1] In re Rosser, 41 C. C. A. 497, 501, 101 Fed. 562, 566. In the Colorado scheme of taxation the notice of the increase of the assessment required by section 5639 was the process upon which the whole proceeding was founded. It was the summons to the complainant to appear before the assessor, before the board of county commissioners, and before the district court if it desired and to answer the claim of the county that its taxable property was $62,500 more than it had testified that it was. But this summons was never served, this notice was never given to the complainant, and a judgment by default was rendered against it that its assessment was $62,500 more than it actually was, and that it should pay an unconscionable tax upon this illegal increase. Why was this notice not given? If the asssessor

[1] 28 Sup. Ct. 621.

intentionally withheld it, and knowingly confirmed and sent forward the assessment without giving the notice, he perpetrated a gross fraud upon the complainant. If he did not knowingly or intentionally withhold the notice or fail to give it, he did so by mistake or accident. In either case he brought this suit well within the domain of a court of chancery. Fraud, accident, and mistake are three great heads of equity jurisprudence, and, whenever injustice or wrong irremediable at law is about to result from either, the power is vested in and the duty is imposed upon the courts of equity to prevent the threatened injury. Their jurisdiction rests upon the fact that, unless they act, wrong will be perpetrated which cannot be remedied. The facts of this case seems to me to bring it within these established principles.

Has the complainant a remedy at law in the national courts against the unjust tax as prompt, complete, and efficacious as the remedy by injunction which it seeks? For it is such a remedy in such a court and that alone that may repel it from a federal court of equity. It is conceded on all hands that the assessment roll and the warrant issued thereon are presumptive proof within and without every court of service of the jurisdictional notice, of the validity of the tax, and of the regularity of all prior proceedings. Are they not also conclusive evidence thereof against every attack not supported by averments and proof of fraud, mistake, or some other such equitable ground of relief? And such allegations and proof for the purpose of avoiding such adjudications and enjoining their execution may be heard in the federal courts in suits in equity alone.

It is true that judgments of courts and of quasi judicial tribunals, such as the assessor and the Board of Equalization, are alike open to collateral attack where the subject-matters or the persons thereof cannot be subject to the jurisdiction of such tribunals. Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 320, 8 C. C. A. 635; In re Sawyer, 124 U. S. 200, 221, 222, 8 Sup. Ct. 482, 31 L. Ed. 402; Whitehead v. Railroad Company, 28 Ark. 460; Lessee of Hickey v. Stewart, 3 How. 751, 11 L. Ed. 814; Bigelow v. Forrest, 9 Wall. 339, 351, 19 L. Ed. 696; Ex parte Lange, 18 Wall. 163, 176, 21 L. Ed. 872. But where, as in the case at bar, the subject-matter and the party are within the potential jurisdiction of the tribunal, in this case the assessor, and its jurisdiction depends upon a fact which might or might not support that jurisdiction, in this case the fact of service of the jurisdictional notice, which the tribunal is empowered and required to ascertain and determine, its decision is conclusive against collateral attack, and it can be avoided only by a direct appeal or a plenary suit for fraud, mistake, or some other equitable ground of relief. Colton v. Beardsley, 38 Barb. (N. Y.) 29, 51, 52, and cases there cited; In re Sawyer, 124 U. S. 200, 220, 221, 8 Sup. Ct. 482, 31 L. Ed. 402; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 556, 559, 8 Sup. Ct. 217, 31 L. Ed. 202; Rogers v. Penobscot Mining Co., 154 Fed. 606, 609, 83 C. C. A. 380; Foltz v. St. Louis & S. F. Ry. Co., 8 C. C. A. 635, 637, 60 Fed. 316, 318; National Surety Co. v. State Bank, 120 Fed. 593, 600, 56 C. C. A. 657.

The difference between these two classes of cases is noted in Rog-

ers v. Penobscot Mining Company, where it is said that a challenge of the power of the court to take any action in the case under any circumstances is fundamental and subject to examination without a specification of error, while an objection that the jurisdictional notice was not served assails nothing but the method of the exercise of the power of the court, relates to procedure only, and cannot be successfully presented indirectly. Pennoyer v. Neff, 95 U. S. 714, 721, 722, 24 L. Ed. 565, cited by the majority, well illustrates the distinction. In that case an indirect attack was made upon a judgment against a person without the jurisdiction of the court which rendered the judgment which was based on the publication of the summons. The fact that the defendant had not been personally served within the territorial jurisdiction of the court was admitted and the judgment was assailed (1) because the affidavit for publication was insufficient to invoke the jurisdiction of the court, and (2) because the court was without any power to acquire jurisdiction of the person of the defendant beyond its territorial jurisdiction. The Supreme Court decided that advantage of the lack of jurisdiction on the former ground could be taken by a direct attack only, but that on the second ground the judgment was void against a collateral attack.

In Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 556, 559, 8 Sup. Ct. 217, 31 L. Ed. 202, a lack of a diversity of citizenship requisite to give jurisdiction to the Circuit Court which rendered the judgment apparent on the face of the record, and in Re Sawyer, 124 U. S. 220, 221, 8 Sup. Ct. 482, 31 L. Ed. 402, a lack of the requisite amount in controversy to give jurisdiction apparent on the record, were declared to be unavailable to avoid the judgments on collateral attacks.

In Colton v. Beardsley, 38 Barb. (N. Y.) 29, 51, 52, the jurisdiction of a school district to elect a trustee was conditioned by the existence of a vacancy, and that fact was primarily determinable by the remaining trustees. They had decided that there was a vacancy and had called the election. The New York court said:

"It is of the essence and nature of such acts, whether the power to perform them is committed to a court or a body of men, or to an individual, that they are final and conclusive except in a direct proceeding for their reversal; and that they cannot be inquired into or questioned collaterally. When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. * * * The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong."

In Foltz v. St. Louis & S. F. Ry. Co., 60 Fed., at page 319, 8 C. C. A., at page 637, this court declared:

"Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."

And in National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, we sustained a bill in equity to enjoin the enforcement of a

judgment of a state court on the ground that by mistake the jurisdictional notice had not been served upon the defendant.

The assessor had jurisdiction upon proper notice to the complainant of the subject-matter and of the party to this tax proceeding. He was invested with the power, and it was his duty to ascertain and determine whether or not the jurisdictional notice had been served upon the complainant, and if it had been to confirm the assessment of its property and send it forward for the levy. The assessment roll and the warrant formed the record of his adjudication of this issue, and it seems to me that they and that judgment which they evidence are impervious to collateral attack under the authorities which have been cited, and that they can be avoided or restrained in a federal court only by a plenary suit like that in hand upon the ground of fraud, mistake, or other like basis for relief in equity.

In my opinion the roll and the warrant, until avoided or restrained in equity, constitute a perfect justification of a distraint by the treasurer, a complete answer to an action of trespass in a federal court for such distraint, incontrovertible proof of a cause of action to recover the tax in such a court where equitable defenses are not available in actions at law, and the complainant has no adequate remedy at law for the threatened collection of the unjust tax.

Moreover, the fact that the assessment upon which the defendant relies to support the tax shows property of the complainant of the value of $66,300 within the jurisdiction of the treasurer, together with the legal presumption that a state of things once shown to exist will continue for a reasonable time, seems to me ample proof that the complainant has property liable to respond to the endeavors of the treasurer to collect this tax and a just estoppel of the defendant who did not deny this fact in his answer from denying it now. For these reasons this bill appears to me to disclose an assessment made by fraud or mistake without due process of law upon which a tax has been illegally founded which the defendant is about to collect out of the property of the complainant, and that it will suffer irreparable injury, in that this unconscionable tax will be collected from it and there will be no way in which it may recover it back without this suit in equity, or another of similar character. Here are safe and ample grounds for an injunction against the illegal tax.

The facts and the law seem to me to place this case on all fours with that of National Surety Company v. State Bank, 56 C. C. A. 657, 664, 120 Fed. 593, 600. In that case the surety company, pursuant to a requirement of a statute of Nebraska, appointed the Auditor of the State its attorney on whom process against it might be served in any action. An action was brought against it, the summons therein was served upon the auditor who, by accident or mistake, failed to forward it to the surety company, and a judgment was rendered against it by default in one of the courts of the state of Nebraska for $7,842.40, on a cause of action to which it had a meritorious defense. A suit was brought in the United States Circuit Court in that district to enjoin the execution of that judgment of the state court. This court quoted the declaration of Chief Justice Marshall in Marine Insurance Company v. Hodgson, 7 Cranch, 332, 336 (3 L. Ed. 362), that:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

—and granted the relief sought.

I am of the opinion that the unconscionable judgment of an assessor rendered through fraud, accident, or mistake without the due process of law and the opportunity to be heard required by the Constitution and the law is not less sacred and is as remediable in equity as the unconscionable judgment of a court.

NORFOLK & A. TERMINAL CO. v. ROTOLO.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1910.)

No. 903.

1. LIMITATION OF ACTIONS (§ 130*)—NEW ACTION AFTER DISMISSAL OF FORMER ACTION—SUIT AGAINST WRONG DEFENDANT—VIRGINIA STATUTE.

Code Va. 1904, § 2934, which provides that where an action is brought against the wrong defendant, and judgment is rendered against the plaintiff solely on such ground, he may bring a new action within one year thereafter, notwithstanding the expiration of the time within which the action must otherwise have been brought, applies to any case where, through a misapprehension of the facts or for any other reason, without fraud, the action is brought against the wrong party, and is for that reason dismissed by the court.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 561; Dec. Dig. § 130.*]

2. CARRIERS (§ 315*)—ACTION FOR INJURIES—VARIANCE—ALLEGATIONS OF NEGLIGENCE.

Under the rule of pleading in Virginia that the declaration must allege the facts upon which plaintiff relies as constituting his cause of action, that defendant may be advised of the issue he is required to meet, which rule governs the federal courts in that state by virtue of the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), a declaration in an action against a street railroad company which alleges that after plaintiff had boarded one of defendant's cars as a passenger, and was standing on the step, defendant's empolyés negligently ran another car against him by which he was injured, is not supported by evidence that the car on which plaintiff was standing was moving while the other car was standing still at the time of the injury, and an instruction permitting a recovery on such state of facts was erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.*]

Brawley, District Judge, dissenting.

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

Action by Frank Rotolo against the Norfolk & Atlantic Terminal Company. Judgment for plaintiff, and defendant brings error. Reversed.

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

Frank Rotolo, alleged citizen and subject of the kingdom of Italy, filed in the court below on August 31, 1908, his declaration in trespass on the case against the Norfolk & Atlantic Terminal Company, alleging himself to have been injured at or near the intersection of City Hall and Monticello avenues, in the city of Norfolk, Va., while entering an electric car operated by defendant company for the purpose of carrying passengers for hire. It is alleged in the first count of the declaration that this injury was received by reason of the defendant, by and through its servants, negligently running another car upon and against plaintiff whilst he was on the step and platform of the first car in the act of boarding it. In the second count it alleged that defendant had placed one of its cars at the intersection of City Hall and Monticello avenues to receive passengers; that a large number of persons were entering this car; that the platform thereof was crowded with such persons; that the plaintiff had gotten upon the step and platform of this car, when the servants of defendant operating another car of defendant at or near the place, who saw, or by reasonable care could have seen, plaintiff in the position that he was in in time to have avoided injuring him, negligently ran this last-named car upon him and injured him. It is alleged in both counts of the declaration that this injury was incurred on April 1, 1907, that within one year from that date, to wit, on December 14, 1907, plaintiff instituted suit in the court below against the Norfolk & Portsmouth Traction Company to recover damages therefor; that on June 13, 1908, a judgment was entered therein determining that the injury was inflicted by the Norfolk & Atlantic Terminal Company, and not by the Norfolk & Portsmouth Traction Company, by reason whereof said action against the latter was dismissed with cost. On September 16, 1908, the defendant filed a plea to the jurisdiction denying plaintiff to be a citizen or resident of the kingdom of Italy, but alleging him at the time of the institution of his suit, and since, to have resided and had his home in Norfolk, Va. On November 6, 1908, the defendant filed its plea of the statute of limitations. On November 7, 1908, the plaintiff filed a special replication to the plea to the jurisdiction, alleging himself to be a citizen of Italy within the meaning of the Constitution and statutes of the United States, and that his residence in Norfolk was temporary only. On the same day he filed special replication to defendant's plea of the statute of limitation, alleging the institution for the same cause of action of his suit against the Norfolk & Portsmouth Traction Company, the judgment therein, and the institution of this suit within one year after such judgment. On this same day defendant filed its demurrer to plaintiff's declaration and by agreement in writing the issue raised by the plea to the jurisdiction was submitted to the court without jury. The court entered thereupon an order overruling this plea and the demurrer to the declaration; the defendant entered its plea of not guilty, and issues were joined thereon, and, upon the plea of limitation, motion was entered by defendant to require plaintiff to file a bill of particulars, which motion was sustained, and this "bill of particulars" was filed in words and figures following:

"The manner in which the plaintiff was injured is as follows: "A car of the defendant was at or very near the corner of Monticello avenue and City Hall avenue, in the city of Norfolk, which the plaintiff, intending to go to Pine Beach, in Norfolk Co., Va., and a number of others were attempting to board for the purpose of becoming passengers. While in the act of boarding the car another car of the defendant approached and in rounding the curve at that point the end or corner of the car, came too close to the car which the plaintiff was then boarding, he being then on the step of said car, and struck the plaintiff causing the injuries of which he complains in the declaration Counsel for Plaintiff."

This "bill of particulars" was subsequently permitted to be amended by minor additions, and the cause at the instance of the defendant was continued until February 1, 1909, when a trial was commenced, and, at a subsequent day, verdict for $5,000 in favor of plaintiff was rendered, motion by defendant to set aside was entered, overruled, judgment rendered and exceptions taken. The defendant has sued out this writ of error assigning 34 grounds therefor.

W. H. Venable and Henry W. Anderson, for plaintiff in error.

J. L. Jeffries (Jeffries, Wolcott, Wolcott & Lankford, on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge (after stating the facts as above). We are confronted at the threshold of this case with the question as to whether the court below erred in rejecting the plea of the statute of limitations. This involves a construction of section 2934 of the Code of 1904 of Virginia, which gives further time when a suit has been brought against the wrong defendant. The section in question reads as follows:

"If an action commenced within due time in the name of or against one or more plaintiffs or defendants abate as to one of them by the return of no inhabitant or by his or her death or marriage, or if in an action commenced within due time judgment for the plaintiff shall be arrested or reversed upon a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the loss or destruction of any of the papers or records in a former suit which was in due time, or if any pending cause or in any action or suit hereafter commenced within due time in any of the courts of this commonwealth the plaintiffs proceed or have proceeded in the wrong forum or bring the wrong form of action or against the wrong defendant and judgment is rendered against the plaintiff solely upon such ground, in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, or arrest, or reversal of judgment, or loss or destruction, or judgment against the plaintiff, but not after: Provided, however, that the time that any such action or suit first brought shall be pending in any appellate court shall not be included in the computation of said year."

It is apparent that this statute, among other things, was intended to provide that where one, because of a misapprehension of the facts or other reason, and without fraud, institutes suit against the wrong person, the bringing of such suit will not prevent him from instituting suit against the proper defendant, if the suit abates solely upon that ground. Here, it clearly appears that suit was instituted against the wrong defendant, due solely to a misapprehension of the facts, and without fraud on the part of the plaintiff. Under these circumstances, we think the ruling of the court upon the issue joined on the plea of the statute of limitations was eminently proper.

We now come to consider what we conceive to be the most important question presented by the assignments of error, to wit, as to whether the court below erred in its statement to the jury, which was substantially to the effect that, notwithstanding the fact that in the two counts contained in the declaration, and the bill of particulars filed, it was alleged that the defendant carelessly and negligently ran the north-bound car so as to cause the injury which the plaintiff sustained, that if it should be found that the injury was sustained at a time when the north-bound car was stationary, and that such injury was due to the fact that the south-bound car was in motion, the plaintiff would be entitled to recover.

The declaration contains two counts, these counts being in substance as follows:

"First count: The said plaintiff * * * was entering for the purpose of becoming a passenger, and then and there became a passenger on one of the said electric cars * * * and had gotten upon the step and platform for the purpose of entering said car as a passenger, * * * the said defendant * * * by and through its said servants, grossly, negligently and recklessly ran another one of its cars against the plaintiff whilst he was upon said step and platform as aforesaid. * * *

"Second count: And the said defendant * * * had placed one of its said cars at the intersection of City Hall and Monticello avenues * * * to receive passengers * * * and the said plaintiff says * * * that at the time he had gotten upon the step and platform of said car, for the purpose of entering the same as a passenger * * * and was proceeding to enter the said car. Nevertheless the said defendant, * * * after its servants in charge of another of its said cars, at and near that place, which was approaching the car upon which the plaintiff then and there was, as aforesaid, saw, or by the exercise of ordinary care could have seen, the plaintiff in the position in which he then and there was, in time to have avoided injuring him, carelessly, negligently, and recklessly ran its said car upon and against the plaintiff. * * *"

These counts are based upon the theory that whilst the plaintiff was upon the step and platform of the south-bound car which he was attempting to enter for the purpose of becoming a passenger, the defendant, through its servants, recklessly and negligently ran another car against the plaintiff, thus causing the injury which the plaintiff sustained.

It will be seen that the defendant was called upon to answer a specific charge of negligence, to wit, that it ran its north-bound car in a negligent and careless manner so that the plaintiff was thereby injured. Nowhere in the declaration is there to be found any allegation to the effect that the defendant carelessly or negligently operated the car which the plaintiff was attempting to enter for the purpose of becoming a passenger. Thus, the issue was at the time of the trial clearly defined, and the defendant was not required to meet any theory as to how the accident occurred other than the one set forth in the pleadings. It appears from the evidence that some of the witnesses testified that the north-bound car was standing still, and that the accident was due to the fact that the south-bound car was in motion and thereby came in contact with the north-bound car. In referring to this phase of the question the court, among other things, said in its charge:

"You are further charged that the two counts in the declaration filed by the plaintiff in this case, together contain all the charges that the defendant has been summoned here to answer. Both of those counts allege a state of facts, which, if true, would make the plaintiff a passenger at the time he was injured; the only material difference in the charges of negligence against the defendant in the two counts being that while in the first count it is alleged the servants of the defendant operating one of its cars, carelessly, negligently and recklessly ran into the plaintiff while he was on the step of the platform of another car, the second alleges that this was done after the defendant's servants operating the car which is alleged to have run into him, 'saw, or by the exercise of ordinary care, could have seen the plaintiff in the position in which he then and there was, in time to have avoided injuring him'; there is the further difference between the two counts in that, by the second count, it is averred that the car upon which the plaintiff took passage had been placed at the intersection of City Hall and Monticello avenues, with a view

of receiving passengers, and the first count omits the averment that the car on which the plaintiff was injured, was thus stationary."

The court then proceeded to further explain to the jury what they must find in order to justify them in finding a verdict in favor of the plaintiff:

"The court charges you that if you believe from the testimony that the plaintiff took passage upon a car of the defendant company, either as charged in the first or second counts of the declaration, that it was the duty of the defendant to use due and proper care to safeguard and protect him while thus a passenger on the rear platform of one of its cars, and if you believe that while thus upon the platform of one of its cars, the defendant negligently ran another car upon and against him causing the injury sued for, then he is entitled to recover damages. If, on the other hand, you should believe that the plaintiff sustained the injury sued for, not because of any negligence or neglect on the part of the defendant in running its car against him while he was a passenger on another one of the defendant's cars, but because of his negligence in recklessly and carelessly attempting to board a moving car of the defendant company, and while hanging to the outside of the gate opposite to the side on which passengers were being received, and in that way came in collision with another car of the defendant company, he is not entitled to recover."

Up to this point the charge is in perfect harmony with the theory of the declaration, and the court clearly instructed the jury that, in order to entitle the plaintiff to recover, it must be found as a fact that the defendant carelessly and negligently ran its car against the plaintiff while he was attempting to board the south-bound car; and the court further said that unless they should find that the defendant carelessly and negligently ran its car against the plaintiff, as alleged, the plaintiff would not be entitled to recover.

It appears from the record that counsel for the defendant in addressing the jury, called attention to the fact that the defendant's defense to the action was that the north-bound car was standing and that the south-bound car was passing the north-bound car at the time the accident happened, and was insisting that he would be able to show from the court's instruction (which we have quoted) and from the declaration, that those in charge of the north-bound car were charged in the declaration with negligently running into the plaintiff, and insisted, therefore, that the plaintiff could not recover if they found from the evidence that the north-bound car was standing while the south-bound car was being negligently operated. In other words, it was insisted by counsel for the defendant that the proof, as he viewed it, did not sustain the allegations contained in counts Nos. 1 and 2, and that, therefore, there was a fatal variance. The court at this point interrupted the counsel, and made the following statement to the jury:

"Though it is customary for the court to comment on the testimony, I rarely do it, and have not done it in this case, but I ought not to sit here and hear you make the explanation you are making now, in the light of the inquiry of the juror as to the court's instruction, because it might mislead the jury. The juror's question was this: 'What effect would moving the north-bound car have, if it was sufficiently close to the other track to cause a collision?' and you are arguing to the jury that the court's instruction in effect says that the north-bound car must have moved in order to entitle the plaintiff to recover, because there is no averment of negligence on the part of the plaintiff against the defendant but for running its south-bound car. Now,

that implies that it would be negligence on the defendant's part to run their south-bound car down their south-bound track. The court never meant to imply that. The instruction means that if this north-bound car was in such close proximity to the other car by reason of its being on the curve, whether standing or moving, as that a passenger on the other car would be run into by it, then that would not disentitle him to recover, because it would be upon the assumption that the defendant was guilty of negligence in using its own tracks, which is not the case. If the car was so close to the other track that it could not run, it must not go any further than necessary to allow the other to pass."

This statement is inconsistent with paragraphs 3 and 4 of the charge, and practically nullifies what the court had to say in those paragraphs as respects the right of the plaintiff to recover. In other words, the statement of the court contained in those two paragraphs was to the effect that the plaintiff could not recover unless he offered proof to show, (1) that he was a passenger on the south-bound car; and (2) that his injury was due to the fact that the defendant carelessly and negligently ran its north-bound car so as to strike him while he was attempting to board the south-bound car. The learned judge, in the statement which we have just quoted, practically told the jury that it made no difference whether the proof as to which car was moving showed that the plaintiff was struck by the north-bound car as alleged, or whether his injury was due to the fact that the south-bound car was moving and thereby came in contact with the north-bound car. After counsel for defendant had concluded his argument, the court submitted an additional instruction to the jury, bearing upon this phase of the question, as follows:

"During the discussion of the court's instructions by counsel for the defendant, one of the jurors inquired of him as to what would be the effect of the north-bound car remaining stationary on the curve at the time of the accident; and the court, in view of counsel for defendant's interpretation of the court's instructions on that point, orally made explanation of the instruction, intending to write the same out formally, which it now does, leaving, however, in the record, what was orally stated as taken down by the stenographer at the request of defendant's counsel, and by permission of the court.

"The juror's inquiry is as to what would be the effect of the north-bound car remaining stationary on the curve at the time of the accident, so that a passenger on a south-bound car was struck by the north-bound car, so standing on the curve, and not actually moving at the time. The court charges you that the plaintiff is not disentitled to recover merely because the north-bound car may have been standing, instead of moving, if you believe from the evidence, under the instructions of the court, having regard as well as to the plaintiff's contributory negligence, that the striking of the plaintiff while a passenger, and himself exercising due care, so on the south-bound car, by the north-bound car, was the proximate and direct cause of the accident."

This case, coming, as it does, from the Eastern District of Virginia, we are governed by section 914, Rev. St. 1878, 4 Fed. Stat. Ann. § 914, p. 563 (U. S. Comp. St. 1901, p. 684), which reads as follows:

"Sec. 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

In the case of Baltimore & Ohio R. Co. v. Whittington's Adm'r, 30 Grat. (Va.) 805, the court in stating the object of a declaration, said:

"The object of a declaration is to set forth the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chitty, Plead. 256; Barton's Law Prac. p. 103. It is very true that in actions for torts it is frequently sufficient to describe the injury generally, without setting out the particulars of the defendant's misconduct. In such cases great latitude of statement is allowed. But this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof. 1 Chitty, Plead. 406 note; Jones v. Stephens, 11 Price's R. 235; 1 Saunders on Plead. and Evidence, 510."

The leading case in Virginia on the subject is the case of Hortenstein v. Virginia-Carolina Ry. Co., 102 Va. 914, 47 S. E. 996. It appears from an examination of that case that the rule of pleading in actions of this nature, prior thereto, had not been very strict. However, after an exhaustive review of the law in that case, the court, among other things, quoted with approval the following statement of Judge Staples in the case of Baltimore & Ohio R. Co. v. Whittington's Adm'r, supra:

"* * * The learned counsel for the plaintiff insists that if greater particularity is required in stating the cause of action, the plaintiff is liable to be defeated on the trial by a variance between the allegations and the proofs. A declaration can, however, subserve no good purpose unless it be sufficiently specific to inform the adverse party of the ground of complaint. If it is deficient in that particular, it may as well be dispensed with altogether. The plaintiff is presumed to have some knowledge of the facts upon which his action is founded. If he is in doubt as to the precise nature of the evidence, he may frame his declaration with different counts, varying his statements to meet every possible phase of the testimony."

These cases define what is necessary to constitute a proper count upon a given state of facts; but in the case at bar there is no attempt in any count to set forth the facts so as to present this particular theory, which, among other things, was submitted to the jury.

As we have stated, some of the witnesses testified that the plaintiff boarded the south-bound car, which began to move and at which time the north-bound car had come to a standstill on the curve, and that the south-bound car in attempting to pass the north-bound car came in such close proximity to the same that the plaintiff, who was standing on the steps or platform of the south-bound car, came in contact with the north-bound car and was thereby injured.

There is nothing contained in either one of the counts which undertakes to charge that the plaintiff was injured in the manner described by these witnesses, and, under such circumstances, it was but natural that counsel for the defendant should, among other things have insisted that if the jury found the facts to be in accordance with this evidence, there was a fatal variance, and that the plaintiff would, therefore, not be entitled to recover.

In the case of Peary Lee Moss v. North Carolina Railroad Company, 122 N. C. 889, 29 S. E. 410, the general rule in regard to this question is clearly stated as follows:

"* * * A defendant is called upon to answer the accusations made against him, but he is not called upon, and it would be unreasonable to do so, to anticipate and come prepared to defend any other accusation. It is a settled maxim of law that proof without allegation is as unavailable as allegation without proof. There is nothing in the answer to assist the complaint, if the facts were as the charge assumes them to be. Conley v. Railroad Company, 109 N. C. 692 [14 S. E. 303]. 'A complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory.' 4 Elliott on Railroads, § 1954."

It may be insisted that this evidence was in the nature of a surprise to counsel for the plaintiff, but it would have been an easy matter for the plaintiff to have amended his declaration at that stage of the proceedings so as to charge that the defendant carelessly and negligently stopped its north-bound car at a point on the curve which brought it in contact with the south-bound car while the same was passing and that the defendant carelessly and negligently operated its south-bound car so as to injure the plaintiff by being brought in contact with the north-bound car. The plaintiff did not avail himself of the right which he undoubtedly had to make such amendment, and his failure to do so placed him in a position where he was bound to rely solely upon the two counts contained in the declaration. Under such circumstances, we are of opinion that the court below submitted to the jury a theory not supported by any count contained in the declaration, and in view of which we are impelled to the conclusion that the court erred in this respect, and that its action in this respect, in view of the other two counts, was such as to materially prejudice the rights of the defendant.

It being apparent that the judgment of the lower court must be reversed, the verdict of the jury set aside, and a new trial awarded, we deem it unnecessary to consider the other assignments of error.

Reversed.

BRAWLEY, District Judge, dissenting.

McGRAW v. MOTT.

MOTT v. BUCKHORN PORTLAND CEMENT CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1910.)

No. 905.

1. COURTS (§ 371*)—FEDERAL COURTS—EQUITY JURISDICTION—ENFORCING REMEDY GIVEN BY STATE STATUTE.

Section 65 of the corporation act of New Jersey (P. L. 1896, p. 298), which authorizes a suit by any creditor or stockholder to wind up the affairs of a corporation which has become insolvent or suspended its ordinary business for want of funds to carry on the same, creates a right which may be enforced in a federal court of equity having jurisdiction of the parties.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 371.*]

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

2. CORPORATIONS (§ 615*)—INSOLVENCY PROCEEDINGS—NEW JERSEY STATUTE —SUIT IN FEDERAL COURT.

A suit to wind up the affairs of an insolvent corporation of New Jersey under section 65 of the corporation act of that state (P. L. 1896, p. 298), as such act has been construed by the Supreme Court of the state, may be brought by a simple contract creditor, and, even if such objection would lie to a suit brought in a federal court of equity, it is open only to the corporation and cannot be raised by an intervening stockholder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 615.*]

3. COURTS (§ 264*)—FEDERAL COURTS—SUIT FOR ANCILLARY RECEIVERSHIP—SCOPE OF JURISDICTION.

Where a federal court of equity in New Jersey, acting under section 65 of the corporation act of the state (P. L. 1896, p. 298), granted an injunction against a corporation of that state on the ground of insolvency and appointed a receiver for its property, it was in accordance with the recognized federal practice for the complainant, with leave of that court, to institute a suit for the appointment of an ancillary receiver in the federal court of another district in which the corporation had property, and, while a stockholder may be permitted to intervene in the ancillary suit and contest the right of the complainant, he cannot in such suit, or on appeal from the decree therein, question the jurisdiction of the court in the principal suit, nor obtain a review of its decree.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 264.*

Supplementary and ancillary proceedings and relief in federal courts, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

4. APPEAL AND ERROR (§ 983*)—REVIEW—DISCRETION OF COURT—SALE OF PROPERTY.

The sale of the property of an insolvent corporation pending contested litigation as to the right, while not usual, is within the sound discretion of the court, and its action cannot be reviewed where the fairness and validity of the sale are not otherwise attacked.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 983.*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Martinsburg.

Suit in equity by Abram C. Mott against the Buckhorn Portland Cement Company; John T. McGraw intervener. Decree for complainant, and the intervener appeals. Affirmed.

Appellee, Abram C. Mott, a citizen and inhabitant of the state of Pennsylvania, for and on behalf of himself and all other creditors and stockholders, on March 2, 1908, filed his bill in equity in the Circuit Court of the United States for the District of New Jersey, against the Buckhorn Portland Cement Company, a corporation chartered and organized under the laws of the state of New Jersey, in which he alleged: That said corporation was duly chartered and organized for the purposes and with the powers set out in the certificate of incorporation attached and made a part of his bill. That said corporation owned, and prior thereto operated, "a portland cement plant" in the state of West Virginia. That said corporation operated the said plant, with occasional interruptions, from the month of June, 1903, until October, 1907, at a money loss of $400,000, so that, in the month of October, 1907, it became necessary for the defendant to close its plant down and suspend business because it had no money to continue the same. That since then the plant had been practically idle, and that, before the business could be resumed, it would be necessary to increase the capital to raise money to pay wages, purchase supplies, and carry its product until it could be marketed, and this could not be done because it had no accounts receivable above $500 and "its borrowing resources had been exhausted." That complainant was

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

president of the corporation, and "by reason of that fact had advanced the sum of $143,150 from his own private funds to pay wages, purchase supplies and machinery, and carry the concern along, and that all he had to show for said loans were certain matured promissory notes, given by said company, amounting, in the aggregate, to the sum of $143,150.08, upon which there was due for accrued interest the sum of $6,175. That, in addition to the above indebtedness, the defendant owed him the sum of $11,200 for salary as president" and other sums, aggregating in all the sum of $166,739.07, exclusive of bonds and stocks. That there were no other unsecured creditors of defendant known to complainant. That the Pennsylvania National Bank held its notes for $56,700 for loans for which it held as collateral bonds for the same amount, being a portion of an issue of $200,000 secured by deed in trust. That the bank was further secured by the guaranty of complainant and three others. That the capital stock of said company was $800,000, of which $450,000 was preferred stock. That complainant held 1,256 shares of the common and 1,330 shares of the preferred stock and $77,000 of bonds secured by the deed of trust, and that $67,750 of bonds were held by other parties. That defendant company had less than $500 in its treasury. That the value of the stock on hand did not exceed $2,500 and bills receivable $500. That these assets, together with the plant at Manheim, in West Virginia, constituted the resources of defendant company. Complainant prayed that defendant company be enjoined from exercising any and all privileges and franchises granted by its charter and from receiving or collecting any debts due, and that a receiver be appointed "in accordance with the statute in such cases made and provided, and that he might have such other and further relief in the premises, as the nature of the case may require and as may be agreeable to equity and good conscience."

On the filing of the bill, an order was made directing defendant to show cause, on the 9th day of March, why an injunction should not issue and a receiver be appointed, pursuant to the prayer of complainant. On the return day a decree was made by Judge Lanning reciting that the cause came on for hearing "in the presence of Carrow & Kraft, of counsel with the complainant, and Walton Pennewill, of counsel with defendant, and it appearing that a copy of the bill of complaint and affidavit thereto annexed, together with a copy of the rule to show cause heretofore allowed, has been duly served upon the defendant, and it further appearing that the defendant, by its answer, this day filed, admits that it is insolvent and without funds or resources to meet its obligations or continue its business, and that said defendant joins in the prayer of the complainant that it be decreed insolvent and a receiver be appointed, and it appearing to the court from the bill of complaint and affidavit thereto annexed and the answer of defendant that said defendant has suspended its ordinary business and is insolvent," it is ordered that the rule to show cause be made absolute, and that Robert A. Patton of Philadelphia be and is appointed receiver of the defendant company with the usual and necessary powers conferred upon receivers and "required by law and by an act of the Legislature of New Jersey entitled 'An act concerning corporations (Revision of 1896)' approved April 21, 1896, and all acts amendatory thereto and supplementary thereto." P. L. 1896, p. 277. The receiver was required to file a bond in the sum of $75,000 with approved security. "And the said receiver is hereby authorized to apply to the Circuit Court of the United States for the Northern District of West Virginia in such proceedings as may be necessary to protect the property of the defendant corporation located in that district and leave is given to the plaintiff in this cause to make application for an ancillary receiver in the United States Circuit Court of said district."

On March 11, 1908, complainant filed, in the Circuit Court of the United States for the Northern District of West Virginia, his bill in equity against defendant company reciting substantially the same facts contained in his original bill in the Circuit Court of New Jersey, and further alleging that he had filed the bill in said court, making a copy thereof, together with the order of Judge Lanning, hereinbefore set forth, a part thereof. Defendant, "pursuant to direction of its board of directors," answered the bill, admitting the allegations therein and joining in the prayer for the appointment of

a receiver. The answer is filed under the seal of the corporation and verified by Charles M. Mott, its secretary.

On March 13, 1908, an order was made by Judge Dayton, reciting the order made by Judge Lanning and appointing the said Robt. A. Patton receiver of said corporation in West Virginia. This order makes no reference to the New Jersey statute, pursuant to which the court in New Jersey proceeded. The receiver was directed to file bond and make an inventory of the property of the corporation located in West Virginia. The bond was duly filed and approved, and on May 13, 1908, the receiver filed a petition in the cause setting forth that he had taken into his possession all of the property of said corporation in West Virginia, an itemized inventory whereof he attached. He also recites that he has filed, in the Circuit Court of New Jersey, a petition setting forth the same facts, and that "on April 27, 1908, a petition of John T. McGraw was filed in said suit in New Jersey, a certified copy of which is hereto attached, marked 'Petitioner's Exhibit F,' and asked to be read as a part hereof." He recommended the sale of the property, etc.

The record shows that on April 25, 1905, appellant filed, in the Circuit Court of New Jersey, his petition setting forth that he was a citizen and resident of the state of West Virginia and a stockholder in defendant corporation, being the owner of 500 shares of common and 500 shares of the preferred stock of said company. He further alleged: That complainant had absolute control and management of the business affairs of the company and its indebtedness, except the bonds secured by mortgage. That the assets of the company, as he is informed, are ample to discharge its indebtedness to complainant "provided reasonable time is given to those persons interested in the Buckhorn Portland Cement Company to work up, either a reorganization or a favorable disposition of its property, or the operation of the plant under favorable conditions and capable management." That the assets of the company, including its plant, under favorable circumstances, are worth very much more than its liabilities, and that the court should not "hurriedly order a peremptory sale to be made of its property without giving the stockholders interested an opportunity to ascertain whether arrangements cannot be made to prevent the sacrifice of their interests and the interests of the company." He asks that he may intervene and an opportunity given him to answer the bill, etc.

On the 27th day of April, 1908, the petition was heard by Judge Lanning and, after argument by counsel for petitioner and complainant, the petition of the receiver for an order to sell the property was granted.

It was provided that "the same be not carried out until it shall have been confirmed by the United States Circuit Court for the Northern District of West Virginia." The petition of John T. McGraw was denied by Judge Lanning.

On May 13, 1908, appellant filed his petition in the court below setting out the proceedings had in the Circuit Court of New Jersey, and alleging "that, at the time of filing his said petition in the Circuit Court of New Jersey, he was not in possession of all the facts necessary to a full statement of his case, nor in the possession of all the facts, at this time, known by him to exist," etc. He alleges a number of additional facts, many of which he says constitute a valid defense to complainant's bill, and asks that he be permitted to intervene in the cause in said court and file answer, etc.

On the same day, May 13, 1908, Judge Dayton heard the petition of the receiver upon the order made by Judge Lanning, and the petition of John T. McGraw, and confirmed said order and directed the receiver to proceed with the sale of the property, being of the opinion from the petition, exhibits, and proceedings that it is imperative, looking to the interest of all persons interested in said property, that a speedy sale of the same be had and that "leave be given McGraw to file such legal defense as he may be entitled to in this cause."

On June 13, 1908, appellant, McGraw, filed in the Circuit Court for the Northern District of West Virginia, a demurrer to the bill, for that:

(1) That it is not alleged that complainant had reduced his claim to judgment in any court of law and by reason thereof a court of equity could not entertain the plaintiff in the premises.

(2) That a simple contract creditor may not have and maintain a suit in equity of the character described in the bill, unless additional grounds be alleged, and that no such grounds are alleged.

(3) That complainant had a full and adequate remedy at law. That he could recover judgment at law on his debt and issue execution against the property of defendant. That, by proceeding in equity, complainant deprives defendant of trial by jury as secured by the Constitution.

The two other grounds assigned are but repetition of the foregoing.

Appellant filed a petition asking that the sale of the property which had been advertised by the receiver to take place on January 19, 1908, be suspended until his demurrer was heard and disposed of. The court set the cause down for argument on June 16, 1908, and, on said day, sustained a motion by complainant to strike from the files the demurrer of McGraw, and further adjudged that "being of the opinion that John T. McGraw is an improper party to this suit, and that the court had improperly ordered the said McGraw to be made a party defendant, the same is corrected and set aside, and the prayer of said John T. McGraw be and the same is hereby denied." McGraw excepted, assigned numerous errors, and filed his petition for an appeal, which was granted by his honor, Judge Goff. The appeal was heard by the Circuit Court of Appeals at Asheville, N. C., on July 18, 1908, when the decree of the Circuit Court of West Virginia was reversed and mandate issued, directing that leave be given the defendant company and Abram C. Mott to answer the appellant's petition, "and that the cause be matured for final hearing at the earliest day practicable, with proper judicial proceedings, and for such further action as may, under the circumstances, be proper."

On August 18, 1908, the defendant company filed its answer denying the material averments of McGraw's petition. On the same day complainant, Abram C. Mott, filed his answer to said petition denying the averments thereof, and setting up as a bar thereto the decree of Judge Lanning, denying the petition and application to intervene. On the same day, appellant, John T. McGraw, by way of "additional and supplementary demurrer," averred:

(1) That the complainant's bill is multifarious, and that more than one cause of action is set up therein.

(2) That the complainant, Mott, cannot maintain his bill as a simple creditor and at the same time sue herein as a stockholder.

Other causes of demurrer are assigned which are involved in the foregoing.

On the same day a decree was made overruling the demurrer and giving to appellant 20 days within which to file his answer to the original bill and until the 25th day of September, 1908, to take his proofs sustaining the allegations of the petition, and giving to the complainant and the defendant company a day named to submit their proofs. Thereafter depositions were duly taken and submitted to the court, and on October 21, 1908, the cause came on for hearing before Judge Dayton, who found that the defendant company was indebted to complainant in the sum of $172,006, for which amount a decree was rendered. The court further found that the defendant company was insolvent and had suspended its regular business and had admitted its inability to carry on its business. Reciting the orders and decrees made by Judge Lanning, the same were again confirmed, and the court, being of opinion that a sale of the property would promote the interest of all parties concerned, ordered the receiver to proceed to make sale thereof upon the terms and in the manner set out in said decree.

On December 12, 1908, the receiver made his report to the court, reciting: That, pursuant to and in compliance with its decree, he sold the property to complainant, Abram C. Mott, the highest bidder, for the sum of $15,000, subject to the bonded indebtedness secured by mortgage, set out in the record. That in his opinion the said sum, in the present condition of the property, was an adequate price and recommended the confirmation thereof. The receiver asked that a special master take an account of his dealings, etc. On December 12, 1908, the sale was confirmed, and the master directed to settle the accounts of the receiver and make distribution of the assets. The master on January 19, 1909, made his report stating an account. On March 16, 1909, appellant filed an answer setting up matters in defense, etc. An order was made that the answer be filed "with leave reserved to the plaintiff to move

rejection or file exception or reply to said answer." On April 9, 1909, appellant filed his petition for appeal assigning error.

William A. Glasgow, Jr., and George W. Johnson (Jake Fisher, on the brief), for appellant.

S. W. Walker (Faulkner, Walker & Woods, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. When this cause was called for argument, the attention of the court was called to the fact that the last decree, from which the appeal is taken, and which disposed of the merits of the cause, was passed on December 12, 1908, and the report of the master was filed January 19, 1909, in regard to which there does not appear that any exception is taken, and on March 16, 1909, appellant filed an answer reiterating the allegations in his petition, and further alleging that, on February 24, 1909, complainant had executed to one Gerstell a deed conveying the property purchased at the sale made by the receiver and conveyed to him, that the consideration recited in this deed was $215,000, and that said conveyance was for the benefit of the "Cement Trust." A copy of this deed is attached as an exhibit. It is insisted by complainant that this answer should be stricken from the files. It appears that some motion to that end was made; the court reserving to the complainant the right to make such motion. It appears that, after the demurrer filed by appellant was overruled and time given him to file answer, the parties treated the petition, which contained the allegations relied upon as a defense to the bill, as an answer and replied to same. The depositions were taken upon the theory that these papers set forth the matters in controversy. We do not perceive that anything additional is set up in the answer, filed March 16th, except the deed to Gerstell, which was executed subsequent to the decree appealed from, and cannot be brought into this litigation. The appellant's assignments of errors, although presented in several phases, are directed principally to the jurisdiction of the Circuit Court of West Virginia.

It must be conceded that the cause has taken a somewhat erratic course. This, we think, has been caused, to some extent, by reason of a failure to keep in view the basis of the jurisdiction of the Circuit Court of New Jersey, wherein the original bill was filed. It is urged that the court was without jurisdiction, because the complainant had not reduced his claims to judgment in a court of law; that he had a complete and adequate remedy at law by obtaining judgment on his debts against defendant corporation and suing out execution against its property. These objections are directed to complainant's right, as a simple contract creditor, to invoke the equity jurisdiction of the court. It is also suggested that he may not prosecute his suit in a court of equity, in the dual capacity of a creditor and stockholder. It will be noted that, although the property of the defendant company had been conveyed, by way of mortgage, to secure a bond issue of $200,000, the mortgagee is not made a party defendant; hence the sale, and title

conveyed under the decree, is subject to this incumbrance; that only the equity of redemption is sold. Conceding that, generally, a court of equity will not take jurisdiction of a bill to subject property to the claims of creditors through the medium of a receiver, unless the debt of the complainant has been reduced to judgment, it is by no means clear that this objection may not be waived; the defendant assenting to the jurisdiction. In Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 380, 14 Sup. Ct. 127, 128 (37 L. Ed. 1113), Mr. Justice Brewer says:

"Defenses existing in equity suits may be waived, just as they may in law actions, and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal." Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Brown v. Lake Sup. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021.

This line of decisions is found in cases wherein the general jurisdiction of the court of equity is invoked. Here, however, it is clear that the original bill, filed in the circuit court of New Jersey, is based upon the procedure providing for winding-up the affairs of an insolvent corporation by the statute of that state, being section 65 of the corporation act (Laws 1896, p. 298):

"Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustee, and the court being satisfied by affidavit or otherwise of the sufficiency of said application and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court, by order, may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transfering any of its estate, moneys * * * except to a receiver appointed by the court, until the court shall otherwise order."

The jurisdiction of the court to entertain the bill in this cause is founded upon the diverse citizenship of the complainant and defendant corporation. The decree made by Judge Lanning, appointing a receiver, expressly refers to and is based upon the New Jersey statute. In Land Title & Trust Co. v. Asphalt Co., 127 Fed. 1, 62 C. C. A. 23, the jurisdiction of the Circuit Court to entertain a suit under this statute where the essential equitable elements exist is upheld by the Circuit Court of Appeals of the Third Circuit in an able opinion by Judge Gray. After quoting the statute, he says:

"It is true that, independent of statutory authority, the general equitable jurisdiction of the United States courts does not extend so far as to entertain a suit by a creditor against a corporation, seeking the appointment of a receiver of its business and property and an injunction against the exercise of its corporate franchises, solely on the ground of insolvency. It is, however,

well settled by adjudications of the Supreme Court and subordinate federal courts that if a state Legislature, by a valid law, create a right essentially equitable in its nature, prescribing a remedy for its enforcement substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in a federal court of equity in the same form as it is in the state courts"—citing Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909.

The learned judge further says:

"The Constitution and laws of the United States provide an additional forum to that of the state, for the adjudication of suits involving controversies between citizens of different states, not a different law. * * * While state legislation cannot directly enlarge or contract the jurisdiction of the federal courts, it can create rights that are justiceable in such courts, which, without such legislation, were not cognizable therein."

Referring to the New Jersey statute, he says:

"A suit under these sections of the act is, therefore, cognizable in the United States Circuit Court having jurisdiction of the parties on its equity side. The right so created will be enforced by the remedies prescribed by the act, so far as the same are consistent with and not violative of the general equitable rules and procedure, as administered in the federal courts of equity."

In that case the complainant, although not a judgment creditor, was "the pledgee or mortgagee of the property of the defendant company." Judge Gray further says:

"It is not necessary, therefore, to discuss or decide the question as to the right of a simple contract creditor to proceed in a federal court of equity under the authority conferred by the state statute in the state Court of Chancery, or the question as to the right of the complainant in the receivership suit, as a lien creditor, to appeal, by such a bill, to the general equity jurisdiction of the Circuit Court."

In Jones v. Mutual Fidelity Co., 123 Fed. 509, Judge Bradford discusses the question presented under a Delaware statute, similar to the New Jersey act, in an able and exhaustive opinion, reaching the conclusion that a bill may be filed in the Circuit Court of the United States by a simple contract creditor.

Without entering into an extended discussion of the decisions, we reach the conclusion that, in view of the construction put upon the statute by the Supreme Court of New Jersey and its evident purpose, it is not essential to the jurisdiction of the Circuit Court of the United States that the complainant shall be a judgment creditor, or have a specific lien on the corporate property. If, however, the law be otherwise in that respect, it appears to be well settled that it is not open to the appellant, as an intervener, to raise the question; this being open only to the defendant corporation. The question of jurisdiction was waived and every essential averment of the bill admitted. In Citizens' Bank & Trust Co. v. Union Mining & Gold Co., 106 Fed. 97, Judge Newman says:

"The contention that this is not a suit of equitable cognizance, because the complainants are simple contract creditors, is raised too late, even if it can be raised by an intervening stockholder at all. * * * This is a bill brought to distribute the assets of an insolvent corporation, having its whole property and assets in Georgia and in this district. * * * The receiver hav-

ing been appointed, given bond, and taken charge of the property, and having cared for the same, and the defendant having acknowledged, by its answer, the debts and the necessity for the receivership, the intervening stockholder cannot raise this question: That the complainants are simple contract creditors."

The conclusion is sustained by a number of decisions of the Supreme Court cited by the learned judge. Proceeding therefore upon the assumption that the Circuit Court of New Jersey had jurisdiction of the cause, and that its decrees are valid, we inquire as to the regularity of the proceedings had in the Circuit Court of West Virginia. It is immaterial in this aspect of the case whether the refusal of Judge Lanning to permit the appellant to intervene, or, by other appropriate proceeding, to be heard in that court, because he was permitted to do so in the Circuit Court of West Virginia, and was fully heard upon the merits of the case; the validity of complainant's debts and the insolvency of the defendant corporation having been established. These defenses he was clearly entitled, either as an intervener or as one of those persons having an interest in the property in whose behalf complainant sued, to make and have determined in some court. The Circuit Court of New Jersey having enjoined the defendant company and its officers from exercising any of its corporate powers, and having, so far as its power to do so extended, vested in the control of its receiver all of the property of the corporation, gave permission to complainant to make application to the Circuit Court of the Northern District of West Virginia for the appointment of an ancillary receiver. This was in accordance with the course and practice of the federal courts in such cases. There appears to be a distinction between an ancillary bill and a bill seeking the appointment of an ancillary receiver. The federal courts in the different states being foreign courts as to each other, the receiver appointed by the court in one state has no power to take charge of, sell, or dispose of property in another state, or to institute suits in the courts of such other state, except by way of comity.

"The difficulty is met, however, by the very convenient and satisfactory practice of instituting ancillary receiverships and appointing ancillary receivers in such foreign jurisdictions where the same becomes desirable or necessary. The practice of appointing ancillary receivers is indeed one of the striking features of the system built up by the federal courts for the administration and winding up of any business in the hands of a receiver, and especially insolvent corporations. It affords the only method for reaching and administering property, or assets, in a jurisdiction foreign to that where the receiver is originally appointed." 3 Street's Fed. Eq. Prac. § 2692.

That a receiver is an officer of the court appointing him, and can exercise no power or maintain any legal status except within the territorial limits of the court, is settled; the latest decision upon the subject being Great Western Mining & Mfg. Company v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163. The bill filed by complainant in the Circuit Court for the Northern District of West Virginia conforms to the practice and pleadings in such cases.

"The court in which ancillary proceedings are instituted will usually, as a matter of comity, appoint the same person to be receiver as was appointed by the court of principal jurisdiction." Street's Fed. Eq. Prac. § 2697.

In this case the Circuit Court followed this practice and appointed Mr. Patton, the same person named as receiver by Judge Lanning. It is not quite clear that appellant was entitled by reason of his relation to defendant company, as a stockholder, to intervene and litigate the merits of the case, in the Circuit Court of West Virginia, except for the purpose of showing that the corporation was not insolvent.

If he had wished to insist upon the right, he should have appealed from Judge Lanning's order denying his petition to intervene. We do not suggest that there was error in the refusal; that question is not before us. It is quite clear that the jurisdiction of the original bill cannot be questioned in the ancillary suit.

In Gregory v. Van Ee, 160 U. S. 643, 16 Sup. Ct. 431, 40 L. Ed. 566, it is said:

"Manifestly, the decree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly."

The mandate of the Circuit Court of Appeals, upon the appeal from Judge Dayton's order, dismissing his petition to intervene, directed the Circuit Court of West Virginia to proceed to hear and determine the controversy revised upon the petition and answer. This has been done, and the insolvency of the defendant corporation, together with validity of complainant's debt, established. The sale of the property, pending the litigation, while not usual, is within the sound discretion of the court, and not reviewable here. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178.

If the property did not bring a fair price, it was open to appellant to show that fact by evidence when the question of confirmation was under consideration, or he could have submitted an upset bid. The sale seems to have been conducted in accordance with the provisions of the decree. After the decree of December 12, 1908, nothing remained to be done except to state the account of the receiver and disburse the proceeds. This was done in accordance with the master's report. The answer of appellant of March 16, 1909, was, under the circumstances attending this case, improperly filed, and should have been stricken from the record.

There is no reversible error.

Affirmed.

TETER v. VIQUESNEY.

(Circuit Court of Appeals, Fourth Circuit. May 11, 1910.)

No. 948.

1. BANKRUPTCY (§ 140*)—CONTRIBUTION BY WIFE TO PURCHASE OF PROPERTY. The wife of a bankrupt filed a petition alleging that some 29 years prior to the bankruptcy her husband's father conveyed to him certain land, which he still owned, valued at $3,000; that $2,000 of the consideration was an advancement and the remainder was to be paid by petitioner, a part of it being evidenced by notes given by her husband; that she furnished her husband with money from her separate estate to make a cash payment and to pay the notes when they matured; that the notes

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

when paid were turned over to her together with the deed, which was unrecorded, to be held by her as security that she should have a proportionate interest in the land or a vendor's lien thereon for the money advanced. No written agreement was made, the notes were not assigned to her nor was anything ever done to vest her with any title to or lien upon the land which remained in the possession of her husband, who gave a trust deed thereon without objection on her part. *Held* that, under the law of West Virginia, where a wife delivers money or property to her husband which he uses in his business, the presumption is that a gift was intended, the testimony alone of the husband and wife to a parol agreement between them as alleged in the petition was insufficient to overcome such presumption, and entitle petitioner to enforce such agreement as against the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 216, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 209*)—PROCEEDING TO ESTABLISH LIEN—PLEADING.

A petition filed in a court of bankruptcy praying that petitioner be adjudged a creditor of a bankrupt and entitled to priority of payment from the proceeds of certain lands cannot be treated as a bill in equity to establish a resulting trust in such lands, which would be inconsistent with the relief prayed for.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. § 209.*]

3. TRUSTS (§ 89*)—RESULTING TRUST—PAROL EVIDENCE TO ESTABLISH.

The uncorroborated testimony of a bankrupt and his wife is insufficient to establish a resulting trust in favor of the wife in lands which were conveyed to the husband nearly 30 years prior to the bankruptcy and have been held by him without objection since that time.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134–137; Dec. Dig. § 89.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy.

In the matter of Thomas B. Teter, bankrupt. Appeal by Mary Sophia Teter from an order of the District Court in bankruptcy. Affirmed.

For opinion of lower court, see 173 Fed. 798.

T. B. Teter was adjudged a bankrupt on the 16th of March, 1909, and on the same day an order was entered referring the matter to Referee George P. Shirley. On the same day, appellant filed her petition before the referee claiming that, in respect to the land embraced in a deed dated February 3, 1880, executed by Jesse Teter to the bankrupt, his son, for two tracts of land containing, respectively, 167 acres and 120 acres, she was entitled to be adjudged a preferred creditor of the bankrupt to the extent of $1,000, advanced by her in the purchase of said land by an understanding to the effect that the money invested by her was to be returned to her, either in land or money; that the true consideration for the deed was $2,000, advanced by the father, Jesse Teter, to his said son, in consideration of $1,000 to be paid the grantor by appellant, and that she fully paid the same, and that she has never been repaid, in money or its equivalent in land; that the deed and the deferred purchase-money notes were all delivered to appellant and held by her from the date of the deed until this date as security for the money advanced; that $250 was paid in hand upon delivery of the deed and three notes for a like amount secured by a vendor's lien thereon. The depositions taken are those of Sophia Teter herself, Floyd Teter, her brother-in-law, and her brother, O. G. Price Durett. Three depositions of Jesse Teter, W. W. Teter, and Minnie Teter, all dead, were lost from the records in Kanawha county, W. Va. The referee, by an order entered June 22, 1909, held appellant entitled to charge the land

as a preferred creditor of the bankrupt, to the extent of the said $1,000. Upon a petition for a review by the trustee in bankruptcy, the court below reversed the action of the referee, and held that appellant was not a preferred creditor, nor a general creditor, and that her claim was barred by the lapse of time.

J. Hop Woods and Samuel V. Woods, for appellant.
William T. George, for appellee:

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

PRITCHARD, Circuit Judge (after stating the facts as above). As appears from the statement of facts, Jesse Teter and wife, the father and mother of the bankrupt, on the 3d day of February, 1880, conveyed to Thomas B. Teter, the bankrupt, two tracts of land situated in Barbour county, W. Va., containing 167 and about 20 acres, respectively, and the consideration recited in the said deed was $1,000, $250 paid cash in hand, and three notes for $250 each, secured by a vendor's lien, retained for the residue. However, it appears that the true consideration of the said conveyance was $3,000, $2,000 of which was an advancement by the said Jesse Teter to his son, Thomas Teter, the bankrupt. The appellant, Mary Sophia Teter, the wife of the bankrupt, avers that she furnished her husband the $250 for the cash payment on the land, and that she furnished her husband the money with which to pay off and take up the purchase-money notes, aggregating $750; that said notes, when paid off and taken up, were turned over to her by her husband, as was the deed for the said land, and that she has been in possession of the same from that time up to the time the petition was filed. The petitioner is not a party to the deed from the said Jesse Teter and wife for the lands, nor is there any statement contained in said deed to the effect that she paid the notes in question, or that she was to have any interest in the lands thus conveyed. There was no written agreement or understanding between Jesse Teter and Mary Sophia Teter nor between Thomas B. Teter and Mary Sophia Teter to the effect that the vendor's lien, which was held by Jesse Teter, was to be assigned to the said Mary Sophia Teter, or the said land retained in said deed, by reason of her having paid the notes; neither does it appear that there was any oral understanding to that effect. The learned judge who tried this case made the following statement, which gives a clear insight into the transaction by virtue of which the petitioner now seeks to establish her claim:

"The agreement charged to have been made at the time the two tracts of lands were conveyed by his father to the bankrupt was that the petitioner should pay the $1,000, and have conveyed to her the land in value to the extent of such payment, or that a vendor's lien was to be retained upon the land to secure her the repayment of her money. Neither of these things has ever been done, and, after the lapse of twenty-nine years, the question arises whether the pleading and evidence justifies equity and good conscience to do either for the relief of petitioner, against the creditors. The decision of the referee is in effect to charge this $1,000 with its accumulated interest, in the nature of a purchase-money lien, upon the land as having priority over all other debts except the life estate of Elizabeth Teter. This practically means

that the wife of the bankrupt shall absorb the whole value of the lands, and the creditors shall take nothing. It seems to me this is clearly untenable. Taking the most favorable view possible to this ruling, and quoting the testimony alone of Mrs. Teter, it seems clear that the deed was made direct to her husband by his father; that the lands were worth at the time $3,000; that she took no written evidence of the agreement; that she did not pay the thousand dollars or any part of it to the grantor, James Teter, but 'furnished' it to her husband partly in money and partly in stock, apparently which he sold, who paid it to his father who surrendered the notes to her husband as paid, and he in turn delivered them over to her with the deed. She says the deed was delivered to her, and has been in her possession since about six months after its date, and the notes were delivered to her by her husband as of the times when he discharged them. They were not assigned to her, and her sole claim to enforce an equitable lien against the land in her favor, independent of oral agreement with her husband, rests upon her possession of the title deed and these notes. I can find no authority warranting me to hold the possession of this deed and of these notes under these circumstances as constituting an equitable assignment to her by Jesse Teter of the existing vendor's lien in his favor. A vendor is not ordinarily compelled to receive payment for and assign to a third person such a lien. Jesse Teter, the father-in-law, might have been entirely willing to have done so, and it is incomprehensible, why he did not do so, if at the time it was contemplated to secure this petitioner this money by and through his existing vendor's lien. Therefore, independent of all questions of trust relations, the whole matter resolves itself into this: Mrs. Teter loaned her husband this money for which she took from him no note or evidence of debt of any kind; with this money he paid off and discharged the vendor's lien to his father; the only way Mrs. Teter sought to secure herself for the money so loaned her husband was, six months after its execution, to take possession of the deed and these notes as her husband paid and delivered them to her. They were living together, and her possession was in fact his. A line of decisions in this state has fully established the principles that where a wife delivers money or property of her own to her husband which he uses in his business the presumption is that such delivery was intended as a gift, and when the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered or was intended as a loan to the husband by the wife and not a gift will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. Zinn v. Law, 32 W. Va. 447 [9 S. E. 871]; Maxwell v. Hanshaw, 24 W. Va. 405; McGinnis v. Curry, 13 W. Va. 29; Bank v. Atkinson, 32 W. Va. 203 [9 S. E. 175]. And in this last case it is held that the fact that the wife's claim for money of hers received by her husband from the sale of her lands was barred by limitation tends strongly to repel her claim as against her husband's creditors.

"This money of Mrs. Teter's was received by her husband, it may be assumed, at various times between February 3, 1880, the date of the deed, and September 1, 1885, when the last note was payable. The evidence does not clearly establish the amount in a sum exceeding $811.50, unless we assume she increased the sums received by her from her father and aunt by investment and loans at interest which are not shown by the evidence. The first effort attempted to secure repayment of this money was not made until after her husband had become Williamson's surety on his sheriff's supplemental bond, judgment for $10,000 had been rendered in favor of and a chancery suit had been instituted for its enforcement by the state. Then she filed her petition in this chancery suit asserting her claim as a debt due her based upon the same facts set forth here. The exact date of the filing of this answer is not shown, but it was not filed before 1895, because the suit was not instituted until that year, and it is probable it was not filed until the following year, 1896, when her depositions were taken in support of it. Thus, for 10 years at least, she allowed this money to remain in her husband's hands with no written evidence of it having been loaned to him, with him in full posses-

sion of the land, with no assignment from her father-in-law of the notes, which she says her money paid, although such assignment could have been taken from him any time prior to his death, with no judgment taken by her, no trust or mortgage lien taken on the land, although such actions could have been taken at any time apparently, in short, with nothing done in accord with legal methods to indicate that this money was to be saved to her as her separate estate. It is true that great reliance is made upon the facts that the deed was not recorded, but together with the notes, when paid off by her husband, were placed in her custody, as claimed, for security for her debt. That this was the purpose of withholding the deed from record instead of for other reasons, such as the existence of the life estate outstanding in Elizabeth Teter, and that she had the custody of the deed for the purpose of security, is alone proven by the husband and wife. It does not impress me, if this evidence be admitted to be sufficient to establish the facts claimed (although the authorities cited seem clearly to hold it is not) that the mere possession of these papers alone constituted any security for this debt. It could vest no title in her to the land, nor could it give her any lien upon it, nor could it, with no assignment of any kind, transfer to her the vendor's lien retained by the grantor upon it. We must necessarily sympathize with the wife who must lose her money by reason of the bad management of her husband, but at the same time, we cannot forget that the relation of husband and wife is such, that their transactions with each other must be closely scrutinized. The temptation to husband and wife to shield each other, as against creditors, when insolvency comes, is almost irresistible to most people. If we were to hold that a man could pay off his purchase-money notes secured by vendor's lien, place these notes and his deed in his wife's custody, and thereby empower her, 29 years afterwards, when he was bankrupt and after he had executed a trust upon the land for a large amount (as Teter sets forth in his schedule he has done), to revive and enforce the vendor's lien to the extent of the notes and accumulated interest in her favor, because it is claimed she allowed him to use her money, the door to fraudulent transactions between husband and wife as against innocent creditors would be thrown wide open."

In the case of Zinn v. Law, 32 W. Va. 447, 9 S. E. 871, the first syllabus reads as follows:

"Where the wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by circumstances that it was a loan, and not a gift."

While, under such circumstances, this presumption arises, it does not necessarily follow that it cannot be rebutted by proper testimony, and this the petitioner has undertaken to do. But has she offered sufficient legal evidence to accomplish that purpose?

It appears that this money was furnished 29 years prior to the filing of the petition, and it does not appear that any deed was ever made to her by her husband in pursuance of the alleged agreement, and it further appears that she had knowledge of the conveyance of this identical property to Fred. O. Blue, trustee, and that she interposed no objection to the same, nor did she at that time notify the said Blue that she had any claim or interest whatsoever in this property. Under such circumstances, and owing to the relationship which exists between husband and wife, we do not think that the evidence offered is sufficient to rebut the presumption that the money furnished to the husband was intended as a gift.

In the case of Zinn v. Law et ux., supra, the court said:

"* * * It is not denied, as a general proposition, that if a clearly valid, subsisting debt is established by a wife against her husband he may pay it or prefer it in the conveyance of his property. But, where a husband becomes insolvent, the wife cannot convert into debts, as against his creditors, former deliveries of her money or other property to him, or permitted receipts by him of her income or proceeds of her separate estate, which at the time of such delivery or receipt were merely gifts intended by the wife to assist her husband in his business, or to pay their common expenses of living; and, considering the relation between them, the law does not, merely from such delivery or receipt, imply a promise on the part of the husband to repay or replace the same, as it would between parties not so related; but it requires more—there must be either an express promise, or circumstances attending the transaction to establish the fact that they dealt with each other as debtor and creditor. It would be exceedingly dangerous to permit the wife, after she has allowed her husband to use and expend her means for the common benefit of themselves and their children, without any expectation of any return, or the creation of a debt, when by mismanagement or misfortune of the husband he becomes unable to pay his debts, to raise up these gifts, and convert them into loans to the prejudice of creditors, and support them by their own evidence, after they had trusted the husband in total ignorance of any such liability. In transactions between husband and wife, which are impeached as fraudulent, it requires less proof to sustain the impeachment, and more and stricter proof to repel it, than would be required if the transaction were between strangers. * * *

"In the absence of an express contract or circumstances, the legal presumption is that the delivery of the money to her husband was a gift, and, as she has entirely failed to rebut this presumption, we must hold that such delivery was a gift. There is no pretense of an express promise by the husband to repay the money. It is true the wife says that by an oral agreement she made her husband her agent, and that the money was furnished to him with the understanding that the mill was to be her property when purchased. But all the circumstances repel this claim. The husband purchased the first mill before she furnished him any money. He made all the subsequent trades, and did all the business in his own name. He claimed the mill as his own; gave a lien upon it to secure his own debt; paid that debt from his own labor and the profits of the mill. In none of these transactions was his wife mentioned, nor did she in any respect make her claim known to any one dealing with her husband. It is entirely fair to conclude, from all the facts and circumstances, that the suggestion of a loan or the investment of the wife's money for her separate use never occurred to either the wife or the husband until insolvency overtook the husband, and some plausible device became necessary to shield the property from the pursuit of creditors. * * *"

The cases of Bank v. Atkinson, 32 W. Va. 203, 9 S. E. 175, McGinnis v. Curry, 13 W. Va. 29, and Maxwell v. Hinshaw, 24 W. Va. 405, also sustain this principle.

So far as the record shows, no one testified other than herself and husband as to the transaction upon which the petitioner bases her claim. It is true that the brother of the petitioner, O. G. P. Durrett, and her brother-in-law, Floyd Teter, testified as to their understanding in regard to the intention of Thomas B. Teter and the petitioner respecting what interest the petitioner was to have in the lands. But the record discloses the fact that neither of these witnesses testified of their own knowledge of these matters, while on the other hand their testimony was based solely upon rumor; and in this respect it is not positive in its character and is, therefore, insufficient to rebut the presumption that the turning over of the money to the husband was intended as a gift.

It is insisted by counsel for the petitioner that she has established a resulting trust in these lands in her favor. We are at a loss to know upon what theory this contention is based, in view of the allegations contained in the petition. The petition filed herein contains the following prayer:

"Your oratrix therefore prays, that she may be ascertained and held to be a creditor of Thomas B. Teter, and entitled to priority of payment out of the proceeds of the land mentioned in the deed dated the 3d day of February, 1880, to the extent of five hundred ($500.00) dollars, with interest from one day after date; two hundred and fifty ($250.00) dollars, with interest from the 1st day of May, 1881, and to the extent of two hundred and fifty ($250.00) with interest from the 1st day of September, 1885."

If, indeed, the petitioner be entitled to come into a court of bankruptcy, and, by parol evidence, establish a resulting trust, she certainly would be required to observe the same formalities in pleading that she would had she gone into a court of equity and there sought the relief which she now seeks. This she has not done in this instance, and the petition filed herein could not be treated as a bill in equity for the purpose of establishing a resulting trust. The prayer is wholly inconsistent with the relief sought in this respect, it being to the effect that she be declared to be a creditor of Thomas B. Teter and entitled to priority of payment out of the proceeds of the land in controversy.

To contend that petitioner is entitled to a resulting trust in these lands, is to assume a position inconsistent with the prayer contained in the petition. There is nothing in the record to show that the petitioner endeavored to amend her petition so as to enable her to base her claim upon the ground that she is entitled to a resulting trust in these lands. But even if, under the pleadings, petitioner would be entitled to have the question passed upon as to whether she is entitled to assert this right in this proceeding, the evidence is wholly insufficient to sustain her contention in that respect, to say nothing of the fact that the loan was made to the husband in 1880. If the questions which the petitioner seeks to raise were properly presented in this proceeding by appropriate pleading and sufficient evidence, we are inclined to the opinion that the petitioner would not, at this late date, be entitled to assert a claim to this property, after having acquiesced in the holding of the same by her husband during all these years. Such rights, if any ever existed, under these circumstances, were barred by laches at the time of the filing of the petition.

In the case of Coleman v. Parran, 43 W. Va. 737, 28 S. E. 769, the following statement from Pomeroy's Equity Jurisprudence (section 1040) is quoted with approval:

"Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt. Where the payment of a part only is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid."

In the case of Cheuvront v. Horner, 62 W. Va. 476, 59 S. E. 964, it is said:

"The evidence relied upon by Horner and his wife to rebut the presumption of fraud in the transfer of the property by the husband to the wife falls short of the rule that the burden is upon the wife to show by clear and satisfactory evidence that the transaction was made in good faith, the consideration adequate and valuable, and that the consideration was paid out of her separate estate. All the testimony on this line, and in relation to these conveyances of the property from husband to wife, we find to be either wholly uncertain as to the amount of money claimed to have been invested in the property of the wife, or to be of questionable and suspicious character. This testimony is wholly insufficient to meet the rule that when a wife claims in a contest against the creditors of her husband to have purchased real estate there is a presumption against the bona fides of the transaction, which she cannot overcome except by clear and full proof that the property was paid for by her with money derived from some other source than her husband. Miller v. Gillispie, 54 W. Va. 450 [46 S. E. 451]; Burt v. Timmons, 29 W. Va. 441 [2 S. E. 780, 6 Am. St. Rep. 664]; Spence v. Smith, 34 W. Va. 697 [12 S. E. 828], and many other cases. The claim undertaken to be made by this testimony on behalf of the husband and wife is that there was a secret parol agreement, at the time of the purchase of the property, that the husband was to hold it in his name in trust for the wife, and the wife in her testimony says that this was to give him a better rating in business. The only evidence of such secret trust is that of the husband and wife. This cannot overcome the presumption nor prevail against the creditor in such case."

While there are some statements in the petition tending to show that, among other things, it is the claim of the petitioner that she is entitled to be subrogated to the rights of the vendor, upon the theory that she paid the purchase money, and that, therefore, she should be permitted to enforce the collection of the money due her under the original vendor's lien. This claim, however, is not seriously insisted upon in this court, as we understand it; but if it were, we are inclined to the opinion that the evidence is not sufficient to sustain such contention.

For the reasons hereinbefore stated, we are of opinion that there is no error in the ruling of the court below, and that the judgment of that court should be

Affirmed.

Ex parte O'HARE.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 241.

1. CRIMINAL LAW (§ 97*)—JURISDICTION—LOCALITY OF OFFENSE—"HAVEN."

Waters inclosed in whole or in part by a breakwater or other artificial structure to afford a protected anchorage, as well as those so inclosed by natural land, constitute a "haven" within Rev. St. §§ 5346, 5361, 5362 (U. S. Comp. St. 1901, pp. 3630, 3640), making certain acts offenses against the United States when committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the ad-

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

miralty jurisdiction of the United States and out of the jurisdiction of any particular state."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 183, 184; Dec. Dig. § 97.*

For other definitions, see Words and Phrases, vol. 4, p. 3220.]

2. CRIMINAL LAW (§ 97*)—JURISDICTION—LOCALITY OF OFFENSE—"HAVEN."
The waters inclosed between the shore and the government breakwaters in Lake Erie at the port of Buffalo, without as well as within the line designated on the government chart as "Buffalo Harbor Line," constitute a "haven," and not "high seas," within the meaning of Rev. St. § 5346 (U. S. Comp. St. 1901, p. 3630), and an assault with a dangerous weapon committed on a vessel belonging to the United States or citizens thereof anchored in such waters is within the state, and not the federal, jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 183, 184; Dec. Dig. § 97.*

For other definitions, see Words and Phrases, vol. 4, pp. 3287–3289.]

3. CRIMINAL LAW (§ 97*)—JURISDICTION—OFFENSE COMMITTED ON VESSEL ON A VOYAGE.
A steam vessel which has been towed from her winter berth on one of the Great Lakes to an anchorage to be fitted out for the season, but which has not signed a crew nor had a fire built under her boilers, is not "on a voyage," so that jurisdiction of an offense committed thereon is given to the courts of the United States by Act Sept. 4, 1890, c. 874, 26 Stat. 424 (U. S. Comp. St. 1901, p. 3627).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 183, 184; Dec. Dig. § 97.*]

Coxe, Circuit Judge, dissenting.

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

Proceeding by John O'Hare for a writ of habeas corpus. From an order denying the writ (171 Fed. 290), petitioner appeals. Reversed.

O'Hare was arrested by the United States marshal in the city of Buffalo on a charge of violating sections 5346, 5361, and 5362, Rev. St. (U. S. Comp. St. 1901, pp. 3630, 3640), and the acts and statutes amendatory thereof. He was held by a United States commissioner for the action of the grand jury and committed to the county jail. Writs of habeas corpus and certiorari were issued, and after a hearing thereon were dismissed.

George H. Kennedy, for appellant.

John Lord O'Brian, U. S. Atty., for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The sections under which petitioner was arrested are as follows:

"Sec. 5346. Every person who upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years."

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

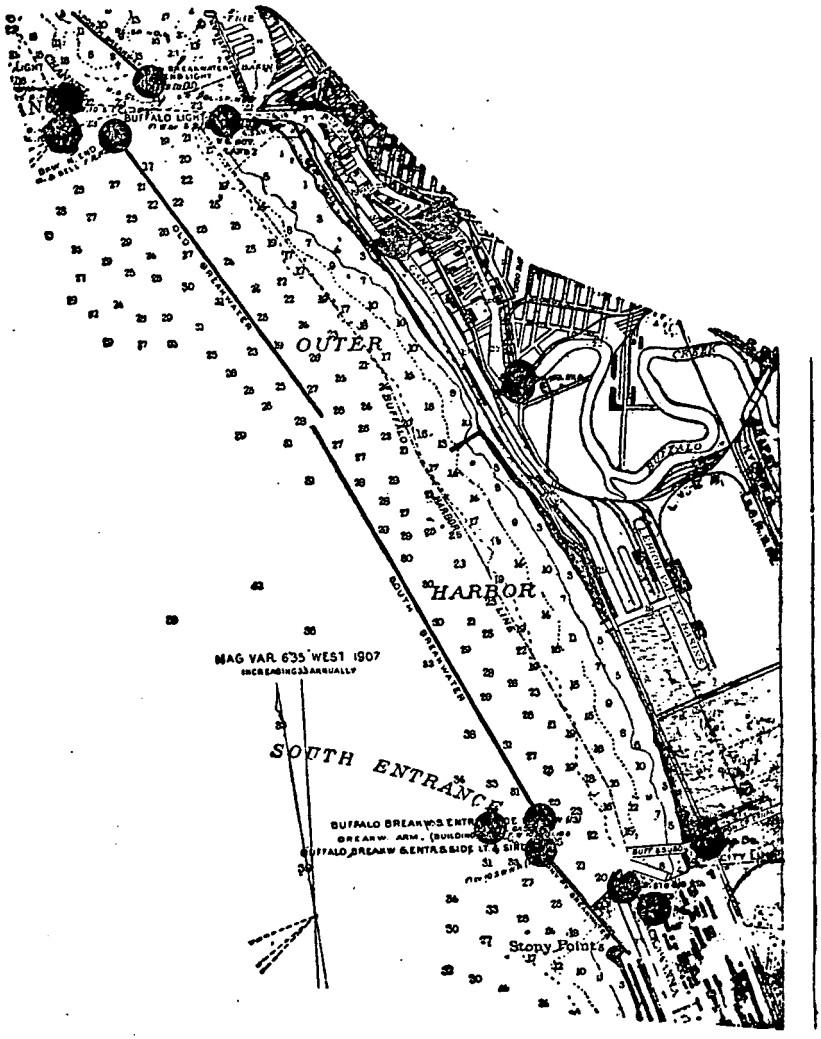
"Sec. 5361. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, by surprise or by open force, maliciously attacks or sets upon any vessel belonging to another, with an intent to unlawfully plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than ten years.

"Sec. 5362. Every person who, upon the high seas, or in any other of the places mentioned in the preceding section, with intent to commit any felony, breaks or enters any vessel, or maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy-rope, head-fast, or other fast fixed to the anchor or moorings belonging to any vessel, shall be punished by a fine of not more than one thousand dollars, and by imprisonment at hard labor not more than five years."

The acts complained of took place on the "John Mitchell," a steel steam vessel of 4,000 tons, belonging in whole or in part to citizens of the United States and registered and enrolled under the laws of the United States. She had been berthed for the winter in the Blackwell Canal, Buffalo, and on May 13, 1909, was towed by a tug to a point about 300 feet inside the old Buffalo breakwater, where she was anchored for the purpose of fitting her out. The alleged assault, etc., took place May 18th.

It will appear from the section quoted that the federal government entertains jurisdiction where the vessel is in a "haven," only when such haven is out of the jurisdiction of any particular state. This restriction "does not apply to vessels on the high seas of the lakes." U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. The question here presented is whether the "John Mitchell" was upon the high seas of Lake Erie, or in a haven connected therewith. No one disputes the fact that the state of New York has jurisdiction of the locus in quo.

From a point on the shore of the lake nearly opposite the westerly line of the city of Buffalo, there extends for about half a mile in a northerly direction the Stony Point Breakwater. Five hundred and fifty feet beyond it comes the South Breakwater, which runs, also northerly, nearly two miles. Two hundred and fifty feet beyond it comes the Old Breakwater which runs, also northerly, about a mile and a half, and ends opposite Buffalo Light at the entrance of Buffalo creek and the beginning of the Niagara river. These three structures practically constitute a single breakwater with entrances through it at two places to the waters inclosed between it and the shore. This structure is about 3,000 feet from the shore line and half that distance from what is designated on the government chart, published by the War Department in 1906, as the "Buffalo Harbor Line," which last is substantially a 17-foot line; there being deeper water between it and the breakwaters. The body of water thus inclosed is designated on the said chart as the "Outer Harbor" of Buffalo. Manifestly it affords an anchorage and refuge for shipping from westerly and southwesterly storms. The John Mitchell lay near the middle of the Old Breakwater about 300 feet in shore from it. A section from the chart shows the situation in detail:



It is contended that, because the breakwater is an artifical structure, the water which it cuts off from the main body of Lake Erie cannot be considered a "haven" or a "basin" within the meaning of these sections. Sir Matthew Hale's definition of a "haven" is quoted, italicized as follows:

"A place of large receipt and safe riding of ships so situated and secured by the *land circumjacent*, that vessels thereby ride and anchor safely, and are protected by the *adjacent land* from dangerous and violent winds." Hale, De Jure Maris, c. 2, 2.

This definition is quoted verbatim in recent law dictionaries—Stroud, Burrill, Black, and Bouvier. We do not know to what extent, in Hale's time, harbors, havens, and basins had been artificially created. There does not seem to be any reasonable distinction be-

tween original upland and made-land. In the upper bay of New York to-day Governor's Island is being extended by filling in to such an extent as to double its area. When that work is done the entire portion above water will be Governor's Island. Why a harbor or haven may not be so improved by artificial structures as to enlarge its capacity and increase its security without losing its character we do not see. The waters inclosed by the breakwaters and forming a continuation of the interior harbor, southeasterly along the shore to the city line, constitute a "haven" within the ordinary meaning of that word as given in the standard dictionaries. It is difficult to see why the circumstances that the federal government constructed the breakwaters and that unless they are kept in repair they would probably be washed away should change the meaning of the word.

Moreover, the intention of Congress as evidenced in the sections quoted is in harmony with our construction. It was very careful to avoid giving jurisdiction of these particular offenses to the federal courts, when they were committed on waters which are indisputably within the jurisdiction of some one of the states which constitute the United States. U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071, held generally that the waters of the Great Lakes and of the rivers which connected them were to be considered "high seas" in the same sense as oceans are. Of jurisdiction touching the particular offense then before the court, which was committed in the Detroit river near the Canadian shore, it held:

"The statute under consideration (section 5346) provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, commits on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit river from shore to shore is within the admiralty jurisdiction of the United States and connects with the open waters of the lakes—high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its center to the Canadian shore it is out of the jurisdiction of the state of Michigan. The case presented is therefore directly within its provisions."

This language would certainly seem to imply that, if the vessel on which the assault was committed had been so close to the Michigan shore as to be within the jurisdiction of that state, a different conclusion would have been reached. The same sections, or the older statutes from which they are taken, were considered in U. S. v. Morin, 26 Fed. Cas. 1310; Wynne v. U. S. (April 4, 1910) 30 Sup. Ct. 447, 54 L. Ed. ——.

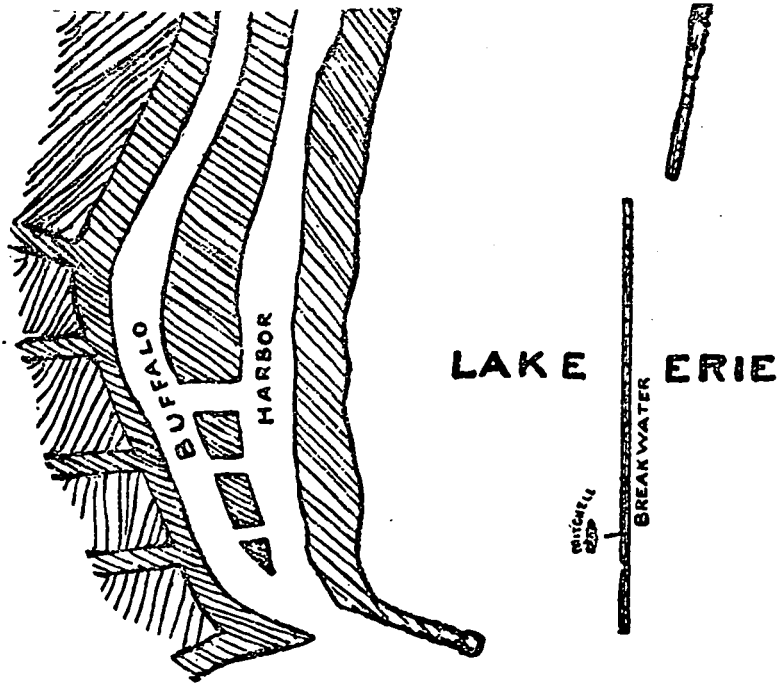
The government further relies on Act Sept. 4, 1890, c. 874, 26 Stat. 424 (U. S. Comp. St. 1901, p. 3627), which provides that the Circuit and District Courts shall have jurisdiction of such offenses as are specified in the sections above quoted, when committed by any person on a registered or enrolled vessel "being on a voyage upon any of the waters of the Great Lakes * * * or any of the waters connecting any of the said lakes." The evidence, however, shows that the "John Mitchell" was not at the time "on a voyage." She had been towed to anchorage to be fitted out. No fire had been kindled under her boilers. She was not equipped, and had not been equipped that sea-

son, with a crew. Her full crew numbered 21 men. Only 10 had been engaged at any time that season. None of them had yet signed papers for any trip, and her clearance papers were not issued until nearly a week after the occurrences. Under these circumstances, it cannot be held, under the authorities, that the "John Mitchell" on May 18th was on a voyage. See Brown v. Jones, 2 Gall. 477, Fed. Cas. No. 2,017; The Brutus, 2 Gall. 526, Fed. Cas. No. 2,060; The John L. Dimmick, 3 Ware, 196, Fed. Cas. No. 7,355; Bowen v. Hope Ins. Co., 37 Mass. 275, 32 Am. Dec. 213; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654.

The order is reversed, and cause remanded, with instructions to discharge petitioner.

COXE, Circuit Judge (dissenting). The petitioner is charged with violating a law of the United States which provides, in substance, that every person who, on board a vessel belonging to citizens of the United States, upon the high seas, or in any river, haven, creek, basin or bay, within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state, commits an assault, or maliciously assaults, with intent to plunder, shall be punished as therein provided.

The assault in question was made on board the steamer John Mitchell when she was lying 300 feet from the land side of the breakwater built at the eastern end of Lake Erie, and about half a mile from the shore. The situation can be better appreciated by an examination of the following diagram than by many words of description:



In United States v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071, the Supreme Court, following the inevitable deduction from the reasoning of The Genesee Chief, 12 How. 443, 13 L. Ed. 1058, decided that the Great Lakes were high seas within the meaning of the statutes here in question and that the courts of the United States have jurisdiction to try the offenses described therein. The sole question, therefore, is whether the erection by the government of a breakwater which may be used, and is used, as an anchorage ground for vessels unable, because of congestion or other reason, to enter the harbor and also for vessels delayed in beginning their westward voyages, converts this portion of the lake into a "haven" within the jurisdiction of the courts of the state of New York?

It is conceded on all sides, that the point where the Mitchell was anchored was "upon the high seas" but for the wall 300 feet west of that point. So the question may be stated thus: Does the erection of a stone breakwater half a mile from the shore, neither end being connected with the land, convert that portion of the high seas lying between it and the shore into a "haven"? To my mind the answer should be in the negative. The Mitchell was anchored inside the wall known as the "Old Breakwater" and it is true that two other sections of wall known as the "South Breakwater" and "Stony Point Breakwater," the latter being connected with the shore, run south from the "Old Breakwater" on a line substantially parallel with it. Between these sections there are wide sea openings said to be 500 and 250 feet respectively. If it be contended that the three walls in question are to be considered as one continuous wall, it follows that a section of Lake Erie four miles long and half a mile wide has been converted into a haven and removed from the jurisdiction of the United States courts.

But, however this may be, it remains true that the existence of the "Old Breakwater" is necessary to give any plausibility to the argument of the petitioner. If that did not exist, the assault would have occurred on a vessel anchored in the waters of Lake Erie. The same is true if the Mitchell had been anchored 300 feet west of the breakwater. Should a storm destroy the wall or the government decide to discontinue it, the jurisdiction of the federal courts might be restored in a single night to the venue of the assault. The unwisdom of vesting the jurisdiction of the United States courts upon circumstances so factitious seems to me obvious.

The word "haven" as used in the statute does not mean the quiet waters under the lee of a wall which man has erected to protect the land from the inroads of the sea, but refers to those places of safety between fauces terræ which nature has protected from the elements and where ships may ride in safety. The latter construction creates a jurisdiction as immutable as the laws of nature; the one contended for by the petitioner must constantly change with the improvements made by man. A breakwater built to protect a city from the tides or prevent a harbor from being inundated may destroy a jurisdiction which existed before the Union was formed. It is true that in one sense the issue is not important, as it relates to what may be considered a simple assault and battery, but in its consequences it is far reaching.

The trend of decision in the federal courts has been steadily in favor of widening the jurisdiction in admiralty; if we uphold the petitioner's contention, it will, in my judgment, be a distinct step backwards. The facts in the present case illustrate how easy it will be to hamper the commerce of the Great Lakes by lawless acts if large sections of the high seas are to be removed from the jurisdiction of the national courts. If the doctrine contended for be universally adopted, it follows that not only on the Great Lakes, but on the ocean as well, the section, where ships may anchor between a protecting wall and the shore must be withdrawn from the jurisdiction of the federal courts, with the constant clashing of authority which is sure to follow.

The commerce of the Great Lakes is not only national, but international, in character and should be under the jurisdiction and protection of the national courts.

The decision of the District Court should be affirmed.

ERIE R. CO. v. HANNA.

(Circuit Court of Appeals, Third Circuit. June 17, 1910.)

No. 23.

RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WHEN QUESTIONS FOR JURY.

Plaintiff was struck and injured by a train while driving over a grade crossing on defendant's railroad at night. He and two other witnesses, who stated they were paying particular attention, testified directly that the train gave no signal for the crossing by either bell or whistle. The track to within 300 feet of the crossing ran through a cut from 1,200 to 1,500 feet long, which hid it from the view of a person on the highway. The train which struck plaintiff was a fast freight running downgrade very quietly at a speed of from 50 to 70 miles an hour. Plaintiff stopped and looked and listened by a tree 100 feet from the crossing, which was the usual place, because from there the road ran down a grade to the crossing and the view of the track was more or less obstructed all the way. He did not see nor hear the train, and drove onto the crossing without again stopping, but continued to look and listen. *Held* that, on such evidence, the questions of defendant's negligence and plaintiff's contributory negligence were both properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

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

Action by George Hanna against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Davenport, for plaintiff in error.

Eugene Mackey and Frank J. Thomas, for defendant in error

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

BUFFINGTON, Circuit Judge. In the court below George Hanna sued the Erie Railroad Company, and recovered a verdict against it

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

for injuries suffered by him when struck by its train. Judgment was entered on the verdict, whereupon the railroad sued out this writ, and assigned for error the refusal of its point asking for binding instructions. Two questions arise therefrom: First, was there evidence of defendant's negligence to submit to the jury? And, second, were the facts such as convicted the plaintiff of contributory negligence?

The railroad's alleged negligence consisted in failing to give warning of the approach of its train to the public road crossing where plaintiff was injured. The train in question was a midnight, high-speed, freight running very quietly downgrade and at from 50 to 70 miles an hour. The track to within 300 feet of the crossing led through a cut which was from 1,200 to 1,500 feet long and hid it from a person approaching the crossing. Witnesses testified no crossing whistle was blown, and their evidence rose higher than the mere negative proof of persons who simply did not observe. For reasons stated by them they were closely observing the whistlings made at this crossing. The plaintiff's accident occurred on June 12, 1906. A fatal accident had occurred at this crossing, which was in a rural neighborhood, in April preceding, and Mr. Davis, who lived some 35 rods from the crossing, and his wife, who had seen a neighbor killed in such accident, said they had since then been paying attention to the trains as they passed the crossing. Mr. Davis was lying awake in bed when he heard the train about half a mile beyond. His testimony was:

"Q. Mr. Davis, do you remember the night of June 12, 1906? A. I do. Q. Where were you that night? A. I was at home in bed. Q. Were you awake about midnight? A. I was. Q. State if you heard anything at that time. A. Yes, sir; I heard a train; made a peculiar noise, which drawed my attention at first, and I listened particularly to hear what it was, and I found it was a passing train and she must have been up about the water tank when I first heard it, probably a half a mile above me, and I listened particularly. Q. Is the water tank north or south of the whistling post? A. It's north of the public highway. Q. Well, is it north or south of the whistling post? A. It is north. Q. And away north? A. Yes. Q. Go on and tell what you heard. A. And I finally made up my mind that it was a fast train, and I listened to it particularly, and it shot across the crossing very rapidly, and was running fast and still. Q. About how was it running with reference to speed? A. Well, in my judgment, living there as long as I have, I would say it was running in the neighborhood of 60 or 70 miles an hour. Q. State, Mr. Davis if you gave any attention to the train at that time. A. I did. Q. Did you notice as to whether it gave any signals at the crossing? A. I did. Q. What, if any signals did it give? A. It did not give any. Q. Did you have any particular reason for noting as to whether there were signals given? A. I did. There was an accident on that same crossing in April, and ever after that I was paying particular attention to the trains when I heard them. Q. About what time did that train pass there? A. It passed there about 12 or 12:05. Q. What do you say as to whether that train sounded a whistle or rang a bell? A. I say it did not."

Mrs. Davis, who was with him, testified to the same effect, viz.:

"Q. Do you remember the night when Mr. Hanna was injured? A. Yes, sir. Q. Where were you that night? A. I was home in bed. Q. About what time of night was it? A. Well, I thing it was about 12 o'clock at night. Q. Did you hear anything? A. Why, yes; I heard the train coming down. Q. Just tell the court and jury what you heard. A. Why, I heard it just coming down

the track, making a creaking noise like a train will, and just passing the crossing without giving any warning. Q. Did you hear a bell rung? A. No, sir; I did not. Q. Did they blow a whistle? A. No, sir; they did not. Q. State whether or not you were paying any attention to the train? A. I was paying close attention to the train. I saw Mrs. Calvin killed, saw her struck, and after that I paid strict attention; and they did not whistle that night as I heard."

When the engine passed the crossing the fireman was not in his cab seat, but was sitting on the chain between the tank and the engine. His foot, which was hooked around the grab iron, was struck by something, and he went forward to investigate, and found a brakeman in his cab seat, and he subsequently made statements from which the jury could infer the brakeman was asleep. Whether the brakeman had any duty on the engine was not disclosed; the engineer simply testifying "there is supposed to be a brakeman on" the engine. The fireman went out on the pilot and found parts of the harness of Hanna's horse. This was the first knowledge the engine people had that an accident had occurred. The fireman was asked about signals:

"Q. Mr. Walters, did you hear the whistle? A. I couldn't say about a whistle. Q. Did you hear the bell? A. I did not hear the bell. Q. You did not? A. No, sir; I won't say it wasn't ringing, though."

There was also the negative testimony of the plaintiff's wife, who lived near the crossing and heard the train, that neither bell nor whistle was sounded. In addition to this the plaintiff testified to his stopping, looking, and listening, and thereafter continuing to do so as he approached the crossing, and that no signal was given. In view of this testimony from one person who was intent on listening for the train, and of two others who give a very likely reason why their attention was particularly directed to the giving of signals, we think the court below would have been in error, had it refused to submit to the jury to determine whether a crossing signal was given.

We next turn to the question of the plaintiff's alleged contributory negligence. He was driving a single-horse top buggy, with a new buggy fastened on behind. As we have seen, the railroad ran for some 1,200 to 1,500 feet through a cut which hid it from view as one approached the crossing. There was an apple tree along the road about 100 feet from the track, and this by the proofs was the best and usual place for travelers to stop. But this vantage point only gave a view to where a train emerged from the cut. From the apple tree to the crossing the view of the track for 300 feet was obscured as the traveler approached by elm bushes along the right of way, then by telegraph poles, and then by tall cat tails on the right of way, and from the property line down to the track by an 8-inch board along the top of a wire, cattle-guard crossing fence. This fence was on an embankment, and the board was thus from 7 to 8 feet above the road. Moreover, from the apple tree to the right of way the road was below the level of an embankment on top of which was a rail fence. Now, the plaintiff having stopped at the usual place at the apple tree, and looked and listened both then and as he went forward, the question whether due care called on him to again stop, in the absence of any warning from the train, was one for the jury. He

had a right to rely on the trainmen doing their duty and whistling in time for the crossing. He had two buggies to handle, and the road approached the crossing at a down grade. There was no place between the apple tree and the telegraph poles where he could get any wider view. Did due care require him to again stop as he approached the track, when the elm bushes, the telegraph poles, the cat tails, and the wide board at the top of the cattle fence more or less obstructed his view, or would due care lead him in the absence of signals, to push forward across the track? We cannot, as a matter of either law or fact, say that the latter was not the more prudent course. Indeed, it would seem he would have passed the track in safety had not his horse shied. But he was on the track before the train emerged from the cut, only 300 feet away. Running as it did, it covered that distance in three or four seconds. While the case is not on all fours with Whitman v. Pennsylvania R. R., 156 Pa. 177, 27 Atl. 291, yet what Chief Justice Mitchell says in that case is so pertinent that we repeat it, in extenso, here:

"The learned judge nonsuited the plaintiff for violation of the rule which requires a traveler, about to cross a railroad track, to stop, look, and listen, because he held that the evidence showed that where plaintiff stopped the trains could neither be seen nor heard. The rule has been enforced and reiterated in so many cases, from Railroad Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753, down, that it needs no further discussion. As was said in McNeal v. Railroad Co., 131 Pa. 184, 18 Atl. 1026, experience has confirmed the wisdom of its adoption, and it will not be relaxed or pared down by exceptions. But it is a rule which in its nature is applicable only to clear cases, to those which practically admit of only one view. We are unable to agree with the learned judge that this is such a case. It is true that the place where plaintiff stopped was 100 feet away from the track, and afforded a very short view, about 35 yards to the eastward, and that further view was then cut off, not only by a curve in the track, but by a hotel. But notwithstanding these disadvantages, five witnesses beside the plaintiff, one of them a liveryman, testified that this was the proper and customary stopping place, used by drivers coming in that direction. The witness Ervin explained why this place is preferred, because there is a break or level place in the road, which then runs at a downgrade until so near the track that some horses cannot safely be checked there. Plaintiff and the driver testified that they not only stopped at this point and waited until two trains in opposite directions had passed, but then drove on and 'slackened up' nearer the track, 'to see or hear whether there was anything coming.' In the face of this testimony we do not think that the court could safely say, as a matter of law, that the place where plaintiff stopped was not one which reasonable prudence would sanction for the purpose."

Finding, therefore, no error in the court's action, the judgment is affirmed.

MOULTON v. FIELD et al.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,628.

1. CORPORATIONS (§ 317*)—OFFICERS—LIABILITY FOR MISAPPROPRIATION OF FUNDS.

Defendant was president of a mutual life insurance company, the general manager of which had a contract giving him sole control and management for 25 years on a percentage basis, subject to the charter and by-laws. He also controlled the election of directors through proxies. When the contract had still four years to run, he became incapacitated and sold the contract to another, receiving $125,000 therefor. Defendant, being a party to the scheme by which the directors approved the transfer, increased all of their salaries, and on the same day bought from the new manager with funds of the company a list of the members of another insolvent company with which he had been connected paying him $200,000 therefor, with which he paid the $125,000 to the retiring manager, retaining the remainder. Such list was of no direct financial benefit to the company. *Held*, that the entire transaction was a fraud upon the company and a betrayal of trust on the part of defendant as an officer which rendered him liable to the company for the $200,000, so fraudulently taken from its funds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401–1415; Dec. Dig. § 317.*]

2. CORPORATIONS (§ 317*)—OFFICERS—SALE OF OFFICIAL POSITIONS.

A contract between a mutual insurance company and its general manager, by which he was to receive for a term of years a percentage on the business done, was one for personal services which he could not transfer to another, and on his becoming incapacitated the value of the unexpired term, if any, belonged to the company, and the action of the officers and directors in permitting him to sell and transfer it to another for a large sum received for his own use was a violation of their duty of good faith toward the company and a betrayal of their trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401–1415; Dec. Dig. § 317.*]

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

Suit in equity by Allen W. Field and others, as policy holders in the Western Indemnity Company, against George M. Moulton and others. Decree for complainants (166 Fed. 607), and defendant Moulton appeals. Affirmed.

Richard S. Folsom and Eugene F. Ware, for appellant.

S. S. Gregory and Jacob Newman, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appellees, policy holders in a mutual life insurance company, brought suit against the company and Gray, Rosenfeld, and appellant Moulton as officers thereof to recover for the use of the company a sum of $200,000 alleged to have been wrongfully taken by said officers from the company's treasury. The master's report and the decree on exceptions thereto sustained appellees' right of recovery. On this appeal the sole question is the sufficiency

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

of competent evidence to establish facts which in law can support the decree as against Moulton.

Not resting on the circuit court's approval of the master's report, we elicit from the voluminous record the following facts pertinent to the question of Moulton's liability.

In 1884 Gray organized the company and secured from it on a percentage basis a contract whereby for 25 years he should have the sole control and management, subject to the charter and by-laws, and the custody of the books, records, and papers, subject to inspection by the board of directors at any regular or special meeting. The contract further provided that no copy of the membership should be made by Gray except as needed in the proper work of the company, and that no copy or list should be made by or for other parties for any purpose whatever without the unanimous vote of the directors. Gray, until Rosenfeld succeeded him in 1905, obtained and held enough proxies to control the election of directors. In 1905 Gray was afflicted with a fatal malady, and his physician instructed him to quit work. His contract had then about four years to run, and his compensation amounted to $12,000 a year. Gray offered to sell his contract to Rosenfeld for $125,000. Rosenfeld was willing to pay that amount if he could be put into Gray's shoes as general manager. (Rosenfeld was insolvent and had had comparatively little experience in insurance.) At Gray's suggestion Rosenfeld saw Moulton, who was then, and for many years had been, president of the company at a salary of $1,500 a year. Rosenfeld, after telling of his negotiations with Gray, and indicating that if he were put in Gray's place he would like to have Moulton's active co-operation in the business and would not be opposed to a salary of $5,000 or $6,000 a year for Moulton, asked Moulton if he favored the plan; and Moulton replied, "A man would be foolish to resent opportunity when it knocks at his door." Rosenfeld also represented to Moulton that he controlled a mutual assessment life insurance business in Pennsylvania which on becoming general manager he would turn over to the company for $200,000. Moulton's comment on this was, "I see now that your idea is that the money you are to pay for Gray's contract you really get back directly from the company." Upon thus learning the extent of Rosenfeld's purposes, Moulton demanded that, if the plan was carried through, his salary should be $10,000 a year and, in addition 1 per cent. of all receipts in excess of $1,000,000 a year. To this Rosenfeld acceded. They also agreed that the annual compensation of the other directors should be raised from $600 to $1,000, and that one director who they thought might prove obstructive should become a member of a contemplated executive committee at a salary of $2,500 a year. In the forenoon of February 17th the directors met, approved the assignment of Gray's contract to Rosenfeld, and by resolution installed Rosenfeld as general manager with all the privileges, benefits, and powers that had theretofore been held by Gray. And Rosenfeld that forenoon paid to Gray $125,000 which Rosenfeld (in some undisclosed manner) had temporarily obtained from a bank. At the same meeting the directors created the intended

executive committee, consisting of Rosenfeld, Moulton, and the director above indicated, with authority to fix the salaries of officers and directors (which were fixed as designed) and with full power "to enter into any contract for the transfer of the members of other companies to this company which in their judgment shall be for the best interests of this company." In the afternoon this committee purchased from one Morgan, who was acting for Rosenfeld in the sale, a list of the policy holders of the Pennsylvania company with their addresses and policy records; and $200,000 was taken from the treasury and turned over to Rosenfeld, who at once returned $125,000 to the bank and put $75,000 in his pocket.

Our conclusions are these:

Gray through his proxy system had autocratic power. Mutual life insurance companies differ radically from ordinary industrial enterprises. Every customer by the act of purchasing what the company has to sell becomes an owner of the business. Because policy holders are necessarily numerous, widely scattered, unaquainted with one another, each owning too small an interest in the business to justify the expense of long travel to the owners' annual meeting, the proxy system seems inevitable. Gray took advantage of this not merely to have the proxies made to himself, but to prevent (by his contract) any one from disturbing his proxy control. If such a self-perpetuating autocracy is not unlawful in its very nature (and if not, it might be well that the taking of proxies in mutual life insurance companies by officers, directors or employés should be prohibited by statute), at least the centering of the electorate and the benefits of the election in one person or group of persons raises the highest obligation of good faith and creates the burden of establishing very clearly the fairness and honesty of any challenged benefit.

With this proxy control in Gray's hands, the directors came to regard Gray, and not the owners, as the master of the business. When Gray became incapacitated, his employment should have been ended on that account; and in all probabilities would have been, if the directors had considered themselves servants of the policy holders instead of dependents of Gray. If the succession was worth $125,000 in the market, the sale (if it were lawful) should have been made by the directors for the benefit of the owners of the business, not of Gray. For Gray had nothing legally saleable. His contract, being for personal service, was not assignable; and the resolution of the directors really created a new contract with Rosenfeld. So the arrangement, to which Moulton was knowingly a party, by which the office of general manager and the proxy control were sold to Rosenfeld and the consideration turned over to Gray instead of into the treasury, was a betrayal of trust.

The dealings between Morgan (Rosenfeld) and the executive committee, constituted as aforesaid, were on their face fraudulent. It was Rosenfeld treating with Rosenfeld. To speak of the transaction as the purchase of an insurance business is a euphemism. There was no pretense of a purchase of the Pennsylvania association's interests in its policies, or a contract whereby its members be-

came members of this company, in which event the consideration would belong to such members; there was merely a disclosure by Rosenfeld, who was then general manager of this company, of the names and whereabouts of policy holders in a moribund concern which shortly went into the hands of a receiver—persons who by solicitations and persuasions might or might not be induced to come into contract relations with this company. The solicitations and persuasions were what brought any new business that came from that source; and, if Rosenfeld as general manager did not owe the disclosure, his work as solicitor and persuader was due by reason of his existing official position. So Moulton's part in turning over the $200,000 to Rosenfeld was another betrayal of trust. And it is easy to see that Moulton had this betrayal in view on the occasion when he insisted to Rosenfeld that his pay should be increased to $10,000 a year and a percentage of the company's income.

The suggestion that the record fails to prove that Moulton's services after this Rosenfeld transaction were not worth $10,000 a year is beside the mark. Subsequent fidelity, fully paid for by his salary, cannot offset his betrayals.

Finally, the contention is raised that the $200,000 decree against Moulton should be reduced or extinguished by the profits that have been and hereafter may be made on the business secured from among the former members of the Pennsylvania association. True, equity allows only compensatory, not punitive, damages. But Moulton on February 17, 1905, jointly with others wrongfully abstracted $200,000 from the treasury. Liability accrued at that moment. What the paper on which the lists, etc., were written and the information therein contained were worth, the record fails to prove. New business written after February 17th was duly paid for by salaries, commissions, and expenses currently taken from the treasury. So there is nothing to deduct.

The decree against Moulton is affirmed.

TALCOTT v. FRIEND et al.

(Circuit Court of Appeals, Seventh Circuit. December 4, 1909. Petition for Rehearing Overruled June 10, 1910.)

No. 1,511.

1. APPEAL AND ERROR (§ 192*)—OBJECTIONS IN LOWER COURT—WAIVER OF OBJECTIONS TO PLEADINGS.

Where the merits of a controversy were fairly presented and tried, an appellate court will not consider technical defects in pleadings not questioned in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1221; Dec. Dig. § 192.*]

2. COURTS (§ 352*)—FEDERAL COURTS—PROCEDURE—TRIAL OF ISSUES TO COURT.

In a federal court, a written stipulation waiving a jury in accordance with Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), is not necessary to the

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

submission to the court of issues of law on what is virtually an agreed statement of facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 930; Dec. Dig. § 352.*]

8. FRAUD (§ 35*)—ACTION FOR DECEIT—ESTOPPEL—AFFIRMANCE OF CONTRACT.
An action for deceit is not based on a rescission of the contract, but implies an affirmance and the proving of a claim in bankruptcy for the price of goods sold and delivered on a contract, and the receiving of dividends thereon is not a bar to a subsequent action by the creditor for deceit based on fraudulent representations inducing the sale.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. § 35.*]

4. BANKRUPTCY (§ 426*)—DISCHARGE—CONCLUSIVENESS—ACTION FOR DECEIT—FORMER ADJUDICATION.
Neither the action of a creditor in opposing a bankrupt's discharge on the ground that he obtained credit on a materially false statement nor a finding by the court thereon, that the bankrupt had not been guilty of any act which barred his right to a discharge under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), is a bar to a subsequent action by the objecting creditor against the bankrupt for deceit based on the same false statement, the parties appearing in such action in a different capacity and the finding of the court not being necessarily determinative of the fact in issue in the second action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 792; Dec. Dig. § 426.*]

5. BANKRUPTCY (§ 426*)—LIABILITIES DISCHARGED—LIABILITY FOR FRAUD.
Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310), providing that a discharge shall release a bankrupt from all of his provable debts except such as are "liabilities for obtaining property by false pretenses or false representations" is not affected by the provision of section 14b (3) which makes the obtaining of property by means of a materially false statement in writing, a ground for refusing a discharge, and a discharge is not a bar to an action for deceit in obtaining property by means of such a statement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 792; Dec. Dig. § 426.*]

6. BANKRUPTCY (§ 405*)—DISCHARGE—PERSONS ENTITLED TO OBJECT—"PARTY IN INTEREST."
The term "party in interest," as used in the rule that objections to discharge in bankruptcy may be made by any "party in interest," includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. § 405.*]

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

Action by James Talcott against Henry Friend, Solomon C. Moss, and Henry Morris. Judgment for defendants, and plaintiff brings error. Reversed.

Roger Sherman, for plaintiff in error.

S. O. Levinson, for defendants in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

BAKER, Circuit Judge, delivered the opinion of the court.

Plaintiff in error, who was plaintiff below, brings this writ of error to reverse a judgment that he take nothing by his action on the case against defendants for their alleged deceit in obtaining goods from him by means of false written representations concerning their financial responsibility. Among various pleas, defendants filed one setting forth certain records in bankruptcy proceedings in the District Court for the Northern District of Illinois, and alleging that by reason thereof plaintiff was barred from prosecuting his present action. Plaintiff filed several replications, in one of which he set forth an additional portion of the same bankruptcy proceedings, and claimed that by reason thereof he was not within the alleged bar of former adjudication. Defendants filed a similiter. Thereafter plaintiff made a "motion to have the court find the issues on the question of former adjudication in favor of plaintiff." Without objection by defendants, the court proceeded with a trial of the aforesaid motion, without the intervention of a jury. And each side, at such trial, introduced in evidence, without objection, the records in bankruptcy set forth in the plea and replication. Thereupon the court, in the form of a finding of facts, recited the contents of those records, stated as a conclusion of law that the matters involved in plaintiff's declaration herein had been fully adjudicated in the bankruptcy proceeding, and entered the judgment which is brought up by this writ of error.

Each side now seeks to take advantage of alleged infirmities in his adversary's pleadings. But we will not stop to judge of the merits of this fencing, because in the light of the record it is impertinent, particularly when we bear in mind that pleadings were primarily intended, not as traps and snares, but as means of fairly advising the adversary in advance of the trial what the pleader would offer to prove at the trial. The plea fairly advised plaintiff that defendants would offer certain records. So, too, the replication fairly advised defendants that plaintiff would offer certain additional records. Each side deliberately refrained from seeking a ruling upon the legal sufficiency of his adversary's pleadings, but joined with his adversary in asking judgment with regard to the legal effect of a concededly existent and true record, in its entirety, upon plaintiff's right to a trial of his present alleged cause of action. On such a record the parties cannot properly inquire of us what rulings the Circuit Court ought to have made if demurrers or motions for judgment on the pleadings had been duly interposed.

Defendants also contend that nothing can be considered on this writ of error, because a trial by jury was not waived by written stipulation. There was no question of fact to be decided at the aforesaid limited hearing. On what was virtually an agreed statement of facts the parties submitted to the court questions of law.

Briefly, the facts were these: On February 1, 1904, defendants were adjudged bankrupts. Plaintiff filed a claim for $3,204 as the agreed price of goods sold and delivered by him to defendants. The claim was allowed, and plaintiff received his share under a composition which was confirmed. Plaintiff opposed the confirmation, and filed a specification in which he alleged that defendants in January, 1903, made

a statement in writing to the Woods Dry Goods Commercial Agency, in which statement defendants showed net assets of $92,900 over and above all debts and liabilities; that defendants gave the statement to the agency for the purpose of having the agency communicate it to plaintiff and other wholesalers in order that plaintiff and others should sell and deliver goods to defendants on credit in reliance upon the truth of said statement; that the agency communicated said statement to plaintiff and others; that plaintiff and others sold and delivered goods to defendants on credit, and in so doing relied upon the truth of said statement; that the statement was false; that defendants, at the time of making the statement, had no assets in excess of their debts and liabilities, but were utterly insolvent, as they well knew; and that plaintiff and others were ignorant of the falsity of said statement until after the petition in bankruptcy was filed. The District Court, construing section 14b(3)[1] (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]) to mean that a bankrupt debtor should not be refused a discharge (confirmation of a composition operating as a discharge)[2] on account of having made a materially false statement in writing, unless the statement was made by the debtor directly to the creditor whom the debtor intended to deceive, ruled that the specification aforesaid failed to state facts sufficient to constitute a bar to defendants' discharge, and entered judgment as follows:

"It appearing that the composition has been accepted by a majority, * * * and that the bankrupts have not been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to a discharge, * * * it is therefore hereby ordered that the said composition be, and it hereby is, confirmed."

This judgment has remained in full force and effect. The deceit counted on in the declaration in the present action is the defendants' giving of the same false statement in writing which was set forth in plaintiff's objection to the confirmation of the composition. The damages alleged to have been suffered as the consequence of the deceit are the unpaid balance of the price fixed in the contract of purchase.

I. What effect upon plaintiff's right to maintain this action on the case for deceit is exerted by the fact that plaintiff filed against the estate in bankruptcy his claim under the contract of purchase, and shared in the distribution?

Filing the claim was an affirmance of the contract of sale, and constituted an election not to rescind and attempt to recover what plain-

1 Section 14b (3) provides that "the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

2 Section 14c. "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

tiff had delivered to defendants in pursuance of the contract. But an action for deceit is not based on recission. It too, implies an affirmance. It means that plaintiff has elected to abide by the contract, to retain and make the best of what he received thereunder, and to recover the difference between what he received and what he parted with, as his damages in being misled.

In Cheney v. Dickinson, 172 Fed. 109, 96 C. C. A. 314, we pointed out that an action for deceit can be maintained against any one who intentionally deceived the plaintiff into making and carrying out the contract. Against any one—quite irrespective of whether the deceiver was himself a party to the contract or not. "In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction." So there was no inconsistency in plaintiff's realizing all he could from defendants' explicit promise to pay, and afterwards demanding damages for having been deceived into accepting such a poor obligation in exchange for his goods, because the defendants were sued in two separate and distinct capacities. That the promisors in the contract case and the fraud doers in the deceit case were the same persons was an incident immaterial to either case.

In Frey v. Torrey, 70 App. Div. 166, 75 N. Y. Supp. 40, 8 Am. Bankr. Rep. 196, affirmed by the Court of Appeals in 175 N. Y. 501, 67 N. E. 1082, which was an action by respondent, plaintiff below, to recover damages suffered through appellant's deceit in inducing respondent to deposit money with appellant while insolvent, the court said:

"The appellant's contention that the respondent is estopped from prosecuting this action by his election to prove his claim in bankruptcy remains to be considered. * * * We fail to discover any inconsistency between the remedy pursued by the respondent in the bankruptcy court and that adopted by bringing this action. It does not necessarily appear that the respondent waived the tort by filing proof of his claim in bankruptcy. If not, merely proving the indebtedness which concededly existed and which was induced by fraud would not be inconsistent with subsequently bringing an action to recover the money obtained by fraud." [3]

If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick; and if the claimant proved the theft or force or trick to support the legal fiction of a contract—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort would be held to be the basis of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with the contract's existence is necessary to the contract's enforcement.

[3] See, also, Stokes v. Mason, 10 R. I. 261; McBean v. Fox, 1 Ill. App. 177; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Bowen v. Mandeville, 95 N. Y. 237; Heastings v. McGee, 66 Pa. 385.

We conclude, therefore, that the prosecution of the claim in bankruptcy was not a bar to this action for deceit.

II. What effect is to be attributed to that part of the record in bankruptcy which shows that plaintiff interposed as an objection to defendants' discharge the deceit counted on in the present declaration and that the court found "that the bankrupts have not been guilty of any of the acts which would be a bar to a discharge"?

Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held, as a matter of law, that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is "that the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge." In the absence of such a showing, it was the duty of the court, under section 14b, to grant the discharge (confirm the composition).

Objections to discharge may be made by any "party in interest." That term certainly includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. The third ground of objection is available if the bankrupt in the manner therein stated "obtained property on credit from any person." Any creditor may therefore urge this objection, whether he was the defrauded party or not. In re Harr (D. C.) 143 Fed. 421. The application for a discharge consequently tenders an issue to all parties in interest. If all remain silent, all are bound by the finding which follows the failure to present objections. All equally have the right and the opportunity to object; but if only one does so, he cannot keep the outcome to himself—all share in the result. Thus identity in interest of the parties to the application for discharge and objections thereto and the parties to this action for deceit is wanting. In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors and the plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in this action the parties are the defendants in the capacity of fraud doers (separate and distinct from their character of contractors, as hereinbefore pointed out) and the plaintiff in the capacity of the solitary victim of their deceit. So, also, there is lacking an identity of issues, for in the bankruptcy proceeding the only proper issue was the bankrupts' right to a discharge as against all parties in interest. In re Thomas (D. C.) 92 Fed. 912; In re Rhutassel (D. C.) 96 Fed. 597.[4]

Our conclusion, therefore, is that plaintiff's act in pleading defendants' deceit in opposition to the application for a discharge, and the aforesaid finding of the court with respect thereto, fail to bar plaintiff from maintaining this action.

III. What effect should be given to that part of the bankruptcy record which confirms the composition and thereby discharges the defendants?

By section 17 "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2)

[4] See, also, In re Tinker (D. C.) 99 Fed. 79, and the reference thereto on page 474 in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754.

are liabilities for obtaining property by false pretenses or false representations."

The cause of action for deceit, not having been reduced to "a fixed liability as evidenced by a judgment," was not a "provable debt" (section 63 of the act; 1 Remington on Bankruptcy, pp. 376, 424) and therefore was not extinguished by the discharge.

But if the cause of action for deceit were to be considered as a provable debt, it would be saved by the second exception in section 17. This exception is not lessened from the natural import of its language by the provision in section 14b (3). The two provisions are of course to be read as parts of the same statute. But they do not limit each other, because on looking to the particular subjects treated of by them respectively, they are found to be not in pari materia. Releasing an insolvent debtor from his debts is an act of grace. The fixing by Congress of the considerations on which the discharge will be granted or withheld is a matter separate and apart from determining the effect to be given the discharge in subsequent litigation. Katzenstein v. Reid, 41 Tex. Civ. App. 106, 91 S. W. 360, 16 Am. Bankr. Rep. 740.

Furthermore, if section 14b(3) were to be interpolated into section 17(2), Congress would be held to have intended the absurdity that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits.

In our opinion, therefore, the record of the discharge is no bar.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BALTIMORE & O. R. CO. v. COPPOCK.

(Circuit Court of Appeals, Third Circuit. June 17, 1910.)

No. 19.

RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate was struck and killed by a train while driving a team over a grade crossing on defendant's railroad. He had stopped and looked and listened at a point 25 or 30 feet from the crossing, where travelers usually stopped, and from where the track could be seen for 1,450 feet. Not seeing or hearing any train, he drove on, and from that point until his horses were on the track his view was obstructed by a station shed. The train approached at a speed of 60 miles an hour, and there was evidence tending to show that it gave no signal until the deceased was upon the crossing. *Held*, that deceased was not chargeable with contributory negligence as matter of law, but that question, as well as the question of defendant's negligence, was properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166–1192; Dec. Dig. § 350.*]

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

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

Action by Emma V. Coppock against the Baltimore & Ohio Railroad Company. Judgment for plaintiff (174 Fed. 264), and defendant brings error. Affirmed.

Kingsley Montgomery and W. B. Linn, for plaintiff in error.

J. De H. Ledward and Albert D. MacDade, for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below Emma V. Coppock recovered a verdict against the Baltimore & Ohio Railroad Company for damages for the death of her husband. To a judgment entered thereon against it the railroad sued out this writ, and assigned for error the refusal of the court to affirm its point that "under all the evidence in the case your verdict must be for the defendant." A careful examination of the proofs satisfies us that the facts, and particularly the inferences to be drawn from such facts, were so controverted that it was the province of the jury to pass upon them. Two questions are involved: First, was there evidence from which the railroad's negligence could be inferred? and, secondly, were the facts so clear, and the inferences therefrom so unquestionable, that the court was bound as a matter of law to adjudge the decedent guilty of contributory negligence?

He, while driving over a public road grade crossing at Felton station, between Wilmington, Del., and Chester, Pa., was killed by an express train. This public road, known as the "Concord Road," crosses the railroad diagonally and approaches it by a short, steep grade, and the obstructions to vision are such that even when timely signals are given its passage is not free from hazard. On the road as the decedent approached the crossing there is a viewpoint "at the tree, as it was called, where it was customary for drivers to stop." There was testimony that this was from 25 to 30 feet from the crossing, and here a driver could see back of the station waiting shed in the direction the train was coming to a point in a grove a quarter of a mile distant. From this stopping point forward, and until his horses were in the pinch of the pull up the approach, or, indeed, on the track, and the driver himself within 8 or 9 feet thereof, his view is shut off by the waiting shed, the front of which is only 8 or 9 feet from the rails. And when an open view is had it is for only some 1,450 feet to the grove, as the track curves at that point. This distance a train at the speed of this one would cover in about 15 seconds.

There was proof the decedent, who was on top of a load of manure in a farm wagon driven by two horses, stopped at the tree. Apparently hearing or seeing nothing, he drove on. The morning was somewhat misty. His horses had cleared the track, and his wagon was struck between the wheels by a train running at 60 miles an hour to make up lost time. There was a conflict of testimony as to whether the crossing signal was blown, and as to whether an electric signal near the crossing was operating, and there was no evidence showing at what distance from the crossing an approaching train started the electric bell. There was negative proof that witnesses within audible dis-

tance did not hear it ring. One Dutton followed Coppock along the road a short distance behind, but in sight. He knew the train was due, and was on the lookout for signals, as he had a skittish young horse. He said he did not hear a whistle. Moreover, there was positive proof by two witnesses, who were near the railroad and beyond the woods referred to, whose attention was especially called to this train not blowing for their own crossing until it was right upon it, and who swore positively that it did not blow again as it went through the woods between them and Felton station.

Summed up, then, we have testimony that Coppock stopped at the tree where there was a view back of the shed to the curve in the Felton woods. As no train was then in sight, he went on; and there was proof from which the jury could infer no whistle was blown until the train was emerging from the woods, and that Coppock's horses were on the tracks and pulling the wagon up the steep grade before the train came in sight and blew. Such being the facts, for we must so assume where there was evidence from which the jury could find them, Coppock was crossing the track before he had any warning of the approach of the train. Under these circumstances, we are unable to say that Coppock, as a matter of law, was guilty of contributory negligence. He had stopped, looked, and listened at the point the traveling public had chosen as the best for that purpose, and there was neither sight nor sound of danger. In the absence thereof, he followed the usual course of drivers on that road in essaying to pass the crossing, and his course in doing so was not so clearly negligent that the court would have been justified in so holding; but its duty was to submit the question of such contributory negligence to the jury.

In Chicago Company v. Minneapolis Company (C. C. A.) 176 Fed. 240, it was said:

"The question whether or not the Soo Company was guilty of negligence which directly contributed to the injury was an important issue in this case. There are cases in which an act or omisson is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of a similar act or omission is insufficient to modify its character or its effect. Dawson v. Chicago, Rock Island & Pacific Ry. Co., 114 Fed. 870 [52 C. C. A. 286]; Gilbert v. Burlington, etc., Ry. Co., 128 Fed. 529 [63 C. C. A. 27]. The act or omission of the Soo Company in this case, however, did not appear at the time this evidence was challenged to be of that character, and where the nature of the act or omisson is doubtful the best test of actionable negligence, where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercised under the same or like circumstances. If the care exercised in such a case rises to or about that standard, there is no such negligence; if it falls below it, there is. The legal presumption was that the servants of the Great Western Company, who had been operating its passenger trains upon the tracks leading out of St. Paul which were used by the Soo Company, on the day of the accident, were men of ordinary intelligence and prudence, and hence the fact that it had been their uniform practice to handle their trains under like circumstances in the same way that the Soo Company operated this train on that occasion was both competent and material evidence that it conducted it with reasonable care. Lake v. Shenango Furnace Company, 160 Fed. 887 [88 C. C. A. 69]."

We think this case falls within the principle there stated. The judgment is therefore affirmed.

MOORE v. KRAFT.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,620.

1. EXECUTORS AND ADMINISTRATORS (§ 524*)—PLEADING (§ 35*)—ACTION BY ADMINISTRATOR—MERGER OF ORIGINAL CAUSE OF ACTION.

While an administrator cannot be authorized by the court which appointed him to sue in another state on a cause of action belonging to his intestate, where he has sued thereon in the state of his appointment and obtained a judgment, the original cause of action in favor of his intestate is merged therein, and a new cause of action arises in favor of the administrator, on which he may sue in his own right in any state where the debtor is found, and the addition of his title as administrator in the declaration is a mere description, which may be rejected as surplusage.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2330–2343; Dec. Dig. § 524;* Pleading, Cent. Dig. § 79; Dec. Dig. § 35.*]

2. JUDGMENT (§ 822*)—ACTION ON JUDGMENT—DEFENSES—MATTERS CONCLUDED BY FORMER ADJUDICATION.

Where the principal administrator of an estate was sued personally in another state, by an administrator there appointed for the same intestate, as a debtor of the estate, and appeared and defended, a judgment there rendered against him is conclusive as to all defenses he made or could have made therein, and such matters cannot be again litigated in an action against him on the judgment in the state of his residence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1500; Dec. Dig. § 822.*]

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

Action by John P. Moore, administrator of the estate of Sallie B. Kraft, deceased, against F. W. Kraft. Judgment for defendant, and plaintiff brings error. Reversed.

In April, 1909, plaintiff in error filed his declaration in debt against defendant in error upon a judgment rendered in a state court of Arkansas. From the record of that judgment it appears that in December, 1898, plaintiff in error was appointed by a probate court of Arkansas administrator of the estate of Sallie B. Kraft, who died intestate leaving real and personal property and also creditors in Arkansas; that as such administrator he brought an action in an Arkansas court to recover a debt which had been incurred by defendant in error to said Sallie B. Kraft; that defendant in error appeared and defended the action; and that the judgment now in suit resulted.

To the present declaration defendant in error pleaded "that Sallie B. Kraft in her lifetime was a citizen and resident of the state of Illinois, and had her domicile in the county of St. Clair in the said state of Illinois at the time of her decease and for a long time previous thereto, and that she was at the time of her decease the wife of the said defendant; that upon the decease of the said Sallie B. Kraft the said defendant, F. W. Kraft, was by the probate court of St. Clair county, Illinois, duly appointed the administrator of the estate of the said Sallie B. Kraft, and that she died intestate; that upon the decease of the said Sallie B. Kraft, and the appointment of defendant as administrator of her estate, he took upon himself the administration of the assets of the said Sallie B. Kraft; and that he has been since the time of his appointment until the present time and still is administrator of the estate of the said Sallie B. Kraft. And defendant further avers that the

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

said John P. Moore, if in fact he was ever appointed administrator of the estate of Sallie B. Kraft, deceased, was appointed as an ancillary administrator in the county of Phillips in the state of Arkansas, and that whatever assets belong to the estate of Sallie B. Kraft, deceased, are subject to administration and distribution in the state of Illinois, the place of her domicile at the time of her decease, and that the said John P. Moore as administrator of the estate of Sallie B. Kraft, deceased, has no right, power, or authority to maintain an action in the state of Illinois for the recovery of any of the assets of the said Sallie B. Kraft, deceased; and this the said defendant is ready to verify."

Plaintiff in error demurred to this plea on the grounds: (1) That it alleged matters "which could not be set up after judgment to avoid its effect in the state from which the record came"; (2) that "all such matters should have been set up in the original action and are now res adjudicata"; and (3) that "after judgment the debt became personal to the plaintiff, the style of administrator being merely descriptive and not essential to a recovery."

The demurrer was overruled, plaintiff in error elected to stand by his demurrer, and the court adjudged that "Moore, administrator of the estate of Sallie B. Kraft, deceased, in the state of Arkansas, be and he is barred of his action upon the judgment in said declaration described, without prejudice to the right of action on said judgment by a domestic administrator, or administrator appointed by the proper court in Illinois of the estate of said Sallie B. Kraft, where the said Sallie B. Kraft had her domicile at the time of decease."

R. B. Hendricks, for plaintiff in error.

George A. Crow, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). A state cannot give its courts, through their officers, such as administrators and receivers, power to reach out for persons and things beyond the lines of the state. Vaughan v. Northrup, 15 Pet. 1, 10 L. Ed. 639. So Moore as Arkansas administrator could not have sued Kraft in Illinois upon the cause of action which had accrued to Mrs. Kraft. But when Moore, in the right of his intestate, sued Kraft in Arkansas and obtained the judgment in question, the original cause of action became merged in the judgment, and the judgment became the legal evidence of a new debt, for the nonpayment of which a new cause of action would arise. Now this new cause of action never belonged to Mrs. Kraft, and so it would be logically impossible for Moore to sue upon it in her right. If a person buys or leases property from an administrator or receiver, the consideration is promised to be paid to a living person, who sues by virtue of what he has done, not by virtue of what the deceased or insolvent had done; and whatever he may do or be obligated to do with the consideration when he collects it, is wholly irrelevant to the issue. The question is the right to collect, not who may be the ultimate beneficiaries, just as in replevin the question is right of possession, not ownership. Therefore the law is that, after an administrator or receiver recovers judgment in the right of the deceased or insolvent, he may in his own right sue upon the new debt wherever he finds the debtor, and the addition of his title in the declaration is mere description which is rejected as surplusage. Biddle, Adm'r, v. Wilkins, 1 Pet. 686, 7 L. Ed. 315; Wilkinson, Receiver, v. Culver (C. C.) 25 Fed. 639; Newberry, Adm'x, v. Robinson (C. C.) 36

Fed. 841; Talmage v. Chapel, 16 Mass. 71; Black on Judgments, § 963; 18 Cyc. 877, 1239, 1240.

So what becomes of the plea? In the Arkansas court Kraft had his day to show why this new cause of action in favor of Moore personally should not be created. If there was any infirmity in Mrs. Kraft's claim, then was the time to assert it. If there was any want of power in the Arkansas probate court, if any challenge of Moore's right to maintain that action in his representative capacity could be made, then was the time to present not only the defenses that were set up but every possible defense. If there was any validity in Kraft's contentions that his indebtedness to his wife became at her death a part of her estate in Illinois, that upon his appointment as administrator in Illinois (when does not appear, but that is immaterial) the chose in action eo instanti was converted into a cash asset for which he was bound to account to the Illinois probate court, and that the jurisdiction of the Illinois probate court over his debt to his wife was exclusive, such matters might or might not have been adjudged to be good reasons why Moore in the Arkansas court should not recover a judgment in the right of Mrs. Kraft against Kraft, the debtor, who was a different identity from Kraft, the administrator; but they afford no defense to the judgment as an evidence of a new debt from Kraft as an individual. Manifestly it is impossible to excuse a judgment debtor merely because he may have suffered some one else to recover a judgment on the same original debt.

The judgment is reversed, with the direction to sustain the demurrer to the plea, and to proceed further not inconsistently with this opinion.

UNITED STATES v. DOYLE.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,641.

ALIENS (§ 68*)—PROCEEDINGS FOR NATURALIZATION—QUALIFICATIONS OF WITNESSES.

Under Naturalization Act June 29, 1906, c. 3592, §§ 4, 5, 34 Stat. 596, 598 (U. S. Comp. St. Supp. 1909, pp. 478, 480), which provide that an applicant's petition for naturalization shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, that on the hearing the testimony of at least two witnesses who are citizens of the United States shall be required to the fact of residence, etc., and that on the filing of the petition the clerk shall give notice by posting of the filing thereof and of the names of the witnesses whom the applicant expects to summon in his behalf, "but in case such witnesses cannot be produced, upon the final hearing other witnesses may be summoned," the witnesses at the final hearing are not required to be the same who verified the petition, nor is the applicant limited to those whose names are given in the posted notice, but in case they, or either of them, "cannot be produced," he may summon others, subject to the right of the court to make whatever orders may be deemed necessary to enable the government to investigate as to their qualifications, character, and credibility.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

*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 Eastern District of Wisconsin.

Proceedings for naturalization by Cornelius Doyle. From an order admitting the applicant to citizenship, the United States appeals. Affirmed.

E. J. Henning and Edward W. Sims, U. S. Atty., for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. This appeal, taken from an order admitting the alien-born appellee to citizenship, involves the construction of those parts of the naturalization act of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1909, p. 478]), which bear upon the qualifications of the witnesses presented at the final hearing.

In section 4 it is provided that the verified petition of the alien "shall also be verified by the affidavits of at least two credible witnesses who are citizens of the United States and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States."

By section 5 it is made the duty of the clerk, immediately after filing the petition, to post a notice thereof and of "the date, as nearly as may be, for the final hearing, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

Section 6 provides, among other things, that "petitions for naturalization may be made and filed during term time or vacation of a court, which shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting notice of such petition."

Other provisions are that "every final hearing upon such petition shall be had in open court" (section 9), and that "in addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution, shall be required, and the name, place of residence and occupation of each witness shall be set forth in the record."

Appellee's petition confessedly met all requirements. As the witnesses whom appellee expected to summon to be present at the final hearing he gave to the clerk, and the clerk duly posted, the names of the men who verified the petition. Before the time set for the

final hearing one of the men moved from the district. At the hearing the remaining man was produced and heard as a witness. Appellee was permitted, over the government's objection, to use as a witness a citizen of the United States whose name was neither in the petition nor notice.

For reversal, the propositions are that no witnesses in behalf of the applicant may be heard at the final hearing except those who verified the petition, and in no event witnesses whose names have not been posted for at least 90 days. The cases of In re O'Dea (C. C.) 158 Fed. 703, United States v. Daly, 32 App. D. C. 525, and United States v. Santi Martorana, 171 Fed. 397, 96 C. C. A. 353, are cited. The last is concerned with the validity and amendableness of a petition not verified by at least two witnesses possessed of the qualifications required by section 4. The other two lend support to the government's contentions.

Section 5 does not explicitly say that the witnesses whom the applicant expects to summon for the final hearing shall be the witnesses who verified his petition. If that had been the legislative intent, we might well expect to find it expressed in direct terms. All the implications from the whole statute we think are the other way. If witnesses at the hearing had to be attesting witnesses, there would be no necessity for giving their names and having them posted, for notice of the petition carries notice of its contents and the District Attorney or other interested parties could get the names from the petition. The requirement that the names of the witnesses who testify at the hearing should be set forth in the record would be supererogatory, because the petition was already a part of the record. Witnesses at the hearing must be prepared to give affirmative testimony concerning the applicant's attachment to the principles of the Constitution. Attesting witnesses need give only their opinion that the applicant is in every way qualified to be admitted as a citizen. It would not be perjury for attesting witnesses to base their opinions on facts which included no knowledge, or only negative knowledge, of the applicant's attachment to the principles of the Constitution. Our conclusion is that witnesses at the hearing need not be limited to those who verified the petition.

Is the court forbidden to hear a witness whose name has not been posted for at least 90 days? When the time set for the hearing arrives, must the proceeding virtually be started anew? We find no express command. The contrary we think is the only inference that can fairly be drawn from the explicit provision that if the posted witnesses "cannot be produced upon the final hearing other witnesses may be summoned." For 90 days the government's representatives have had the opportunity to investigate the applicant and his sponsors named in petition and notice. If a posted witness is not present, the applicant has the burden of satisfying the court that he cannot be produced. If any suspicion should arise that the posted witnesses had been run off, or that the tendered witnesses were not reliable, the court, on motion, should allow the government ample time in which to investigate, and a denial might be deemed an abuse of dis-

cretion, for which a naturalization order should be reversed. But we conclude that no adequate ground exists for challenging the jurisdiction of the court to proceed with the cause at the time set and to hear substitute witnesses who are citizens of the United States. See In re Schatz (C. C.) 161 Fed. 237; In re Neugebauer (D. C.) 172 Fed. 943.

The order is affirmed.

LA HOGUE DRAINAGE DIST. NO. 1 OF IROQUOIS COUNTY, ILL., et al. v. WATTS.

(Circuit Court of Appeals, Seventh Circuit. May 25, 1910.)

No. 1,638.

1. APPEAL AND ERROR (§ 1176*)—APPEAL FROM INTERLOCUTORY ORDER—REVERSAL—DIRECTION OF DISMISSAL.

If the averments of a bill in a federal court furnish no support for the relief prayed for, its dismissal may be directed by the appellate court on an appeal from an interlocutory order granting an injunction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1176.*]

2. SPECIFIC PERFORMANCE (§ 74*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR PUBLIC WORK.

A court of equity will not decree specific performance of a contract for the construction of a public drainage ditch, at suit of the contractor, where the work requires special skill, and the contract contemplates supervision by the drainage district.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 209; Dec. Dig. 74.*]

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

Suit in equity by Edwyn E. Watts against the La Hogue Drainage District No. 1 of the County of Iroquois, State of Illinois, and Louis Kraft, Jr., Patrick Drinan, and Albert Vandervliet, Commissioners. From an order granting a preliminary injunction, defendants appeal. Reversed and remanded, with directions to dismiss bill.

A. F. Goodyear, for appellants.

Walter C. Lindley, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This appeal is from a preliminary injunctional order, granted under the appellee's bill filed to enforce specific performance of an alleged contract entered into between the parties for the construction of "dredge ditches" in the appellant drainage district. The order enjoins the appellants both from proceeding to readvertise or relet contracts for such work, and from interference with attempted performance on the part of the appellee, by "proceedings to declare a forfeiture" of his contract or other means. It was allowed July 1, 1909, upon hearing of the bill, answer, and voluminous affidavits for and against the application, and the appeal therefrom has not been pressed for hearing until the lapse of a year from the time

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

named in the contract for completion of the work. Whether the injunction was authorized or unauthorized, it left the appellee free to carry on the contract work; and the averments of the bill justify an inference that it may have been completed meantime. The contract provided that the appellee should "begin building his dredges on the work on or before" October 1, 1908, and that the entire work "be completed on or before the last day of April," 1909, unless the time was extended or work "delayed by unavoidable conditions or accident." While the bill avers that weather conditions prevented operations within such period, it states (in effect) readiness in all respects for speedy performance thereafter, if allowed to proceed. So, were no interests or question involved other than the abstract rightfulness of such stay order, it is probable that no standing would appear to entertain the appeal at this time, as raising an issue which has become moot. Mills v. Green, 159 U. S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed. 293. We are impressed, however, with another aspect of the appeal which affects the groundwork of relief sought under the bill and calls for determination without postponement to final hearing. The alleged contract in suit is not only for public work, wherein public interests are involved both in the execution and in prompt performance; but the bill rests alone on alleged equities of the appellee, as contractor, to entitle him to have specific performance thereof enforced in equity. In other words, it necessarily involves "judicial superintendence and execution of the performance" (Pomeroy on Contracts, Spec. Perform. [2d Ed.] § 23); and if the averments of the bill furnish no support for such relief, not only is the order appealed from unsupported, but dismissal of the bill may be directed "to save the parties from further litigation" thereunder (Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 494, 20 Sup. Ct. 708, 44 L. Ed. 856). In such event the contract rights of the parties remain undisturbed by the decree. If the contractor has performed, or completes the work substantially within the contract provisions, or completion is unreasonably prevented by the other party, his legal remedies are clearly open. On the other hand, it appears to be of primary concern to the appellants to have completion of the work without further delay; and if unreasonable delay has intervened on the part of the contractor, or other breach has occurred, causing damage to the district, the legal remedy on its behalf is likewise open. So no complications appear to defer the inquiry whether equitable jurisdiction to enforce specific performance is authorized under the bill.

The general rule is well settled that contracts of the nature described in the bill are not thus enforceable, for reasons which are elementary in equity. 3 Pomeroy's Equity Jur. § 1402, p. 2159; Pomeroy on Contracts (Spec. Perform.) § 23; Fry on Specific Performance, c. 2; Marble Co. v. Ripley, 10 Wall. 339, 350, 19 L. Ed. 955, 7 U. S. Notes, 331, 333. Exceptions to the general rule are recognized in reference to works constructed under grants, franchises and like contracts, where no adequate remedy exists at law and the

"ordinary means and instrumentalities of equity" are adequate for mutual enforcement, as clearly defined in the authorities cited; but no sanction appears, as we believe, for such relief under the present bill. The alleged contract is for dredging ditches in the drainage district, involving special skill in the performance (as averred in the bill), and intending oversight throughout on behalf of the appellants, thus bringing it within the elementary doctrine uniformly upheld, that equity will not undertake to enforce specific performance of such contracts when mutuality of enforcements is impracticable.

For the reason stated, we are of opinion that the bill states no cause for equitable relief, and that it is unnecessary to consider the further contention of adequate remedy at law. The injunctional order of the Circuit Court is reversed accordingly, and the cause remanded, with direction to dismiss the bill for want of equity.

FEDERAL LEAD CO. v. LOHR.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,645.

1. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE—OTHER ACCIDENTS.

Plaintiff was employed in defendant's lead works; his duty being to operate a drum which drew an ore car up an incline to the top of a furnace, to swing down doors in the furnace, and to open doors in the bottom of the car, dumping the ore into the furnace. The doors were operated by means of levers; that on the car being held in place by a square shoulder from which it was prevented from slipping by a latch. Plaintiff was inexperienced and was instructed to first open the latch, then operate the furnace door levers, and last to knock the car door lever free from the shoulder. In operating the furnace levers he was required to stand close to the car, and while doing so his left arm was struck and injured by the lever of the car door, which was jarred from the shoulder, the outer edge of which had become rounded by wear. *Held*, in an action to recover for the injury, that evidence was admissible to show that a former employé had been injured in the same manner and had previously complained of the insecurity of the fastening, although the latch had been placed on the car afterward; the conditions being similar after the latch was unfastened, and also to show that the unfastening of the latch before operating the furnace doors, as he was instructed to do, was unnecessary and dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 930; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The following by an inexperienced workman of the master's instructions, as to the manner of doing his work, by reason of which he was injured, *held* not so obviously dangerous as to charge him with contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1105; Dec. Dig. § 289.*]

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

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

Action by William H. Lohr against the Federal Lead Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dan McGlynn, for plaintiff in error.

Thomas F. Ferns, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. The judgment assailed by this writ of error was rendered in Lohr's favor in his action against the company for damages on account of personal injuries.

Lohr's employment was to operate a drum which by means of a cable pulled an ore car up an incline; to stop the car over the top of a furnace; to swing down doors in the furnace; and to open doors in the bottom of the car, thereby dumping the ore into the furnace. The furnace and car doors were operated through levers. When the car doors were shut, their lever was by the doors' weight held in place against a square shoulder projecting from the car. A movable latch, to prevent the lever's slipping from the shoulder, could be opened when it was desired to free the lever. On coming to this employment Lohr was inexperienced in the operation of the machinery and in the work assigned to him. Under the master mechanic he was instructed how to proceed. After the car was stopped over the furnace, his directions were to open the latch in front of the car doors lever, then to operate the furnace doors levers, and finally to knock the car doors lever free from the shoulder. A few days after beginning work, and while following the directions, he was injured. Having opened the latch on the car, he was lifting a furnace door lever with his right hand, when his left arm, extended, was struck by the car doors lever which had slipped from the shoulder.

Negligence was charged with respect to the construction and condition of the holding devices for the car doors lever and the character of instructions for doing the work.

In proving defects in holding devices and the company's knowledge thereof, Lohr was permitted to show by witnesses that one Scovil on a former occasion had been injured by being struck by the same lever. Objection was made that the conditions were not the same. When Scovil was doing this work, there was no latch to prevent the lever from slipping off the shoulder; but at the outer edge of the shoulder a small stop was fixed behind which the lever was seated. The stop wore down "almost to nothing," so that if there was any jar "it would naturally spring the lever." Scovil repeatedly complained to the company of this condition. After Scovil's injury, what remained of the stop was filed off so that the shoulder was level, and the latch was affixed. By the repeated knocking of the lever from its seat the outer corner of the shoulder became rounded. The shoulder was broader than the thickness of the lever so that the vibration of the car was liable to jostle the lever over to the rounded corner of the shoulder. During Scovil's time the danger came from the liability of the lever's slipping off the shoulder. During Lohr's time, whenever the latch was open, the lever could be jarred from its seat even more easily. We are of the opinion that the testimony as to

Scovil's injury and the conditions and complaints at that time was properly admitted, and that the jury were justified in finding negligence and notice.

This spring-gun condition of the lever might not have been injurious if Lohr had not been directed to open the latch before operating the furnace doors levers. To operate them brought him into a small space beside the car where if he was not on guard against the swing of the car doors lever he was liable to be hit. If he had been instructed to open the furnace doors first, and if he had obeyed, this injury would not have occurred. Testimony that such a method of operation was safer and equally feasible was admitted. This we do not deem erroneous. Indeed, the fact is so obvious that the jury might well have inferred it from the evidence of locations and conditions.

For Lohr to follow his master's directions in the premises does not seem to us to have been so imminently dangerous that the jury could not fairly determine the fact otherwise. So the questions of assumed risk and contributory negligence were rightly submitted to the jury. On the whole record we think the judgment is right, and it is, accordingly, affirmed.

In re KING.

KING v. BANK OF WHITING, INDIANA, et al.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1910.)

No. 1,686.

BANKRUPTCY (§ 95*)—INVOLUNTARY PROCEEDINGS—CONDUCT OF HEARING ON PETITION—"JUDGE."

Under Bankruptcy Act July 1, 1898, c. 541, § 18d, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), which provides that, when the facts alleged in a petition for involuntary bankruptcy are controverted, "the judge shall determine as soon as may be the issues presented by the pleadings," and section 1a(16), which defines "judge" to mean "a judge of a court of bankruptcy not including the referee," a judge has no authority to make a general reference of such issues to a referee, but is required to exercise his personal judgment in their determination, and where direct issue is joined on the jurisdictional averments of a petition as to the alleged bankrupt's residence and principal place of business in the district, and it appears that the facts for the solution of such primary issues are readily ascertainable, such issues should be determined by the judge, on direct hearing if possible, as a condition precedent to inquiry upon the other issues raised.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 95.*

For other definitions, see Words and Phrases, vol. 4, pp. 3823-3826; vol. 8, p. 7695.]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Illinois, in Bankruptcy.

In the matter of John King, alleged bankrupt. On petition by bankrupt for revision of orders of the District Court in proceedings by Bank of Whiting and others. Reversed.

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

Otto Gresham, for petitioner.
James Rosenthal, for respondent.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. Proceedings are pending in the District Court, under a creditors' petition for adjudication of involuntary bankruptcy against John King, who petitions this court for review and revision in matter of law of orders entered therein. The record presents issues of fact joined by the verified answer of the alleged bankrupt to the creditors' petition, with the primary jurisdictional averment of residence and principal place of business at Chicago controverted, and as well insolvency and other material averments of such petition; the answer stating that his residence and place of business for the past 25 years "have been and still are in the city of Gainesville," Tex., and that he has been in Chicago, on business only, "for a part of the past six months," but maintaining "his principal place of business and legal residence as aforesaid." Upon issues so joined, motions were made before the district judge on behalf of King "to dispose of statements in the answer as to jurisdiction of the court" and discharge receiver (theretofore appointed); and both motions were overruled, with entry of an order referring the petition and answer to "referee in bankruptcy, S. C. Eastman, to hear, take proofs, and report his findings, conclusions, and recommendations to the court on the issues raised by said pleadings." Proofs were speedily taken before the referee on the jurisdictional issue of residence and principal place of business, and the hearing was proceeding upon the other issues, when an adjournment became needful on account of other engagements of the referee, requiring his absence from the city for a week or more. Thereupon request was made on behalf of King that the referee submit report to the district judge upon the primary issue of jurisdiction, for determination thereof in advance of other proceedings; and upon denial of such request application was made to the district judge (upon notice and affidavit setting forth the circumstances referred to) to set aside the order of reference, determine the "issues bearing on the jurisdiction of the court," and "dismiss the cause." These motions were denied, and review of such order and of the original order of reference above mentioned is sought under the present petition.

We believe a question of law to be thus presented, under both orders, and that error was committed in the denial of preliminary hearing upon the jurisdictional issue of residence and principal place of business. Section 18d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]) expressly provides that "the judge shall determine, as soon as may be, the issues presented by the pleadings," and section 1(16) defines such provision to mean "a judge of a court of bankruptcy, not including the referee." It requires, therefore, that the testimony be weighed and considered by a district judge and that his personal judgment be exercised in the determination of each issue, leaving no authority for delegation of either duty to a ministerial officer. While it is undoubted—as upheld in Re Lacoy, 134 Fed. 237, 67 C. C. A. 19; and Fellows v. Freuden-

thal, 102 Fed. 731, 735, 42 C. C. A. 607—that reference to a special master or like ministerial officer may be ordered, to hear and report the testimony (with or without advisory findings thereupon), when an issue triable by the judge alone involves extended testimony and its hearing in open court appears to be impracticable, we believe the act neither intends nor authorizes such general reference of issues as ordered in the instant case. The jurisdictional averments of residence and principal place of business were distinctly controverted, and it appears that the facts were readily ascertainable for solution of that primary issue. Orderly procedure required, as we believe, its determination by the district judge as a condition precedent to inquiry upon the other issues of fact raised by the pleadings. Direct hearing of the testimony upon an issue of such nature would seem desirable; but, if that course is impracticable, reference to a ministerial officer to take and report such testimony cannot rightly extend the hearing as well to the subordinate issues, not open to inquiry until jurisdiction to proceed therein is ascertained and found by the district judge. The court can confer no authority upon the referee (as master or otherwise) to decide these issues, nor to rule thereon either finally or temporarily.

We are of opinion, therefore, that the order of reference in question was erroneous in its scope and terms; that the petitioner was and is entitled to have such order either set aside or so modified as to require the referee to report and submit to the court the testimony taken thereunder upon the primary jurisdictional issue, for determination of such issue before other inquiries are authorized; and that the order complained of denying such relief was erroneous.

Both orders are reversed accordingly, with direction to proceed in the cause in conformity with the foregoing opinion.

THE HUGH DOHERTY.

(Circuit Court of Appeals, Third Circuit. June 10, 1910.)

No. 61.

MARITIME LIENS (§ 65*)—REPAIRS—WORK ORDERED BY CHARTERER.

Evidence considered, and *held* insufficient to sustain the burden of proof resting on a libelant to show by a clear preponderance of the evidence that repairs made on claimant's barge, for which the suit was brought, were ordered by claimant's agent; it being shown that the barge was delivered for repairs by the charterer, which had a running account with libelant, and to which the work was charged, and which was required by the charter to pay for the same.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. § 65.*]

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

Suit in admiralty by the Burt & Mitchell Company against the barge Hugh Doherty. Decree for claimant, and libelant appeals. Affirmed.

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

N. Zabriskie, for appellant.
A. A. Wray & S. Callaghan, for appellee.

Before BUFFINGTON, Circuit Judge, and BRADFORD and J. B. McPHERSON, District Judges.

BUFFINGTON, Circuit Judge. In the court below Burt & Mitchell filed a libel against the barge Hugh Doherty for repairs. The barge was owned in New York state, and the repairs made in New Jersey. Mrs. Mary F. Doherty, the owner of the barge, defended, inter alia, on two grounds: First, that William H. Doherty, her son, who was alleged to have ordered the repairs, had no authority to do so; and, secondly, that he never ordered them. The court below, without passing on the second question, decided in favor of the claimant on the first ground. In the argument and subsequent reargument of the case there was a difference of opinion in this court as to whether the court below was right on that proposition.

We have turned, therefore, to the other question, and, assuming the son had authority from his mother to order these repairs, did he in fact do so? Now, Mrs. Doherty's barge was chartered by the Robinson, Baxter & Dissosway Towing Company and they were to repair it. There was proof that it was known to the libelant that it was chartered. The towing company used a number of vessels in its business, and had a current repair account of some $4,000 with Burt & Mitchell. Being in possession of the barge, the charterer delivered her to the dry dock of the claimant for repairs on May 7–9, 1907, when $129.29, and on October 31–November 2, 1907, when $113.69 additional, work was done. The bills for such repairs were carried into the general repair account of the towing company, and no bill was rendered to Mrs. Doherty then, or any demand made on her for their payment until after the towing company went into bankruptcy, which was in January, 1908.

We have carefully examined the proofs bearing on the question of whether these repairs were ordered by young Doherty. The burden of proving this is on the libelant. The libelant produces one witness, who testifies Doherty did order them made, while the appellee produces Doherty, who testifies he did not. Baxter, the member of the chartering firm who ordered the boat to be put on the dry dock is dead. As between them and the owner, the charterers were bound to make the repairs. Their credit was good with Burt & Mitchell, the repairs were of a minor character, and there was no apparent or probable reason why Mrs. Doherty should be called into the transaction or consulted about it. We are therefore inclined to regard young Doherty's testimony in that respect as in accord with the probable actions of the parties.

In this contradiction of proof, weighing on the one hand the inherent probabilities, the relations of the parties, the nature of the work done, and the failure to send bill to Mrs. Doherty, and, on the other hand, not overlooking a clear contradiction of young Doherty's testimony in reference to a payment made on the bill, we are, on the whole, of opinion the libelant has not met the burden of proof resting upon it

to establish by a clear weight of the evidence that young Doherty actually ordered the caulking and other work.

The decree below will therefore be affirmed.

UNITED STATES v. ONE ENGINE & BELTING, ETC.

(Circuit Court of Appeals, Third Circuit. June 15, 1910.)

No. 34, March Term, 1910.

INTERNAL REVENUE (§ 46*)—FORFEITURES FOR VIOLATION OF LAW BY DISTILLER—BURDEN OF PROOF.

In a proceeding by information for the forfeiture of property under Rev. St. §§ 3257, 3281 (U. S. Comp. St. 1901, pp. 2112, 2127), as being used by one carrying on the business of a distiller without giving bond and attempting to defraud the government of the tax on spirits distilled by him, the burden of proof rests on the United States to establish the facts alleged, and every reasonable intendment and effect must be given to answers filed by third persons who claim the property as their own.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 134; Dec. Dig. § 46.*]

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

Information by the United States for the forfeiture of one engine and belting, etc., for violation of the internal revenue laws. Donegan & Swift and William E. Headley claim the property. From the decree, the United States appeals. Affirmed.

J. Whitaker Thompson, U. S. Atty., and John C. Swartley, Asst. U. S. Atty.

Thompson & Ballantine, for claimants Donegan & Swift.

Jos. H. Hinkson and J. De H. Ledward, for claimant Headley.

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

BUFFINGTON, Circuit Judge. This is a proceeding by the United States to forfeit certain personal property of one Berman, who was alleged to be carrying on the business of a distiller without giving bond, in violation of Rev. St. § 3281 (U. S. Comp. St. 1901, p. 2127), and of attempting to defraud the government of a tax on spirits, in violation of Rev. St. § 3257 (U. S. Comp. St. 1901, p. 2112). All of the chattels sought to be forfeited, with the exception of certain spirits and brandy, were claimed by one Headley, who filed an answer, and of those claimed by Headley an engine and belting were claimed by Donegan & Swift, who also filed an answer. On hearing, the court decreed the spirits and brandy be forfeited and all the property claimed be discharged. Thereupon the government took this appeal.

No opinion was filed by the court below, so we are not advised as to the grounds of its action; but after consideration we find no error

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

in its decree. The burden of establishing a right of forfeiture was on the government, and no testimony was taken to support its claim. The case was heard on information, and, being one of alleged forfeiture, every reasonable intendment and effect must be given to the answers. Viewed in that light, we think the government's case was not established. Without discriminating between the two answers of the two claimants, or in any way deciding their rights as against each other, we think the answers, taken together, aver that Berman on the date of the alleged forfeiture on July 15, 1909, had removed from the state, that he was not carrying on the business of a distiller on the premises in question, that he was not in possession of the articles or the premises at that date, but that possession of the articles on the premises was then and had been previously and in good faith in the claimants or their privies.

Such being the effect of the unchallenged answers it is clear that the case did not fall within the above sections, in the absence of proof to sustain the averments of the information.

AMERICAN SURETY CO. OF NEW YORK v. FIDELITY TRUST CO.

(Circuit Court of Appeals, Third Circuit. June 15, 1910.)

No. 29.

1. BONDS (§ 62*)—CONSTRUCTION—EXTENT OF LIABILITY.

A bond given by a contractor, conditioned for the faithful performance of the contract, although in terms an absolute obligation to pay a certain sum on default by the principal, is modified by the accompanying conditions, and on breach of the contract by the principal the obligee can recover thereon only the damages proved.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 59–72; Dec. Dig. § 62.*]

2. CONTRACTS (§ 171*)—CONSTRUCTION—DIVISIBILITY—DAMAGES RECOVERABLE FOR BREACH.

A sculptor entered into a contract with plaintiff to execute a bronze statue; the contract providing that 10 per cent. of the stipulated price should be paid when the sketch model of the statue was approved, 10 per cent. when the staff model was completed and placed on its pedestal, and other payments when successive steps of the work were completed, and requiring the sculptor to give a bond on the receipt of each payment conditioned for the completion of the contract in accordance with its terms. Two payments were made, and bonds executed pursuant to such requirement, signed by defendant as surety, after which the principal made default. *Held*, that the contract was an entire one for the completion of the statue, and not a series of independent contracts for the completion of each step of the work, and that the failure to fully perform it was a breach of the condition of each bond given, and entitled plaintiff to recover thereon as substantial damages at least the amount of the payments made for which it had received no consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754–757; Dec. Dig. § 171.*

Divisibility of contracts, see note to Saunders v. Short, 30 C. C. A. 467.]

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

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

Action by the Fidelity Trust Company, trustee under the will of Richard Smith, deceased, against the American Surety Company of New York. Judgment for plaintiff (175 Fed. 200), and defendant brings error. Affirmed.

Jas. H. Wescott and W. W. Smithers, for plaintiff in error.

John M. Gest and John G. Johnson, for defendant in error.

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

BUFFINGTON, Circuit Judge. This is a writ of error from a judgment entered in the court below in favor of the plaintiff, the Fidelity Trust Company, trustee under the will of Richard Smith, on a verdict rendered in its favor. To the entry of judgment on such verdict, and the denial of its motion for judgment non obstante veredicto, the defendant, the American Surety Company, sued out this writ. The action was upon a surety bond given to the plaintiff by defendant, conditioned for the designing and furnishing by one Bartlett, a sculptor, of a bronze memorial statue of Gen. McClellan. The opinion of the court below is reported in 175 Fed. 200. The facts of the case and the conclusions of law are so fully and ably set forth therein that an opinion by this court would practically be but a repetition.

We therefore adopt the opinion of the lower court, and affirm the judgment.

BOEHM v. FAIRCHILD BROS. & FOSTER.

(Circuit Court of Appeals, Seventh Circuit. May 17, 1910.)

No. 1,671.

APPEAL AND ERROR (§ 1017*)—REVIEW—FINDINGS OF FACT.

Where there was evidence in support of every material element of a master's finding, which was approved by the court, it will not be disturbed by an appellate court unless it appears that an obvious mistake was made in the consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3996; Dec. Dig. § 1017.*]

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

Suit in equity by Fairchild Bros. & Foster, a corporation, against John J. Boehm. Decree for complainant, and defendant appeals. Affirmed.

Wade W. Meloan, for appellant.

Sigmund Zeisler, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

PER CURIAM. The only question is whether the report of the master, on which the decree appealed from is based, is supported by sufficient evidence. On every material element of appellee's case evidence was produced. The master was in the best position to judge of the weight and credibility of the testimony given orally before him; and his finding, approved by the Circuit Court, should not be disturbed by us, unless it appears that an obvious mistake was made in the consideration of the evidence. Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552. So far from this being true, we are satisfied that the finding was amply justified by the record.

The decree is affirmed.

KUEHMSTED v. FARBENFABRIKEN OF ELBERFELD CO.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1910. Rehearing Denied July 7, 1910.)

No. 1,639.

1. PATENTS (§ 45*)—PATENTABILITY—CHEMICAL COMPOUNDS—NOVELTY—EVIDENCE.

That a chemical compound is not a new article of manufacture in a patentable sense is not conclusively shown by the fact of a prior known compound having the same formula.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 51; Dec. Dig. § 45.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ASPIRIN.

The Hoffman patent, No. 644,077, for acetyl salicylic acid, known medically as "aspirin," is for the product of a new process, which for the first time produced it in a sufficiently pure state to render it therapeutically available, and is valid; also *held* infringed.

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

Suit in equity by the Farbenfabriken of Elberfeld Company against Edward A. Kuehmsted. Decree for complainant (171 Fed. 887), and defendant appeals. Affirmed.

The appeal is from a decree of the Circuit Court sustaining patent No. 644,077, issued February 27, 1900, on an application filed August 1, 1898, to Felix Hoffmann of Elberfeld, Germany, assignor to appellee; finding appellant an infringer thereof; and granting an injunction. The essential portion of the letters patent is as follows:

"In the Annalen der Chemie und Pharmacie, Vol. 150, pages 11 and 12, Kraut has described that he obtained by the action of acetyl chlorid on salicylic acid a body which he thought to be acetyl salicylic acid. I have now found that on heating salicylic acid with acetic anhydride a body is obtained the properties of which are perfectly different from those of the body described by Kraut. According to my researches the body obtained by means of my new process is undoubtedly the real acetyl salicylic acid:

$$C_6H_4 \begin{matrix} /OCO.CH_3 \\ \backslash COOH. \end{matrix}$$

"Therefore the compound described by Kraut cannot be the real acetyl salicylic acid, but is another compound. In the following I point out specifically the principal differences between my new compound and the body described by Kraut.

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

"If the Kraut product is boiled even for a long while with water, (according to Kraut's statement,) acetic acid is not produced, while my new body when boiled with water is readily split up, acetic and salicylic acid being produced. The watery solution of the Kraut body shows the same behavior on the addition of a small quantity of ferric chlorid as a watery solution of salicylic acid when mixed with a small quantity of ferric chlorid—that is to say, it assumes a violet color. On the contrary, a watery solution of my new body when mixed with ferric chlorid does not assume a violet color. If a melted test portion of the Kraut body is allowed to cool, it begins to solidify (according to Kraut's statement) at from 118° to 118.5° centigrade, while a melted test portion of my product solidifies at about 70° centigrade. The melting-points of the two compounds cannot be compared, because Kraut does not give the melting-point of his compound. It follows from these details that the two compounds are absolutely different.

"In producing my new compound I can proceed as follows, (without limiting myself to the particulars given): A mixture prepared from fifty parts of salicylic acid and seventy-five parts of acetic anhydride is heated for about two hours at about 150° centigrade in a vessel provided with a reflux condenser. Thus a clear liquid is obtained, from which on cooling a crystalline mass is separated, which is the acetyl salicylic acid. It is freed from the acetic anhydride by pressing and then recrystallized from dry chloroform. The acid is thus obtained in the shape of glittering white needles melting at about 135° centigrade, which are easily soluble in benzene, alcohol, glacial acetic acid, and chloroform, but difficultly soluble in cold water. It has the formula

$$C_6H_4\begin{cases}/OCOCH_3\\ \backslash COOH.\end{cases}$$

and exhibits therapeutical properties."

And the claim is as follows:

"As a new article of manufacture the acetyl salicylic acid having the formula:

$$C_6H_4\begin{cases}/O.COCH_3\\ \backslash COOH.\end{cases}$$

being when crystallized from dry chloroform in the shape of white glittering needles, easily soluble in benzene, alcohol and glacial acetic acid, difficultly soluble in cold water, being split by hot water into acetic acid and salicylic acid, melting at about 135° centigrade, substantially as hereinbefore described."

The appellant sells an article having an identical formula and responding to the characteristics set forth in the claim—that being the sole proof of infringement (appellant's process not being shown) upon which appellee obtained the decree appealed from.

Further facts are stated in the opinion.

John G. Elliott, for appellant.

Livingston Gifford and Anthony Gref, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion:

The so-called new article of manufacture is known in the trade as "Aspirin," a well-known medicine; a medicine today that has an output in this country of two million ounces per year, standing next to quinine as the best selling medicine on the market. It is recognized as an "ethical remedy," being prescribed by physicians. No medicine, possessing the physiological properties of aspirin, was before known. As an article of manufacture in the line of therapeutics, whatever may

have been its antecedents chemically, aspirin therefore is a new thing. Is it a new article of manufacture within the meaning of the patent law? That is the first question before us.

In his letters patent, Hoffmann says:

"Kraut has described that he obtained by the action of acetyl chlorid on salicylic acid a body which he thought to be acetyl salicylic acid. I have now found that on heating salicylic acid with acetic anhydride a body is obtained the properties of which are perfectly different from those of the body described by Kraut. According to my researches the body obtained by means of my new process is undoubtedly the real acetyl salicylic acid,

$$C_6H_4 \begin{cases} /OCO.CH_3 \\ \backslash COOH. \end{cases}$$

"Therefore the compound described by Kraut cannot be the real acetyl salicylic acid, but is another compound."

This the appellant challenges, the challenge being founded, not upon the contention that appellee's "body" therapeutically is not different from the Kraut "body," or its other antecedents, but that the two bodies chemically are the same; shown (a) by the fact that the formulae are the same, and (b) that the two bodies respond to the same tests. And upon these contentions, as premises, appellant insists that aspirin is nothing more than Kraut's acetyl salicylic acid "purified."

The fact that the formulae are identical cuts little figure. A chemical formula is simply the symbolical expression of the composition or constitution of a substance; as the formula for water is H_2O (Webster's New Unabridged International Dictionary). Customarily, chemists who intend to produce a combination of two substances write the formula of the product in advance of making it. (Professor Haines, expert for the appellant.) "Without doubt, processes have been described in chemical publications which give products differing somewhat in their chemical structure and name from those which the writer supposed would be produced," or which give the formulated product "only in conjunction with other substances so that the total product obtained at the end of the process is not correctly represented or entirely represented by the structural formula or chemical name given." (Haines.) "It is quite customary for chemists to predict the structural constitution of substances which they endeavor to produce, and they are often surprised when the result of their prediction exhibits quite a different and totally unexpected constitution, or when the process which they have ingeniously contrived fails to produce any satisfactory result whatever. * * * The great chemist Perkin started out over fifty years ago to produce quinine synthetically and was surprised to find that, instead of producing quinine, he produced a beautiful purple dye stuff, mauve, which laid the foundation for the great coal-tar industry, and other great developments which grew from it." (Dr. Chandler, expert for appellee.) And, assuming that the formula actually expresses the constitution of the substance chemically, the substance physically, and in consequence therapeutically, may be widely different, as, for instance, the water of the seas, differs, in its physical body, from the water of certain springs, though the chemical formula for "water," whether of sea or spring, is H_2O. That is to say, two

substances, having the same chemical formula, may differ widely, as to impurities, upon qualitative analysis.

So much for identity of formula. What about Kraut's body responding to the tests laid down in the patent? Aspirin, when boiled with water, is readily split up, acetic and salicylic acid being produced, this being one of its characteristics. On the contrary, according to Kraut's statements, if the Kraut product is boiled with water, even for a long while, acetic acid is not produced. But appellant insists, that notwithstanding this statement of Kraut, he (appellant) can take the Kraut body, and by subjecting it to a process in which boiling in water intervenes (as distinguished from the entirely dry process described in the patent), obtain a product responding to the characteristics of aspirin. But how does he do this? Enlightened by the disclosures of the Hoffmann patent that the product is decomposed by boiling in water, he avoids, as far as possible, this effect by hastening the process—dissolving in water already boiling, rapidly cooling by artificial means, and by pouring off the supernatant liquid (still containing over fifty per centum of the product) in order to rescue the product already crystallized from further contact with the water. This process was repeated from three to five times, in addition to hastening dissolution by finely dividing the crystalline mass and by stirring. Appellant thereby obtained a substantially pure product, amounting to less than half the original crystalline mass, or less than half the amount obtainable under the Hoffmann process. This, to our minds, is not proof that Kraut's body is Hoffmann's body, but only that Kraut's body can be so treated, apart from the dry process pure and simple, that it will yield some portions corresponding to Hoffmann's body.

But assuming that the compounds, chemically, are not different—that the two bodies are analytically the same—Hoffmann's recrystallized product is therapeutically different from the Kraut and antecedent products in the following undisputed particulars: It was long known that salicylic acid was the best remedy for rheumatism, and was also anti-neuralgic and anti-pyretic; that when taken internally in a free state it was injurious to the stomachs of all patients, and particularly so to those the physiological action of whose stomachs were idiosyncratic; and that for a long time attempts were made to overcome this pernicious quality of salicylic acid and at the same time retain its beneficent effects, but without ultimate success until the discovery by Hoffmann of the resulting product of the patent in suit. In the Hoffmann product all the salicylic acid is held entirely in bond while passing through the stomach, where it would do harm, and is set free in the intestines, where its utility as a therapeutical agent is rendered effectual—the acetyl molecule or radical, unaffected by the acid fluids of the stomach, being split off or set free by the alkaline fluids of the intestines—thus making the Hoffmann product practically effective and safe in its therapeutical results as against what previously had been undesirable or unsafe, if effective at all, in therapeutics.

Hoffmann has produced a medicine indisputably beneficial to mankind—something new in a useful art, such as our patent policy was intended to promote. Kraut and his contemporaries, on the other hand, had produced only, at best, a chemical compound in an impure state. And it makes no difference, so far as patentability is concerned, that the medicine thus produced is lifted out of a mass that contained, chemically, the compound; for, though the difference between Hoffmann and Kraut be one of purification only—strictly marking the line, however, where the one is therapeutically available and the others were therapeutically unavailable—patentability would follow. In the one case the mass is made to yield something to the useful arts; in the other case what is yielded is chiefly interesting as a fact in chemical learning. Merrill v. Youmans, 94 U. S. 569, 24 L. Ed. 235; Badische v. Kalle, 104 Fed. 802, 44 C. C. A. 201 (C. C. A. 2d Circuit); Badische v. Klipstein (C. C.) 125 Fed. 543.

Upon the question of infringement, appellant offered no explanation of how the product which he sold was obtained, but testified that he sold it as the same chemical product as aspirin and a substitute for aspirin. What the evidence before us shows is, that it is in chemical characteristics the exact article that appellee has patented. The fact that the "ear marks" showing this are chemical instead of physical, such as color, shape or the like, or some characteristic disclosed by taste, smell or the like, makes no difference. They are none the less, so far as the facts in this case have been brought to our attention, true "ear marks" of aspirin—the product of appellee—and therefore, in the absence of explanation, at least, establish identity. In other words, aspirin stands, upon the facts before us, as a new article of manufacture produced by appellee's patent, and the product sold by appellant stands, upon the proof before us, as identical with it; wherefore, his sale of it is an infringement of appellee's product.

The decree of the Circuit Court is affirmed.

KOHLSAAT, Circuit Judge (concurring). Kraut in 1869 found that Von Gilm's so-called acetyl salicylic acid of 1859, obtained by treating the acids with acetyl chloride, and purified by recrystallizing from boiling water, responded to the same tests as Gerhardt's product resulting from the action of chloracetyl on sodium salicylate, extracted with ether and recrystallized from boiling water. He also found that the mass so produced was easily dissolved in wine spirits, ether, and benzole, viz., these are given as purifying substances. Hoffmann provides for a mixture of salicylic acid and acetic anhydride subjected to heat. It does not appear that the mass so produced differs from those described by Kraut. Hoffmann then presses out the anhydride and recrystallizes from dry chloroform. His claim for novelty over the Kraut, Gilm, and Gerhardt products, is based upon the fact, as claimed, that his result responds to certain tests, to which the others do not purport to respond, and that the others give certain features which disclose impurity, and masses entirely different from his.

Hoffmann fixes his solidifying point at 70 degrees Centigrade; while Kraut fixes his at 118 degrees to 118.5 Centigrade.

The evidence favors the Kraut figure, and Hoffmann is not sure enough of his to include it in his tests. Kraut, as was the custom in 1869, fails to give any melting point. Hoffmann, in 1898, fixes the melting point of his product at 135 Centigrade, which element he enumerates as one of his tests. He also states that his new body, when boiled with water, is readily split up, acetic and salicylic acid being produced, and quotes Kraut as saying that if the Kraut product be boiled even for a long time with water, acetic acid is not produced. What Kraut did in fact say is that:

"They dissolve very little in cold water, melt on heating with water, to an oil, which, even with prolonged boiling with water, allows no acetic acid to escape and suffers no noticeable decomposition at all."

The grammatical arrangement of this statement seems to be somewhat involved. The word "they" may refer to the products or bodies produced by his two methods, or it may refer to the white needles. The word "which" would seem to apply to the oil produced by boiling the mass, though complainant and Prof. Haines seem to apply it to the two bodies being dealt with. The latter construction seems strained, in view of the fact that it is used in connection with the singular verbs "allows" and "suffers."

Kraut says that his aqueous solution colors iron chlorid like salicylic acid. This defendant insists must refer to the solution accompanying the oil resulting from heating with water. It is difficult to account for this on any other ground than that Kraut's product, when boiled with water does decompose and produce acetic acid. At any rate, so defendant asserts, Hoffmann is not justified in his statement that Kraut says acetic acid is not produced by boiling his product for a long time with water, since what Kraut in fact says is that the oil produced by prolonged boiling with water, does not throw off acetic acid or appreciably decompose. Each of the three masses dealt with by Kraut and Hoffmann, it appears from the record, does give out, on boiling with water, an oil which is "settled off." Kraut distinctly does not say, defendant insists, that acetic acid is not produced in the course of the treatment of his product as above. This seems to be the reasonable import of his language.

Notwithstanding the foregoing, defendant's witness Haines (page 116 of record) says:

"In regard to two points, Kraut's description of acetyl salicylic acid is somewhat misleading. The first of these is in regard to the effect of boiling water on the compound. He describes with perfect accuracy what he undoubtedly observed, viz., that in boiling the acid with water, it suffers no noticeable decomposition and allows no acetic acid to escape, although, as a matter of fact, it is slowly decomposed by hot water. This decomposition, however, is easily overlooked. If a little of the perfectly pure acid is boiled with water, no decomposition is seen by the unaided eye, and there is no odor of escaping acetic acid unless a considerable amount of material is acted on, and even then the odor might be easily overlooked, if one's sense of smell was not naturally acute, or if one was suffering from a little catarrhal cold. * * * The second point in Kraut's description of acetyl salicylic acid which is somewhat misleading is his statement that its aqueous solution strikes a color with iron chloride like that produced with salicylic acid. * * * It was the presence in Kraut's product of a little free salicylic acid, either orig-

finally present or developed by dissolving in hot water, or both, that undoubtedly misled him."

Inasmuch as response to tests seems to be a fair method of determining the lack of identity of the product of the patent in suit with Kraut's product, it becomes important that the results of the tests should correspond in all material respects. If the construction placed upon Kraut's language by defendant's expert is to prevail over what might seem to be the unskilled judgment of counsel and court in that respect, it follows that the language of the patent in suit with reference to Kraut's article is justified, and that, failing to meet these material tests, the latter cannot be said to correspond to Hoffmann's product. Thus, while Kraut seems to have pointed out the method of obtaining a practically pure acetyl salicylic acid by the boiling water process, giving ether, wine spirits, and benzole as solvents—that is, dry solvents—it appears that in two important respects his language is misleading. It is evident that he was not principally concerned with obtaining the pure article, nor with anticipating Hoffmann's tests. He does not give a process which can be said to lead one skilled in the art to the product of Hoffmann, if his language is to be followed literally. Something has to be supplied before Kraut's product can be deemed to meet Hoffmann's decomposition test. That the crystal needles in both cases, Kraut's and Hoffmann's, are practically the same, differing, if at all, in degree of purity, admits of little doubt.

The record discloses attempts to demonstrate their actual identity, but these are not produced in such shape as to avail the appellant. Courts place little weight on ex parte demonstrations in any case, but especially is this true with regard to experiments with chemicals. Speaking therapeutically, it is of course desirable that the acetyl salicylic acid be pure; that is, substantially so. Aspirin is nothing more than this. So long as there is no appreciable amount of free salicylic acid in the product, the beneficial effects of salicylic acid are preserved. Had Kraut produced pure acetyl salicylic acid, he would have anticipated aspirin—no matter by what name it is called. The evidence is that a substantially pure article will suffice. Kraut claims to have produced a 98 per cent. article, according to his baryta titration test. The efficiency of this test is disputed. It may be conceded therapeutically that purity is a patentable advance over practical purity, but it is a very narrow advance. Acetyl salicylic acid, obtained by Kraut's process—that is, the article produced by water, or the ether, benzole, or wine spirits crystallization—belongs to the public, whether pure or only approximately so; and, had appellant shown that he was employing these methods, he could not have been held to infringe. On the contrary, the tests called for by the patent apply to defendant's product and do not apply to Kraut's. It surely was within appellant's power to rebut the presumption arising from these facts, had the Kraut processes been employed by him, but no attempt has been made to do so. There would seem to be in this a suggestion that the process rather than the product should have been claimed. Whatever this leads to, it still is true that so far as the record shows, Hoffmann's product is different from Kraut's, and there-

fore not anticipated or in the possession of the public prior to the filing of his application.

For these reasons, I concur in the conclusion of the majority of the court.

WILSON TROLLEY CATCHER CO. v. FRANK RIDLON CO. et al.

(Circuit Court of Appeals, First Circuit. June 27, 1910.)

No. 852.

PATENTS (§ 328*)—VALIDITY—TROLLEY CONTROLLER.

The Lord patent, No. 548,074, for a trolley pole and rope controller, claim 4, is void, as broader in its terms than the real invention described in the specification.

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

Suit in equity by the Wilson Trolley Catcher Company against the Frank Ridlon Company and others. Decree for defendants (173 Fed. 308), and complainant appeals. Affirmed.

William K. Richardson (J. Steuart Rusk, on the brief), for appellant.

Allen Webster, for appellees.

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

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 548,074, granted to Lord, October 15, 1895, for improvements in trolley pole and rope controllers. Claim 4 alone is in issue, and reads as follows:

"In combination with a trolley pole and with a trolley rope, a tension device for the rope and an automatic lock for locking the tension device when the trolley leaves the conductor."

The Circuit Court was of opinion that the claim was valid, but that the defendant did not infringe, and so it dismissed the bill. The complainant appealed to this court.

The trolley art has two connected needs: First. "A take-up," which shall absorb the slack of the trolley rope, a slack of varying length, inasmuch as the trolley wire is not always at the same height above the ground. The spring for taking up this slack must be of slight tension, so as not to check considerably the operation of the much more powerful spring which keeps the trolley wheel in touch with the the trolley wire. Second. Inasmuch as the trolley wheel sometimes leaves the trolley wire, the spring last mentioned, if uncontrolled, will throw the trolley pole into a position substantially perpendicular. As the car may hold its motion for a time, the trolley pole may thus be brought into collision with the cross-wires, or even with the feed wires, doing damage to some part of the structure. Control of the trolley pole in this respect was formerly had in two ways: (a) By a so-called "retriever," a spring stronger than that which holds up the trolley pole,

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

yet one which does not operate so long as the trolley wheel remains in place against the trolley wire. The retriever is released only when the wheel leaves the wire. Catching the pole, the retriever pulls it down nearly parallel with the top of the car. (b) By a "check," which differs in its object from the retriever in that it does not draw down the pole, but only checks its upward movement. Until something happens the check is held inoperative. When the trolley wheel leaves the wire, a detent is released, and the check becomes immediately operative.

As has been said, the Circuit Court somewhat doubtfully held the claim to be valid, though it dismissed the bill for want of proof of infringement. Like the Circuit Court, we also are required to pass upon the claim's validity before coming to the issue of infringement. The claim in suit is expressed broadly, and its language covers the combination of any kind of "tension device" or "take-up" with any kind of "automatic lock" or "check." Now take-ups were old in the art; so were retrievers; so were the two in combination. The complainant urges that Lord was the first to combine a take-up with a check, and therefore that the claim in suit is entitled to the broadest construction. If a mere check is generally preferred to a retriever (a retriever necessarily contains a check), it is hard to see why the obvious adaptation of a patent like that of Yeakley, No. 476,028, by omitting the machinery to retrieve, would not be covered by the claim in suit. But the Lord patent is concerned with a particular sort of locking device, not with locking devices in general.

"My invention, therefore, consists of two parts: First, a tension device for keeping the rope taut while the car is proceeding in the ordinary way; and, secondly, in a means for locking such device when the roller leaves the conductor, and thus preventing the end of the pole from being thrown above the level of the conductor itself."

"With this explanation, and still referring to the drawings, I now proceed to describe the locking device."

Still again:

"In practical operation I prefer to use the construction shown in the drawings, in which the trolley roller is mounted in a sliding casing acted upon by a coil spring; but I can accomplish the same result and still keep within the limits of my invention by attaching two springs near the trolley head and causing them to bear directly upon the pin on which the roller rotates."

In other words, the patentee declares that he does not limit himself to the "sliding casing," but expresses as its equivalent "two springs near the trolley head." This limited equivalency is far from the unlimited "automatic lock" of the claim in suit. The specifications show also that the tension device of the claim in suit is in effect a "spring-actuated reel."

We are of opinion that the language of the claim in suit is broader than Lord's real invention. There are other claims in the patent which are not here in suit, and which may protect that invention. We are not required to save the fourth claim in order to save the patent. We are unable to allow the validity of a claim so broad and unrestricted as is the one claim upon which the complainant here relies.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

UNION COUNTY NAT. BANK, LIBERTY, IND., v. OZAN LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1910.)

No. 2,991.

1. APPEAL AND ERROR (§ 179*)—FEDERAL COURTS—ACTIONS TRIED WITHOUT JURY—MODE OF RAISING QUESTIONS FOR REVIEW.
On the trial to the court of an action at law in a federal court, where the evidence is not contradictory in substantial respects, it is a proper practice for raising a question of law for review by the appellate court for each party to submit to the trial court a declaration in his favor on such question.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1137; Dec. Dig. § 179.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF FACT.
In an action at law tried in a federal court without a jury, findings of fact made by the court on conflicting evidence are conclusive in the appellate court.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

3. BILLS AND NOTES (§ 107*)—NOTES GIVEN FOR PATENTED MACHINE—VALIDITY UNDER ARKANSAS STATUTE—"MERCHANT" OR "DEALER."
Under Kirby's Dig. Ark. §§ 513–516, requiring negotiable notes taken by any vendor in payment for a patented machine to be on a printed form stating such fact, and providing that all such notes not so showing shall be absolutely void, but that the act "shall not apply to merchants and dealers who sell patented things in the usual course of business," a corporation which contracted to "make and deliver" a patented log loader according to certain specifications, and did so, taking notes therefor which did not state that they were given for a patented machine, was not a "merchant" or "dealer" selling the machine in the usual course of business within the exceptions in the statute, where its principal business was the manufacture of other articles, and it did not appear that it had or had ever kept any of such log loaders on hand for sale, or had ever made any except on orders taken in advance and according to specifications agreed upon.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 227; Dec. Dig. § 107.*]

4. WORDS AND PHRASES—"MERCHANTS"—"DEALERS"—"MANUFACTURERS."
The words "merchants" and "dealers," according to common understanding, mean something different from the word "manufacturers." The former are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade; the latter to designate those engaged in the business of making or producing articles for use or sale.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4482–4488; vol. 8, p. 7721; vol. 2, pp. 1859–1862; vol. 5, pp. 4346–4358.]

Hook, Circuit Judge, dissenting.

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

Action by Union County National Bank of Liberty, Indiana, against the Ozan Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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

Morris M. Cohn, for plaintiff in error.

T. C. McRae, W. V. Tompkins, and U. M. Rose, for defendant in error.

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

ADAMS, Circuit Judge. This was a suit on 11 promissory notes made by the defendant, the Ozan Lumber Company, a corporation of Arkansas, payable to the order of P. H. & F. M. Roots Company, a corporation of Indiana, and by the latter indorsed for value before maturity and delivered to plaintiff, the Union County National Bank, another corporation doing business in Indiana. The defense was that the notes were executed in the state of Arkansas in payment for a patented log loader sold by the Roots Company to the lumber company on credit; that they were not written upon a printed form showing upon their face that they were executed for that purpose and were, therefore, under the provisions of the statutes of Arkansas (Kirby's Dig. §§ 513–516), void. These sections of the statute, so far as necessary for our present consideration, are as follows:

"Sec. 513. Any vendor of any patented machine * * * when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, * * * and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void. * * *

"Sec. 516. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

The case has an interesting history. At its first trial in the Circuit Court recovery was permitted on the ground that the statute invoked by the defendant was unconstitutional, in that it denied to manufacturers of patented articles the equal protection of the laws. 127 Fed. 206. The judgment of the Circuit Court was affirmed by this court on the ground that the statute improperly discriminated against patents and patented articles. 76 C. C. A. 218, 145 Fed. 344. The case then went by certiorari to the Supreme Court, where the statute was declared constitutional and valid, the judgment below reversed, and the cause remanded to the court below for a new trial. 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195. The plaintiff then amended its complaint, alleging that the Roots Company was a dealer in log loaders, that the notes were executed and delivered to it in payment for a log loader purchased by defendant from it as such dealer in the usual course of business, and, therefore, that it fell within the exception specified in section 516.

The defendant for its answer denied that the Roots Company was a dealer as alleged, and averred that it was a manufacturer, and that the log loader was manufactured and sold by it in the usual course of its business as such manufacturer and not otherwise. A jury was duly

waived and the cause tried to the court. Judgment followed for defendant, and plaintiff prosecutes error.

Prior to the filing of the amended complaint no contention had been made that the vendor of the log loader was a merchant or dealer within the meaning of the statute quoted. Nevertheless, that question is now an issue in the case and must be met. The proof was so harmonious and uncontradictory that both parties treated it as raising a question of law only; each requesting the court to declare in effect that as a matter of law on the evidence produced the judgment should be in its favor. The court refused to give the declaration requested by the plaintiff, but gave that requested by the defendant, in effect that the Roots Company was not a merchant or dealer, and that the notes sued on were, therefore, void. Plaintiff saved due exceptions to these rulings.

On the assumption that the evidence all taken together was not contradictory in substantial respects, the method pursued was a proper one for raising a question of law for review by an appellate court. Insurance Co. v. Folsom, 18 Wall. 237, 251, 21 L. Ed. 827; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; Keeley v. Ophir Hill Consol. Min. Co., 95 C. C. A. 96, 169 Fed. 598.

The decisive question before us is whether the vendor company was a merchant or trader and, therefore, within the exception of the statute, or whether it was a manufacturer only and, therefore, subject to the main provisions of the statute. If the determination of this question was dependent upon contradictory evidence and determinable by the preponderance of proof, the finding of the court under well-recognized rules of practice would be conclusive. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 77 C. C. A. 601, 147 Fed. 457; Keeley v. Ophir Hill Consol. Min. Co., supra.

If, on the other hand, the testimony was substantially without conflict, a question was presented to the trial court, as we have already seen, to determine as a matter of law its legal significance and import.

The proof shows the following facts without substantial contradiction: That the business of the vendor company had for years consisted in the manufacturing of blowers, gas exhausters, and pumps on an extensive scale; that it had just begun manufacturing and selling log loaders, a patented device, under an agreement with the patentee whereby the latter received a certain royalty thereon; that the one delivered to the defendant was the eighteenth which it had manufactured; that the contract for its delivery was negotiated by a traveling salesman of the vendor company who called at defendant's place of business in Arkansas for that purpose; that the notes in suit were executed by the defendant payable to the order of the vendor and by it indorsed for value before maturity and delivered to the plaintiff; that they were not executed on a printed form and did not show upon their face that they were executed in consideration of a patented article; that the negotiations of the traveling salesman resulted in a written contract between the vendor and vendee company.

The contract was in the form of a proposition in writing made by the former and accepted by the latter company and was as follows:

"We propose to make and deliver, f. o. b. cars Connersville, Indiana, within fifteen (15) days from date of your acceptance, unless delayed by strikes, fires or manufacturing contingencies beyond our reasonable control, the hereinafter described machinery; One Standard Decker log loader, as per specifications attached. Price $4,600.00. Terms $475.00 cash, and eleven notes of $375.00 each, at 6 per cent., when set up and running; it being understood that if you are not ready to start and test said machinery at or within thirty days from shipment, then settlement to be made at the expiration of that time. Plans and erections: We will furnish foundation drawings free of charge, also ten days time of competent man to erect and start the within specified machinery, we pay his travelling expenses and board, you to prepare foundations as per our plans and you to furnish all laboring help. * * * The title to the machinery we furnish remains in the P. H. & F. M. Roots Company until the same has been fully paid for in cash. Any changes in this proposal must be in writing and attached hereto. There can be no understandings or agreements which are not expressed in this proposal."

The specifications referred to gave the exact size and dimensions of each element and part of the machine and specified with detail and precision their required quality and strength. They concluded thus:

"These specifications contemplate the building and furnishing a log loader complete, in which the workmanship and material are the best of every kind."

After the execution of the contract, the vendor company constructed the machine according to requirements of the specifications and loaded it upon the cars consigned to the vendee company as required by the contract. It does not appear that the vendor company had any store or warehouse in which it kept log loaders for sale, or that it had any supply of them on hand for sale, or that the one in question was shipped from any such warehouse or store to the defendant.

We think the facts conclusively show that the Roots Company in its transaction with the defendant dealt as a manufacturer and not as a merchant or dealer selling things in the usual course of business. The contract according to its terms was not one of sale at all. It did not purport to sell anything, but rather "to make and deliver" something. Its subject-matter was not in existence. The undertaking was to make a log loader of certain prescribed size, dimensions, material, and capacity to meet the requirements of the defendant. It said:

"We propose to make and deliver * * * the hereinafter described machinery * * * as per specifications attached. * * *"

The specifications, as the word indicates, described materials to be employed and the details of construction. In them it was said:

"These specifications contemplate the building and furnishing a log loader complete."

The machine had to be made, and when made and loaded upon the cars at Connersville, the place of business of the vendor, in Indiana, the delivery was complete. We do not think it would have occurred to learned counsel for defendant to claim that the Roots Company in this transaction was acting as a merchant or dealer within the meaning of the statute, except for the language of Mr. Justice Peckham in delivering the opinion of the Supreme Court in the case (207 U. S. 251, 256, 28 Sup. Ct. 89, 91, 52 L. Ed. 195). It was there said:

"The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of section 4 (section 516, Id.). He may be none the less a dealer, selling in the usual course of his business, because he is also a manufacturer of the article dealt in."

We discover nothing in this language to support the contention of counsel. It seems very plain. The court merely announced the proposition that a manufacturer who produces articles and deposits them in his store or factory from which he sells them in the usual course of business would probably be a merchant and dealer within the meaning of section 516, notwithstanding the fact that he manufactured the articles dealt in. But how does that pronouncement aid the plaintiff in this case? As already seen, its assignor had no supply of log loaders on hand for sale. Neither is any course of business concerning such sales made to appear. On the contrary, the manufacturing of log loaders was outside the regular business of the Roots Company, and, so far as this record discloses, no disposition of them was ever made except upon orders to manufacture a desired machine according to specifications agreed upon between the contracting parties. It cannot escape observation that the learned justice did not say "the manufacturer of a patented article would probably come within the exception of section 516"; but he imposed a most significant qualification and limitation upon the word "manufacturer." It was only "such a manufacturer as sells in the usual course of business in his store or factory" that would be probably protected by the exception. The purpose obviously was to construe section 516 so as to protect such persons as manufactured patented articles who kept a supply on hand for sale and from time to time sold from that supply in the usual course of their business.

Counsel also lay stress upon the following words immediately following those already quoted in the opinion:

"Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual, and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception."

It is urged that the Supreme Court meant by this language that the provision of section 516 would apply in all but unforeseen, unusual, and exceptional cases, and that the class excluded from the benefit of the exception would be insignificant. We cannot so interpret the language. It was obviously employed in answer to an inquiry propounded by the District Judge in his opinion (127 Fed. 206, 208) as follows:

"By the plain provisions of this act it is made to apply to all persons except 'merchants and dealers who sell patented things in the usual course of business.' How shall this act be reconciled with the last paragraph of the first section of the fourteenth article of the Constitution of the United States, which forbids in terms any state to 'deny to any person within its jurisdiction the equal protection of the laws?' How can the state, acting within this provision of the Constitution, protect by its laws 'merchants and dealers who sell patented things in the usual course of business,' and deny the

same protection to other persons; as, for instance, manufacturers of the same patented things who 'sell them in the usual course of business?'"

Mr. Justice Peckham, in answering the questions so propounded, made use of the language under consideration.

It is difficult to find in this language any support to the contention of counsel to the effect that the Supreme Court intended to announce the general proposition that the exception practically nullified the rule. That question was not before the court, and we cannot believe it was intended to be decided by the language referred to.

The words "merchants" and "dealers," according to common understanding, mean something different from the word "manufacturers." The former are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade; the latter to designate those engaged in the business of making or producing articles for use or sale. Webster and Century Dictionaries; Kidd v. Pearson, 128 U. S. 1, 20, 9 Sup. Ct. 6, 32 L. Ed. 346; United States v. E. C. Knight Co., 156 U. S. 1, 14, 15 Sup. Ct. 249, 39 L. Ed. 325; Kansas City v. Brewing Co., 98 Mo. App. 590, 73 S. W. 302. This common understanding of the meaning of the words is presumptively what Congress intended in using them. The last-cited case was one for the recovery of taxes in which the liability depended upon whether the defendant was a merchant or a manufacturer. The court, after reviewing the cases, said:

"It will be seen by these decisions that a manufacturer may or may not be a merchant within the meaning of the charter and the statute of the state. If he keeps at a store, stand, or other place, in stock, articles manufactured by him for sale in the ordinary course of trade, he is a merchant. If he only manufactures upon order, he is not a merchant."

Applying the criterion just mentioned to the facts of the present case, we conclude that the Roots Company was not a merchant or dealer within the meaning of section 516, but was a manufacturer only, and as such was subject to the conditions imposed by section 513.

The Circuit Court committed no error in its rulings to that effect. Its judgment is, accordingly, affirmed.

HOOK, Circuit Judge (dissenting). When this case was here before, we held the Arkansas statute invalid because it appeared to be exclusively directed against a right conferred by the patent laws of the United States enacted pursuant to the Constitution. It relates exclusively to patented things and does not proceed upon any consideration of their material character or the use for which they are designed. The Arkansas statute would not apply to sales of exactly the same kind of property if it were not patented; and likewise if a patent thereon once obtained had expired. 76 C. C. A. 218, 145 Fed. 344. The Supreme Court, however, upheld the statute as a permissible police regulation in view of the frequency of fraud and imposition in the sale of patented articles. The fraudulent practices of itinerant venders was referred to as being almost proverbial. 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195. In other words, it was held the statute

was directed, not at the right under the patent laws, but at the evil commonly attending the sale of patented articles in the particular way indicated. I refer to these different views merely for their bearing upon the application of the statute—upon the question whether the facts developed at the second trial bring the case within the special purpose of its enactment as construed by the Supreme Court. The consideration for the notes that are held void because not executed on the prescribed form was a log-loading apparatus manufactured, sold, and installed according to extensive detailed plans and specifications contained in a written contract. The Roots Company, which made and sold it, was not a peripatetic or itinerant vender, but was an old manufacturing concern with a long-established business and a fixed abode; and what it did was in the usual course of its business. Again, the log-loading apparatus was not a mere patented article or thing like those in the peddling or vending of which there is frequently fraud and overreaching. It was a comprehensive, permanent structure erected in part upon foundations, with fully equipped boiler, engine, car body, trucks, rails, water tank, pump, and various other appliances. The transaction was no more within the particular evil, to correct which the statute was enacted, than the construction under contract of a sawmill, a flouring mill, a power plant of an electric light or street railway company, or the heating system of a hotel or office building, in which cases it would be rare indeed if there were not considerable machinery covered by letters patent of the United States. Transactions of the kind mentioned are of such frequency and importance in the business world that it cannot be said they are exceptional or rare and may therefore have escaped the attention of the legislative body. Nor can it be conceived that the Legislature could put them in a class for discriminatory legislation; there would be no discernible reason for it arising from the incident of a patent. It seems to me quite clear that regardless of specified exceptions in the statute it does not apply to such cases.

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

The case cited well illustrates the danger of adhering closely to the written text and ignoring the spirit and purpose of the enactment. An act of Congress prohibited assistance or encouragement of immigration of aliens under contract "to perform labor or service of any kind." The Trinity Church Corporation contracted with an alien residing in England to remove to New York and enter its service as rector and pastor. The alien having come, the government sued to recover the penalty, and the strength of its case is shown by the following observations of the court:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section."

The court, however, held that Congress, having a definite evil in view, used general terms for the purpose of reaching all its phases; and, though the general language employed was broad enough to cover the case, it could not reasonably be said Congress so intended.

To adapt the Arkansas statute to the evil attending the sale of patented articles in the particular way referred to, and also to indicate its limitations, it was provided that it should "not apply to merchants and dealers who sell patented things in the usual course of business." Was the Roots Company a merchant or dealer within the meaning of the act? It may be admitted that construing those words narrowly, or even giving them their ordinary meaning, it was not a merchant or dealer. For instance, it might have been a manufacturer as distinguished from a merchant within a municipal law imposing license taxes on merchants. 98 Mo. App. 590.[1] But were they employed in a narrow or ordinary sense? It is elementary that the meaning of words in a statute is very largely controlled by the fundamental intent of the statute itself. Words of comprehensive import may be restrained to that intent, and, on the other hand, words narrow in their literal sense may be enlarged and extended. Their particular signification in a legislative act, as in a conventional writing of private individuals, is determined by the context and the discernible purpose of those who put it forth. Words have no such absolute meaning that they cannot derive from their environment a different signification from that commonly given them when standing alone or in different company. Thus, a "locomotive engine," which is rarely regarded as a railroad car, has been held to be a "car" within the safety appliance act (Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363), and, as above shown, the labor and service of a rector and pastor of a church are not "labor or service of any kind" within the alien contract labor law. The ordinary term "debt" used in the legal tender acts may not embrace taxes imposed by state authority (Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101); nor as commonly used in law does it include taxes imposed by one sovereignty when sued on in another (Crabtree v. Madden, 4 C. C. A. 408, 54 Fed. 426), yet it may do so when the suit is in the proper forum (Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. Ed. 80). In England half a century ago an uncertified bankrupt without an occupation was properly styled a gentleman (12 C. B. N. S. 730), though in these days and in this country he might be very far from meriting the appellation. Illustrations along this line might be multiplied indefinitely. The Supreme Court observed when the case at bar was before it that one might be none the less a dealer

[1] 73 S. W. 302.

selling in the usual course of business, though also a manufacturer of the article dealt in.

The Legislature of Arkansas endeavored to classify and exempt from the operation of the statute all persons dealing in patented articles whose methods of business were commonly regarded as unobjectionable or at least not generally attended by the evil practices it sought to correct. It denominated that class merchants and dealers selling in the usual course of business; and, bearing in mind the legislative intent, I think it quite clear the Roots Company falls within it.

UNITED STATES NAT. BANK v. AMALGAMATED SUGAR CO.

(Circuit Court, D. Oregon. May 16, 1910.)

No. 3,472.

BILLS AND NOTES (§ 330*)—CHECKS—INDORSEMENT—RIGHTS OF INDORSEE.

Where defendant drew a check to its own order, and indorsed it without restriction for credit to an insolvent bank, in which defendant had an account, and the indorsee indorsed the check for collection and credit to plaintiff bank, its correspondent, which credited the check, and paid out the amount thereof on drafts of the insolvent bank before notice of the bank's failure, when defendant stopped payment of the check by the drawee bank, plaintiff, having no knowledge that the insolvent bank was a mere collecting agent, was entitled to assume that it had title to the check which it could transfer, and hence was entitled to recover thereon.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 330.*]

At Law. Action by the United States National Bank against the Amalgamated Sugar Company. Judgment for plaintiff.

Chamberlain, Thomas & Hailey, for plaintiff.
Snow & McCamant, for defendant.

BEAN, District Judge. Action on a check. The defendant is a Utah corporation, carrying on business in this state. For convenience it kept an account at the Farmers' & Traders' National Bank of La Grande. On October 1, 1908, it drew a check on the First National Bank of Ogden, Utah, for $4,000, payable to itself, and on the 5th deposited same with the La Grande Bank, using a deposit tag which had the following conditions printed on it:

"Items listed hereon are taken at owner's risk until we have reduced to our own possession the funds received by us in settlement thereof, and credits or remittances made by us therefor are subject to revocation until we have received actual final payment. Mediums of collection employed are your agents, and we assume no responsibility for their neglect, default, or failure. In making this deposit, the depositor expressly assents to the foregoing conditions."

The check, however, was indorsed by the defendant:

"Pay to the order of the Farmers' & Traders' National Bank."

The La Grande Bank was insolvent at the time; but that fact was not known to either the plaintiff or defendant, or to the general public.

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

On receipt of the check, the La Grande Bank credited defendant's account with the amount thereof, which credit, however, was never used, and on the same day indorsed the check, "Pay to any bank or banker," and forwarded it, with other items, to the plaintiff, its correspondent at Portland, "for collection and credit."

The La Grande Bank had opened an account with plaintiff in the fall of 1907, without any special agreement, however, between the two banks, except as is to be inferred from the course of business between them. It was the custom for the La Grande Bank to forward to plaintiff from time to time items for collection and credit, and for plaintiff to credit such items to the La Grande Bank upon their receipt, and to advance money to or pay drafts of the La Grande Bank upon the faith of such credit prior to the actual collection of the paper. From the time the account of the La Grande Bank was opened, plaintiff used a deposit tag for its general customers which, among other things, provided that on receiving paper payable elsewhere than in Portland it assumed no responsibility for the failure of any of its collecting agents, and should only be held liable when the proceeds in actual funds or solvent credits shall have come into its possession. This tag, however, was never used by the La Grande Bank in any of its transactions with plaintiff. The check in controversy was received by plaintiff on the 8th day of October, and immediately credited to the account of the La Grande Bank, and forwarded through the usual channels for collection. It reached the First National Bank of Ogden on October 12th, on which day the La Grande Bank suspended. Defendant, learning of such suspension, stopped payment on the check, and it was charged back, according to the usual custom of bankers, until it again reached the plaintiff. Meanwhile, however, and prior to receiving notice of the insolvency of the La Grande Bank, and without any knowledge of defendant's ownership of the check, or the conditions upon which it had been received by the La Grande Bank, unless it is to be inferred from the fact that that bank forwarded the check to it for collection and credit, the plaintiff, on the faith of the check and according to the usual course of business between it and the La Grande Bank, cashed drafts of the latter for the full amount of the check together with the subsequent credits, so that at the time it received notice of the insolvency of the La Grande Bank, and that the payment of the check had been stopped, the La Grande Bank had a credit with it of only $9.85.

Upon these facts, I think the plaintiff is entitled to judgment. If it be conceded that the La Grande Bank was a mere collecting agent, plaintiff had no knowledge of that fact. The indorsement of the check by defendant to the La Grande Bank was unrestricted. It thereby became the apparent owner, and could pass good title to a subsequent holder in due course, for value, and without notice. It forwarded the check to plaintiff with an unrestricted indorsement thereon. Plaintiff, without notice or knowledge of defendant's title, or the insolvency of the La Grande Bank, advanced money and paid drafts of the La Grande Bank, drawn on it in the usual course of business, to the full amount of the check, relying on the apparent ownership. Defendant

could have given notice of its title by indorsing the check to the La Grande Bank "for collection." It chose, however, to give an unrestricted indorsement, and thus permitted the paper to pass out into the channels of trade as apparently the property of the La Grande Bank and must abide the consequences. The facts that the check was forwarded by the La Grande Bank to plaintiff for "collection and credit," that it has not been collected, and that plaintiff, according to the custom of bankers, could charge it back to the La Grande Bank, are immaterial.

The question is whether the plaintiff had a right to treat the La Grande Bank as the owner of the check and pay its drafts on the faith of such ownership. It certainly had that right, because the check had been indorsed without restriction by the apparent owner. Having made advances thereon to the amount of the check in good faith, without knowledge of defendant's title, plaintiff is entitled to collect it. 2 Morse on Banking (4th Ed.) 961; 3 E. & A. Enc. of Law (2d Ed.) 815; Continental Bank v. Bank, 84 Miss. 103, 36 South. 189, 2 Am. & Eng. Ann. Cas. 116, and note; Bank of Met. v. New England Bank, 1 How. 234, 11 L. Ed. 115; Vickrey v. State Sav. Assn. (C. C.) 21 Fed. 773; Cody v. Bank, 55 Mich. 379, 21 N. W. 373; Miller v. F. & M. Bank, 30 Md. 392; Ayers v. F. & M. Bank, 79 Mo. 79, 49 Am. Rep. 235; Doppelt v. Nat. Bank, 175 Ill. 432, 51 N. E. 753; Hoffman v. Nat. Bank, 46 N. J. Law, 605; Wyman v. Col. Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

In re JACKIER.

(District Court, M. D. Pennsylvania. May 23, 1910.)

No. 1,642.

1. BANKRUPTCY (§ 288*)—RECOVERY OF GOODS—SUMMARY PROCEEDINGS.

A summary order, directing a third person to surrender goods alleged to belong to the bankrupt, claimed to be in the former's fraudulent custody, could not be made, where the goods could not be followed and sufficiently identified to enable the marshal to take them into his possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 303*)—RECOVERY OF GOODS—ACTION BY TRUSTEE—EVIDENCE.

In a plenary suit by a bankrupt's trustee to recover goods alleged to belong to the bankrupt in the fraudulent custody of a third person, the trustee may recover the value of the goods, even if they cannot be precisely identified.

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

3. BANKRUPTCY (§ 287*)—RECOVERY OF GOODS—CLAIM BY THIRD PERSON—COLOR OF TITLE—REMEDY.

A third person, in possession of goods alleged to belong to the bankrupt, held under claim and color of title, asserting that he had purchased and paid for them, is entitled to retain them until dispossessed in a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 287.*]

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

4. BANKRUPTCY (§ 288*)—RECOVERY OF GOODS—CONFUSION OF GOODS—IDENTIFICATION.

Where neither specific goods nor goods in large lots of the same kind as possessed by the bankrupt could be traced from him to respondent, the doctrine of confusion of goods could not be applied, so as to entitle the bankrupt's trustee to recover a similar quantity of goods from respondent in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

In the matter of David Jackier, bankrupt. On petition by the receiver to compel Adolph Leventhal to deliver goods alleged to belong to the bankrupt. Denied.

Levy & Kaufman, for petitioner.
Abram Salsburg, for bankrupt.

JOHN B. McPHERSON, District Judge (specially assigned). It must be confessed that the very capable and ingenious argument of the receiver's counsel has much to recommend it, and I am not prepared to say that it might not properly carry conviction in a different proceeding. But the difficulty now is that I am asked to make a summary order directing the respondent upon pain of imprisonment to surrender certain goods of which he is said to be holding fraudulent custody, the property still belonging to the bankrupt. It is clear that such an order should not be made, unless the goods can be followed and sufficiently identified to enable the marshal to take them into his possession. The evidence in the present case does not go far enough to meet these requirements, and for this reason the petition must fail. In a plenary suit, where a receiver or a trustee may recover a verdict for the value of goods, even if the goods themselves cannot be precisely identified, a recovery may rest upon proof of a somewhat less definite quality; but in a proceeding like this it is necessary to follow specific articles with reasonable certainty. 1 Remington, Bank. § 1831 et seq. As I have already said, the evidence does not come up to the proper standard. Some articles that had been the bankrupt's within the four months were undoubtedly traced into the respondent's possession, but these he holds under a claim and color of title, asserting that he paid for them and offering evidence in support of his assertion. These, therefore, he is entitled to retain until he is dispossessed by a plenary suit. To other articles, which were in the respondent's possession, but were not identified as having belonged to the bankrupt, it was attempted to apply the doctrine of confusion of goods; and Jewett v. Dringer, 30 N. J. Eq. 291, was cited in support of the position. It was definitely established there that Dringer had fraudulently procured certain goods of the complainant and had intermixed them with his own. The goods thus procured were of different kinds and values, and could not be so distinguished as to enable the property of the respondent to be separated from the property of the complainant. If similar facts appeared here, there would be room to contend that Leventhal must surrender at least so much of the mass as would replace the goods that had been followed into the heap. But

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

the evidence breaks down at that point. Neither specific goods, nor goods even in large lots, have been definitely traced from the bankrupt to the respondent; and therefore the doctrine of confusion cannot be applied. Upon the evidence laid before me no order could possibly be framed that would point out to the marshal what goods he should seize, and I mean by that, not only what indubitable goods of the bankrupt he should seize, but also what goods of the same kind as the bankrupt's. In other words, the evidence does not enable the court to decide that the respondent has in his possession, for example, 50 suits of clothing belonging to the bankrupt, whether 50 specified suits can be pointed out or not. At the best, the evidence may point to the conclusion that somehow (in a manner not specified) and somewhere (at a place not specified) the respondent received from the bankrupt some clothing and other articles (in amounts not specified), and continues to hold them improperly.

The rule is discharged, and the restraining order revoked, but without prejudice to the right of the receiver or the trustee to institute hereafter a plenary suit for relief, if he shall be so advised; the petitioner's costs in this proceeding to be paid out of the bankrupt estate.

In re CALORIS MFG. CO.

(District Court, E. D. Pennsylvania, W. D. May 21, 1910.)

No. 3,496.

BANKRUPTCY (§ 318*)—ADMINISTRATION OF ESTATE—ALLOWANCE OF CLAIMS.

Where a claimant leased premises to a bankrupt for a term of years from June 1st, and bankrupt paid rent for June, but the petition in bankruptcy was filed June 15th, and an adjudication followed on July 2d, and no other payment was made, but the property was leased August 5th at a lower rent, the claim for the difference between the amount of rent for the two terms, not being a fixed liability due at the time of the petition, so as to be provable under Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), is nevertheless provable under section 63a (4) as a claim upon an open account, or on a contract, express or implied, having become liquidated within a year after the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. § 318.*]

In the matter of the bankruptcy of the Caloris Manufacturing Company. Heard on certificate of referee disallowing claim of landlord. Order of referee reversed, with directions to allow the claim.

Walter H. Bond (of the New York bar), for claimant.

Henry C. Thompson, Jr., for trustee.

J. B. McPHERSON, District Judge. In March, 1909, the claimant, the 503 Fifth Avenue Company, leased certain premises in New York City to the bankrupt for four years and five months from June 1, 1909, at the rate of $4,500 per annum. On May 27th the bankrupt offered to surrender the lease, but the landlord refused to accept it. On May 28th the bankrupt authorized the landlord to sublet the

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

premises, and an earnest effort was immediately made to secure another tenant, but without success until August 5th, when another tenant was obtained at the lower rent of $3,200 per annum. The bankrupt paid the rent for June, but as the petition in bankruptcy was filed against it on June 15th, and an adjudication followed on July 2d, no other payment was made. Clause 29 of the lease is as follows:

"That if the premises shall at any time become vacant, or if any rent, or any other sum herein agreed to be paid by the tenant, shall be due or unpaid, or if default shall be made in the performance of any other term or condition herein mentioned and reserved to be performed by the tenant, agents, or servants, then and in such event it shall be lawful for the landlord to terminate this lease and to re-enter the said premises and remove all persons therefrom, or to obtain possession of the premises by summary proceedings or otherwise; and after obtaining possession of such premises the landlord shall relet the same or any part thereof for the whole or any part of the term from time to time, as it may deem best; and in the event that the landlord shall obtain possession by re-entry, dispossess, summary proceedings, or otherwise, the tenant hereby agrees to pay the landlord the expense incurred by the landlord in obtaining possession of said premises, including legal expenses and attorney's fees, and to pay such other expenses as the landlord may incur in putting the premises in good order and condition, and also any other expense or commissions which may be paid by the landlord in and about the letting of the same; and the tenant further agrees to pay each month to the landlord the difference between the amount to be paid as rent as herein reserved, and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided remaining after the taking possession by the landlord, and the overplus, if any, at the termination of the period herein provided for shall be paid to the tenant."

The claimant filed its proof of debt on February 23, 1910, for $6,166.67; this being the difference between the amount of rent for the two terms. The referee disallowed the claim on the authority of Re Roth and Appel (D. C.) 174 Fed. 64, and the decision undoubtedly sustains his position. I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of "hopeless confusion," and that an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey. Meanwhile, however, I think the principle of Moch v. Market Street Bank, 107 Fed. 897, 47 C. C. A. 49, governs the District Courts of this circuit, and requires them to hold that, even although the landlord's claim in the present case was not a fixed liability under Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), when the petition was filed, it was liquidated within the year, and thus became provable as a claim founded upon a contract express or implied, under section 63a (4). The Case of Moch was followed in Re Dunlop Carpet Co. (D. C.) 163 Fed. 541, and I shall adhere to that ruling until its error is definitely established.

The careful brief of counsel for the claimant contains the following additional references, which may be added for the sake of convenience: Re Smith (D. C.) 146 Fed. 923; People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129; Id., 3 App. Div. 544, 38 N. Y. Supp.

379; Re Collignon (D. C.) 4 Am. Bankr. Rep. 250; Martin v. Orgain, 174 Fed. 772, 98 C. C. A. 246; Re Orne (C. C.) 12 Fed. 779; Llynri Coal & Iron Co., L. R. 7 Chan. App. 28.

The order of the referee is reversed, and he is directed to allow the claim.

In re ROBINSON.

(District Court, D. Minnesota, Fourth Division. May 11, 1910.)

1. BANKRUPTCY (§ 413*)—EXAMINATION OF NONRESIDENT.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), provides that a court of bankruptcy may on application require any designated person, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or judge of any state court to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under the act. *Held* that, where it was sought to examine a resident of another state in support of creditors' specifications of objection to a bankrupt's discharge, application for an order requiring the witness to appear before a referee in bankruptcy and submit to examination should be made to the federal District Court of the district wherein the witness resided.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 244*)—WITNESSES—EXAMINATION—DEPOSITIONS.

Where evidence of a nonresident is desired in support of creditors' specifications of objections in resistence to a bankrupt's discharge, his deposition may be taken according to the laws of the United States under Bankr. Act, July 1, 1898, c. 541, § 21b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), providing that the right to take depositions in proceedings under the act shall be determined and enjoyed according to the United States laws, then in force or thereafter enacted, relating to the taking of depositions, except as thereafter provided.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 244.*]

In the matter of Josiah Robinson, bankrupt. Application for an order for the examination of George McMasters before a referee in bankruptcy in another district in support of a creditor's specifications of objection to the bankrupt's discharge. Denied.

W. A. McDowell and W. L. Converse, for bankrupt.
Bowersock & Hall, for creditors.

WILLARD, District Judge. In the above-entitled matter, the bankrupt having filed his petition for a discharge, the Fidelity Trust Company, of Kansas City, Mo., and the Union National Bank, of Kansas City, Mo., appeared and opposed the granting of the petition. Specifications of their objections were duly filed, and the case was referred to the referee of this division to take the evidence and report the same to the court. The matter is still pending before him under that order of reference.

The objecting creditors now present to the court a petition alleging that they desire to take the evidence of George McMasters, a citizen and resident of the county of Rock Island, in the state of Illinois,

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

and general manager of the Mutual Wheel Company, a corporation of the state of Illinois, in support of their specification that the bankrupt removed, transferred, and concealed, for the purpose of defrauding his creditors, within four months of his bankruptcy, certain stock of the Mutual Wheel Company.

The petition alleges that, by agreement between the creditors and the attorney for the bankrupt, the testimony of McMasters was to be taken before a notary public at Rock Island, but that McMasters refused to appear before that officer and give his testimony. The creditors now ask that this court require and authorize the referee in bankruptcy in the city of Rock Island to cause McMasters to appear before him and be examined, and to bring with him before the referee the records and papers of the Mutual Wheel Company.

The application is apparently based upon section 21a of the Bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]). The Supreme Court of the United States, on February 21, 1910, decided the case of Babbitt, Trustee in Bankruptcy, v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. ——, and in this opinion it said:

"The precise question before us on the present appeal is whether, in a case in which the original court of bankruptcy could act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction."

And it concluded with this declaration:

"There is no decision of this court adverse to the ancillary jurisdiction of the District Courts as asked to be exercised in this case. Upon the whole, we are of opinion that the District Court for the Southern District of New York had jurisdiction of the petition below and to grant the relief therein prayed for."

On the same day the Supreme Court decided the case of Abram I. Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. ——, and in that case the court said:

"The questions submitted are: (1) Did the United States District Court for the Southern District of New York have jurisdiction to grant an order for the examination of witnesses, who were residents of that district, when the bankrupt proceedings in which the examination was desired were being administered in the Northern District of Illinois? (2) Have the respective District Courts of the United States sitting in bankruptcy ancillary jurisdiction to make orders and issue process in said proceedings pending and being administered in the District Court of another district? On the authority of Babbitt, Trustee, etc., v. Dutcher et al., just decided, we answer both questions in the affirmative."

It is thus seen that, if the petitioners have the right to an examination of McMasters under section 21a of the bankrupt act, they can obtain it by application to the United States District Court for the Southern District of Illinois. Under these circumstances, I do not feel called upon to decide whether under that section this court has any authority to issue an order requiring McMasters to appear before the referee in bankruptcy at Rock Island, or whether it can authorize the referee himself to require such appearance. Even if this court did have that power, there are certain practical objections in the way

of issuance of a subpœna, punishment for contempt, and other matters which might be referred to, that justify me in requiring the petitioners to proceed before the Illinois court.

It seems to me, however, that the case does not fall under paragraph "a," § 21, but rather under paragraph "b" of the same section, which is as follows:

"The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided."

Under that section there are various ways in which the petitioners may proceed, some of which are indicated in the case of In re Williams (D. C.) 123 Fed. 321, cited by petitioners.

If the petitioners do not care to proceed in the United States District Court for the Southern District of Illinois, but desire the appointment of a commissioner under section 21b, for the taking of testimony in Rock Island, such a commission will be issued upon proper application made therefor.

In re NORTHAMPTON PORTLAND CEMENT CO.

(District Court, E. D. Pennsylvania. May 28, 1910.)

No. 3,739.

BANKRUPTCY (§ 61*)—ACTS OF BANKRUPTCY—INABILITY TO PAY DEBTS—ADMISSIONS BY DEBTOR.

Where a bankrupt admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, it was subject to adjudication over the objection of creditors, though it was not insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 61.*]

In Bankruptcy. In the matter of the Northampton Portland Cement Company. On motion to enter adjudication. Granted.

W. A. Rex Schultze and Sidney E. Smith, for petitioning creditors.
Charles S. Yawger, for objecting creditor.

J. B. McPHERSON, District Judge. This is a creditors' petition, which sets up an admission in writing of the debtor's inability to pay its debts and its willingness to be adjudged bankrupt on that ground. A creditor was permitted to intervene and to file an answer opposing adjudication. The ground of opposition is as follows:

"Upon information and belief, he denies that the said alleged bankrupt, Northampton Portland Cement Company, was on the 20th day of April, 1910, or at any time since said date, insolvent, within the meaning of the bankruptcy law, and he alleges that the said Northampton Portland Cement Company is possessed of a large plant, consisting of real and personal property, situated at Stockertown, in the state of Pennsylvania, with which plant it is engaged in the business of manufacturing and selling Portland cement, and that the said alleged bankrupt is not unable to pay its debts, and is not insolvent, and was not insolvent at the time the petition herein was filed against it."

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

The present motion is made upon the grounds (1) that the answer is too vague and indefinite to call for further inquiry; and (2) that, even if it were amended so as to set out in detail sufficient facts to require investigation in a proper case, an inquiry in this case would be superfluous—the reason being that insolvency is not essential when the act of bankruptcy is an admission of inability to pay debts and a willingness to be adjudged bankrupt on that ground.

It is unnecessary to pass upon the first of these reasons, since in my opinion the second must be sustained. The Supreme Court has decided in West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, that:

"As a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law."

The reasoning of the court in support of this ruling applies with equal force when the petition is based upon the bankrupt's admission that he cannot pay his debts and is willing to be adjudicated upon that ground. Upon the authority of the foregoing case the pending motion must be granted.

The clerk is directed to enter the adjudication.

KEYSTONE BANK v. SAFETY BANKING & TRUST CO.

(Circuit Court, E. D. Pennsylvania. May 27, 1910.)

No. 680.

TRIAL (§ 259*)—REQUESTED CHARGE—FORM.

An oral request to charge, made after the charge had been delivered and as the jury was about to retire, was properly refused, under the rule that such requests must be plainly written and so framed that the court's answer will be full, direct, and explicit by a simple affirmation of negation, and that a copy shall be presented to the court and the opposite counsel at the close of the evidence and before argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 648; Dec. Dig. § 259.*]

At Law. Action by Keystone Bank against the Safety Banking & Trust Company. On defendant's motion for new trial. Denied.

Carr, Beggs & Steinmetz, for plaintiff.
John C. Gilpin, for defendant.

J. B. McPHERSON, District Judge. The only question that needs attention upon this motion arises upon the following facts: The suit is brought on a certificate of deposit, and under its terms the defendant could have resisted recovery on the ground that demand for payment was necessary before suit, and that a proper demand had not been made. No such question was raised during the trial, however, and al-

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

though the defendant presented four requests for instruction (the first and fourth were withdrawn before the court delivered its charge) none of them asked for an instruction upon the subject of demand. But after the charge had been delivered, and as the jury was about to retire, the defendant's counsel made an oral request for instructions upon that subject. The stenographer's notes show what took place at that time between the court and counsel, and it is not necessary to repeat the colloquy. It is enough to say that the court pointed out that the request was in violation of the rules of practice, and for that reason refused to comply. The defendant asked for an exception to this refusal, and I held the matter under abeyance in order to consider it further. This I have since done, but without seeing any reason to change the opinion I then entertained—that the defendant was entitled neither to the instruction nor the exception. The rule of the Circuit Court, which I think sustains this position, is as follows:

"Points upon which the opinion of the court is desired on the trial of the cause shall be plainly written, and so framed that the answer of the court will be full, direct, and explicit, by a simple affirmation or negation. A copy of the points shall also be presented to the court and the opposite counsel at the close of the evidence and before the commencement of the summing up, or the court may, at their discretion, refuse to charge the jury upon the points proposed."

The other reasons for a new trial do not call for special notice. The motion is refused.

HAMILTON v. LOEB.

(Circuit Court, E. D. Pennsylvania. June 10, 1910.)

No. 346.

1. COURTS (§ 371*)—FEDERAL COURTS—PROCEDURE.
   A federal court must decide a point for itself, when it has not been passed on by the courts of the state under which it arises.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 972; Dec. Dig. § 371.*]

2. CORPORATIONS (§ 244*)—STOCKHOLDER'S DOUBLE LIABILITY.
   Under Const. Minn. Art. 10, § 3, making stockholders in certain corporations liable to the amount of their stock, and under Rev. Laws Minn. 1905, §§ 2863, 2864, regulating transfers of stock, a transferee, who has never been a stockholder on the corporate books, nor enjoyed a stockholder's privilege, nor held himself out as a stockholder, and has not destroyed the registered owner's primary liability, cannot be charged with double liability, regardless of his liability to the registered owner.
   [Ed. Note.—For other cases, see Corporations, Dec. Dig. § 244.*]

At Law. Action by Charles R. Hamilton, receiver, against Ferdinand L. Loeb. On final hearing. Judgment for defendant.

George Wentworth Carr and James E. Trask, for plaintiff.
Abraham Israel and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. This is an action at law. After the evidence had all been offered, each side asked for binding

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instructions, and thereby submitted the decision of all questions to the court. In my opinion, the defendant is entitled to a general verdict; but I think I should add a statement of my reasons for this conclusion.

The suit is brought to enforce the double liability imposed by the Constitution and the statutes of Minnesota upon stockholders in certain corporations. The plaintiff is suing in behalf of the creditors of the Evans-Johnson-Sloane Company, and his right to recover must rest upon the ground that the defendant is liable as a holder of stock, within the meaning of the Minnesota law. The facts are these: On February 25, 1905, certain shares were assigned to the defendant by an instrument of writing, and were paid for by him. Thereupon delivery was made of the certificates, indorsed in blank; but no transfer was ever made upon the books of the corporation. The constitutional provision is as follows:

"Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of the stock held or owned by him." Const. Minn. art. 10, § 3.

Sections 2863 and 2864 of the Revised Laws of Minnesota are as follows:

"Transfer of Stock.—The delivery, by the rightful owner or by one by him intrusted therewith, to a bona fide purchaser or pledgee for value, of a certificate of stock duly transferred in writing by the holder personally, or accompanied by his power of attorney authorizing such transfer, shall be sufficient to transfer title, but shall not affect the right of the corporation to pay any dividend thereon, or to treat the holder of record as the owner in fact, until such transfer has been recorded on its books, or a new certificate issued to the transferee, who, upon delivery of the former certificate to the treasurer, shall be entitled to receive such new one.

"Effect of Transfer—Stock Books.—The transfer of shares is not valid, except as between parties thereto, until it is regularly entered on the books of the company, so far as to show the names of the persons, by and to whom transferred, the number or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person making the transfer from any liabilities of said corporation which were created prior to such transfer. The books of the company shall be so kept as to show intelligently the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof, and such books, or a correct copy thereof so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same."

One of the by-laws of the Evans-Johnson-Sloane Company provides that:

"Section 1. The stockholders of said company shall be entitled to certificates of stock signed by the president and secretary, with the corporate seal affixed thereto, and shall be numbered and registered as issued.

"Sec. 2. Transfer of stock shall be made only on the books of the company, either in person or by attorney, and the possession of said stock shall not be regarded as evidence of ownership of the same unless issued or duly transferred to the person holding the same."

The controlling question of law is whether, under the facts just stated, the defendant can be charged with the double liability of a stockholder. The question has never been decided by the Supreme

Court of Minnesota, as a brief reference to the cases will I think make clear. In Baldwin v. Canfield, 26 Minn. 43, 55, 1 N. W. 261, 271, 276, the subject seems to have come before the Supreme Court of the state for the first time. It appeared that a stock certificate had been delivered by way of pledge, but that no transfer had been made upon the books of the corporation. Nevertheless the transfer was held to be valid, the court saying:

"Provisions of this kind are intended solely for the protection and benefit of the corporation. They do not incapacitate a shareholder from transferring his stock without any entry upon the corporation books. * * * Except as against the corporation, the owner and holder of shares of stock may as an incident of his right of property transfer the same as any other personal property of which he is owner. It appearing in this case that the certificates of stock (the evidence of title to the same) were delivered to the plaintiffs in pledge and as security for the payment of the notes and the return of the gas stock loaned, the court below was right in finding the plaintiffs to be bona fide holders of the shares represented by said certificates as collateral security."

The plaintiffs were the transferees of the stock, and were seeking to enforce their rights as such.

In Nicollet National Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643, the plaintiff, an assignee of stock, sued for damages because the defendant corporation had refused to transfer the shares upon its books. It was said, approving Baldwin v. Canfield:

"The assignment to the plaintiff without a transfer on the books of the bank did not constitute a complete transfer in merely legal contemplation, so as to effect an actual substitution of shareholders binding upon the corporation. But as between the immediate parties to the transaction, the assignment was effectual, and would be recognized and enforced, at least in equity, as against all parties not showing a superior right."

In Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337, it appeared that a certificate of stock in the defendant company had been issued to Lizzie M. Hicks, and the purpose of the suit was to cancel the certificate upon the ground that she had fraudulently obtained it, and that the plaintiff was the real owner of the stock. The trial court had jurisdiction of the parties defendant, but did not obtain possession of the certificate issued to Mrs. Hicks. In refusing the relief prayed, upon the ground that possession of the certificate was essential, the court said:

"The character and qualities of stock certificates are the only questions involved here. If they are to be treated as if they were shares themselves, and when properly transferred, as passing to the assignee all the equitable rights of the holder, and the legal right to be admitted as a shareholder on the books of the association, it must follow that, upon a regular assignment and delivery of the certificates, there has been transferred to the purchaser the full legal and equitable ownership of the shareholder's contract, with all the indicia of such ownership. While there has been some difference of opinion upon this, the weight of authority is undoubtedly, that where a corporation having authority to issue a stock certificate does issue such a certificate, wherein it is affirmed, as in the case at bar, that a designated person is entitled to a certain number of shares of stock, transferable only on the books of the association, on the indorsement and surrender of the certificate itself, it thereby holds out to persons who may deal in good faith with the person named

in the certificate that he is the owner, and has capacity to transfer the shares. There is in the certificate, which evidences and represents the shares, the assurance of the corporation to the commercial world that no prior right to the stock can be obtained, unaccompanied by possession of the certificate, and that the shares shall not be transferred upon the books of the corporation unless the certificate is first surrendered. * * *

"The certificate itself must be regarded as a continuing affirmation of the ownership by the person to whom it has been issued, and of his power over and right to sell the stock, until this power and right has lawfully terminated. It is clear that at any time, at least prior to the commencement of this action, a purchaser of the certificate, in good faith, from Mrs. Hicks or her assigns, would have had the right to rely on the certificate securing to him the shares of stock it represented and evidenced"—citing numerous cases.

In Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623, Baldwin v. Canfield was again referred to with approval, and it was decided that a sale and transfer of corporate stock, although not entered on the books of the corporation, is effectual as between the parties, and takes precedence of a subsequent attachment in behalf of a creditor of the vendor. The dispute was between the assignee and the attaching creditor. In Prince Investment Co. v. St. Paul, etc., Land Co., 68 Minn. 121, 70 N. W. 1079, it was again decided that an owner of stock in a corporation is not incapacitated from transferring it, even if the transfer thereof is not entered upon the books of the corporation, and that an assignee of such stock without a transfer upon the books of the corporation has an equitable title which will be protected as against all parties not showing a superior right. The corporation was seeking to enforce a lien on the stock against the vendor, and was denied such right because it had had prior notice of the vendee's title. In the course of the opinion the court said also:

"While the statute ought not to be so construed as to interfere with the sale and transfer of stock as personal property, yet it is quite appropriate and necessary that there should be record evidence on the books of the company conclusive as to the right to vote and receive dividends. Otherwise the corporation might frequently be greatly embarrassed, and its rights endangered, by the claims of parties asserting the right to vote and receive dividends. If the transferee omits to have the transfer registered, he thereby waives his right to vote and receive dividends as against the corporation, whatever may be his subsequent right against the transferror receiving such dividends as trustee. This provision relating to transfer on the books of the corporation is, therefore, solely for the protection and benefit of the corporation."

In none of the foregoing cases was the subject of double liability either involved or considered. Some of the following decisions are concerned with various phases of this question. In re People's Insurance Co., 56 Minn. 180, 57 N. W. 468, was primarily a question of practice. The court decided that in the proceeding then before the court the constitutional or statutory liability of a stockholder for debts of the corporation could not be enforced; but the court went on to consider a stockholder's liability upon an unpaid subscription (not his double liability), and held that his liability for an unpaid subscription does not continue after the stockholder has transferred the stock (except where the transfer was for the purpose of defrauding creditors), but that the transferee of such stock was solely liable for

the unpaid subscription. In Olson v. Cook, 57 Minn. 552, 59 N. W. 635, the method of procedure to enforce the double liability of stockholders was considered, and it was held that in the particular form that had been there adopted such liability could not be enforced. But the court declared that one who had acquired stock in a banking corporation incurred the statutory liability, not only in respect to corporate debts contracted after he became a stockholder, but also in respect to debts contracted before that time. No question concerning the effect of failure to transfer the stock upon the corporation books was involved. The case of Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721, only decided that upon the facts in that case there had been a sufficient transfer of stock upon the corporate books, and a sufficient mutual recognition by the corporation and by the transferee of the relation of stockholder, to change the equitable ownership of the stock into a legal ownership, so as to make the transferee liable to the corporation for the payment of calls on the stock—not for the payment of the double liability. In the course of the discussion the court said:

"Our conclusion is that the act of the company in making this entry in the stock account of the transfer of title by execution sale to the defendant was not only a clear recognition of it as a stockholder, but a sufficient, although informal transfer of the stock on the corporate books to bring the defendant in privity with, and make it liable to, the corporation. In purchasing stock, the transferee impliedly agrees with the transferror to pay all future calls. According to the doctrine of this court, the person for whose benefit a promise is made may enforce it, though he be a stranger to the contract and to the consideration. A transfer on the corporate books is designed for the benefit of the corporation itself. In view of these facts, and keeping in mind the distinction between an action against the transferror, where the corporation has never recognized the transferee as a stockholder, and refuses to look to him for payment of the call, and an action against the transferee, where the corporation has elected to accept him as a stockholder and to look to him for payment, it may be doubtful whether there is any sound principle upon which it can be held that the absence of a transfer of the stock upon the corporate books is ever available as a defense in favor of a transferee who is liable to his transferror in case the latter has to pay. But it is not necessary to decide that question in this case."

Oswald v. Minneapolis Times Co., 65 Minn. 254, 68 N. W. 15, merely presented again the question of fact that had previously been determined in Basting v. Northern Trust Co., supra. In Hunt v. Reardon, 93 Minn. 375, 101 N. W. 606, an effort was made to enforce the double liability upon 15 shares that had been issued in the name of the defendant's wife. The decision of the case depended wholly upon questions of fact, and on the evidence then laid before the court it was held that the defendant had always been the owner of these 15 shares, and that, although they had been issued in his wife's name, he continued to be the owner and was subject to the statutory liability. Gunnison v. United States Investment Co., 70 Minn. 292, 73 N. W. 149, decided that a shareholder in a corporation could not affect his constitutional liability for the prior debts of the corporation, even by a bona fide sale of his stock to a solvent party and a transfer thereof on the books of the corporation. The court declared that it was entirely competent for the Legislature to regulate the transfer of shares

in a corporation, and to declare the effect of such transfer if no impairment of liability as fixed by the Constitution was made. Such liability, it was said, may be increased, but cannot be diminished, by the Legislature; the court being of opinion that:

"The prohibition against the transfer of shares in a corporation, so as to affect the liability of stockholders for existing debts of the corporation, is absolute."

The case is wholly concerned with the power of a registered stockholder to affect his liability by the sale of his stock. Dent v. Matteson, 70 Minn. 519, 73 N. W. 416, arose under the national banking act, and merely decides that, where a stockholder of a national bank died, and the stock was distributed to his widow, heirs, and next of kin, but without being transferred on the books of the bank, the distributees were liable in respect to an assessment upon these shares, but only to the extent of the assets received by them from the estate. The case is put upon the ground that the estate continued to be liable, as the following quotation will show:

"We are clearly of the opinion that, as a general rule, the statutory or constitutional double liability of a stockholder survives his death, whether the corporate indebtedness was incurred before or after his death, and whether the corporation becomes insolvent before or after his death. One of the very objects of organizing corporations is to prevent the death of any of its members from interfering with the business or affairs of the concern. The stockholder's contract does not contemplate a hiatus in liability resulting from his death. Whether he is living or dead, there may be no assets out of which the liability can be satisfied. But the liability contracted by the stockholder does not terminate with his death. His is a continuing contract. He contracts for a liability which is to continue, at least, until his stock is transferred to another on the books of the company, or until such a transfer is rightfully demanded."

In Harper v. Carroll, 66 Minn. 487, 504, 69 N. W. 610, 1069, the facts that are now pertinent thus appear: It was shown that Hill had transferred certain stock to Jenks. This transfer was not entered on the books of the bank, but a transfer of the same stock was afterwards entered from Hill to a man named Shepherd. Up to the date of this latter transfer, therefore, Hill appeared on the books of the corporation to be the holder of the stock. Hill and Jenks were two of the parties defendant to the suit, and Hill filed a cross-bill against Jenks to compel him to respond to the creditor, who as plaintiff was seeking to enforce the double liability upon this stock. Hill contended that as between him and Jenks the latter was primarily liable on the stock, even although he had failed to register the transfer. But the court said:

"We need not consider whether or not under these circumstances Jenks would, at the election of the creditors, be liable directly to them. * * * We are satisfied that in any event the creditors need not undertake to enforce such liability against Jenks, or accept the benefit of any such attempted enforcement of the same by Hill. They are entitled to look solely to the liability of the persons who appear by the books to have been stockholders. However, under the circumstances, we see no objection to Hill retaining his present hold on Jenks for the purpose of compelling contribution by the latter in this action for any sum which the former may be compelled to pay on a judgment against him herein, after he has paid the same."

In Minneapolis Base Ball Co. v. City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415, it was decided that a receiver appointed to sequester the assets of an insolvent corporation had no authority (except in cases where it was otherwise provided by statute) to enforce the double liability of the stockholders for the debts of the corporation. Such liability was declared not to be an asset of the corporation, as are unpaid stock subscriptions, but to be a liability belonging directly to the creditors, and to be enforced only by them. "The corporation cannot enforce it. It is no part of its assets."

Markell v. Ray, 75 Minn. 138, 77 N. W. 788, merely decided that where an executor, pursuant to the provisions of a will, procured stock which stood in his own name on the books of a corporation to be transferred to himself as executor, the estate was primarily liable upon the subsequent insolvency of the corporation, and the executor was only secondarily liable on such stock. In Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901, the double liability was held to be enforceable, although the stockholder had transferred his stock on the books of the corporation in good faith for a valuable consideration. It was decided that the original stockholder was liable in an independent action, and that the transferee need not be made a party; the court saying that, if it was desired to have the transferee made a party on the ground that execution might be enforced against him in the first instance because of his primary liability, the original stockholder should have made application for that purpose.

It is apparent, I think, from the foregoing citations, that the question under consideration is still open in Minnesota, and it follows, therefore, that a federal court is bound to decide the dispute for itself. As my decision will certainly be reviewed, I shall not enter upon an elaborate discussion of the cases in which the opposing views of the question are maintained. They are referred to in the briefs of counsel, and will be presented to the Court of Appeals. In my judgment the weight of authority supports the proposition that, where a transferee of certificates of stock has never been a stockholder upon the books of the corporation, and has neither enjoyed the privileges of a stockholder nor held himself out as such, and has not destroyed the primary liability of the registered owner, he cannot be charged with the double liability. Whether he may be liable to his vendor in case the latter (being the registered owner) has been compelled to pay is a separate question, and need not now be considered.

I further find that the defendant was not a registered stockholder, he did not hold himself out as such, he has in no way interfered with the liability of his vendors, who were and are the registered owners of the stock, and he did not exercise any of the privileges of a stockholder, or take part as such in the management of the corporate affairs. Under such circumstances, I think he is not exposed to the liability declared by the Minnesota law.

The clerk is directed to enter a finding in favor of the defendant, upon which judgment may be entered in due course.

UNITED STATES v. BAUMERT et al.

(District Court, N. D. New York. May 23, 1910.)

1. CRIMINAL LAW (§ 211*)—PRELIMINARY WARRANT—FOUNDATION.

Under Const. U. S. Amend. 4, providing that no warrant shall issue but on probable cause supported by oath or affirmation, a federal court has no jurisdiction to direct the issuance of a warrant on an information made on the information and belief of the United States district attorney alone; but it must be supported by proof establishing probable cause, to wit, legal evidence that a crime has been committed and that there is probable cause and belief that the accused is guilty of the commission thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420–430; Dec. Dig. § 211.*]

2. INDICTMENT AND INFORMATION (§ 36*)—STATUTES.

Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), providing that for any crime or offense against the United States the offender may, by any judge or justice of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor or judge of a Supreme or superior court, chief or first judge of common pleas, mayor or other magistrate of the state, where he may be found and agreeable to the usual mode of process against the offender of the state or the offender of the United States, be imprisoned or bailed as the case may be, and providing for the return of process for the recognizance of witnesses, etc., relates to preliminary examinations and has no application to prosecutions by information.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 36.*]

3. INDICTMENT AND INFORMATION (§ 9*)—NECESSITY OF COMPLAINT.

An indictment may be found and presented by a grand jury without a preliminary formal complaint or prior arrest.

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

4. INDICTMENT AND INFORMATION (§ 3*)—INFORMATION BY UNITED STATES ATTORNEY—MISDEMEANORS.

A prosecution for an offense not punishable by imprisonment in a penitentiary or state's prison may be instituted by the United States attorney by the filing of an information supported by oath or affirmation and showing probable cause.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9–23; Dec. Dig. § 3.*]

5. CRIMINAL LAW (§ 211*)—INFORMATION—EVIDENCE "SUPPORTED BY OATH OR AFFIRMATION.

Rev. St. § 1022 (U. S. Comp. St. 1901, p. 720), provides that certain offenses may be prosecuted either by indictment or information filed by the district attorney, and Const. Amend. 4, declares that no warrant shall be issued but on probable cause supported by oath or affirmation. *Held*, that the constitutional provision does not require that the oaths or affirmations of the supporting witnesses be taken in open court or before the judge issuing the warrant or directing its issuance, but that the information is so supported where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, properly taken and certified, or when accompanied by the affidavits made on oath of witness sworn before any officer authorized by law to take and subscribe such oaths or affirmations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420–430; Dec. Dig. § 211.*]

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

6. CRIMINAL LAW (§ 211*)—SUPPORTING AFFIDAVITS—INSUFFICIENCY.

An information for violating the pure food law was sworn to on information and belief by the United States district attorney supported by certain letters purporting, but not proved, to have been written or authorized by accused taking issue with the Agricultural Department's claim of violation; also a statement not in the form of an affidavit, by an analyst of the Agricultural Department, to which was attached a notary's certificate that it had been subscribed and sworn to, etc. The paper contained no venue, nor was there any certificate attached to it showing that the person certifying it was a notary or authorized to take and certify oaths and affirmations, and that it was taken and subscribed as required by the laws of the state, etc. *Held*, that the information was not sufficiently proved to justify the issuance of process.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420–430; Dec. Dig. § 211.*]

Information for violation of the pure food and drug law of the United States by George B. Curtiss, District Attorney, against Frank J. Baumert and others. On motion for process. Denied.

George B. Curtiss, U. S. Atty., for the application.

RAY, District Judge. The information, as to all material allegations, is made on information and belief, and charges the shipping, etc., in interstate commerce between Antwerp, N. Y., and points in the state of Pennsylvania, of misbranded cheese, in violation of the so-called "Pure Food and Drug Law" (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]).

Annexed to the information which is verified by the oath of Geo. B. Curtiss, United States attorney for the Northern district of New York, to the effect that the allegations are true except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, are: (1) Letter of Wade H. Ellis, Acting Attorney General of the United States, inclosing "copy of report and other documents transmitted to this department by the Secretary of Agriculture relative to the apparent violation of the food and drug act by F. X. Baumert & Co., New York, in the shipment of misbranded cheese from Antwerp, N. Y., to Detroit, Mich.," and directing that "immediate and proper action" be taken in the matter. Also, what purports to be a letter from F. Baumert & Co., under date of August 3, 1909, to the chief of the Food and Drug Inspection Laboratory, New York City, stating that the firm has been charged with making and selling a misbranded "Neufchatel cheese," but taking issue with and denying the charge as to misbranding, while admitting the firm made and sold the cheese of which the sample referred to was a part. There is no proof that the defendants, or the firm of which they are members, wrote or authorized this letter. Also, a statement signed by J. G. Riley, Analyst, United States Department of Agriculture, in which he says he has examined a sample of cheese labeled: "Crown Brand Neufchatel Cheese. Made in the state of New York from partly skimmed milk"—and which he believes to be the sample purchased from McCann & Co. at Pittsburgh, Pa., on or about June 25, 1909, by Inspector C. A. Meserve of the United States Department of

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

Agriculture and designated by him as "I. S. No. 26086-a"; and that he has made a careful analysis of same and found that "it is not Neufchatel cheese." This statement is not in the form of an affidavit, has no venue, but, after the signature of J. G. Riley, contains the following certificate, "Subscribed and sworn to before me at Washington, D. C., this 5th day of November, 1909." Signed: J. G. Shebley, Notary Public. The seal of the notary, bearing the words "J. G. Shebley, Notary Public," is attached. There is nothing to show that Shebley was a notary when he certified the paper, or that he was authorized to take affidavits or administer oaths in Washington, D. C. There is also attached a statement purporting to be that of McCann & Co. showing where that firm purchased the cheese, and what purports to be a letter of F. X. Baumert & Co., dated July 31, 1909, addressed to chief of the United States Food and Drug Inspection Laboratory, Pittsburgh, Pa., referring to the specimen "I. S. No. 26086-a," and admitting the making of the cheese from which that specimen came and the selling of same to McCann & Co., but asserting that such firm would present proof that the finding of the analyst of the department was an error. There is no proof or even affidavit that the letter was written by the firm or authorized by it. The information expressly states that these letters are the sole basis of the information and belief of the United States attorney.

But assuming that the letters show they were written by the defendants' firm, they do not admit any offense against the law, but deny. At most they admit the making and sale in interstate commerce of the cheese while denying that same offends against the law. They assert it was and is just what the brand says, domestic made Neufchatel cheese; that is "Crown Brand Domestic Neufchatel Cheese. Made in the state of New York from partly skimmed milk."

We have, then, as the only evidence (if it be evidence) of the commission of the offense charged in the information on information and belief, this statement of Analyst Riley verified as stated, who says the cheese "is not a Neufchatel cheese."

This paper is filed with and attached to the information. On this information, supported by these papers and others, now referred to, can this court issue process and cause the arrest of the defendants accused?

A supplemental information on information and belief has annexed the affidavits of James W. Chesewright, made at Pittsburgh, Pa., and that of Charles A. Meserve, made at the same place, the last being taken before a United States commissioner, showing the sale and purchase of the sample of cheese referred to. It raises the plain question whether an information made solely on information and belief and giving as the sources of such information certain letters and affidavits taken out of court and outside the jurisdiction of the court which are attached to and filed with the information, such affidavits tending to support the charge, is sufficient. There is no substantial doubt that offenses against this act may be prosecuted by information duly filed.

It is clear that the court has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof.

The Constitution of the United States (Amend. 4) has wisely provided that:

"No warrant shall issue but upon probable cause supported by oath or affirmation."

However convenient and inexpensive it might be to ignore this provision of the Constitution, a due regard for the rights of the citizen and the danger of gross abuses of the old system which had its basis in the now exploded idea that the king—that is the government—can do no wrong, led to the adoption of this amendment to the Constitution. But it may be and is contended that this provision is complied with when an information setting forth on information and belief the facts claimed to exist is filed accompanied by the mere affidavits of third persons cognizant of the facts, taken out of court by any officer authorized by law to take and certify affidavits; that in such case the information is supported "by oath or affirmation"; and that it is not necessary that the evidence be given in court or before the officer issuing or directing the issuance of the warrant. In short, the contention is that affidavits taken in various states, judicial districts, and jurisdictions before United States commissioners, notary publics, and judges, may be filed with the information made solely on information and belief, and that the charge made in the information is then supported "by oath or affirmation." If this construction is to prevail, this information is sufficient, provided a mere signed statement with a certificate attached signed by some commissioner, notary, or judge, that it was sworn to on a certain day at a certain place, constitutes a legal affidavit.

Hughes, Federal Procedure, p. 43, says:

"A complaint to justify an information must show personal knowledge and probable cause."

On this point the author sites Johnston v. U. S., 87 Fed. 187, 30 C. C. A. 612; U. S. v. Tureaud (C. C.) 20 Fed. 621. The Johnston Case is not in point here, as there the affidavit of Dudley in support of the information, which was signed but not verified by the United States attorney, so far as appears, was taken before the judge of the District Court who issued the warrant. The affidavit stated conclusions merely and not facts. The court said:

"The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed, and it shows no knowledge, information, or even belief on the part of the affiant as to the guilt of the party charged beyond the bare statement that 'there is probable cause to believe that the said offense has been committed by P. T. Johnston.' However false the affidavit may be, it would be next to impossible to assign and prove perjury on it."

While the case speaks of affidavits as the foundation of an information, it is silent on the question whether they must be taken before the court or judge issuing the warrant. United States v. Tureaud (C. C.) 20 Fed. 621, is in point on the question that an information on information and belief and supported by an affidavit or affidavits made on information and belief is sufficient, but is not in point on the question whether or not the affidavits must be taken before the judge or court granting the warrant, except as we might infer that an affidavit taken before a United States commissioner will be deemed sufficient. In that case the affidavit in support of the information was taken before a United States commissioner and not the judge; but the point was not raised, so far as appears, that it should have been taken by the judge holding the court, or directing the issuance of the warrant. In that case the court said:

"The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by the king, because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse. See State v. Mitchell, 1 Bay [S. C.] 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General Wirt holds that even the president is controlled by this amendment. All arbitrary information, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedures, and the learning about informations was left valuable only as showing what proofs were considered adequate in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind.

"The master of the crown, whose duties with regard to informations to be sustained by proofs correspond with the district attorneys' of the United States in the courts of the Union, was required to produce to the court 'such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant, otherwise he will be left to his ordinary remedy by action or indictment.' Cole, Crim. Inf. marginal paging 15, 54 vol. Law Library. This is the measure of proof which is held to be requisite by the courts of the United States under the fourth amendment. See Ex parte Burford, 1 Cranch, C. C. 276 [Fed. Cas. No. 2,148]. Cranch, J., whose dissenting opinion was adopted by the Supreme Court, said: 'It (the warrant) ought to have stated the names of the persons on whose testimony it was granted, and the nature of the testimony, so that this court may know what kind of ill fame it was, and whether the justices have exercised their discretion properly.' When the case reached the Supreme Court (3 Cranch, 453 [2 L. Ed. 495]), 'the judges of that court were unanimously of opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by affidavit.'"

In the matter of a Rule, etc., as to Informations, 3 Woods, 503, Fed. Cas. No. 12,126, Bradley, C. J., held that informations on information and belief were insufficient to justify the issuance of a warrant, and also said:

"It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause

referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he (the magistrate) may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant."

This would justify the filing of an information supported by the affidavits, properly taken, of those knowing the facts taken out of court or before officers duly authorized to take affidavits, and not by the judge directing issuance of the warrant. Not much consideration seems to have been given to this point in either of these cases. Judge Bradley seemed to be of the opinion that the "probable cause" referred to is the sworn statement of the facts, and that the oath of the one knowing the facts and setting them forth is to be presented to the judge who is to issue the warrant, but that this may be done in the form of an affidavit taken before any person authorized to take oaths and affirmations, or by an oral examination before the judge who takes down the facts sworn to on such personal examination. On reading the opinion we would infer that the affidavits, if presented to and filed by the judge in support of the information, may be taken before any officer authorized to take and certify oaths and affidavits.

In United States v. Polite et al. (D. C.) 35 Fed. 58, information was filed by the United States attorney; but same was not sworn to. It was based on and accompanied by the evidence taken before a United States commissioner who held a preliminary examination in the case. The evidence was not taken before the court or judge with which the information was filed and who directed the issuance of the warrant of arrest. The motion to quash was denied.

It seems to me that it would be a useless expense and formality to require witnesses, in cases where the charge may be prosecuted by information—all cases that may be punished by imprisonment in a penitentiary or state's prison are excluded—to travel long distances, and in many cases from one state to another, and it might be across the continent, for the simple purpose of signing and swearing to an affidavit before the judge holding court and who is to direct the issue of a warrant if the facts sworn to justify and require that it issue. I do not think that the Constitution requires that the oath or affirmation be taken in open court or before the judge holding the court and who is to be called upon to order its filing and the issuance of a warrant. If the information itself states with precision and clearness the commission of a crime which may be prosecuted by information, and charges some person with the commission thereof, giving time and place, and it is supported by the affidavits of persons who know the facts and set them forth, and such facts sworn to justify the allegations of the information, I think it all-sufficient, and that such affidavits may be subscribed and sworn to before any officer in any

jurisdiction authorized to take and subscribe oaths and affirmations in criminal proceedings by the laws of the United States. I think the cases all indicate this. I find nothing in the statutes of the United States requiring that prosecution by information conform to the practice of the states respectively in preliminary examinations before committing magistrates. Section 148 of the Code of Criminal Procedure of the state of New York provides that:

"When an information is laid before a magistrate of the commission of a crime he must examine on oath the informant and prosecutor and any witness he may produce and take their depositions in writing and cause them to be subscribed by the parties making them."

But this relates to examinations before committing magistrates preliminary to a trial before them or upon which to base a holding for the action of the grand jury, and applies to all crimes of every grade. The information upon which the courts of the United States proceed is now unknown to the law of the state of New York. People ex rel. Livingston v. Wyatt, 186 N. Y. 383, 389, 79 N. E. 330, 332, 10 L. R. A. (N. S.) 159. The court says:

"Originally an information was a criminal proceeding at the suit of the king without a previous indictment or presentment to a grand jury. It could be preferred only by a responsible public officer when duly supported by affidavit, was limited to misdemeanors, and was a substitute for an indictment. In this sense it is unknown to the law of this state." (New York.)

In 22 Cyc. 271, 282, the question of verifying informations and supporting them by affidavit is quite extensively gone into; but I find no case holding that they or the affidavits filed in support thereof must be sworn to before the judge directing the issuance of the warrant. It goes without saying that when the matter is regulated by statute, and a particular officer is named before whom the information or affidavit must be sworn to, the statute must be followed. But Congress has not specified any officer or class of officers before whom such affidavits must be taken. If in the District Courts of the United States held in New York the practice prescribed by the Code of Civil Procedure is to be followed, the judge, before directing the issuance of a warrant, must examine on oath the informant and prosecutor and all witnesses produced and reduce this examination to writing and cause such deposition to be subscribed by such persons. This would be a too cumbersome as well as an expensive proceeding in cases of misdemeanors, and I do not think it was contemplated by Congress when it authorized the prosecution by information of the minor offenses.

In People v. Vasalo, 120 Cal. 168, 52 Pac. 305, the defendant was prosecuted by information in the superior court of Los Angeles county which was verified before the clerk of the police court of the city of Los Angeles. The point was raised that such clerk had no authority to administer oaths; but it was held that he had such authority, and the information was held good. The statutes of California did not require that the depositions be taken before the magistrate issuing the warrant. This would indicate that, in the absence of a statute demanding that the oath to an information be taken before

the judge or court issuing the warrant, it may be taken before any officer authorized to administer such an oath. 1 Bishop on Criminal Procedure, p. 431, § 604, etc., devotes a chapter to informations; but it is not suggested that the same or the affidavits in support thereof must be sworn to before the judge or court issuing the warrant. See, also, Dig. Law of Cr. Proc., Stephen, 126; "Criminal Information," Wharton Law Dictionary. In Connecticut nearly all crimes are prosecuted by information, and it is common in Indiana. 1 Bishop, Cr. Proc. 38, book 6. In Miller v. State, 122 Ind. 355, 24 N. E. 156, it was held that such an affidavit may be sworn to before a notary public; but in that case the information was quashed for the reason the acts of the notary were void because he had not procured a seal as required by statute.

People v. Nowak, 52 Hun, 613, 5 N. Y. Supp. 239, was a case arising before the committing magistrate, and was controlled by section 148, Code Cr. Proc., already quoted.

I do not think section 1014, Rev. St. (U. S. Comp. St. 1901, p. 716), has anything to do with regulating prosecutions by information. That section relates to preliminary examinations before a justice, judge, or United States commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by the United States attorney, and in such cases, conforming to the practice prescribed by the New York Code of Criminal Procedure, it would be necessary to file a complaint or so-called 'information," and for the judge or commissioner to examine the witnesses and reduce their statements to writing and cause them to be subscribed. But an indictment may be found and presented by a grand jury without any preliminary formal complaint or prior arrest, whereupon the arrest follows. So prosecutions for crimes of the nature before referred to may be instituted by the United States attorney who presents to and files with the court when in session an information which must be supported by oath or affirmation and show probable cause and which, in such cases, takes the place of an indictment and thereupon the warrant issues. Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it state facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge.

Congress might have provided, when it enacted section 1022, Rev. St. (U. S. Comp. St. 1901, p. 720), stating that certain crimes and offenses "may be prosecuted either by indictment or by information filed by a district attorney," that such information shall be supported by the oaths or affirmations of witnesses taken in open court or before the judge issuing the warrant, or directing its issuance; but it did not, and I do not think the language of the Constitution, above quoted, can be construed to require this. The information is supported by oath or affirmation where it is accompanied by the evidence

of witnesses sworn before a United States commissioner on a preliminary examination, if taken in due form and certified by him, or when accompanied by the affidavits made on oath of witnesses sworn before any officer authorized by law to take and subscribe such oaths or affirmations. In my judgment it would be a strained construction to hold that, after a preliminary examination held in due form before a commissioner, where the facts are fully disclosed and the examinations are reduced to writing and sworn to, the United States attorney cannot file an information based on and supported by such evidence and prosecute by information, instead of indictment, without again producing the witnesses in open court on filing the information. I am of the opinion that on filing an information supported by the evidence taken before a commissioner a new warrant would properly issue; that this is true even if such examination were held before a commissioner in another district. If this be true, the Constitution is satisfied when information is filed supported by affidavits duly taken and subscribed before officials authorized to take oaths and affirmations.

But the information presented in this case does not meet these requirements. Letters do not prove themselves. There must be an affidavit showing that the defendants wrote or authorized the letters annexed to the information. The affidavits must contain a venue and, if sworn to before a notary public, must have a certificate attached showing that the person certifying them was at the time a notary public and authorized by the laws of the state or district to take and certify oaths and affirmations, and that same is taken and subscribed as required by the laws of the state or district. If taken before a state judge or justice of the peace, there must be a like certificate, and so of commissioners outside the district where the affidavit is to be used.

For these reasons, I must decline to direct the issuance of a warrant on the information presented.

In re CARPENTER.

(District Court, D. South Carolina. June 1, 1910.)

1. HUSBAND AND WIFE (§ 49¾*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—GIFT—PRESUMPTION.

   Where a wife on coming of age receipted to her husband for a sum of money which he held as her guardian, but he retained the money, a gift is not presumed unless the circumstances make it plain that it was so intended.

   [Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 259; Dec. Dig. § 49¾.*]

2. HUSBAND AND WIFE (§ 49¾*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—GIFT—EVIDENCE.

   Evidence *held* insufficient to show that the parties intended a gift of a wife's money to her husband, when she receipted for the money, though he retained it in his possession.

   [Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49¾.*]

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

3. HUSBAND AND WIFE (§ 43*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE —LOAN—EVIDENCE.

To constitute the relation of debtor and creditor between husband and wife, where she receipted to him for money which he retained in his possession, there must be some evidence of a contract between the parties, and a note executed by the husband without the wife's knowledge, and which was never delivered to her, is not sufficient.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 226; Dec. Dig. § 43.*]

4. HUSBAND AND WIFE (§ 113*)—SEPARATE PROPERTY OF WIFE—CONVEYANCES AND CONTRACTS TO CONVEY.

Under the Constitution and laws of South Carolina, the real and personal property of a married woman, whether held by her at the time of her marriage or accruing to her thereafter by inheritance or otherwise, becomes her separate property, and she may dispose of it to the same extent as if she were unmarried; the husband having no marital rights such as existed at common law, but being under the same obligation as at common law to support and maintain the wife and family.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 394; Dec. Dig. § 113.*]

5. BANKRUPTCY (§ 340*)—ADMINISTRATION OF ESTATE—REFEREE—HEARING.

On a hearing before a referee in bankruptcy as to a claim of the bankrupt's wife against the estate, testimony of the wife that money for which she gave a receipt to the bankrupt was left with him in the confidence that he would take care of it for her, and that on many occasions thereafter when reference was made to it he told her that he was taking care of it, was competent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

6. TRUSTS (§ 44*)—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that money retained by a husband after his wife gave him a receipt therefor was held by him as a trustee, and that he is liable to account therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

7. LIMITATION OF ACTIONS (§ 102*)—COMPUTATION OF PERIOD—RECOVERY OF TRUST FUND.

A claim of a wife against the estate of her husband in bankruptcy for a fund which he held in trust for her was not barred by limitations, nor by her laches, where up to within three years he had been in prosperous financial circumstances, and there had been nothing to awaken her suspicions that her money was in danger, or that there was any breach of trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. § 102;* Trusts, Cent. Dig. § 570.]

8. BANKRUPTCY (§ 325*)—ADMINISTRATION OF ESTATE—ACCOUNTING.

In an accounting between a bankrupt and his wife as a claimant against the estate, he is entitled to credit for property transferred to her to its value at the time of the transfer, and not its increased value at the time of the accounting.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 325.*]

9. BANKRUPTCY (§ 314*)—ADMINISTRATION OF ESTATE—CLAIMS AGAINST ESTATE.

Where a wife signed a receipt in full for $3,138 in connection with the sale of real estate of her parents, where the husband and another bid off at the sale a certain tract at $2,805, and the husband subsequently paid the other $500 for his interest in the bid and had the property conveyed

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

to his wife, her claim against the estate of her husband in bankruptcy for the amount of the receipt will not be allowed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In the matter of the bankruptcy of W. C. Carpenter. Petition to review the order of the referee disallowing the claims of Mrs. Carrie J. Carpenter. Affirmed in part, and reversed in part.

Butler & Hall, for Mrs. Carpenter.

H. K. Osborne, for trustee.

BRAWLEY, District Judge. This is a petition for review of the order of the referee disallowing the claims of Mrs. Carrie J. Carpenter. Carpenter was adjudged a bankrupt upon involuntary petition filed January 31, 1908. He resisted the petition, after a trial by jury was adjudicated a bankrupt, and upon appeal (174 Fed. 603, 98 C. C. A. 449) the judgment below was affirmed, and the estate is being administered in due course.

The claims proved largely exceed the assets, and the question now before me is whether the claims of the bankrupt's wife are to be allowed as debts. While the cause was pending in the Court of Appeals, Carpenter became non compos mentis, and is now confined within an asylum. The claim of Mrs. Carpenter is for moneys belonging to her separate estate, alleged to have been received by her husband, and consists of several items, each of which will be considered in its order.

It appears that at the time of her marriage she was a minor, entitled to an interest in the estate of her father, then being administered in the probate court; that Carpenter was appointed her guardian; that on becoming of age, March 20, 1891, she receipted him as guardian for the sum of $1,775.85, and he was discharged; and that he retained in his hands the sum mentioned. The case turns upon whether this is to be considered as a gift to the husband, or as a loan to him, or whether he is to be treated as a trustee. At the time the money was received, and for many years thereafter, in fact until a very short time before the adjudication in bankruptcy, Carpenter was a successful business man, upright in character, and correct in all his relations. There is no testimony tending to show that the wife intended to give, or that the husband intended to receive, this money as a gift, and a gift is not presumed unless the circumstances make it plain that it was so intended. All of the circumstances here are against the presumption of a gift. The husband was a man of property, in a prosperous condition, and the testimony of Mrs. Carpenter is that her husband told her that he would take care of it for her. Carroll, who was a partner of Carpenter, testified that some years after the receipt of the money he had some talk with him about "Carrie's money," which he put in the store, putting in a duebill or a deposit slip, he is uncertain which, and that he afterwards took it out; that he did not know what disposition he made of it; and there was found in the store, after the commencement of the bankruptcy proceedings, a prom-

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

issory note dated May 23, 1895, for $2,270.57, due one day after date, with interest at 7 per cent. from date, payable to Mrs. Carpenter, and signed by the husband. This note was never delivered to Mrs. Carpenter, and she had no knowledge of it. It is supposed, and it is probably true, that this note represented the amount of money which Carpenter had received as guardian, with interest, and was intended as a memorandum to show the amount due by him at the date of the note, and there is testimony of other witnesses that Carpenter had referred to "Carrie's money." All of this clearly shows that Carpenter did not regard this money as a gift. As it is clear that Mrs. Carpenter never saw the note just referred to, and that the same was never delivered to her, there is an utter absence of testimony tending to show that she intended it as a loan. To constitute the relation of debtor and creditor, there must be some evidence of a contract. Under the Constitution and laws of South Carolina, the real and personal property of a married woman, whether held by her at the time of her marriage, or accruing to her thereafter by inheritance or otherwise, becomes her separate property, and she has power to dispose of it to the same extent as if she were unmarried. The husband has no marital rights such as existed at common law; but there is the same obligation on him as at common law to provide for the support and maintenance of the wife and family.

It is not claimed that there was any express trust created by direct and positive words, and manifested by any instrument in writing; but that there is an obligation arising out of confidence reposed by the wife in the husband, superinduced as matter of equity upon the transaction by operation of law for the purpose of carrying out the presumed intention of the parties. Carpenter received this money as the regularly appointed guardian of his wife, and when she attained her majority, for the purpose of discharging the sureties on his guardianship bond, she receipted to him for the money; but he continued to hold it as a quasi trustee, unless it can be shown that in some way he held it in another capacity, and I am of opinion that he did not take it either as a gift or as a loan. Of course a gift cannot afterwards be converted into a debt. Carpenter's repeated reference to it as "Carrie's money" negatives the idea that it was his own, for if it had been given to him or loaned to him it would have become his own money. There can be no doubt that, if this money could be traced to an investment in any specific property, the wife's right to follow it and to establish her claim to it would be incontestable in the absence of any circumstances creating an estoppel; but there is no proof of any such investment. The wife's receipt to the husband on the termination of the guardianship was manifestly given only for the purpose of discharging the husband on the obligation of his bond to the probate court. Objection was made on the hearing to the testimony of the wife; but the referee has held, correctly, as I think, that the testimony was competent, and I need not refer to the reasons given for his conclusion. The substance of this testimony is that the money was left with the husband in the confidence that he would take care of it for her, and she says that on many occasions

thereafter, when reference was made to it, he told her that he was taking care of it. There is no testimony that he formally acknowledged that he held the money in trust; but it seems to me that by his acts he made himself a trustee sub modo, and that in equity he must be held liable as a trustee for the funds belonging to his wife's separate estate, and must account for the same, unless some superior equities supervene.

"If a husband receives the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him; but he is prima facie a trustee for her, and a gift from her to him will not be presumed without clear evidence." Perry on Trusts, § 666.

In Stickney v. Stickney, 131 U. S. 238, 9 Sup. Ct. 677, 33 L. Ed. 136, there was a suit by the widow of William Stickney against certain of his heirs to establish her claim as creditor for the sum of about $79,000 against the estate, real and personal, held in the name of her husband at the time of his death; her contention being that all of that estate was acquired by her husband with her moneys, received under the will of her deceased father, and which were delivered to him to invest for her benefit, but which, without her knowledge, and contrary to her directions, he used and invested in his own name. The married woman's act of the District of Columbia is similar to the law of South Carolina in giving to the wife absolute control of her separate estate. There was a contention in that case, as there is here, that there was a presumption, arising from her allowing her husband to use the moneys of her separate estate, that she intended them as a gift to him. In considering it, Mr. Justice Field says:

"Any presumption of that kind, if it would otherwise arise in the case, was entirely rebutted by her repeated and express directions to invest the moneys for her benefit in her own name; but we are of opinion that, in the absence of her testimony, there would be no presumption, since the passage of the married woman's act, that she intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him. If there be no proof of indebtedness to the party receiving the moneys, the presumption would naturally be that they were placed with him to be held subject to the order of the other party or to be invested for the latter's benefit. We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him."

The opinion cites with approval from a decision of the Supreme Court of Pennsylvania (Grabill v. Moyer, 45 Pa. 530, 533), as follows:

"After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value; but the law does not transmit it without the act of the parties. If mere possession were a sufficient evidence of the gift, the act of 1848 (similar to our married woman's act) would be useless to the wife. Nothing is more easy than for the husband to obtain possession even against the consent of the wife, and where he obtains it with her consent, it can be at most but slight evidence of a gift."

The opinion also cites the case of Bergey's Appeal, 60 Pa. St. 408, 100 Am. Dec. 578, another Pennsylvania case, where Bergey received money belonging to his wife, for her patrimonial portion, in her presence, and both united in the receipt for it.

"Not a word was spoken by the wife when her husband took up the money to count it, and put it in his pocket; nor was there a word ever heard afterwards to the effect that the wife had made a gift of it. The husband appropriated it to the purchase of a farm, and the Supreme Court of the state held that no inference could arise of a gift in the transaction as detailed, observing that she was not bound to attempt a rescue of it from him or proclaim that it was not a gift. She might rest on the idea that his receipt in her presence was with the intent to take care of it for her."

And again:

"If it was not a gift the husband was a trustee for his wife, and, whether he kept the money in his pocket or put it into real estate which he had purchased, honesty required that he should account to her for it. He could be compelled to do so in equity."

Upon the authority of this case I must hold that Carpenter was liable to account for this money as trustee of his wife.

There is nothing in the case of McLure v. Lancaster, 24 S. C. 273, 58 Am. Rep. 259, relied on by counsel for creditors, which is in conflict with this view. That was an appeal founded upon alleged errors in the charge of the circuit judge, where, after the death of the husband, an action was brought by the widow against his executors to recover rents and profits of land accrued during the time the husband had been in possession. The circuit judge left it to the jury to determine whether a gift to the husband could be inferred from the fact of long acquiescence by the wife in the management and control of her lands, and the appropriation of the income therefrom to his own use, without objection by her; the verdict of the jury being against the wife.

I have carefully examined all the other cases cited by the counsel for the creditors, and find nothing therein to change the views already expressed. Every case of this nature must be determined by the facts peculiar to it, and upon general principles. This principle is stated by Perry on Trusts, § 206, as follows:

"Whenever one person is placed in a relation to another by the act or consent of that other, or the act of a third person or of the law, so that he becomes interested for him or with him in any subject of property or business, he will in equity be prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has been associated."

It remains only to consider the further contention of the counsel for creditors that this claim is barred by the statute of limitations, or by laches. The money was received by Carpenter as the statutory guardian of the wife, at a time when she was little more than a child; and when she attained her majority, being little versed in business, it was but natural that she should leave the money in his hands, in the trust and confidence that he would take care of it for her, and she testifies that he promised to do so, and repeatedly informed her that he was taking care of it. He was an honorable man, in prosperous circumstances financially, and up to 1907, when his financial troubles,

arising mainly out of unfortunate speculations in cotton, began, there was nothing to awaken her suspicions that her money was in danger. There is nothing in the testimony or in the circumstances tending to show that this confidence was unreasonable, or calculated to awaken any suspicion that there was any breach of trust. She had no knowledge of the transaction referred to by Carroll of Carpenter's putting the money in the store and of his taking it out, or of the execution of the note, which was never delivered to her, and found among his papers after the bankruptcy. There was no assertion of any adverse claim on the part of Carpenter, or of any claim on his part inconsistent with the relation of trust and confidence which she had reposed in him at the beginning, and nothing to put upon her the duty of making a demand for the money. I must conclude, therefore, that her claim is not barred by the statute of limitations, or by her laches.

A case might arise where a wife, intrusting her property to her husband, upon the supposed ownership of which standing in his name he might obtain credit that otherwise might not have been given him, would be estopped from setting up her claim as against creditors; but there is no proof of such facts here, and no circumstances to create such estoppel.

The next item in Mrs. Carpenter's claim arises out of the transaction in the court in Cherokee county in August, 1901, in connection with the sale of the real estate of her parents, where she signed a receipt in full for $3,138, which she now claims against the bankrupt estate of her husband. This claim cannot be allowed. There is no proof that Carpenter received this money. The transaction seems to be as follows: Carpenter and Cudd bid off at this sale the "home place" at $2,805. Carpenter subsequently paid Cudd $500 for his interest in the bid, but took no conveyance of the same in his own name, and by his direction the clerk of the court who made the sale conveyed the "home place" to Mrs. Carpenter. All of this was done apparently without Mrs. Carpenter's knowledge. The creditors now claim, and have offered testimony to show, that this place is worth $8,000, and that, in the event that it is decided that Mrs. Carpenter has a subsisting claim against the bankrupt estate, Carpenter should be credited with $8,000. This contention cannot be sustained. In any accounting Carpenter would be entitled to credit for the value of the property at the time the transfer was made, which was in the year 1901, and not its present value. Ordinarily, what property brings at a public sale is regarded as a test of its value; but there may be circumstances which show that a bid at a public sale does not represent a fair value of the property, and some such circumstances appear here, for it seems that Carpenter paid to his associate administrator, Cudd, $500 for his share of the bid, and; assuming that his own share was of equal value, it would appear that the value of the "home place" was $1,000 more than the bid of $2,805. Inasmuch as this item of Mrs. Carpenter's claim is based upon the supposed receipt by Carpenter of the sum above mentioned, and it appears that he did not receive the money, but by arrangement with the clerk of the court transferred his bid to his wife, who received the conveyance of

the lands in question, that fully discharged all obligation with respect thereto, and this claim is disallowed.

There are sundry other items in the claim presented by Mrs. Carpenter, including among them some claims arising out of her interest in her brother's estate, and there is proof of conveyances of certain property by Carpenter to his wife. The referee has disallowed them, and it has not been made clear to me that Carpenter has received any actual moneys in these transactions for which he is liable to an account beyond the conveyances mentioned.

I am therefore of opinion that the referee's report should be, and it hereby is, affirmed, except as to the item of $1,775.85, received by Carpenter March 20, 1891, and it is adjudged that Mrs. Carrie J. Carpenter is a creditor for said amount, with interest thereon, and entitled to share pari passu with other creditors in the bankrupt estate.

In re DAVISON.

(District Court, N. D. New York. April 14, 1910.)

1. BANKRUPTCY (§ 323*)—SECURED CLAIMS—SECURITY—VALUATION—PROCEEDINGS.

Where a bankrupt's creditor held certain insurance policies, having no cash surrender value, as security for its claim, and the creditor and the trustee could not agree on their valuation, the creditor was entitled to have the value fixed by litigation before the referee, under Bankr. Law July 1, 1898, c. 541, §§ 57, 58, 30 Stat. 560, 561 (U. S. Comp. St. 1901, pp. 3443, 3444), providing that the value of securities shall be determined by converting them into money according to the agreement pursuant to which they were delivered to the creditor, or by agreement, compromise, or litigation, as the court may direct, and the amount of such value credited on the claims and dividends paid on the balance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. § 323.*]

2. INSURANCE (§ 222*)—INSURANCE POLICIES—CONVERSION.

Where a bankrupt assigned certain insurance policies having no surrender value, to a bank as collateral security for certain loans, and there was no agreement as to the mode in which the value of the policies should be determined or the manner in which they should be sold or disposed of to realize thereon in case of the buyer's default, the bank was authorized at its election to convert the policies into money and apply the proceeds to the debt, and was not required to continue the loan until the maturity of the policies, paying the premiums to preserve the security and trusting to it for reimbursement on the death of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. 222.*]

3. BANKRUPTCY (§ 323*)—SECURITY—VALUATION—SURRENDER.

Where a bank held certain policies as security for a debt against a bankrupt, and, on bankruptcy intervening, the policies were valued in litigation before the referee, and the amount of such value deducted from the bank's claim in ascertaining the amount on which it was entitled to dividends from the bankrupt's estate, but no offer was made by the trustee to redeem the policies in accordance with the pledge, the bank was not required to surrender them to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 323.*]

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

In the matter of the bankrupt proceedings of Charles M. Davison. On petition of the Citizens' National Bank for review of a referee's order for settlement of allowance of trustee's account involving a prior order fixing the value of a secured creditor. Affirmed.

Nash Rockwood, for Citizens' National Bank of Saratoga Springs.

Clarence B. Kilmer, for First National Bank of Saratoga Springs, a creditor.

RAY, District Judge. Charles M. Davison was duly adjudicated a bankrupt on the 5th day of May, 1903. The first meeting of creditors was held June 1, 1903, when the First National Bank of Saratoga Springs, N. Y., filed its proofs of claim amounting to $16,127.42 represented by the promissory notes of the bankrupt held by the bank. As collateral security to such indebtedness the said bank held certain life insurance policies upon the life of said Davison calling for about $17,500 on the death of Davison, and giving certain rights and privileges by way of paid-up policies, etc., at an earlier day at election of insured. The annual premiums required to keep same alive amounted to between $800 and $900. The proof of claim alleged a gross indebtedness of $16,127.42, the value of the policies held as security to be $2,714.45, and that the claim over and above such security was $13,413.97. Since the bankruptcy the said bank has paid the premiums to keep said four policies alive. About July, 1903, the said bank filed a petition for the ascertainment or determination of the value of such securities held by said bank under section 57h of the bankruptcy law. Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). The trustee took issue thereon and the referee filed an opinion January 25, 1904, as follows:

"There being no surrender value to the policies in the present case it will be necessary to determine their value by arbitration unless some satisfactory accommodation between the bank and the trustee can be reached. Whatever order shall be necessary may be entered, or, in case of disagreement, will be settled upon notice."

No agreement was reached, and finally, November 16, 1906, the referee made an order directing that their values be determined by litigation before him. Thereupon proofs were taken and an order was entered December 13, 1907, determining the value of the policies as $3,500, and allowing the claim after deducting said sum at $12,627.42. No exception was taken to either of these orders, and there was no appeal or petition for a review until April 2, 1909, when the Citizens' National Bank, a creditor, filed its petition of review. December 31, 1908, at a meeting of creditors held for the purpose of examining and passing upon the account of the trustee same was approved and allowed, and a first and final dividend was declared under which the said First National Bank became entitled to the sum of $2,031.75. On such accounting the said bank without objection proved that since the adjudication in bankruptcy of said Davison it has paid the sum of $5,568.89 in premiums to protect and preserve such security in force.

As the policies had no cash surrender value, a conceded fact, the referee proceeded on due notice and hearing to determine the value of

such securities, policies, under subdivision "h" of section 57, and, as it was not done by agreement, determined that it should be done by litigation, and the litigation was had. That subdivision clearly authorizes the determination of the value of securities held by secured creditors by the mode here adopted and it is conclusive, no error in the admission or rejection of evidence being alleged, and no error in the result reached being claimed, provided the terms of the agreement pursuant to which the securities were delivered to the bank do not point out a mode for converting them into money or for ascertaining their actual value different from that adopted. Section 57a and section 57h read as follows:

"a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. * * *

"h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The assignments to the bank of the two policies issued by the New York Life Insurance Company were straight-out assignments "as security for all notes signed by me, or to be signed by me, or indorsed by me, and all renewals of the same in whole or in part." There is no suggestion of any agreement as to the mode in which the value of the policies shall be determined, or the manner in which they shall be sold or disposed of for the purpose of realizing thereon in case the assignor (insured) should not pay the notes at maturity. It was of course contemplated that the bank in such event could, if it saw fit, convert them into money and collect in due course any balance. The bank did not agree to continue the loan until the maturity of the policies, paying the premiums, if necessary to preserve the security, and trust to the security for reimbursement on the death of the insured. Nor did it expressly or impliedly agree that, if it saw fit to realize what it could on the securities in case of default in payment of the notes, it would take pay or realize in one of the modes specified in the policies themselves; that is, by exercising one of the options. The assignments to the bank of the two policies issued by the Home Life Insurance Company are quite different in terms. They read:

"For value received, I do hereby assign, transfer and set over the above-described policy of assurance and all sums of money, interest, benefit and advantage whatsoever, now due or hereafter to become due by virtue thereof, subject to all the terms and conditions therein expressed unto the First National Bank of Saratoga Springs, New York, in trust for the following uses and purposes, viz.: First to secure to it the payment of any sum or sums of money which, at the date of any settlement of the policy, may be due and owing from me for any moneys which I may have received from it, or which it may have paid or be liable to pay for me, or for premiums on the said policy with interest. Second, to pay the remainder of the amount which it may receive upon the said policy according to its terms, and I do hereby direct, authorize and empower the said trustee to demand and collect the amount assured by the said policy and to apply and pay over the same as aforesaid."

These assignments are (1) of the policies and of all sums of money due or to become due thereon; (2) subject to all the terms and conditions therein expressed; (3) in trust, however, for the following purposes, viz.: (a) "To secure to it the payment of any sum or sums of money which, *at the date of any settlement of the policy*, may be due and owing from me for any moneys which I may have received from it, or which it may have paid or be liable to pay for me, or for premiums on the said policy with interest;" and (b) to pay the balance to any person entitled thereto according to the terms of the policy. This is not an agreement as to the ascertainment or determination of the *value of the policies as a security* even if construed as an agreement to defer payment of the notes secured thereby in case it should become necessary to realize on the securities. It cannot reasonably be construed into an agreement to wait until the death of the insured in case of bankruptcy, pay the premiums in the meantime, collect the policy, deduct the notes or the balance due and premiums paid, and pay over the balance, if any, to the person or persons entitled thereto, and that the value of the security as such can be determined in no other way. As a secured creditor the bank has the right to have the value of the securities as such determined, and to have that value deducted from the amount due or unpaid on the notes and have a dividend on the balance. This is true even if ultimately the persons entitled to the surplus of the policies, if any, may call on the bank to account. It is not necessary to decide that question. The bank is a secured creditor, and as such is entitled to have the value of its security determined, deducted, and receive a dividend on the balance of its claim. I do not think this action will cut off any right others may have in the proceeds of the policies on their maturity. But if so, that fact cannot affect the right given by the law itself. The assignment as security cannot be construed as a waiver of the right to share in the property of the bankrupt in case of bankruptcy. The debt owing the bank evidenced by the notes is now due. The policies at maturity—the death of the insured—may be worth more and produce more money than is then due the bank, in which case, quite likely, under the wording of these assignments the bank may be liable to account for such surplus. In re Newland, Fed. Cas. No. 10,171, 9 Nat. Bankr. Reg. 62. On the other hand, the policies may be worth nothing whatever, taking into account the premiums the holder will be compelled to pay to keep them alive and the interest on such premiums. Taking into consideration all the facts, amount of the policies, premiums paid and to be paid, probably, the probable duration of the life of the insured, the privileges or options that may be exercised under the terms of the policies, and the value of the exercise of such options, the court has fixed the present value of such policies as a security, and the mode adopted in getting at this is not challenged. If the bank had exercised, assuming it had the power so to do, either of the options, it would not have realized on its debt more than it has been compelled to credit.

The Citizens' National Bank also contends that the bank should be compelled to surrender these policies to the trustee for the benefit of the estate, if allowed the present value of the policies as determined

by the referee in bankruptcy to apply on the debt and a dividend on the balance, as has been done, and that it was error to refuse to provide for a surrender. The contention seems to be that having procured the present value of the securities to be determined and having received that value to apply on the debt, and having, also, taken a dividend, pro rata, with the others on the balance of the debt, the interest of the bank in such securities has ceased, and the equity, if any, belongs to the estate. But the bank has the policies as securities for the entire debt and must pay therefor their present value by crediting the amount on the debt before having a dividend on the balance. Sections 57a, 57e, 57h. The law does not provide that on crediting the value of the security on the debt, and being allowed a dividend on the balance, the secured creditor is to surrender the security, even if tendered the value thereof as fixed by the court. The secured creditor has the right to retain the policies as security for any balance and any premiums it may pay to keep them alive. In re Frank F. Newland, Fed. Cas. No. 10,170, 7 Nat. Bankr. Reg. 477. The policies belong to the bank as security until the debt is paid, but for purposes of a dividend, as well as ultimate payment, it is compelled to credit now the value of such security. It does not follow that the policies and all sums received thereon at maturity will become or now become the property of the bank absolutely, for the ownership is a qualified one, I think, but the bank cannot be deprived of them until the notes are fully paid. In re Frank F. Newland, Fed. Cas. No. 10,170, 7 Nat. Bankr. Reg. 477. These policies were assigned to the bank in good faith more than four months before the bankruptcy, and the rights of the bank therein and thereto are in no way affected by the bankruptcy except that it is compelled, if it elects to prove its claim, to credit the present value, as fixed in the mode provided by the act, on the debt, and I do not think this operates as an absolute sale and transfer to the bank.

It is useless to speculate as to what the rights of the parties might have been or would be had the trustee or creditors offered to purchase the policies at a greater sum than the court or referee fixed as their value. Probably such offer or offers would have determined that their value was at least that sum, but, even then, the bank was not under obligation to let the policies go, except to some one willing to pay more than it would. Here, so far as appears, the trustee did not offer to purchase the policies or tender the amount fixed as their value and demand their surrender. Clearly, the bank cannot be compelled to part with its securities for a debt, there being no preference, until its debt is paid in full, except in case the securities are sold or converted into cash, and in such case it is entitled to the proceeds of the sale or conversion to apply on the debt. The bank cannot be compelled to part with or surrender its security for the reason it receives a dividend, or as a condition of receiving a dividend, after crediting the present value of the security as determined by arbitration or by litigation as the court directs. It is, of course, true that the trustee became the owner of all these policies subject to the rights of the bank. He took them in the same plight and condition and subject to the same equities

as the insured held them, and that condition was that the bank had the right to hold them as security for the entire debt, keep them alive by paying the premiums, and collect and apply the proceeds at maturity on such debt, or to dispose of them under the laws relating to pledges. The trustee had the right to redeem these policies on paying the debt due the bank, for the benefit of the estate. But I find no evidence of any offer to do this.

The bankruptcy law in plain terms says that in such a case as this the secured creditor may prove his debt, have the value of his security determined, credit such value, and have a dividend on the balance except in cases where the contract of pledge provides a way of converting it into money, in which case that is to be done under and pursuant to the terms of the contract or agreement under which the thing pledged is held. In the absence of something in the bankruptcy act to the contrary I am of the opinion that, in cases where the value of the security is determined by agreement, arbitration, or litigation as the court directs, it is contemplated that the secured creditor is to retain such securities, after receiving the dividends, subject to such claims as others may have therein or thereon when finally converted into money. With this the contract of pledge may have something to do while in cases where the contract is silent the rights of the parties would be determined by the general rules of law applicable. This seems to have been the ruling under the prior bankruptcy act, the provisions of which, in this regard, were substantially the same as those of the present law. See cases cited. The Citizens' National Bank does not point out any error in the rulings of the referee or in the mode of arriving at the value of the policies which operates to the injury of that bank, a creditor of the bankrupt. Clearly borrowing under the options or taking paid-up policies would not have given a greater value than was fixed by the referee. I do not see that the policies could have been converted into cash in any way that would have produced more than $3,500. I am not called upon to decide what the rights of the parties or of the trustee would be should the insured die before the estate is finally closed, or even thereafter.

I do not find it necessary to pass upon the question raised by the First National Bank, that the order providing for fixing the value by litigation and the order fixing such value cannot now be reviewed, for the reason a petition for the review thereof was not filed in time, although it would seem that the point is well taken. Bacon v. Roberts, 146 Fed. 729, 77 C. C. A. 155; In re Holmes, 142 Fed. 391, 73 C. C. A. 491; In re Chambers Calder & Co., 6 Am. Bankr. Rep. 709; In re Grant, 16 Am. Bankr. Rep. 256, 143 Fed. 661. And see prior opinion of this court in Re Nichols, 22 Am. Bankr. Rep. 216, 220, 221, 166 Fed. 603.

The orders of the referee are affirmed.

DELAWARE RIVER FERRY CO. v. AMOS.

(District Court, E. D. Pennsylvania. July 6, 1910.)

No. 28.

SHIPPING (§ 209*)—LIMITATION OF VESSEL OWNER'S LIABILITY—SCOPE OF REMEDY—SINGLE CLAIM FOR LESS THAN APPRAISED VALUE.

Rev. St. § 4283 et seq. (U. S. Comp. St. 1901, p. 2943), limiting a vessel owner's liability for damage done without his privity or knowledge to the value of his interest in the vessel and in her freight then pending, and Supreme Court admiralty rules 54 to 57, prescribing procedure to ascertain the value of such interest, etc., relate to a claim or claims growing out of a particular act for which it is sought to hold the owner liable, and in the proceeding to limit the owner's liability it is these claims only that are pertinent in the first instance, the ultimate disposition of the fund produced by the owner's interest being a matter for subsequent determination; and admiralty may refuse to exercise its jurisdiction to limit liability, where there is and can be only a single claim against a single owner, and when the appraised value of the vessel exceeds many times the sum already adjudged to be due claimant.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 648; Dec. Dig. § 209.*

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. Petition by the Delaware River Ferry Company against Jennie Amos. On respondent's exception to the petition. Petition dismissed.

William Clarke Mason, for petitioner.

Michael Francis Doyle and Thomas Leaming, for respondent.

J. B. McPHERSON, District Judge. Section 4283 of the Revised Statutes (U. S. Comp. St. 1901, p. 2943) declares inter alia that the liability of a vessel owner for any loss or damage done, occasioned, or incurred without his privity or knowledge shall in no case exceed the amount or value of his interest in the vessel and in her freight then pending. Succeeding sections, and admiralty rules 54 to 57 of the Supreme Court, provide the machinery for ascertaining the value of such interest, the amount of claims, and other matters pertinent to the inquiry. Under these provisions of the federal law the present petition has been filed.

It appears that Jennie Amos suffered a personal injury in 1905 on board a ferryboat belonging to the Delaware River Ferry Company, while the boat was upon the water between the Pennsylvania and the New Jersey shores of the Delaware river. This was a tort of which the District Court in admiralty had jurisdiction. But, as the admiralty jurisdiction of this particular wrong was not exclusive, she elected to sue in one of the common pleas courts of Philadelphia county. The ferry company took no steps to remove the controversy to the District Court, but litigated the case persistently and (in part at least) on the merits for five years in the courts of the state; there having been two trials in the common pleas and one appeal to the Su-

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

preme Court of Pennsylvania. The appeal resulted in the affirmance of a judgment for $8,000 against the company, upon which execution was duly issued. At this late stage in the dispute, the present petition was filed, asking for a limitation of the company's liability, and an appraisement has been made, valuing the boat at $92,250. The questions for decision arise upon an exception alleging that the District Court has no jurisdiction. I do not understand this to mean that the court has no jurisdiction of the subject-matter, but merely that under the facts disclosed in the proceeding it should not now entertain the petition.

Turning to the petition, we find that it sets forth the corporate ownership of the boat by the company, the fact of the respondent's injury during one of its trips across the river, a brief outline of the accident, a denial of fault or negligence on the part of the master or crew, and an averment that the injury was caused solely by the respondent's negligence. The petition then goes on:

"(6) That the said petitioner has contested in the court of common pleas No. 5, of Philadelphia county, and in the Supreme Court of the state of Pennsylvania, in the aforesaid suit of Jennie Amos v. Delaware River Ferry Company of New Jersey, the petitioner herein, the jurisdiction of the said court of common pleas of Philadelphia county in the premises, and has contended that the exclusive jurisdiction in the said suit is in the United States District Court for the Eastern District of Pennsylvania sitting in admiralty. The said court of common pleas of Philadelphia county and the Supreme Court of Pennsylvania have held in the said suit that the said court of common pleas of Philadelphia county had jurisdiction in the premises."

The prayer of the petition is that the company may have the benefit of the federal statutes relating to limitation of liability; that the interest of the company in the boat may be appraised; and that—

"the petitioner may give stipulation for the value thereof as fixed by such appraisement, or pay such value into court, the same to be for the benefit of the said Jennie Amos in case she shall establish the liability of the said petitioner in the premises, and of all other claimants who may prove to be entitled to claim compensation against the said ferryboat Ocean City by reason of the premises, or on account of any other claim or indebtedness due by your petitioner as owner of the said ferryboat at the time hereinbefore mentioned, and that such claims, when proved, be paid in proportion to the amounts or otherwise as this court shall direct, and that thereupon the petitioner may be discharged from all liability for all losses, injuries, and damages by reason of the premises aforesaid, and for all claims or debts incurred on account of the said ferryboat Ocean City, and, further, that the said court will be pleased to make an order to restrain the further prosecution of the before-named action, and of all or any suit or suits against the petitioner in respect to any such claim or claims."

It will be observed that the petition contains no averment that there are, or are likely to be, any other claims against the company growing out of the act that injured the respondent. From the nature of the accident, such claims are highly improbable. There is a vague and general suggestion that other claims or indebtedness may perhaps be due by the company as owner of the boat; but, even if definite averments on this subject existed, it is apparent, I think, that they would not be primarily relevant at this stage of the proceeding. The federal statutes refer to a claim or claims growing out of a particular

act for which it is sought to hold the owner liable, and in the proceeding to limit his liability it is these claims only that are pertinent in the first instance. What may be the ultimate destination of the fund that is produced by the owner's interest is a matter to be determined afterward. It there should be other creditors holding prior or preferred liens upon the owner's interest their rights may be a subject for consideration at the proper stage. But the precise question now is whether the District Court should exercise its jurisdiction to limit the owner's liability in a case where there is and can be only a single claim against a single owner, and when the appraised value of the vessel exceeds many times the sum already adjudged to be due to the claimant. The question is not ruled by The S. A. McCaulley (D. C.) 99 Fed. 302. As in all other cases, what was there said is to be applied to the facts then before the court, and especially to the facts that, while there was only a single claimant, there were several owners—some of them not served with process—whose liability needed to be apportioned, and that the value of the owner's interest had not been ascertained, nor the amount of the claim determined. Where there are numerous claimants, this of itself may be decisive in favor of the federal remedy, and the same decision may follow if there are several owners whose due proportion of liability needs to be determined, or if the relation between the amount of the claim or claims and the value of the owner's interest has not yet been ascertained. But where all this has already been done, and it is manifest that there is no object in the admiralty proceeding except to litigate again questions of fact that have been three times decided, it would be a reproach upon the law if the effort were allowed to succeed, unless the acts of Congress require the District Court to go on with the suit.

There is no authoritative decision upon the point now presented. In Quinlan v. Pew, 56 Fed. 120, 5 C. C. A. 438, although there was only a single claimant, there were several owners, and there is nothing in the report to show that the value of the vessel was greater than the claim. Moreover, the action there was originally brought in the District Court, and it seems clear that the court had jurisdiction of the controversy in any of its aspects, and properly decided that it could not be compelled to send the dispute to a state court for determination. The subject has been thoroughly discussed by Judge Brown in The Rosa (D. C.) 53 Fed. 132, and The Eureka (D. C.) 108 Fed. 672; and, while I am not sure that I am prepared to decide that a court of admiralty must decline jurisdiction in a case where there is, and can be, but a single claimant, and where he has originally appealed to that tribunal, I agree with the reasoning of these cases so far as to hold that the admiralty may properly refuse to act where the circumstances of the litigation are such as are now presented. See, also, The Garden City (D. C.) 26 Fed. 770; The Lotta (D. C.) 150 Fed. 219; and the opinion of the Supreme Court of Pennsylvania by Mr. Justice Stewart in Amos v. Delaware River Ferry Company, 228 Pa. 362, 77 Atl. 12.

It may be that I should be justified in taking the course pursued

in The Lotta—merely dissolving the injunction, heretofore granted, which restrains further proceedings upon the judgment in the state court. This would retain the petition for other purposes, in order to protect the ferry company's right to limit its liability, in case such right should hereafter be denied. But there are two reasons that lead me to dismiss the petition altogether: (1) I understand that the company's right to limit its liability is not questioned by the respondent; and (2) it seems to me important that the Court of Appeals should have an opportunity to pass speedily upon the point now involved, in order that the District Courts of this circuit may have definite instruction on a mooted question. An order merely dissolving the injunction might not be a final decree from which an appeal would lie, and I have therefore decided to dispose of the whole case.

For the reasons heretofore given, I decline to entertain jurisdiction, and direct the clerk to enter a decree dismissing the petition.

BARRON v. McKINNON.

(Circuit Court, D. Massachusetts. May 13, 1910.)

No. 656.

1. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—SHAREHOLDER'S AGENT—SUIT.

Where a shareholder's agent has been appointed to take charge of the assets of a national bank under Act June 30, 1876, c. 156, § 3, 19 Stat. 63 (U. S. Comp. St. p. 3510), providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 287.*]

2. BANKS AND BANKING (§ 260*)—NATIONAL BANKS—GUARANTY—ULTRA VIRES.

Where a national bank, in order to induce complainant to purchase certain steamship stocks owned by it, agreed to take complainant's note for $50,000 for the stock and hold the stock as collateral security, and to guarantee plaintiff against any loss in the transaction from the execution and delivery of the note, such guaranty was not an ordinary commercial guaranty, but one outside the ordinary business of banking, and ultra vires.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 260.*]

Suit by Clarence W. Barron against John W. McKinnon. On demurrer to declaration. Sustained.

Whipple, Sears & Ogden and Alexander Lincoln, for plaintiff.
Walter I. Badger and Wm. Harold Hitchcock, for defendant.

LOWELL, Circuit Judge. The plaintiff's amended declaration alleges that the defendant is the shareholders' agent of the National Bank of North America in New York; that Morse, the vice president and director of the bank, owning the majority of its capital stock

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

and controlling its management, acting on behalf of the bank, sold the plaintiff 2,000 shares of stock of the New York & Porto Rico Steamship Company. In payment therefor the bank took the plaintiff's note for $50,000, and on the bank's behalf Morse and the plaintiff agreed that the bank should hold the stock as collateral security for the payment of the note and should guarantee the plaintiff against any loss in the transaction from the execution and delivery of the note. Thereafter the bank transferred the note, the transferee brought suit against the plaintiff, and recovered judgment for more than $56,000, which judgment the plaintiff has paid. The plaintiff further alleges that the stock has not been sold, that he is still its owner, and—

"that the value of said stock with all increment received by him therefrom was at all times and is now much less than the amount which the plaintiff has been obliged to pay and expend by reason of said suit, and much less than the amount of the plaintiff's liability upon said promissory note, and that he has sustained great loss in said transaction arising from the execution and delivery of said note."

The defendant demurred to the declaration upon several grounds, of which the court need notice but two:

I. That the suit was brought against the shareholders' agent, and not against the bank itself.

Had action been brought against the receiver of the bank, appointed under the banking act, the defendant's contention would seem to be sound. Lantry v. Wallace, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218, was an action brought by the receiver of an insolvent national bank to recover an assessment duly levied upon the shareholders. The defendant set up by way of cross-petition or counterclaim that the bank had induced him to become a purchaser of its stock by means of fraud. The Supreme Court said:

"We perceive no ground whatever upon which the defendant can have a judgment upon his cross-petition or counterclaim against the receiver. That officer had nothing to do with the fraudulent transactions of the bank prior to its suspension. His duty was to take charge of its assets, and have them administered according to the rights of parties existing at the time of such suspension. Whether, if the defendant claimed a judgment against the bank or its officers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock assessment until all the contract obligations of the bank had been met, was not decided by the Court of Appeals."

Weeks v. International Trust Co., 125 Fed. 370, 60 C. C. A. 236; International Trust Co. v. Weeks, 203 U. S. 364, 27 Sup. 69, 51 L. Ed. 224, decides nothing to the contrary, as the liability there sued on arose after the receiver's appointment.

But the shareholders' agent appointed under section 3 of the act of June 30, 1876 (19 Stat. 63, c. 156 [U. S. Comp. St. p. 3510]), stands differently from a receiver. In order that the shareholders may elect an agent to administer the bank's affairs, it is necessary that the receiver should certify that the allowed claims of every creditor of the bank, not including the shareholders who are creditors, have been paid. In order that the agent shall enter upon his duties, some of the shareholders must have executed a bond to pay all claims against the bank subsequently allowed. Hence it follows that no question of

priority arises between the plaintiff's claim and the ordinary contract obligations of the bank, as in the Lantry case. There a judgment against the receiver would embarrass him in his statutory distribution of assets. Here no embarrassment would arise from a judgment against the shareholders' agent, unless we are to suppose that the bank's creditors are limited to their remedy on the bond, an inconvenient and unreasonable interpretation of the statute and one apparently at variance with the authorities. Guarantee Co. v. Hanway, 104 Fed. 369, 44 C. C. A. 312. The reason which forbade a suit against the receiver in the Lantry Case does not exist in case of a suit against the shareholders' agent. It must be presumed that the contract obligations of the bank have already been discharged, and therefore there appears no reason why the plaintiff's claim, if he can establish it, should not be satisfied as soon as possible. The section cited above provides expressly that the shareholders' agent "may, in his own name or in the name of such association, sue and be sued." No such provision is made for suing a receiver. I can perceive no reason for denying their natural meaning to the words above quoted. In this respect, as against this ground of demurrer, I hold the declaration to be good.

II. That the contract set up in the plaintiff's declaration is ultra vires of the bank.

It is not easy to state precisely the meaning of the contract sued on. What would be a loss on the plaintiff's note does not clearly appear. as the establishment of loss involves, to some extent at least, a comparison between the plaintiff's payments on the note and the value of the stock which he bought. For instance, did the bank guarantee that the value of the stock should at all times be at least equal to the plaintiff's payments on the note? Or did it guarantee merely that at some time or other the stock should reach that value? If so, what was the time fixed? The contract's precise meaning need not here be determined, inasmuch as in any construction it appears to me to be beyond the corporate power of the bank. Doubtless a bank may guarantee a note under some circumstances in the course of its banking business; but the guaranty here made, whatever it may mean, is not an ordinary commercial guaranty, but an extraordinary and almost unintelligible contract, somewhat connected with stock which the bank was seeking to sell. In this respect, the declaration does not state a valid cause of action, and the demurrer must therefore be sustained.

UNITED STATES v. CAMPBELL. SAME v. STUMP. SAME v. TURNER et al.

(District Court, E. D. Pennsylvania. June 9, 1910.)

Nos. 36-38.

1. CRIMINAL LAW (§ 242*)—FEDERAL PRACTICE—REMOVAL OF ACCUSED.
On motion to remove one to the jurisdiction where he has been indicted, the indictment is prima facie evidence that the offense was committed there; but he may overcome the presumption by appropriate evidence, and show any other legal reason why removal should be denied.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. § 242.*]

2. CRIMINAL LAW (§ 97*)—LOCALITY OF OFFENSE—CONSPIRACY—PARTICIPATION IN OVERT ACTS.
Persons accused of conspiring to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) in the District of Columbia may be tried there, if they participate in overt acts there, though the unlawful agreement was made elsewhere, since participation may be proved by evidence of their conduct elsewhere.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 177; Dec. Dig. § 97.*]

3. CRIMINAL LAW (§ 242*)—FEDERAL PRACTICE—REMOVAL OF ACCUSED.
Probable cause for a finding that persons accused of conspiracy to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) in the District of Columbia participated in the overt acts committed there warranted their removal.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. § 242.*]

4. DISTRICT OF COLUMBIA (§ 3*)—CONGRESSIONAL POWER.
Congress may enact laws applying exclusively to the District of Columbia.
[Ed. Note.—For other cases, see District of Columbia, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. CRIMINAL LAW (§ 242*)—"OFFENSE AGAINST UNITED STATES."
A conspiracy to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) of the District of Columbia is an offense against the United States, within Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), providing for the removal of offenders against the United States, and section 5440 (page 3676), relating to conspiracies to commit offenses against the United States.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 242.*]

Thomas H. Campbell, Henry C. Stump, and George Turner and another having been indicted in the District of Columbia for conspiring to violate the so-called "bucket shop" law, the United States applies for warrants of removal. Motion granted.

J. Whitaker Thompson, U. S. Dist. Atty., and Jasper Yeates Brinton, Asst. U. S. Dist. Atty.
Ruby R. Vale, for defendants.

J. B. McPHERSON, District Judge. Three indictments have been found in the District of Columbia charging certain persons with conspiring there to violate the so-called "bucket shop" law of the District.

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

passed in 1909 (Act March 1, 1909, c. 233, 35 Stat. 670). Several of these defendants have been arrested here and the government now applies for warrants of removal. The indictments are prima facie evidence that the offense was committed in that jurisdiction, but they are only prima facie; and it is beyond doubt that the defendants have a right to overcome the presumption by appropriate evidence, and to show any other legal reason why the removal should not be permitted. Such evidence was heard by the commissioner as the defendants desired to offer, and by agreement this evidence is to be considered by the court on the pending motion. The question for decision is whether upon the whole case the defendants can be lawfully removed to Washington for trial; or, to state the question more accurately, whether the commissioner had probable cause to hold that the offense was triable in the District of Columbia.

For present purposes it may be conceded that if the evidence clearly showed that the defendants now before the court did not conspire within the District of Columbia, and also that they did not take part in the overt acts that are charged to have been committed there, they cannot be tried in that jurisdiction. In that event the sixth amendment of the Constitution would be a bar to the removal. But if they did take part in these acts, it is lawful to try them in Washington, although the unlawful agreement may not have been entered into there; for participation may be proved by the evidence of their conduct elsewhere (In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514), if such conduct was intended to further, and did further, the doing of the overt acts in the District of Columbia. The physical absence of the defendants does not of itself prove that they did not conspire in the District; neither does it prove of itself that they did not take part in the overt acts that may have been committed there. It is merely evidence on these questions, and, while it is evidence in favor of the defendants, it is by no means conclusive. In spite of it, the result of all the testimony may justify the commissioner's finding. And this, I think, is what the evidence taken as a whole does show—that probable cause for the removal exists. The prima facie case made out by the indictments has not been overcome, so as to enable me to say with the required certainty that the defendants have committed no offense for which they can lawfully be put on trial in the District of Columbia. In an admirable and exhaustive argument, the defendants' counsel relies on two legal propositions to prevent the removal. One of them is that a conspirator can only be tried in one of two places—either where the unlawful agreement was in fact made, or in a jurisdiction where he himself took part in some overt act that was done in furtherance of such agreement. For the reason already stated, this proposition need not be controverted; but, assuming it to be sound, it is my opinion that probable cause has been shown for the commissioner's finding that the defendants did take part in the overt acts that were done in the city of Washington. This is sufficient to justify their removal to that jurisdiction for trial. Price v. Henkel (decided Feb. 21, 1910) 216 U. S. 488, 30 Sup. Ct. 257, 54 L. Ed. —, and cases there cited.

The second proposition is that even actually to conspire in the Dis-

trict of Columbia to keep a bucket shop there is not an offense against the United States within the meaning of sections 1014 and 5440 of the Revised Statutes (U. S. Comp. St. 1901, pp. 716, 3676). The case chiefly relied upon to support this position is In re Dana (D. C.) 68 Fed. 886, decided in 1895 by Judge Brown in the Southern district of New York. It is a very careful and elaborate discussion of the subject; but it is at variance with later and more authoritative decisions of the federal courts, and therefore cannot be regarded as binding on the present motion. Benson v. Henkel, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919; Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162; United States v. Wimsatt (D. C.) 161 Fed. 586. No doubt Congress may pass laws applying exclusively to the District of Columbia, and the law in question may belong to this class. But if an offense against this statute is not an offense against the United States, how is it to be described? It is certainly not an offense against the District of Columbia, for the District is not a sovereignty, and has no legislative power of its own. Unless, therefore, it is an offense against the United States—the sovereignty which has exclusive jurisdiction of the subject and has passed the law forbidding the disputed acts—it is not an offense at all, but remains somehow in the air, removed from all danger of punishment. If the present contention is correct, it would follow that no criminal who had evaded arrest in the District could be arrested elsewhere and returned for trial; for neither the Constitution nor any federal statute (unless it be section 1014) provides for the return to the District of such offenders. In contemplating this contingency the Supreme Court used the following language in Benson v. Henkel, supra (page 15 of 198 U. S., page 572 of 25 Sup. Ct., 49 L. Ed. 919):

"* * * Any construction of the law which would preclude the extradition to the District of Columbia of offenders who are arrested elsewhere would be attended by such abhorrent consequences that nothing but the clearest language would authorize such construction. It certainly could never have been intended that persons guilty of offenses against the laws of the United States should escape punishment simply by crossing the Potomac river, nor, upon the other hand, that this District should become an Alsatia for the refuge of criminals from every part of the country."

The motion is granted.

TRUST CO. OF ST. LOUIS COUNTY v. MARKEE.

SAME v. REYBURN

(Circuit Court, E. D. Pennsylvania. June 21, 1910.)

Nos. 91, 92.

1. BILLS AND NOTES (§§ 358, 379*)—BONA FIDE HOLDERS—CREDITORS.

Under sections 25, 27, 29, art. 2, of the Missouri and Pennsylvania negotiable instruments acts (Laws Mo. 1905, p. 247 [Ann. St. 1906, §§ 463—25, 463—27, 463—29]; Act Pa. May 16, 1901 [P. L. 199]), making a pre-existing debt a valuable consideration, providing that where a holder has a lien on the instrument he is deemed a holder for value to the ex-

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

tent of his lien, and making an accommodation indorser liable to a holder for value, accommodation indorsers are liable on a note transferred before maturity to a creditor as additional collateral security for a preexisting debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 922; Dec. Dig. §§ 358, 379.*]

2. PLEDGES (§ 58*)—COLLATERAL NOTES—LIABILITY.

Judgment is properly awarded against accommodation indorsers for the full amount of a note deposited with the holder as collateral security, though there have been payments on the original note; execution on the judgment being properly controlled to avoid injury to the indorsers.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 186; Dec. Dig. § 58.*]

At Law. Actions by the Trust Company of St. Louis County against William T. Markee and against John E. Reyburn. Judgments for plaintiff.

Townsend, Elliott & Townsend and W. W. Porter, for plaintiff.
J. Howard Gendell, for defendants.

J. B. McPHERSON, District Judge. These two cases are brought upon the same promissory note and were tried together. The defendants are successive indorsers and the plaintiff is a holder for value before maturity. The note is for $25,000, is dated September 27, 1906, is payable one year thereafter in the city of St. Louis, and was made in Missouri by the St. Louis, Webster & Valley Park Railway Company to its own order. It was indorsed by the company itself, and by Paul D. Cable, John E. Reyburn, William Markee, and H. C. Begole, in the order named, and has been duly protested for nonpayment. The further facts are as follows:

On July 26, 1906, the plaintiff discounted a note of $25,000 for the St. Louis, Webster & Valley Park Railway Company. The note was signed by the railway company and by three other persons, and was accompanied by $50,000 of the company's bonds as collateral. It was due on January 26, 1907, and contained the provisions that are usual in such obligations—among them, the provision that the makers should give further security under certain conditions. In addition to the railway bonds, the plaintiff held what purported to be a written obligation of the Allis-Chalmers Company guaranteeing the payment of the note. When the note fell due the Allis-Chalmers Company denied its liability on the guaranty, asserting that the writing was without authority. Thereupon a conference was held between the plaintiff and the officers of the railway company; and, in consequence of the plaintiff's demand, the note in suit, accompanied by other bonds of the railway company, was pledged as further collateral for the original note. The defendants are accommodation indorsers, and, so far as Reyburn is concerned, his indorsement was given "under an agreement that [the note] was to be used or given to the Allis-Chalmers Company"—to use his own language on the witness stand. But the note was delivered by him to the proper officers of the railway company, and was pledged by

them without communicating this agreement to the plaintiff, and with no knowledge on its part thereof. The pledge was made in January, 1907, several months before the due date of the note.

Upon these facts there seems to be little room for dispute. If the case is to be governed by the federal decisions, it is enough to refer to Railroad Company v. Bank, 102 U. S. 14, 26 L. Ed. 61, in which the Supreme Court decided that:

"The transfer by indorsement to a creditor of negotiable paper before maturity, merely for an antecedent debt, although it is without his express agreement for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of the debt. In neither case is the bona fide holder affected by equities or defenses between prior parties of which he had no notice."

If the statute either of Missouri or of Pennsylvania is to govern, the result is the same. Both states have adopted the negotiable instruments act, and the provisions now relevant are identical in both. See Laws Mo. 1905, p. 247 (Ann. St. 1906, §§ 463—25, 463—27, 463—29); Act Pa. May 16, 1901 (P. L. 199). In article 2, § 25, value is defined as follows:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Section 27 provides:

"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Section 29 declares:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Tested by these statutes, the liability of the defendants under the facts in proof is, I think, too clear to need discussion; and the only question remaining is, For what sum the judgment should be entered? It appeared at the trial that the railway company has made certain payments on the original note, and the defendants contend that in any event the judgment can only be rendered for the balance that is still due. But none of these payments was made on the note in suit, and the plaintiff is therefore legally entitled to a formal judgment for the full amount of that obligation. The plaintiff concedes, however, that only payment of the balance can be enforced; and, if it should become necessary to issue execution in either suit, the process can be controlled so that no injury will be done to the defendant. But for the present a judgment for $25,000, the face of the note, with interest from September 27, 1907, may be entered against each defendant.

To the entry of this judgment an exception is sealed in each case.

In re SCHWARTZ.

(District Court, S. D. New York. October 25, 1909.)

BANKRUPTCY (§ 228*)—REFERENCE—FINDING OF SPECIAL MASTER.

Where the question to be determined was whether a bankrupt made a fraudulent mortgage to his brother, a finding by the special master should be given great weight, though the district judge from a perusal of the evidence might have come to a different conclusion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In the matter of Barned Schwartz, bankrupt. On report of special master. Report confirmed.

L. T. Fetzer, for bankrupt.

Myers & Goldsmith, for petitioning creditors.

HAND, District Judge. This case must turn upon the existence of the mortgage to Schwartz by his brother, because I think it fairly proved, first, that the bankrupt made a fraudulent transfer when he withdrew money and gave it to his wife, and, second, that the assets are insufficient without the mortgage to cover the liabilities. I do not think there is any evidence that the bill of sale was ever delivered to Schwartz's wife, and so I cannot exclude the value of the merchandise.

I have read substantially all the testimony, and, were I to judge from it alone, I should not hesitate to find that the mortgage did not exist on April 14th, for the testimony is exceedingly suspicious. However I do not feel at liberty to disregard the special master's finding. It is quite possible that Schwartz's testimony on the examination under section 21a may have been through misunderstanding. It is perfectly clear that such contradictions can be satisfactorily resolved only by the tribunal which sees the witness. Other explanations are possible than that of perjury, and, when a competent master has concluded that the true explanation is not perjury, a judge should not upset his finding simply upon the basis of the written words. They constitute but a small part of the evidence; the bearing of the witness, his appearance, his general intelligence, and deportment counting as much as the words he uses.

Nothing is more certain than that great weight should be given to the finding of the tribunal which had before it all this evidence in its entirety. It is true in this case that with some of the master's findings I disagree, as, for example, on the value of the licenses, of the insurance policy, and of the jewelry; but that does not militate against the correctness of his finding as to this issue, for in all of those matters my difference from him does not turn upon the credibility of a witness. He has necessarily determined that Schwartz spoke truly, and, even though there must have been strong evidence in his appearance to meet the inconsistency of his statements, I cannot say that it was not forthcoming, because I was not there, and I cannot judge with my own senses. Without, therefore, refusing to give to his finding

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

that weight to which it should be entitled in any orderly system of administering the law, I do not see how I can avoid confirming the report.

Report confirmed, and petition dismissed, with costs.

In re BRADIN.

(District Court, E. D. Pennsylvania. June 24, 1910.)

No. 3,715.

1. BANKRUPTCY (§ 413*) — DISCHARGE OF BANKRUPT — OBJECTIONS — SUFFICIENCY.

An objection to the discharge of a bankrupt because of his failure to keep proper books of account, which does not state that such failure was with intent to conceal his financial condition, is insufficient, but the defect is amendable.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 413*) — DISCHARGE OF BANKRUPT — OBJECTIONS — SUFFICIENCY.

Objections to the discharge of a bankrupt, charging in effect a fraudulent transfer of the bankrupt's property within the four months period, are sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

In the matter of the bankruptcy of James A. Bradin. Heard on objections to bankrupt's discharge. Cause committed to referee.

Alex. M. De Haven and Ephraim Lederer, for objecting creditors.
Harry M. McCaughey, for bankrupt.

J. B. McPHERSON, District Judge. Separate objections to the bankrupt's discharge have been filed by two creditors, William E. Gibson and Frederick Gerber, and these objections are attacked by the bankrupt as insufficient.

The first objection of each creditor is defective, because it does not aver that the bankrupt's failure to keep proper books of account was with intent to conceal his financial condition. Godshalk Company v. Sterling, 12 Am. Bankr. Rep. 303, 129 Fed. 580, 64 C. C. A. 148. But this is amendable, and permission is given to amend within three days; otherwise, the objection will be dismissed.

The fourth and fifth objections of Gibson and the fourth, fifth, and sixth objections of Gerber need no comment. They are plainly insufficient and are hereby dismissed.

The second and third objections of Gibson and the second and third objections of Gerber, when read in each instance as if they were combined in one paragraph, are sufficiently specific, and are sustained. In effect, they charge a fraudulent transfer of the bankrupt's property within the four months period. These objections—with the first, if the amendment shall be made—are committed to the referee for prompt and appropriate action thereon.

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

CHARLOTTE NAT. BANK OF CHARLOTTE, N. C., v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1910.)

No. 919.

TRIAL (§ 177*)—DIRECTION OF VERDICT—EFFECT OF MOTION BY BOTH PARTIES.

Where both parties at the close of the testimony request peremptory instructions in their favor, but also at the same time ask for special charges to be given in the event that the peremptory requests are denied, some of them relating to conflicting evidence from which divergent inferences could be drawn, such peremptory requests do not affirm that there are no disputed questions of fact which should be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*

Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to Love v. Scatcherd, 77 C. C. A. 8.]

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

Action by the Charlotte National Bank of Charlotte, N. C., against the Southern Railway Company. There was a directed verdict for defendant, and plaintiff brings error. Reversed and remanded.

C. W. Tillett and E. T. Cansler, for plaintiff in error.

W. B. Rodman and John K. Graves (R. G. Lucas, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

GOFF, Circuit Judge. This writ of error is to a judgment of the court below, on a verdict directed by that court, in an action instituted by the plaintiff in error, against the defendant in error, to recover the value of certain bales of cotton, covered by bills of lading held by the plaintiff in error, which cotton it is alleged the defendant in error unlawfully delivered to other persons. The complaint charges that the defendant, or its connecting carriers, issued the several bills of lading, for the cotton mentioned in them, which was to be carried and delivered in accordance with the contracts of carriage; that all of the cotton was actually received by the defendant, either from the shippers direct or from connecting lines, and was as required by the terms of the bills of lading transported to Charlotte, where it was placed in its compress by the defendant, there to be compressed so as to facilitate its carriage to Norfolk; that said bills of lading were for value duly assigned and delivered to the plaintiff by the original owners, after the cotton had been received by the defendant at the point of shipment, and before its arrival at Charlotte, and that the plaintiff was when the suit was brought and has been since such assignments the owner of said bills of lading, and said cotton; that while the cotton was so at the compress in Charlotte, the defendant wrongfully delivered the same to persons other than the plaintiff, without having

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

first required the production and surrender of the bills of lading, and without having required the parties to whom it was so delivered to substitute an equal number of bales of cotton therefor.

The answer of defendant admits that it issued certain bills of lading for cotton, and that it received from its connecting carriers cotton to be transported according to the terms of the bills of lading issued therefor, and demands the production of the original bills for inspection; says that if they are genuine the defendant received the cotton as described in them, but denies that plaintiff is the owner of them, and denies that the defendant delivered the cotton covered by them, without first requiring the surrender of the bills of lading; for further defense the defendant pleaded in bar of the plaintiff's right to recover, its failure to make claim for the cotton within 30 days after the expiration of the time designated for the delivery of the same; that the compress was under the control of B. D. Heath and others, and that as per the terms of the bills of lading the cotton was stopped at Charlotte for compression, the compress forming a separate link in the chain of transportation, the defendant not being responsible for its wrongdoing, and that if the cotton was wrongfully delivered it was the act of Heath and others; that said Heath was the president of the plaintiff, and also a stockholder and officer of a corporation known as the Heath-Reid Jobbing & Commission Company, and that he contracted with himself for said two corporations, that the commission company, during the year in which said bills of lading were issued, should purchase cotton, the shippers to take "order notify" bills of lading therefor, consigned to Norfolk, but to be stopped at Charlotte for compression, which bills were to be attached to drafts drawn on the commission company for the price of the cotton, and that when the drafts were paid the bills were to be delivered to the commission company; that the drafts were paid by checks drawn by the commission company on the plaintiff, and that thereby the cotton became the property of the said commission company; that the plaintiff knew the bills of lading required that the cotton should be stopped at the Charlotte compress, operated by Heath and others, and that upon its arrival there would go into the possession of plaintiff through Heath, its president; that by the custom and the rules of the compress, as well as by the express understanding between the plaintiff and the commission company, the latter had the right to divert certain cotton from its original destination, and for that purpose to remove it from the compress; that the commission company, either as the agent or the partner of the plaintiff, had authority to receive and dispose of the cotton as it saw fit, and for that purpose to demand and receive bills of lading covering it, and to receive the proceeds of the sales of cotton so disposed of by it; that if the plaintiff had any interest in the said bills of lading, such interest was as security for any amount the commission company might owe it upon a final accounting, and that a proper accounting would show that such company was indebted but little if at all to the plaintiff; that the plaintiff is not the real party in interest, because Heath, either before or since the bringing of this action, had agreed to indemnify it against loss on account of its transactions with the

commission company, and that he and the plaintiff held other securities for such indebtedness, which should be first applied thereto, part of which had been released without the consent of defendant, because whereof the defendant has been discharged of any liability for any balance due on such account; that the plaintiff authorized said commission company to sell the cotton, and has received the proceeds thereof in full; that the plaintiff authorized the commission company to gamble in cotton futures, and consented to its using the funds deposited from such proceeds for that purpose, and that said company's dealings in both spot and future contracts was as the agent of the plaintiff, having so received the entire proceeds of all the cotton covered by the said bills of lading. As a still further defense the defendant pleaded that a great part of the cotton so handled by the commission company was transported by way of Charlotte, to be stopped for compression, substitution, or diversion, and that plaintiff, instead of acting merely as an agent for the collection of drafts drawn by the original shippers of cotton, paid the same out of its own funds, retaining the bills of lading attached thereto, and then permitted the commission company to assume control of the cotton, withdraw the same from the compress and reship it to Norfolk or elsewhere, and that when that company had withdrawn from the compress cotton equal in amount to that called for in any one bill of lading, it would issue to defendant a duebill for the delivery of an equal amount of cotton, and would from time to time strike a balance with the plaintiff, and then obtain from it such bills of lading as plaintiff might owe the commission company, plaintiff not requiring, before the surrender of the bills, the deposit of the proceeds of the sales of the cotton covered by them, relying instead upon the promise of the commission company to account with it for such sales, and that because of such dealings the plaintiff would not present bills of lading and make demand upon defendant for cotton within a reasonable time, but consented to such course of dealing under which all the cotton referred to in the complaint was withdrawn from the compress by the commission company, and that when the plaintiff discovered that such company was insolvent, it conspired with that company to defraud the defendant by retaining said bills of lading then in plaintiff's possession, though the cotton they called for had then been delivered, and the plaintiff therefore refused on demand to surrender said bills to the defendant; that such course of dealing induced the defendant to deliver the cotton to the commission company, and that the plaintiff by such conduct was guilty of such laches as estops it from now denying that the commission company was authorized to receive the cotton.

The plaintiff by replication denied that the "thirty-day clause" was any part of the contract of carriage, or that the plaintiff had any notice thereof prior to the filing of defendant's answer, and avers that defendant waived its right to rely upon that clause by previous custom and course of dealing; that under the contracts of carriage, and the custom of defendant pertaining to cotton at the compress, defendant was in the habit upon the surrender of bills of lading to permit the owners to ship cotton to other points, thereby by such interference

with the continuous carriage, and by allowing the cotton to remain in the compress for an indefinite time, plaintiff was unable to reasonably ascertain when it was wrongfully converted, or to know what was a reasonable time for its transportation, or when to make claim for the loss thereof in accordance with said "thirty-day" clause, by reason whereof the defendant was estopped to plead such clause in defense of this action; that plaintiff did make demand upon defendant for the cotton within a reasonable time after it discovered that the same had been converted, and that then defendant again waived its right to rely upon that clause by investigating the claim made therefor, without asserting any right thereunder.

This suit was originally instituted in the superior court of Mecklenburg county, N. C., and was by due proceedings removed to the Circuit Court of the United States for the Western district of North Carolina. The plaintiff below is a corporation organized and existing under the national banking act of the United States, and the defendant is a corporation created and doing business under the laws of the state of Virginia.

On the pleadings referred to, the case was tried before a jury on the issue, "Is the plaintiff entitled to recover of defendant damages for the causes alleged in the complaint, and if so, in what amount?" A considerable number of witnesses were examined before the jury by both plaintiff and defendant, depositions were read, exhibits, bills of lading, account books, and waybills were offered by the parties and laid before the jury. When the evidence had all been submitted, counsel for plaintiff presented to the court certain instructions in writing, among others one directing the jury to find for the plaintiff, assessing its damages at such sum as should not exceed the value of the cotton covered by the bills of lading described in the complaint. The other instructions so offered by plaintiff's counsel requested the court to give certain directions relating to the facts and the law applicable thereto, in case the court should decline to give the peremptory instruction. At the same time the defendant's counsel requested the court to give to the jury a number of instructions relating to the evidence, the effect thereof and the law pertinent thereto, including a positive direction to find a verdict in favor of the defendant. Thereupon the court after hearing argument of counsel, ruled as follows:

"These two requests for instruction as stated, presented as set forth, do not waive the service of the jury in the case, but in the opinion of the court, following the decision of the Supreme Court of the United States, in the case of Beuttell v. Magone [157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654], the action of counsel in thus presenting for each party, at the close of the testimony, a request to the court, in writing, to instruct a verdict, does affirm that there is no disputed question of fact which can operate to deflect or control the question of law involved in this case.

"So, therefore, the court, without assigning reasons, which it deems unnecessary at this time (reserving, however, the privilege or the right to file in the case reasons at length, in support of the action taken by the court) instructs the jury, in response to the defendant's request, to return a verdict in behalf of the defendant."

In accordance with this instruction of the court a verdict was returned by the jury in favor of the defendant, on which a judgment

was duly entered, from which the writ of error now under consideration was asked for and allowed. The assignments of error are numerous, but in the light that the record presents the case to the court, only a few of them will be referred to.

The "order notify" bills of lading concerning which plaintiff claimed damages from defendant, were contracts made by the defendant in which it agreed to deliver the cotton mentioned in them upon the order of the shipper. They were by virtue of the order of the shipper assigned for value to the plaintiff. The bills of lading had been issued and delivered to the shippers by the defendant, after the cotton had been received by it, and the shippers had indorsed them, attached them to drafts drawn on the Heath-Reid Jobbing & Commission Company, and then sent them in course of business to banks in Charlotte. When the plaintiff received such drafts it retained the bills of lading, the commission company giving its check on plaintiff for the amount of the draft, which was then delivered to that company. If the drafts had been received by a bank other than plaintiff, they were paid by the commission company giving its checks for them on plaintiff, the bills of lading going to plaintiff and the drafts to the commission company. The bills of lading required their surrender properly indorsed, in order to secure the delivery of the cotton mentioned in them; the rules of defendant in force at the compress prohibited the delivery of cotton therefrom without the surrender of the bills of lading; these rules were not observed at the compress by the defendant, in its dealings with the commission company, defendant insisting that plaintiff had notice of and assented to such nonobservance, which plaintiff denied. The bills of lading reading "order notify Heath-Reid Commission Co." gave notice that such company was not the consignee to whom the cotton was to be delivered. By the contract made with the shipper when said bills were issued, it was the duty of the defendant to transport the cotton to Norfolk, stopping it at the compress at Charlotte and there notifying the commission company, and finally to deliver the cotton on the order of the shipper. Such bills of lading enter largely into the commercial transactions of the country, great lines of credit being given on them, and it is highly important that neither their validity should be questioned, nor the faith of the public in them be impaired. These bills of lading were the muniments of title to the cotton described in them, and when they were duly assigned the title to the cotton as well as its constructive possession passed with them to the assignee, to whom it was the duty of the carrier issuing them,—the defendant below,—to deliver said cotton, on the production and surrender of the bills, unless the assignee had assented to its delivery to others without such surrender.

We think that it was clearly shown to the jury that the defendant below made and issued the bills of lading offered in evidence by the plaintiff; that the defendant duly received the cotton covered by them, and subsequently permitted the commission company to take possession of and dispose of said cotton without having required that company to produce and surrender the bills of lading, which defendant knew had in due course of business been assigned to the plaintiff.

Therefore, unless the defendant can succeed in sustaining its contention that it was because of its dealings with the commission company and the plaintiff—referred to in the pleadings—which defendant claims were with the understanding that the plaintiff would subsequently deliver to the commission company for the defendant the bills of lading covering the cotton delivered to the commission company by the defendant, then the plaintiff will be entitled to recover for the value of the cotton called for by said bills of lading.

Does the testimony show that the commission company was the agent of the plaintiff for the purpose of receiving from the defendant the cotton covered by the bills of lading held by the plaintiff, with the understanding that as such agent it should sell said cotton and deposit the proceeds of the sales thereof with plaintiff, and return to defendant the bills of lading issued for the cotton so sold, as is claimed by defendant? If so, the verdict and judgment should be for the defendant. We do not find it to be our duty—after analyzing the mass of testimony found in the record—to express an opinion concerning it indicating the verdict that should have been found from it. We find the testimony relating to the material points to which we have referred to be conflicting, and peculiarly of that character requiring a decision by a jury, before which the witnesses appeared, and by which the credit to be given them can be ascertained. As this case is to be retried, we submit to the jury hereafter to be impaneled the finding of the facts essential to a just disposition of this controversy.

We are impelled to the conclusion that the learned judge of the court below was in error when he held that the rule announced by the Supreme Court in Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, was applicable to the conditions shown by the record to have existed in the case at bar at the time he directed the verdict complained of. It appears that not only the plaintiff, but also the defendant below, at the close of the testimony, requested peremptory instructions in their favor, and that they also at the same time asked for special instructions—to be given in the event the peremptory requests were denied—some of them relating to the conflicting evidence from which it was apparent that divergent inferences could be drawn. The court properly held that the requests by both plaintiff and defendant for verdicts in their favor by direction, did "not waive the service of the jury," but mistakenly concluded that such requests affirmed that there were no disputed questions of fact which he should submit to the consideration of the jury. On this point, and as conclusive of it, we quote from the case of Empire State Cattle Co. v. Atchison, Topeka & Santa Fé Railway Co., 210 U. S. 1, 8, 28 Sup. Ct. 607, 609, 52 L. Ed. 931, as follows:

"It was settled in Beuttell v. Magone, supra, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of Beuttell

v. Magone, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in Beuttell v. Magone has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth circuit, in Minahan v. Grand Trunk Ry. Co., 138 Fed. 37, 41 [70 C. C. A. 463], and was also lucidly stated in the concurring opinion of Shelby, Circuit Judge, in McCormick v. National City Bank of Waco, 142 Fed. 132 [73 C. C. A. 350], where, referring to Beuttell v. Magone, he said (page 133 [142 Fed., page 351, 73 C. C. A.]):

" 'A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitle him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in Beuttell v. Magone, supra, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

" 'In New York there are many cases showing conformity to the practice announced in Beuttell v. Magone, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. Kirtz v. Peck, 113 N. Y. 226, 21 N. E. 130; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907.

" 'The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. Minahan v. G. T. W. Ry. Co., 138 Fed. 37 [70 C. C. A. 463].'

"From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. McGuire v. Blount, 199 U. S. 142, 148 [26 Sup. Ct. 1, 50 L. Ed. 125], and cases cited; Marande v. Texas & P. R. Co., 184 U. S. 191 [22 Sup. Ct. 340, 46 L. Ed. 487], and cases cited; Southern Pacific Co. v. Pool, 160 U. S. 440 [16 Sup. Ct. 338, 40 L. Ed. 485], and cases cited."

The evidence in this case as it was before the jury, when the court directed the verdict, was of such character that it is quite improbable that the court would, under the rules applicable to such conditions, have disturbed a verdict rendered for either party. We are therefore unable to sustain the insistence of counsel for defendant in error that the direction in favor of the defendant below was proper, for the reason that the court would have been bound to set aside a verdict for the plaintiff had one been rendered.

It follows that the assignments of error relating to the action of the court in directing a verdict for the defendant, and in refusing to

submit the case to the jury are not without merit, and that we find it to be our duty to reverse the judgment and set aside the verdict on which it was based. The court below did not consider the other instructions asked for by the plaintiff in error. Under the conviction that he was forced, by the rule of practice referred to, to direct a verdict, he did not find it necessary to pass upon them. It does not follow that this court should now discuss them, or the assignments relating to them, for it is not to be presumed that the case when tried again will then be so presented as to render all of them pertinent, or that if then applicable that the court will not give them to the jury.

We find no error in the rulings of the court concerning the admission and rejection of testimony, and consequently the assignments of error relating thereto are without merit. The judgment complained of will be reversed, the verdict of the jury will be set aside, and the case will be remanded so that another trial therein may be had.

Reversed.

FRANK v. MICHIGAN PAPER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1910.)

In Bankruptcy, No. 966.

1. BANKRUPTCY (§ 423*)—PARTNERS—EFFECT OF DISCHARGE.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428) § 17, as amended by Act Cong. Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310), providing that a discharge in bankruptcy shall not release the bankrupt from judgment in actions for fraud or obtaining property by false pretenses or representation, etc., a false representation by one partner by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability for such debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 818; Dec. Dig. § 423.*]

2. BANKRUPTCY (§ 407*)—PARTNERS—RIGHT TO DISCHARGE.

Where, after a firm had been adjudged an involuntary bankrupt, one of the partners filed an individual voluntary petition in bankruptcy and was adjudged a bankrupt, the fact that one of the other members of the firm had made false representations in writing concerning the credit of the firm, and by virtue thereof had obtained goods for the firm on credit, in which representations the petitioning partner did not participate, such representations were unavailable to bar the petitioning partner's right to discharge, though the discharge, when granted, might not be a defense to the petitioning partner's liability for the debts contracted on the faith of such representations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 760; Dec. Dig. § 407.*]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

In the matter of Nathan B. Frank, bankrupt. From an order denying the bankrupt's application for discharge on objections of the Michigan Paper Company and Kalamazoo Paper Company, the bankrupt appeals. Reversed.

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

On the 21st day of May, 1908, the firm of McDonald & Frank, at the time composed of Walter A. McDonald and Nathan B. Frank, was adjudicated an involuntary bankrupt. Subsequently, on the 25th day of November, 1908, said Nathan B. Frank filed his individual voluntary petition in bankruptcy, and on the same day was adjudicated a bankrupt. On January 2, 1909, he filed his petition praying for a discharge, and on January 18, 1909, the Michigan Paper Company and the Kalamazoo Paper Company, two corporation creditors of the firm of McDonald & Frank, filed their separate specifications of objection to the discharge of the bankrupt, Nathan B. Frank, setting forth that on September 30, 1907, the bankrupt firm of McDonald & Frank (then McDonald, Frank & McDowell), through McDonald, one of its members, wrote unto Elmer H. Haas, of New York, selling agent of both of said creditors, a letter in which said firm set forth that their capital amounted to the sum of $5,000, whereas said firm did not have the sum of $5,000 as their capital, but only had in their business about $2,500 as capital, and that the said creditors, upon said statement, "sold unto said firm of McDonald & Frank, of which said Nathan B. Frank was a member, large quantities of paper on credit, and that the said bankrupt firm as aforesaid have obtained the said property on credit upon a false statement in writing." To these specifications the bankrupt interposed his demurrer, and, the same being overruled, filed his answer, identical in form to the several specifications of objection filed by the corporate creditors. Upon the hearing before the District Court no evidence was introduced, but, in lieu thereof, the following agreed statement of facts was presented to the court:

"It is hereby agreed by Edward M. Hammond, attorney for the Kalamazoo Paper Company and the Michigan Paper Company, and E. Allan Sauerwein, Jr., attorney for the bankrupt, that the matters and facts upon which the specifications of the said paper companies against the discharge in bankruptcy of the said bankrupt shall be heard, are as follows:

"That Walter McDonald and Robert McDowell were engaged in the paper jobbing business prior to the month of April, 1907, and during said month the bankrupt, Nathan B. Frank, was invited to and did become a partner, the firm name then being changed to McDonald, Frank & McDowell; that McDonald invested two hundred and fifty dollars ($250) in cash and gave his note for a thousand; McDowell invested two hundred and fifty dollars ($250) in cash and gave his note for a thousand; and Frank invested twenty-five hundred dollars ($2,500) in cash—all of which constituted the capital of the firm; that on the 20th day of September, 1907, the said McDonald wrote to one Elmer H. Haas, at New York, the selling agent of the said Paper Companies, the following letter:

"We have your favor of the 19th and thank you for the same. In regard to our responsibility, would say that our capital amounts to $5,000; as you know we are all young men, doing all our own work together with small expenses so far as warehouse is concerned. We have dealt with mills only whom writer knows very well, and no one has refused to give us a good line of credit. For instance, we have been buying right along from P. H. Glatfelter in the way of book paper. We have discounted every month and now owe them about $2,000. We would rather you not to write Glatfelter, however, because we don't want him to know whom else we are buying book paper from, but we would refer you to N. Frank & Sons, #1402 Mullikin St., and Hubbs & Corning Company, both of Baltimore and the Lee Paper Co. of Vicksburg, Mich. We have bought some little from Kalamazoo as you know, whom we have paid promptly. We also inclose herewith some letters which speak for themselves.

" 'Now while our capital is small, as stated above, our expenses are small, and we are going along carefully, not overstepping the mark. Of course, there may be times when we will have to ask some of our mills for a little time, but thus far we have been able to discount. Would further state that we are not selling anybody but those who discount and pay their bills promptly. We are getting a very good percentage of the business in Baltimore and some little out of town business. Altogether, we feel very much encouraged, and confidently believe that your mill will make no mistake in

placing their paper with us. Kindly return the inclosed letters and let us hear from you by an early mail. Thanking you for past favors, we are,

"'Yours truly, McDonald, Frank & McDowell,

"'By McDonald.'"

"That said letter was written by the said McDonald for the purpose of opening an account with the said paper companies, and that the firm did thereafter by virtue of said letter obtain goods from them to the amount of $——— upon which credit payments of $——— were made; that the said McDonald had been engaged for some time in the paper business, and attended to the active management of the same for the firm and particularly to the purchasing of stock; that the said McDowell was the bookkeeper for the said firm, and that the said Frank, who, at the time of the formation of the said partnership was not twenty-one years of age, had no knowledge of the business, and, during the existence of the partnership, he attended solely and only to the selling of goods; that said Frank, during the existence of the partnership, undertook to buy out said McDowell's interest for $250, but because he could not get his note discounted at his bank, he gave his note to the firm who indorsed it, and it was then discounted to Mr. Frank's father. The firm then assumed the purchase of the interest. After bankruptcy Mr. Frank's father paid the note; that said Frank became twenty-one years of age on the ——— day of ———; that the said Frank knew nothing whatever of the writing of the said letter at the time it was written, nor at any time thereafter, until the firm was thrown into involuntary bankruptcy; that he did not know at any time prior to said bankruptcy of any statements whatsoever having been made to the said paper companies for the purpose of inducing a line of credit, nor did he know what was the inducing cause of the extension of credit by the said paper companies, nor did he ever wittingly derive any benefit from any credit so wrongfully obtained.

"Edward M. Hammond,
"Atty. for Michigan Paper Co., and Kalamazoo Paper Co.
"E. Allan Sauerwein, Jr.,
"Attorney for Bankrupt."

E. Allan Sauerwein, Jr., for appellant.
Edward M. Hammond, for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and KELLER, District Judge.

KELLER, District Judge (after stating the facts as above). Section 14b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), provides that upon the bankrupt's application for a discharge the judge shall "investigate the merits of the application and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. * * *"

Section 17, as amended in 1903, provides that a discharge in bankruptcy "shall release a bankrupt from all of his provable debts except such as * * * (2) are liabilities for obtaining property by false pretences or false representations. * * *"

The only question to be decided here is whether the action of McDonald in making the statement of September 30, 1907, can be successfully urged to prevent the granting of a discharge to Frank upon proceedings growing out of his individual voluntary petition in bank-

ruptcy. In this connection it becomes important to distinguish between the *right* to a discharge and the *effect* of a discharge in bankruptcy. With regard to the latter, we think it clear from the language quoted from section 17 of the present bankruptcy act as amended in 1903 that a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability as to such debt. Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; Schroeder v. Frey, 60 Hun (N. Y.) 58, 14 N. Y. Supp. 71; Collier on Bankruptcy (6th Ed.) page 225. As applied to partnership debts these questions ought to be considered in connection with the fact that under the present bankruptcy act a partnership is a "legal entity"; consequently a materially false statement made in writing by one of the partners (without the knowledge of the others) for the purpose of obtaining credit on behalf of the partnership, and by means of which such credit is obtained, is (1) the act of the individual partner making it, and (2) the act of the legal entity called the "partnership," and hence both the partner making such statement and the legal entity called the "partnership" are chargeable with having done one of the acts, the doing of which will, upon objection being properly made, prevent the granting of a discharge under section 14b, Bankr. Act 1898, as amended in 1903; and it follows that any "party in interest" can successfully oppose the discharge of the acting partner and of the "partnership."

Under the existing statute the question of what will bar a discharge has now been passed upon by at least three different Circuit Courts of Appeals, and all of these decisions are in substantial harmony in holding that the bar to a discharge by reason of a false statement in writing is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member.

In Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, the Circuit Court of Appeals for the Fifth Circuit (Shelby, Circuit Judge, dissenting), reversing the District Court for the Western District of Texas (143 Fed. 607), in a case in every way similar to the one at bar, held that a materially false statement in writing made by a partner in the ordinary course of business of the partnership for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 14b, c. 3, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), to another partner who did not participate in the wrongful act and had no knowledge of it.

In W. S. Peck & Company v. Lowenbein, decided February 21, 1910, by this court (178 Fed. 178), it appeared that on September 14, 1907, Lowenbein, a member of the firm of Owens & Lowenbein, addressed a letter to W. S. Peck & Co., Baltimore, Md., which letter contained a statement of the financial condition of the firm of Owens

& Lowenbein; that said statement was based almost entirely upon information derived by Lowenbein from Owens in the preparation of it; that matters in the statement other than those furnished by Owens were not misleading, being, in the main, true. The court affirmed the judgment of the court below, refusing a discharge to Owens and granting that to Lowenbein, saying:

"It is the evident purpose of the bankruptcy act to protect that unfortunate class of debtors who are unable to pay their debts, by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive and thereby defraud their creditors. Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose. This finding of fact has been approved by the learned judge who heard the case below, and is within itself conclusive in so far as the question involved in this controversy is concerned."

In Gilpin v. Merchants' National Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, the bankrupt, upon the request of a bank from which he had asked accommodation, for a financial statement, signed a statement form in blank, and delivered the same to his bookkeeper, requesting him to make an exact statement of his condition, for the bank, to which the bookkeeper replied that he could not (the posting of his books being in arrear), but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, marked "approximate," and sent to the bank, and upon the faith of this statement the bank extended credit. The referee found that, although the falsity of the statement sent to the bank was proved, the fact that the bankrupt knew it to be false or did not know it to be true, was not proved, and said in his report:

"There is no evidence to support the contention that the bankrupt knew or had any reason to believe that the statement sent to the bank by the bookkeeper was false, or that the bankrupt intended in any way to deceive the bank."

Upon these facts the Circuit Court of Appeals for the Third Circuit, in an opinion by Gray, Circuit Judge, held that the word "false" as used in section 14b of the bankruptcy act, as amended by Act Feb. 5, 1903, which makes it a ground for denying a discharge to a bankrupt that he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue.

It must be manifest that the intent to deceive can never be imputed to one who not only takes no part in making the written statement, but, as in the case at bar, knows nothing of it. We believe that the view taken by the Circuit Court of Appeals for the Third Circuit of the meaning of the word "false," as used in this section, is the correct one,

and the decision above referred to is in entire harmony with the Lowenbein Case decided by this court.

Taking the view that the *right* to a discharge is determined by the good faith of the bankrupt, and that the *effect* of such discharge is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt.

The order of the District Court for the district of Maryland, made and entered on the 22d day of January, 1910, sustaining the specifications of objection to the discharge of the appellant, and refusing to grant him a discharge is therefore reversed, with costs, and the cause is remanded to the District Court for further proceedings herein not inconsistent with this opinion.

Reversed.

THE MEDEA.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1910.)

No. 1,758.

1. SHIPPING (§ 132*)—LIABILITY OF VESSEL FOR DAMAGE TO CARGO—ACTIONS—BURDEN OF PROOF.

With respect to the liability of a common carrier for loss or damage to goods, while in his possession, the question as to the burden of proof is not one of pleading but of primary liability, and where goods were received by a vessel in good condition, but delivered in a damaged condition, the ship has the burden of proof to show that the injury was due to some cause within the exceptions of the bill of lading to avoid liability although the libel may allege a specific ground of negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 481; Dec. Dig. § 132.*]

2. SHIPPING (§ 132*)—LIABILITY OF VESSEL FOR DAMAGE TO CARGO—ACTIONS—EVIDENCE.

The fact alone that damage to cargo was caused by sea water, without any evidence as to how the water entered the ship, is not sufficient to relieve the vessel from liability on the ground that the damage resulted from sea perils within an exception in the bill of lading, nor is it sufficient to show, in addition, that the ship encountered stormy weather on the voyage, which was no worse than should have been anticipated.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

3. SHIPPING (§ 121*)—CHARTERS—"SEAWORTHINESS" AND FITNESS OF VESSEL.

A warranty of seaworthiness in a charter party is absolute and not conditional, and includes a warranty of proper stowage for the voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 449, 450; Dec. Dig. § 121.*

For other definitions, see Words and Phrases, vol. 7, pp. 6362–6365; vol. 8, p. 7796.

Implied warranty of seaworthiness, see notes to The Carib Prince, 15 C. C. A. 388; Neilson v. Coal, Cement & Supply Co., 60 C. C. A. 179.]

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

4. SHIPPING (§ 132*)—LIABILITY OF VESSEL FOR DAMAGE TO CARGO—SEAWORTHINESS—IMPROPER STOWAGE.

Evidence considered in a suit against a vessel for damage to cargo and *held* to establish the allegation of libelant that she was unseaworthy by reason of improper stowage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Suit by Henry Lund and Henry Lund, Jr., partners as Henry Lund & Co., against the Swedish bark Medea. The Aktiebolaget Standard, claimant. Decree for respondent (173 Fed. 498), and libelants appeal. Reversed.

E. B. McClanahan and S. H. Derby, for appellants.

Nathan H. Frank, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On October 25, 1906, Henry Lund & Co. of San Francisco chartered the Swedish bark Medea, then being overhauled at Gothenburg, Sweden, under a charter party containing the usual warranty as to the seaworthiness of the vessel, for a voyage from the ports of Gothenburg and Limhamn in Sweden to San Francisco. The Medea sailed from Gothenburg on January 10, 1907, and from Limhamn on January 29, 1907, taking on board a cargo at both places, and arriving at the port of San Francisco on October 12, 1907. The cargo consisted of:

Cement	From Limhamn	853.1791/2240 tons.
Iron	From Gothenburg	343.2220/2240 "
Bottles	From Gothenburg	175. 168/2240 "
Clay	From Limhamn	23. 487/2240 "
Sardines	From Gothenburg	13.1303/2240 "
Chalk	From Limhamn	8.1370/2240 "
Sand	From Limhamn	8. 400/2240 "
Total cargo		1426.1019/2240 tons.

On arrival of the bark at San Francisco, it was found that much of the cargo had been damaged by salt water, and thereupon Henry Lund & Co. brought this action against the ship to recover the loss. It was alleged in the libel that the cargo was received on board of the vessel at the ports named in good order, well conditioned, and free from damage; that upon examination and special survey at the port of San Francisco the cargo was found to have been greatly injured and damaged during the voyage; that the damage and the injury resulted from the unseaworthiness of the vessel. The libel was verified by one of the libelants upon his knowledge that the cargo was received in a damaged condition and upon information and belief as to the cause of the damage. The respondent excepted to the libel on the ground that it could not be ascertained therefrom whether the damage arose from the alleged unseaworthiness of the vessel or from bad stowage of the cargo; or in what respect the vessel was unseaworthy, or in what respect the stowage was bad. The exceptions were overruled by the court and thereupon respondent filed its answer. In its answer to

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

the libel the respondent, referring to the allegation that the cargo had been received on board the vessel in good order and condition, alleged that it was ignorant so that it could neither admit nor deny the same, and called for proof. The same answer was made as to the other allegations of the libel, with the further allegation that on information and belief it denied the unseaworthiness of the vessel and the bad stowage of the cargo, and alleged that the damage to the cargo, if any, was caused by the peril of the sea. The answer was verified by one of the proctors for the respondents upon information and belief.

The first question relates to the burden of proof. The libel alleges the shipment of the goods constituting the cargo in good order and condition, and that the cargo was delivered in a damaged condition. Do the allegations of the libel that the damage to the cargo resulted from the unseaworthiness of the vessel or from improper and bad stowage of the cargo place the burden of proof on the libelants? The respondent contends that they do and cites the case of Rich v. Lambert, 53 U. S. 347, 353, 13 L. Ed. 1017, as authority for his contention. In that case the essential allegation of the libel was "that the said goods, wares, and merchandise were not taken care of and safely carried and delivered according to the tenor and effect of the bills of lading; but, on the contrary, although no damage accrued from any dangers or accidents of the seas, or navigation, the said goods were so badly taken care of by the said master, and the cargo of said ship, and particularly a quantity of salt on board thereof was stowed so improperly, that through the neglect and mismanagement of the master the said goods were greatly damaged and great loss thereby sustained." The respondents in their answer in that case alleged "that the ship encountered several violent gales, and very boisterous weather during her voyage, causing her to labor heavily, and straining her badly, the sea at times breaking over her, so that she shipped a great deal of water from leaks, and stress of weather, requiring the constant use of pumps, which were faithfully attended to, and every effort made to preserve the ship and save the cargo from damage." In passing upon the issue thus presented the court said:

"We have already stated that the libelants charge in the several libels the damage to the goods to have been occasioned exclusively from the improper stowage of the cargo, and especially of the sacks of salt in the between-decks over the goods in the hold of the vessel. This is denied in the answers, and as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the part of the libelants to maintain this ground by the proofs, in order to charge the respondents."

This appears to have been said with respect to certain testimony, and the well-known rule requiring that the proofs of each party must substantially correspond to his allegation so far as to prevent surprise. It had no reference to the burden of proof which is clearly stated in a subsequent paragraph of the opinion as follows:

"The goods having been found to be damaged on the arrival of the ship, and which must necessarily have accrued in the course of the voyage, the burden devolved upon the respondents to show, in order to excuse themselves, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. That burden they have assumed; and have shown by nearly an unbroken current of testimony, that the conveyance of the salt between decks, in a mixed cargo, was according to the established custom and

usage of the trade between Liverpool and this country, and that it was well stowed, and packed, and secured with proper and sufficient dunnage."

The opinion in this case was written by Mr. Justice Nelson, who wrote the opinion of the court in New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U. S. 347, 382 (12 L. Ed. 465), where the court said:

"The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

Mr. Justice Nelson also wrote the opinion of the court in Clark v. Barnwell, 53 U. S. 272, 279 (13 L. Ed. 985), where the court said:

"After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading."

The case of McKinlay v. Morrish, 63 U. S. 343, 16 L. Ed. 100, is cited by the respondent as holding that the burden of proof is where the pleadings place it. In that case the liability of the carrier for damage to a shipment of soap was alleged to have been caused by bad stowage and leaks in the deck of the vessel. The respondents met the charge by direct denial, averring that if the soap had been in any way injured, it might have been from causes beyond his control by any care whatever, and should be attributed to causes or perils excepted to as they were expressed in the bill of lading, viz., "all and every danger and accident of the seas and navigation of whatsoever nature." It appears that there was testimony received by the trial court concerning storms encountered by the vessel in the Bay of Biscay and in weathering Cape Horn. But the case in the Supreme Court was put by the libelants altogether upon bad stowage and the leaks in the deck as both had been alleged in the libel. What that court said about the exclusion of testimony inapplicable to the issues made by the pleadings states the rules referred to in Rich v. Lambert, supra, that the proof must correspond to the allegation, and had no reference whatever to the burden of proof. But even this rule of pleading and proof is no longer enforced in admiralty with the strictness observed in common-law procedure. In the Gazelle and Cargo, 128 U. S. 474, 487, 9 Sup. Ct. 139, 142 (32 L. Ed. 496), the court, referring to this rule, said:

"In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libelant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants."

The rule as to the burden of proof as stated in New Jersey Steam Navigation Co. v. Merchants' Bank, supra, and in Clark v. Barnwell, supra, has been followed by the courts of the United States in numerous cases, and must be deemed to be settled.

In Nelson v. Woodruff, 66 U. S. 156, 169 (17 L. Ed. 97), the court said:

"When goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he is not responsible."

In Transportation Co. v. Downer, 78 U. S. 129, 133 (20 L. Ed. 160), the court said:

"On the trial the plaintiff made out a prima facie case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this prima facie case by showing that the loss was occasioned by one of the dangers of lake navigation."

In the case of The Mohler, 88 U. S. 230, 233 (22 L. Ed. 485), a cargo of wheat had been shipped on a barge appurtenant to the steamer Mohler at Mankato, on the Minnesota river, destined for St. Paul on the Mississippi. The bill of lading contained the usual exemption of the "damages of navigation." The barge was wrecked by collision with one of the piers of a bridge just above the city of St. Paul and was totally lost. The answer set up that the accident occurred through the sudden and unexpected gust of wind which overtook the boat as she passed through the piers, and that, therefore, she was unanswerable for the collision. The case was heard on the testimony introduced by the respondents, the libelants having called no witnesses. The Supreme Court held that:

"The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

In The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, the court, after referring to the carrier in that case, said:

"In any aspect, the real point in controversy is, did the respondents so far sustain the burden of proof which was upon them?"

In the case of The Majestic, 166 U. S. 375, 386, 17 Sup. Ct. 597, 41 L. Ed. 1039, the libelants were passengers on board the Majestic from Liverpool to New York. On landing in New York the contents of their trunks was found badly damaged by sea water. It was charged in the libel that the damage to the baggage was caused by negligence and want of proper care. The answer admitted the delivery of the baggage on board in good order and its condition on arrival in New York, but put in issue the allegations of negligence and want of proper care. It set up certain stipulations contained in the ticket under which libelants took passage, by which it was averred that the ship was discharged of liability, or in any case was not liable for any injury beyond the amount of £10. It was further alleged that the injury, if any, was caused by the act of God or the perils of the sea, and was in no wise caused by the neglect or misconduct of its agents or any of its servants. The defense that the ship was discharged of liability by reason of the stipulations contained in the ticket was dis-

allowed. The remaining question upon the allegations of the libel, if the burden of proof was upon the libelants, was whether the damage to the baggage was caused by negligence or want of proper care; but upon the allegations of the answer, if the burden of proof was upon the carrier, the question was whether the damage was caused by the act of God or the perils of the sea. The Supreme Court held that the question to be determined was the latter with respect to which the burden was upon the carrier.

The reason why the burden of proof is placed upon the carrier is that he or his servants know, or at least ought to know, the circumstances connected with the loss or damage to the cargo, while the owner of the lost or damaged goods has no such knowledge, and if he were required to furnish such proof it would operate as a denial of justice. Riley v. Horn, 5 Bing. 217; Berry v. Cooper, 28 Ga. 543; Mitchell v. Railway Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515. In Selma, Rome, etc., Railroad v. United States, 139 U. S. 560, 567, 11 Sup. Ct. 638, 640 (35 L. Ed. 266), the Supreme Court followed this rule saying:

"While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances. 'From the very nature of the question in dispute,' says Mr. Best, 'all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established, as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.' Best on Evidence, § 274."

These cases settle the rule beyond controversy that with respect to the liability of a common carrier for loss or damage to goods while in his possession the question as to the burden of proof is not one of pleading, but of primary liability which the carrier must meet according to the tenor of his contract.

The contract of the carrier in this case was that of an insurer requiring that he should deliver the cargo in like good order and condition as when received with certain stipulated exceptions including, among others, dangers and accidents of the seas and of navigation described in the charter party as perils of the sea. If perils of the sea were encountered by the Medea on her voyage the evidence of that fact was in the possession of the officers of the vessel, and if the respondent relied upon that fact as one of the stipulated exceptions to liability provided in the contract, it was required under the rule to produce that evidence. Upon the trial the libelants introduced in evidence the charter party under which the libelants chartered the Medea for the purpose of transporting the cargo mentioned in the libel from Gothenburg and Limhamn in Sweden to the port of San Francisco; also bills of lading and testimony showing that the cargo was received on board at the ports of shipment in good order and condition, and was delivered in San Francisco in a damaged condition.

The libelants also introduced testimony tending to show that the damage to the cargo was primarily caused by improper stowage of the cargo causing the seams of the deck to open and let down the salt water upon the cargo.

The respondent to show that the damage to the cargo was caused by perils of the sea introduced the testimony of the master of the vessel, Carl H. Bruse, and that of the chief mate, R. S. Royter, also the Marine Declaration or Extended Protest of the Master. From this testimony it appears that the Medea sailed from Gothenburg on January 10, 1907, and from Limhamn on January 29, 1907, taking on a cargo at both places. After completing the cargo the vessel sailed for San Francisco. The master testified in substance that it was the original intention to sail down through the English Channel, but, as stormy weather was coming up from the south, the course of the vessel was laid around the north of Scotland where stormy weather was also encountered. Coming in sight of Shetland Islands they had to keep clear of the land, and so tacked the other way to get enough water between the vessel and the land so as not to go ashore. During that time some sails were damaged and lost. The lower topsail on the foremast was lost altogether. The lantern boxes over the forecastle were washed away. A chain plate was broken, and the new rigging became slack. The sea was very high; more than a common gale of wind, and more or less water was taken on deck. In consequence of this heavy weather, and after the vessel had been out three weeks, the men and mates were called together, and it was agreed to get to the nearest harbor, set the rigging, and get things in order. They accordingly made for Christiansand in Norway, encountering storms on the way; but they finally reached port and examined the cargo. The hatches were raised, but nothing was found damaged. Afterwards the cargo was taken from one side to the other to raise her port above the water line. The port was opened, and was found to have been leaking, but not so much as to get any water marks for the pumps. Both ports had been packed at Gothenburg under the supervision of the surveyors. When it was found that one of the ports had sprung a leak, it was repacked and closed. The repairs were made in a week, but on account of the weather they remained in port for two weeks. They again set sail on the same course as before. It was about a month before they came to the west coast of Scotland. The distance from Christiansand to the western coast of Scotland is less than 500 miles. The wind was always ahead and stormy so that the vessel could carry but very little sail. The sea was heavy, and they got water on deck, lost a post, and got much water in the cabin; but the water did not come further than the cabin. After they got to the west coast of Scotland the course lay southwest towards the Cape. On the Atlantic running from Staten Island down to Cape Horn the weather was more moderate, and they got more favorable winds, until they came to the northeast trade winds. After they passed the line and going through the southeast trade winds they encountered a heavy storm one day. It carried away the foretopmast stay, and the foretopmast staysail was blown away at the same time, and a chain broke from the jib boom. Then they had more or less fresh wind until they

came as far as the Patagonian coast. They got heavy weather again, but the wind was not from the head. It was in favor of the vessel. They then came in sight of Staten Island. From that time they got very bad weather, not every day, but it was the worst that they got around the Horn for about a month or five weeks. Sometimes they could not carry canvas except a little piece of lower maintopsail; and the sea broke very high, and there was a lot of water on the deck and in the cabin. Sometimes they had heavy weather for a day or more, and were driven back, and could not carry canvas. The current was against the vessel in going that way during the five weeks, including the month of July they were rounding the Horn. At that time some of the bulwarks were broken and carried away, two chain plates and two of the shrouds were broken, and a stanchion was broken. In the five weeks rounding the Horn they made a distance of about 200 miles. Had bad weather for two or three weeks after rounding the Horn. The master thinks he sailed from Limhamn on the 31st of January and arrived in San Francisco on the 12th of October. The master testified that when the ship rolled she came back again as ships do in heavy weather; not very quick, and that the ship was one of the most tender ships.

The vessel carried a cargo of about 1,426 tons. Of this cargo approximately 300 tons were stowed in the between-decks. In the storm encountered going around Scotland the vessel drew a little water; it was not very often that they pumped, but only sounded. The vessel has a very sharp build so that a very little water would take in the pumps very quickly. It would not take as much water to reach the pumps as in a flat ship. This was the first trip the master had made in an iron ship. He had been chief mate on a vessel about the same size as the Medea having two decks, but was never in command of any but a single deck ship. Prior to his appointment as master he did not know anything about the Medea. When loading at Gothenburg it was to be expected that she would meet storms and gales, and the master expected bad weather. The season was the season for storms in the North Sea, and he expected storms around the Horn, and in the stowage of the cargo he had in mind the voyage they were going to take. The sudden rolling of the ship depends upon her size, but the more weight there is on the bottom, the more stiff the vessel will be. A vessel is stiffened by putting the weight down low, which makes her roll more in a seaway. He testified that with the cargo in this case the right proportion for the between-deck load was 300 tons. That would make her a stable ship. When the cargo was examined at Christiansand there was no damage to it. After they had passed the line coming north after having rounded the Horn the hatches were taken off. On the way south around the Horn they did not take the main hatches off, but they got the fore hatches off and looked after them. They did not find any damage to the cargo then. Under cross-examination the master was asked the following questions:

"Q. Do you think the damage to the cargo occurred in the Pacific Ocean? A. From Staten Island around the Horn to the Pacific. Q. Did you examine the deck underneath at any time on the voyage? * * * A. I was not down

there myself, but the mate was down and looked after it. Q. The mate was down? A. Yes, sir. Q. And he did not report to you that there was any leakage through the deck? A. No, sir. Q. To what do you attribute this damage to the cargo? A. I cannot explain it in any other way than owing to the excessive storms that we had the water in some way had gotten down into the cargo. Q. The sea water? A. Yes, sir, the sea water. It cannot be any other water. Q. Yet your mate when he examined the hold did not report to you that there was any leakage through the deck? A. No, sir. Q. Have you any idea where this water came from that got into the hold? A. No, sir. Q. You do not know where it came from? A. No, sir."

The testimony of the chief mate concerning the voyage after leaving Christiansand is in substance as follows, his memory being refreshed by the logbook, from which he read:

On Friday, March 8th, we were at Christiansand. March 9th we left the harbor at Christiansand to go on the voyage again. When we got outside we found fine weather. It commenced with a little blow and squalls, and we made fast the small sails as there was more breeze; not a storm exactly. On March 15th the weather was stormy and rainy. On March 17th sometimes there was a squall; it blowed a little; sometimes no wind at all. In the forenoon of March 18th there was no wind; in the afternoon storm with squalls. At four o'clock in the morning of the 19th it was snow and storm. The topsail sheets broke, and the sail was blown to pieces on one side. On the 21st there was a storm and some pieces aft that go round the stern washed away. On the 22d the sea was heavy; ship worked hard. Much water on deck. We were at this time north of Scotland. We had a storm on the 31st of March. Up until the 7th of April according to the logbook we had storms most of the time. On May 19th we had a hard storm. We lost three or four or five sails; and we had plenty of water on deck and water in the cabin. On the 4th of June it was a storm; and some sail was blown to pieces. The sea was heavy and the ship worked hard. This was when we began to get in the neighborhood of Cape Horn. The weather varied from the 17th of June from moderate to heavy with squalls. On the 23d the ventilator in the forecastle head was broken by a heavy sea; also one stanchion, and the skylight in the forecastle head. On Tuesday, June 25th, we sighted Staten Island. The weather was stormy with short squalls. On the 26th the storm was not so heavy. On the 25th, 26th, and 27th there were storms and parts of the rigging were lost. From the 28th of June until the 7th of August they encountered storms and heavy sea and lost various parts of the rigging. The witness testified in general that during the trip around the Horn they encountered many heavy storms and heavy sea; and always plenty of water on deck. When we got a head storm we were always driven back and could not keep our course. During the heavy weather we had in the North Sea and north of Scotland and around the Horn the ship rolled easily; and she did not roll very fast. The ship is very sharp and tender.

Under cross-examination this witness was asked if he had encountered storms before in his experience. He said he had many times, and related an experience he had in the Bay of Biscay on his first voyage, and at another time when the ship he was on had been out a day

from Savannah and encountered a hurricane, and the vessel was close to going to the bottom. He was then asked:

"Q. Can you remember another storm, a very severe storm? A. Them two were the worst. I have been out in a thousand others. Q. A thousand other storms? A. Yes, sir. Q. Can you remember any particular one that was especially severe? A. I cannot remember. Q. They are all of them—this thousand or more—something similar that you met going around the Horn in the Medea? A. Yes, sir; just storms. Q. Storms that a sailor expects to meet when he goes to sea? A. Yes, sir, of course. Q. When you went on this trip through the North Sea it was a stormy season? A. Yes, sir; winter time; that is the stormiest time. Q. You expected storms in the North Sea? A. Yes, sir. Q. When you went around the Horn you passed there in a stormy season? A. Yes, sir. Q. You expected storms? A. Yes, sir. Q. And you were not disappointed? You got them? A. Yes; we got storms. * * * Q. Then you had no water in the hold after you left Christiansand? A. Sometimes we must use pumps, anyhow. The ship was leaking a little, but where it came from I don't know. Standing eight or ten days we had to pump two or three minutes. Q. Was this pumping done after the storms? A. No, sir; when there is a little water in the ship there is no use to pump. When a ship is laying quite steady we pump out all the water that is in her and then we let her stand for eight or ten days again. Q. You did use the pumps on the voyage around the Horn? A. Yes, sir; once in a while. * * * Q. So that after leaving Christiansand, and after you had at that port fixed that side port, you know of no way for the water to have got down into the hold? Everything was tight? A. Yes, sir. Q. It could not have come down through the hatches? A. No, sir. Q. Nor through the decks? A. No, sir. Q. Nor through this exposed piece on the starboard stern? A. No, sir. Q. And the damage which you did see to the cargo when you went down on one occasion was such as to show itself to the eye? * * * A. Yes, sir; there was damage on that cargo. Whether it came from the top I don't know. Q. And you at no time noticed any water in the cargo? A. Towards the end of the voyage there was some water came down forward. I did not go far aft because my legs were poor. Q. When was this water noticed coming down onto the cargo forward? What date? A. I don't know. Q. Have you a note of it in your log? A. I did not put it in there. Q. How did you know it came down on the cargo forward? A. You could see it. Q. Did you see it? A. A little forward. Q. When was it that you saw water coming down on the cargo forward? A. I cannot tell that; I don't remember. Q. You did see it? A. Yes, sir. Q. Where was it coming from? A. Coming from the top a little from the deck, from the sweat, or something like that. Q. You saw water coming? A. No, sir; I say the cargo was a little damp. I saw no water running down only that the cargo was damp. * * * Q. By the term 'working of the ship' which you have used on your direct examination, what do you mean? A. I don't think she worked any harder than other ships do."

The Marine Declaration or Extended Protest of the Master furnishes no additional detail to that furnished by the testimony of the master and mate.

If we accept the testimony of the master who should have known when and where the damage to the cargo occurred, we must conclude that the cargo had not been damaged when the Medea sailed from Christiansand, nor had it been damaged prior to reaching Staten Island, an island off the southeastern extremity of Tierra del Fuego. When the master was asked the question: "So that you think the damage to the cargo occurred in the Pacific Ocean," his answer was, "From Staten Island and around the Horn to the Pacific." When asked to what he attributed the damage of the cargo to, his answer was that he could not explain it in any other way than owing to the excessive storms they had and the water in some way had gotten down

into the cargo. He says it was the sea water; it could not have been any other water. When asked if he had any idea where this water came from that got into the hold, he answered, "No, sir." The mate who kept the logbook in which he was required to make a faithful and minute journal of the voyage (Curtis, Rights and Duties of Merchant Seamen, 95) was not able to furnish any more definite information than the master concerning the cause of the damage to the cargo. He testified that the water could not have come down through the hatches nor through the deck, and whether it came from the top he did not know. He says that towards the end of the voyage there was some water coming down forward. When this water was noticed he did not know. He made no note of it in the log.

The master and mate did not even agree upon these meager details relating to the time and cause of the damage to the cargo. Storms were encountered and water came on deck as was expected, but they did not connect either the storms or the water on deck with the water that damaged the cargo. Where the water came from that damaged the cargo they did not know. The testimony leaves the question in doubt. The evidence is not sufficient to sustain the burden of proof cast upon the carrier.

In the recent case of The Folmina, 212 U. S. 354, 362, 29 Sup. Ct. 363, 365 (53 L. Ed. 546), the Supreme Court said:

"Where showing an injury by sea water does not in and of itself operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils."

The court further said:

"The inability of the court below to determine the course of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier."

The court refers to a number of cases "holding that because the damage to cargo was shown to have been occasioned by sea water without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof." Among other cases the court refers to the case of The Compta, 4 Sawy. 375, Fed. Cas. No. 3,069. The action in that case was to recover for damage to goods shipped on board a vessel and the defense was that the vessel during the voyage encountered sudden and violent gales and heavy seas so as to strain and damage her thereby causing her decks to leak and admit water

to her cargo. In proof of these allegations the respondents produced the logbook and protest of the master, supported by the suppletory oaths of the latter and the two mates. The logbook showed that the ship experienced weather of a considerable severity. Speaking of this evidence the court said that the "decks appear to have been very frequently flooded, and 'high, confused seas, heavy seas, heavy swells,' are constantly mentioned. * * * But that is not of such unusual and extreme severity as to justify the assumption, without further evidence, that it caused the leaks which occasioned the damage. The carrier, to make good his defense, is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did."

In the present case the burden of showing the connection between the damage by sea water and the exception against sea perils has not been discharged by the carrier. The cause of the damage to the cargo has been left to conjecture and we must look elsewhere for a satisfactory explanation. But libelants have not relied entirely upon the inability of the respondent to prove that the damage to the cargo arose from perils of the sea. They have introduced evidence tending to prove that the damage was caused by bad stowage. We will now proceed to consider that question.

The total weight of the Medea's cargo was 1426.1019/2240 tons. Upon the proper distribution of this cargo in the vessel depends the question of stowage. The vessel was warranted "tight, staunch, strong and in every way fitted for the voyage." If she was badly stowed at the beginning of the voyage she was not fitted for the voyage. The warranty of seaworthiness was absolute and not conditional. The shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage. The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688; The Caledonia, 157 U. S. 124, 131, 15 Sup. Ct. 537, 39 L. Ed. 644; Corsar v. J. D. Spreckels & Bros. Co., 141 Fed. 260, 264, 72 C. C. A. 378. The vessel was loaded by the master—that is to say, the cargo was stowed under his direction—and the distribution was made in accordance with his experience. He was 56 years of age and had been going to sea 40 years. He had been 10 or 11 years mate and 19 years a master; but this was his first voyage on the Medea. Prior to this voyage he knew nothing about the Medea. This was his first command of an iron ship and his first command of a two-deck ship. His experience with a vessel of the size of the Medea consisted in being chief mate on one vessel of about the same size. With this experience he thought that the right proportion of the cargo of the Medea for the between-deck load was 300 tons.

The libelants introduced in evidence the testimony of Charles Green, a master mariner, who was 54 years of age, and who had been 8 years an officer or mate, and 17 years a master of a vessel. He had been master of the Medea for seven years from 1889 to 1896, and had frequently loaded her with a dead weight cargo. He had always given instruction to the stevedores when loading to have about one-third

of the dead weight in the between-decks. The approximate weight in tons carried by the Medea on such occasions in between-decks was usually from 450 to 500 tons. On one occasion he had 350 tons stowed between-decks and when he got to sea, he noticed the jerky motion when the ship rolled to windward and the tendency to ship heavier water than he had noticed on the previous voyage when with a cargo of 1,500 tons nearly 500 tons were stowed between-decks. Whilst hove to on the port tack a heavier lurch than usual caused the main topgallant backstays to carry away, and the mast went over the side. As the rigging and backstays were all good, he attributed the loss of the mast to the general unseaworthiness of the ship, to the excessive weight in the lower hold, and the center of gravity being too low. When the weather moderated he at once took up 60 or 80 tons of the cargo out of the hold into the between-decks and in about three weeks buffeting against heavy gales and high seas off Cape Horn he found she behaved well, and went through it all without accident. He refers to other experiences with the vessel from which he concluded that for stability the vessel required one-third of her cargo between-decks. During voyages when her cargo was thus distributed she never had a pound of damaged cargo. This witness knew the individual characteristics of the Medea and his testimony is entitled to weight for that reason.

Samuel Vint, a master of more than 17 years' experience, who had been around the Horn about 30 times, and had had 27 years' experience in the stowage of cargo on vessels, testified that he was then in command of the Killiecrankie, an iron ship which had come around the Horn from Gothenburg and Alberg with a cargo of iron and cement. His experience had taught him to put about one-third of his cargo between-decks. He had two-fifths of his cargo on the Killiecrankie stored between-decks, and no part of the cargo was damaged during the voyage. He knew the Medea, and in answer to a hypothetical question stated that one-third of the cargo should have been loaded between-decks, and that loaded as she was the roll of the Medea would be accompanied by a sudden return movement.

The libelants introduced the testimony of other experienced masters who testified that the vessel should have carried one-third of her cargo between-decks, and when informed as to the cargo carried they testified in answer to fair hypothetical questions that the cargo was improperly stowed.

The testimony as to how the weight of the cargo was distributed is conflicting. The respondent introduced the depositions of the stevedores at Limhamn, and a stipulation as to the testimony of the stevedores at Gothenburg who loaded the vessel and who testified, or would have testified, as to the weights of the various articles constituting the cargo stowed between-decks, from which it appears that the weight of the between-deck cargo as estimated by these witnesses was 343 tons. If this testimony were accepted as true the between-deck cargo was still insufficient to give the vessel stability according to the actual experience of Capt. Green, the former master of the vessel, and other masters who testified concerning the proper loading of such a vessel. But the evidence on the part of the libelants tends to

show that the weight of the between-deck cargo based upon the custom-house weights taken in San Francisco did not exceed 266 tons, or 18 per cent. of the whole cargo; and whether we take the testimony of the libelants that only 266 tons were stowed between-decks, or the testimony on the part of the respondent that the between-decks cargo was 343 tons, it is clear that the stowage of the cargo was bad, causing the ship to strain in heavy weather and open her deck seams, and that the damage caused by the leakage of salt water through the seams of the deck down onto the cargo is to be attributed to the improper distribution and bad stowage of the cargo.

It follows that because of the failure of the respondent to sustain the burden of proof the cause of the damage to the cargo arose from perils of the sea, and, the weight of evidence being in favor of the libelants that the vessel was unseaworthy by reason of the bad stowage of the cargo, the decree should have been in favor of the libelants.

The decree of the District Court is therefore reversed, with instructions to ascertain the damages sustained by the libelants, and award a decree accordingly.

ILLINOIS COMMERCIAL MEN'S ASS'N v. PARKS.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,606.

1. INSURANCE (§ 825*)—ACTION ON ACCIDENT POLICY—QUESTIONS FOR JURY.

In an action on an accident policy to recover for the death of the insured who fell on a sidewalk and received severe injuries, dying a few minutes later, issues of fact were made by the pleadings (1) whether the fall was accidental, caused by a misstep or stumble, or resulted from a diseased condition, and (2) whether, if accidental, the injury received was the cause of death "independent of all other causes" within the meaning of the policy. There was evidence that deceased stumbled and fell, but that there was no obstruction in the sidewalk at the place. Evidence was introduced by defendant that an autopsy made in its interest tended to show diseased conditions of the heart and kidneys and by plaintiff that deceased was apparently in the best of health at all times up to the moment of his fall, and medical testimony that it was improbable that the chronic diseased conditions described could have existed and reached a fatal stage without prior manifestation in the health of deceased. There was a conflict of medical testimony as to whether the injuries received from the fall were sufficient alone to cause death. *Held*, that on such testimony both issues were properly submitted to the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 825.*]

2. INSURANCE (§ 817*)—ACCIDENT INSURANCE—RISKS AND EXEMPTIONS IN POLICY—CAUSE OF DEATH—BURDEN OF PROOF.

An accident policy expressly made the application and by-laws of the association a part of the contract, and provided that its liability for the death of the insured should be subject to all the provisions of the by-laws. One by-law limited such liability to death from "bodily injuries which shall * * * independently of all other cause result in the death of said member" and another provided that "the association shall not be liable to any person for any indemnity or benefit for injuries or death * * * in case such injuries shall occur as the result, wholly

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

or partially, directly or indirectly of * * * disease, bodily or mental infirmity. * * *" *Held* that, in an action for the death of the insured, following a fall upon a sidewalk by which he was injured, the burden of proof was on the plaintiff to establish not only that the injury was accidental and was the proximate cause of death, but that such accidental injury was the sole cause of death independently of any pre-existing disease or bodily infirmity as a contributory cause thereof.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 817.*]

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

Action by Florence E. Parks against the Illinois Commercial Men's Association. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff in error is an accident insurance association and defendant below, in a suit brought by the beneficiary under one of its policies to recover the amount thereby insured, wherein trial of the issues resulted in a verdict and judgment in favor of the plaintiff (defendant in error); and various errors are assigned for reversal under the present writ. The only assignments which require discussion are stated in the opinion, together with the contract terms and evidence involved in the inquiry.

James Maher and Charles T. Thompson, for plaintiff in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The Illinois Commercial Men's Association issued the policy of accident insurance in suit to Rodney N. Parks, on December 5, 1903, naming his wife, Florence E. Parks (defendant in error), as the beneficiary. On September 30, 1904, the assured received severe injuries from a fall on a sidewalk, in Springfield, Minn., striking the corner of an iron hitching post and rail, wounding his chest and fracturing his first left rib, and death ensued within a few minutes. In her suit thereupon the beneficiary recovered the verdict and judgment from which this writ of error is brought, and the only issues of fact in controversy, under the pleadings, stipulations and testimony, are: (1) Whether the fall of the assured (above mentioned) was accidental, caused by a misstep or stumble on or off the sidewalk, or resulted alone from a diseased condition; and, (2) if accidental, Was the injury arising from the fall the cause of death, "independent of all other causes" within the meaning of the policy of insurance?

Under the first issue, it is undoubted that the testimony of the single witness who saw the occurrence tends to establish (prima facie) an accidental fall, through a stumble by the assured while turning on the sidewalk from conversation with another person, to start in the direction of the hotel where he was registered. It appears, however, that there was no obstruction in the sidewalk at the place where he was observed to stumble (as described "over his feet"), so that this testimony is not inconsistent with the contention on behalf of the plaintiff in error (resting on other circumstances in evidence), that the

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

fall may have been caused by disease of the heart. The second issue is one of mixed law and fact, arising under the terms of the policy and predicated on testimony of an autopsy held at Minneapolis, in the interest of the insurer (after the arrival there of the body), tending to show diseased conditions of the heart and kidneys. This testimony is applicable as well to the first issue; its credibility and force under either issue was for the jury to determine, and comment thereon is not deemed proper, beyond the remark that it was material and raised both issues. Supplemented by other expert opinion testimony introduced by the plaintiff in error, the evidence tended to establish the defense that the diseased conditions appearing on the autopsy were either the cause of the fall and death of the assured, or contributory causes of death, if not of the fall, and that the injuries received from the fall upon the hitching post and rail were insufficient to cause death without such diseased conditions. On the other hand, the testimony on the part of the beneficiary tends to prove that the assured was in excellent health, apparently free from disability or disorder of heart or kidneys, throughout the 30 years of his married life with the beneficiary, and up to the instant of his fatal fall; that he was transacting business with a customer immediately before starting for the hotel and then appeared to be in the best of mental and physical condition; that it is improbable (according to other expert opinion testimony) that the chronic diseased conditions, so described in the testimony for plaintiff in error as the cause of death, could have existed and reached the fatal stage without prior manifestation in the health of the assured; that the injury and shock received from striking the hitching post were sufficient alone to cause death; and that the evidence that the assured "grabbed the railing" after his tumble was indicative of consciousness therein.

Under the evidence above recited, we are of opinion that error is not well assigned for refusal of the trial court to instruct the jury to find in favor of the plaintiff in error, even if the contract of insurance be interpreted as sought on its behalf. The testimony in support of liability was sufficient, to say the least, to authorize submission of the issues to the jury, and the only meritorious question raised is whether error appears in an instruction to the jury reading as follows:

"There is evidence here that at the time the autopsy was performed, within a few days after the death of Rodney N. Parks, the heart of Parks and the kidneys of Parks appeared to have been in an unhealthy condition. There is evidence before you, from which you are authorized to infer and believe and conclude that at the time Parks died he had a defective heart and defective kidneys. Now, in connection with that situation, I instruct you, gentlemen of the jury, that even though you believe that at the time Parks died, at the time he struck the corner of this hitching post or hitching rack, at the time his body started from an erect attitude to fall, his heart or kidneys, or both his heart and kidneys were in a defective and unhealthy condition, and that at the time he started to fall he was not dying—to put it in common language—was not 'dropping dead,' and that he was falling from some accidental cause, such as stumbling or slipping or getting his feet tangled, and struck the corner of this hitching rack and a blow was received thereby upon his chest, which caused him to die, you will find a verdict solely and independently of all other causes, in favor of this plaintiff, even

though you may believe from the evidence that death might not have or would not have resulted had it not been for the unhealthy heart or the unhealthy kidneys or both, because we are dealing with causes and not conditions. The defective heart and defective kidneys went to make up the condition. The blow which the man received, if it caused the death, because of the defective heart and defective kidneys, was the sole cause of death."

The contract of insurance in suit consists of three parts: (1) The so-called policy; (2) the application for membership; and (3) the by-laws of the association. (1) The policy expressly recites its issuance, "In consideration of the application for membership * * * referred to and made a part of this contract, and of each of the statements and declarations therein," which are adopted and warranted to be true, and "the only statements or declarations upon which this contract is made"; and it promises payment of $5,000, "in the case of the accidental death of said member" within 90 days after proof of accidental death, subject, however, to "all the provisions of the by-laws of said association." (2) The application is made up of 23 questions and answers, followed by this recital:

"I am aware that the benefits of this association do not extend to hernia, orchitis or to any bodily injury or death happening directly or indirectly in consequence of disease, or to any injury of which this association is not notified within fifteen (15) days of its occurrence, or to any death or disability which may have been caused wholly or in part by mental or bodily infirmities or disease."

Other recitals are not involved herein. (3) The by-laws introduced as part of the contract are sections 2 and 8 of article 7, reading as follows:

"Whenever any member of this association in good standing, shall, through external, violent and accidental means, receive bodily injuries which shall, within six (6) months from and after the date of said accident, and independently of all other causes, result in the death of said member, the beneficiary named in the application of said member, or, in the case of the death of said beneficiary, or in case none were named, then the executor or administrator of the estate of said deceased member, shall be paid (except as provided in section 8, article 7, of these by-laws), within ninety days after the receipt by the association of proof, satisfactory to the board of directors, of said injuries and of the accidental cause thereof, the sum of five thousand dollars ($5,000.00), less any and all sums previously paid to said member as indemnity on account of said accident, in full satisfaction of any and all claims on account of said member; provided, however, such member shall be totally disabled as a result of such injury, and such total disability shall be continuous from the time of the injury to the time of death of said member. But no death claim will be paid by this association unless, within fifteen days after the happening of such accident, said member, or in case of his death or inability, then some person on behalf of or his beneficiary shall have sent to the secretary of this association written notice of said accident, and unless the death of said member occurs within six months after the date of said accident, and unless said claim for death benefit be presented to the association within thirty days after the death of the deceased member, together with full proof of the death and of the particulars of the accident claimed to have caused said death, in manner and form as prescribed by the board of directors."

"Sec. 8. This association shall not be liable to any person for any indemnity or benefit for injuries, or death, or loss of limb or of eye resulting from an accident to a member which happens while said member was violating any law; was not in the exercise of due diligence for his self protection; or was in any degree under the influence of intoxicating liquors or narcotics, or which

shall happen on account of, by reason of, or in consequence of, the use thereof; nor for injuries or death in any case in which there is no visible mark of injury on the body of the member; or in case such injuries shall occur as the result, wholly or partially, directly or indirectly, of any of the following causes, conditions, or acts, or while the injured member was under the influence of or affected by, any such cause, condition or act, to wit: Disease: bodily or mental infirmity; hernia; orchitis; fits; vertigo; sleep walking; medical or surgical treatment; intentional or unintentional taking of poison; voluntary inhaling of gas; contact with poisonous ivy; intentional injury inflicted by the insured while sane or insane; voluntary over-exertion; wrestling; fighting; racing; professional ball or professional football playing; and this association shall not be liable to any person on account of any member who, while sane or insane, shall take or destroy his own life; nor shall this association be liable to any person on account of any member who may or shall be injured while acting as a soldier or sailor."

The insurance contract thus made and accepted, with its express agreement by the parties in reference to their understanding of the terms of liability in question, we believe to be free from the difficulty which has appeared in construing the terms of various other accident insurance policies, involved in cases cited in the briefs, both for and against the foregoing instruction to the jury. These citations present two divergent lines of decision in the interpretation of the various terms employed in such policies by way of limiting the cause or causes of death or disability for which indemnity is provided, diverging, as we understand their import, over the inquiry whether the general rule of proximate cause is applicable and controlling. The cases which are relied upon for support of the instruction adopt that rule as the ultimate test of liability under such policies, seemingly treating and accepting Freeman v. Mercantile Accident Assoc., 156 Mass. 351, 353, 30 N. E. 1013, 17 L. R. A. 753, as a leading precedent therefor. In that case, however, the policy for indemnity in the event of death or disability from an accident, stated the terms of liability to be "where the injury is the proximate cause of the disability or death," and the familiar doctrine was upheld thereupon: that "the law will not go further back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions"; and that recovery was authorized for death thus caused by an accident, "even if he would not have died if his * * * previous state of health had been different." So, in reference to policies limited either (a) to injuries through "purely accidental causes," which injuries "shall solely and independently of all other causes, necessarily result in death" (Continental Casualty Co. v. Lloyd, 165 Ind. 52, 59, 73 N. E. 824), (b) to "bodily injuries sustained through * * * accidental means" if death results "from such injuries, independent of all other causes" (Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 258, 267, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560), or (c) death from accidental injuries, if death "shall result from such injuries alone" (Modern Woodman Accident Ass'n v. Shryock, 54 Neb. 250, 256, 267, 74 N. W. 607, 39 L. R. A. 826), these authorities (and others cited) uphold the above-stated doctrine of proximate cause as controlling for their interpretation respectively. Nevertheless, each of such authorities applies the doctrine, with the issue of proximate

cause defined therein as one of fact for determination by the jury under the testimony; and were such rule of interpretation unquestionable, no sanction thereunder would appear for withholding from the jury the issue of fact presented accordingly in the case at bar.

Under the present contract, however, we are not required to determine whether the true rule of interpretation was adopted in the above cited cases; nor, whether the indisputable limitation of liability under the one by-law (section 2) to "bodily injuries which shall, * * * independently of all other cause, result in the death of said member," extends only to the proximate cause of death. The other by-law above quoted (section 8) is alike made a part of the contract, and it provides that the "association shall not be liable to any person for any indemnity or benefit for injuries or death * * * resulting from an accident to a member which happens" under several contingencies recited (not involved here), "or in case such injuries shall occur as the result, wholly or partially, directly or indirectly, of any of the following causes, conditions, or acts, or while the injured member was under the influencce of, or affected by any such cause, condition or act, to wit, disease, bodily or mental infirmity, hernia, orchitis, fits, vertigo, sleep walking, medical or surgical treatment, intentional or unintentional taking of poison." On reference to the wording of the context which names other contingencies, it is contended that the exemption so defined is not thereby made applicable to causes of death. But whatever of force might otherwise appear in this contention of ambiguity in these terms (for construing the one above quoted in favor of the assured) is expressly set aside, as we believe, by the above-quoted stipulation contained in the application and "made a part of this contract." While such statement could not become operative alone to create new contract terms, it plainly amounts to an agreement by the contracting parties upon the meaning of the terms referred to, in so far as ambiguity may otherwise appear therein, and requires their interpretation accordingly. The contention is untenable that this statement must be rejected, in conformity with the ruling of Accident Ins. Co. v. Crandal, 120 U. S. 527, 533, 7 Sup. Ct. 685, 30 L. Ed. 740, in reference to like remarks made in an insurance application, for the reason there pointed out, that "the whole application is not made a part of the contract"; so that, upon the distinctions stated in the opinion, the statement therein not included in the terms was deemed one "not of fact but of law"—merely as to "the effect of the insurance"—and without force to "control the legal construction of the policy afterwards issued." Such view is obviously inapplicable to the present statement, not only incorporated in the contract, but distinctly made in reference to an express provision thereof which might otherwise be misunderstood.

We are of opinion, therefore, that the ultimate issue of liability under this contract, in the event of a finding of accidental injury, is not whether such injury was the proximate cause of death, but whether it was the efficient cause, without the intervention of pre-existing disease or bodily infirmity as a co-operative cause of death—within the extended line of authorities cited under analogous provi-

sions, whereof the following are deemed sufficient examples: National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 775, 20 C. C. A. 3; Commercial Trav. Mut. Acc. Ass'n v. Fulton, 79 Fed. 423, 426, 430, 24 C. C. A. 654; Sharpe v. Com. Trav. Mut. Acc. Ass'n, 139 Ind. 92, 93, 95, 37 N. E. 353; Binder v. National Masonic Acc. Ass'n, 127 Iowa, 25, 102 N. W. 190, 194; White v. Standard Life & Acc. Ins. Co., 95 Minn. 77, 103 N. W. 735, 736, 884. An issue of fact under these provisions was presented by the evidence, and instructions in conformity with the foregoing view became needful for its submission, entirely apart from the primary question whether the fall resulted from accident or disease. If the jury found from the evidence that the immediate injury was not caused accidentally, such finding would leave no further inquiry open under the policy; requiring a verdict against recovery. If they found, however, that the evidence upon that question was in favor of accidental cause for the fall, the other above-mentioned issue of fact was not involved therein, but remained for determination under conflicting evidence upon one and the other phase of contract liability; so that explicit instructions of law were essential, both for interpretation of the contract and for application of the testimony thereunder in accord with these propositions which are deemed applicable: That the burden of proof was on the beneficiary under the policy, not only to establish that the injury from which death ensued was accidental, but that such accidental injury was the sole cause of death, independently of any pre-existing disease or bodily infirmity as contributory cause thereof; that if the testimony further established that the assured was then affected by disease or bodily infirmity, which caused his death, either directly therefrom, or indirectly, as its natural result ensuing such accidental injury, so that the accident would not have caused his death without such pre-existing disease or infirmity, the contract exempted the association from liability therefor; that recovery was not authorized under the contract for death caused partly by disease and partly by accidental injury (National Masonic Acc. Ass'n v. Shryock, supra; Commercial Trav. Mut. Acc. Ass'n v. Fulton, supra); that if the evidence, however, established not only the fact of accidental injury, but the sufficiency thereof to cause the death independently of other causes, and the testimony in reference to pre-existing disease or infirmity failed to establish such disease or infirmity as indirect or contributory causes of such death, liability therefor was within the contract terms and recovery was authorized.

The instruction complained of (as above quoted), under which the case was submitted to the jury, is inconsistent with the foregoing view and was erroneous, as we believe, both in its interpretation of the contract and in withholding the issue of fact from the jury. For that reason the judgment must be reversed; and reversal is directed accordingly, and the cause remanded to the Circuit Court for a new trial.

WEST v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910. Rehearing Denied June 10, 1910.)

No. 1,583.

1. MASTER AND SERVANT (§ 286*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—LOW BRIDGE OVER RAILROAD.

In an action against a railroad company to recover for the death of a brakeman on a freight train who was killed in the night while on top of the cars in the course of his duty by his head striking an overhead bridge, proof that the clearance between the rails and such bridge was more than two feet less than the standard or usual clearance maintained by the company in case of such permanent overhead structures made a prima facie case of negligence against the defendant, which could only be met by proof of a necessity which could not reasonably be avoided, and which was not conclusively overcome by evidence that the bridge was for a highway crossing, and that when it was rebuilt some time before the highway commissioners objected to its being raised because of the steepness of the approaches, it not being shown that such objection could not have been overcome by also raising the approaches nor that it was impracticable to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Where there was direct and positive testimony of apparently disinterested and reputable witnesses that "telltales" to give warning of the approach to the bridge, which had been taken down six weeks before, had not been replaced at the time of the injury, although contradicted, the question was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—RAILROAD BRAKEMAN—LOW BRIDGE.

To charge a railroad brakeman with assumption of the risk of injury from a low overhead bridge, by which he was struck and killed, it must be shown that he had either actual or constructive notice, not only of the existence of the bridge, but of the fact that it was so low as to be dangerous, and also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*

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

4. MASTER AND SERVANT (§§ 113, 288*)—ASSUMPTION OF RISK—RAILROAD BRAKEMAN—LOW BRIDGE.

The maintaining by a railroad company of an overhead bridge so low that it will strike a brakeman when standing or walking on the top of passing freight cars in the course of his duty, unless reasonably unavoidable, is negligence per se, and the company cannot charge its brakemen with assumption of the risk as matter of law by publishing rules giving them notice generally that bridges will not clear a man on top of high cars and to look out and guard themselves accordingly.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 224–227, 1068–1088; Dec. Dig. §§ 113, 288.*]

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

5. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—RAILROAD BRAKEMAN.

The posting of a notice on a bulletin board by a railroad company that the "telltales" were down at a certain overhead bridge cannot charge a brakeman with assumption of the risk therefrom as a matter of law in the absence of evidence that he had actual notice or knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

6. MASTER AND SERVANT (§ 289*)—INJURY OF RAILROAD BRAKEMAN BY LOW BRIDGE—CONTRIBUTORY NEGLIGENCE.

A brakeman on a freight train who was struck and killed by a low bridge at which there were no telltales, while proceeding along the tops of the cars in the night during a storm, *held* not chargeable with contributory negligence as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

7. WORDS AND PHRASES—"TELLTALES."

"Telltales" are ropes suspended from a wire across the track to give warning of a low bridge.

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

Action by Stella F. West, administratrix of the estate of Henry W. West, deceased, against the Chicago, Burlington & Quincy Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

E. J. King, for plaintiff in error.

Chas. V. Miles, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The action was for damages on account of the company's alleged wrongful causing of West's death. At the conclusion of the evidence the court directed a verdict for the company.

West, a freight brakeman on one of the company's trains, while passing on a stormy night from the engine back over the tops of the box cars to examine the hand brakes in the performance of his duty at the time, stepped from an ordinary box car to a furniture car, and there was struck on the back of the head by the girder of an overhead bridge and killed.

Negligence was charged in the lack of sufficient clearance and also of "telltales" (ropes suspended from a wire across the track) to give warning of the low bridge.

Evidence is in the record tending to prove that the bottom of the girder was 19 feet 8½ inches above the rails; that ordinary box cars are 12 feet high; that the furniture car in question was 14 feet 1 inch; that West was 6 feet tall in his shoes; that the company maintained this bridge as an overhead highway crossing; and that the company had a standard or usual clearance of 22 feet between track and permanent overhead structures. This was sufficient to make a prima facie case under the first charge of wrongful conduct. The ways of these great roads of commerce are maintained for the indefinite future.

To erect permanent structures in such locations and relations that employés when discharging their duties are likely to be killed indicates an almost wanton disregard of human life. Under its denial the company did not conclusively overcome the prima facie showing. Such a death trap is not to be excused except by a necessity that cannot reasonably be avoided. The bridge foreman testified that when an old bridge at this location was replaced by the present one it was the intention to raise the new bridge, but the commissioners objected because the grade of the approaches would be too steep. There was no proof that the commissioners objected to the raising of the bridge if the company would also raise the approaches, nor what the cost of filling the approaches would be. A civil engineer testified that the track was upgrade both ways from the bridge and that while the clearance could be made sufficient by lowering the track "the grade would have to be carried out so far I should say it would be impracticable." Physical practicability was thus admitted; and, there being no evidence of how far the grade would have to be extended nor of the cost, the jury were not bound to accept an unsupported opinion that the change was financially impracticable. There was no proof to establish conclusively that the expense was beyond what a master of ordinary prudence would incur, first, out of regard for the safety of his employés; and, second, to save the damages that would accrue throughout the existence of the death trap in all cases where assumption of risk or contributory negligence could not successfully be used in defense.

For about six weeks before the accident the telltales were down. Six witnesses, mainly farmers residing near this highway crossing, testified that the telltales were not put up until after West was struck. The bridge crew and the section men, 14 in all, testified that the telltales were restored the second day before the injury. Furthermore, records of the work done by the bridge crew and telegraph messages sent over the company's wires from the bridge boss to his superintendent telling the daily whereabouts of the crew, were introduced. These corroborated the men's testimony. Thereon counsel for the company insist that the evidence of the plaintiff was so slight in comparison with that of the company that the court was justified in directing the verdict. The records and messages were at all times in the custody of the company's men who would naturally have an interest in freeing themselves and the company from blame. And while there was no direct attempt to impeach the company's men and records, the ultimate fact was squarely contradicted by the positive and circumstantial testimony of apparently disinterested men whose reputation for truthfulness was unassailed. Although from our study of the record the company's evidence appears much the stronger, we are of the opinion that this question of fact, involving the reliability of the evidence offered pro and con, should have been submitted to the jury, if the case was otherwise submissible.

With evidence sufficient to go to the jury upon the questions of the company's negligence respecting clearance and telltales, it was incumbent upon the company, in order to warrant a directed verdict, to establish affirmatively and conclusively either that West had assumed the risks or that he negligently contributed to his injury.

Assumption of risk of injury by the low bridge: From the teaching in Hough v. Rld. Co., 100 U. S. 213, 25 L. Ed. 612, that a railroad company's negligence in building and maintaining its tracks and appurtenant structures "is not a hazard usually or necessarily attendant upon the business" nor one "which the servant, in legal contemplation, is presumed to risk" it is apparent that West, by the act of entering the service, did not agree to take upon himself the danger of the negligent lack of clearance. When, if ever, did he assume the risk?

West, 25 years old, had had 4 years' experience as a brakeman. For 2 years he had worked on this division. During several months preceding his death the trains on which he worked had passed under this bridge about 20 times a month. The fatal occasion was in the middle of the night. How often the trains on which he worked passed under this bridge in the daylight was not shown. If it might be inferred that some of his trains passed in daytime, still there was no evidence that he was ever in a position on the trains where he could see the bridge. If it might be inferred that he had noticed the bridge, that would be far from establishing that he had ever apprehended the danger arising from its presence. The record contains no evidence that any one had informed him of the particular danger, nor any statement or admission that he knew of it. The knowledge, actual or constructive, that must have been brought home to West was not merely knowledge that there was an overhead bridge in this locality, but knowledge of the danger that would arise at the instant when a tall man standing erect on a high car in a moving train was about to pass under the bridge. Rld. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Ry. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382; Hawley v. Ry. Co., 133 Fed. 150, 66 C. C. A. 216; Ry. Co. v. Beckett, 163 Fed. 479, 90 C. C. A. 25; Ry. Co. v. Cowley, 166 Fed. 283, 92 C. C. A. 201.

As bearing on the question of West's knowledge of the danger arising from this low bridge, a time table was introduced which bore this print:

"Every man in the employ of the company that is in the train and engine service should have a copy of these time-table rules on hand. * * * Overhead bridges will not clear a man standing on top of high cars. Employés must look out for and guard themselves accordingly."

If this rule is to be construed as a notice that the company had been and intended to continue to be negligent in the construction of overhead bridges, and as a requirement that employés, without having any particular defect called to their attention, should hunt for and at their peril find all the defects, the rule is void as being an attempted abandonment of the company's duty and an attempted destruction of the employés' right to rely upon the belief that the company's duty has been faithfully performed until notice of failure in some particular is brought home to them—void as against public policy—just as void as the efforts in bills of lading to compel shippers to assume the carrier's negligence in transportation. As an attempted notice of the particular danger at this particular place, the rule manifestly falls short. And there was no direct proof that West had knowledge of the rule. If it

might be inferred from the company's custom of furnishing its brakemen with copies of the time tables that West had been provided with a copy, the inference is not conclusive.

But, concerning permanent obstructions (the maintenance of which, unless reasonably unavoidable, is negligence per se), we think a further principle is involved, namely, that in law an employé is not bound at his peril to keep his consciousness continually charged with memories of the locations and relations of such obstacles, and that his engrossment in his duties at the time may excuse his failure to recall the impending peril. Shearman & Redfield on Negligence (4th Ed.) § 198; Dorsey v. Construction Co., 42 Wis. 583. So, assumption of risk being a matter of defense, it would be necessary for the company to establish not merely that West at some former time had apprehended the danger, but also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness.

Assumption of risk from the absence of telltales: On this, the record contains the further evidence that a written notice that the telltales were down was posted on a bulletin board, and that the matter was a frequent topic of conversation among the trainmen. But there was no direct proof that West had knowledge either of the written notice or of the talk. If knowledge might be inferred, it would not be the only inference on that subject that would be warranted by a consideration of all the circumstances in the record.

We are not now saying, with respect to either the lack of clearance or of telltales, that 12 reasonable men, under proper instructions from the court, might not properly find that a prudent person, circumstanced as was West, would have known of the dangers before stepping on the high car and would either have kept off or gone ahead knowingly at his own risk. But as different inferences of ultimate facts were fairly deducible from the state of the evidence, the question of assumed risk should have been submitted to the jury.

Contributory negligence: During a storm in the night, while discharging an immediate duty, West was proceeding along the tops of the cars. We can find nothing in the circumstances on that occasion that would have compelled the jury to find as the only legally permissible finding of fact that any danger was so obvious and imminent that a reasonably prudent person would not have acted as West did.

The judgment is reversed, with the direction to grant a new trial.

ATHERTON v. GREEN et al.

(Circuit Court of Appeals, Seventh Circuit. June 10, 1910.)

No. 1,690.

BANKRUPTCY (§ 163*)—PREFERENCE—TRANSFER IN PAYMENT FOR PROPERTY CONVERTED.

A bankrupt conducted a bank as sole owner, and as such banker received a note from defendants for collection and remittance of the proceeds. He collected the note but converted the proceeds to his own use. He was at the time insolvent and within a few days thereafter executed a conveyance to defendants of real estate which he had long owned, sending it to them with directions to hold it until they had definite notice of the closing of his bank. The bank was closed at the time, and, receiving notice of such fact, defendants accepted the deed.

Held, that while the conversion of the proceeds of the note gave the bankrupt no title thereto, and defendants were entitled to follow and recover the amount in so far as it remained on hand or was traceable into other property, their acceptance of the conveyance of the property with knowledge of the conversion and insolvency was an election to treat the misappropriation as creating an indebtedness, and they stood in no better position than general creditors, and that the conveyance constituted a preference voidable at suit of the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 163.*]

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

Suit in equity by Harvey H. Atherton, as trustee in bankruptcy of James W. Quillen, against J. W. Green and Barnet Trimmer. Decree for defendants, and complainant appeals. Reversed.

The appellant, as trustee of the estate of Quillen, a bankrupt, filed a bill in the District Court to set aside conveyances of real estate (a) by the bankrupt to the appellee Green, for the benefit of the appellee Trimmer, and (b) by Green to Trimmer in compliance with the bankrupt's purpose, alleged to be preferential and voidable under the provisions of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Upon reference of the issues to a special master and hearing of the testimony, the master found and reported in favor of the appellant for the relief sought in the bill. Exceptions to such findings and conclusions were filed by the appellees; and the trial court, on hearing thereof, sustained the exceptions and dismissed the bill. This appeal is from a final decree accordingly.

The material facts in evidence are uncontroverted and are summarized in the opinion.

John M. Elliott, for appellant.

B. M. Chipperfield, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The decree appealed from dismisses the appellant's bill, filed to set aside a transfer of real estate made by the bankrupt in favor of the appellees, alleged to be conveyed and accepted in violation of the bankruptcy act. All the circumstances of the conveyances respectively are established by undisputed evidence, and the legal effect thereof, under the provisions of the act referred to, is the sole question raised.

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

The bankrupt, Quillen, prior to May 20, 1908, was engaged in banking, as sole proprietor of the business conducted under the name of Bank of Ipava, in the village of Ipava, Fulton county, Ill.; and the appellee Green,during all the times in controversy, was cashier of the People's State Bank of Astoria, located in the same county. In May, 1908, the appellee Trimmer placed with the last-mentioned bank, for collection, a note and mortgage owned by him, for $2,100 principal and accrued interest; and cashier Green, for the bank, delivered such note and mortgage to Quillen (as the Bank of Ipava), with instructions to collect principal and interest and return the proceeds to People's State Bank of Astoria for account of Trimmer. Quillen collected the principal on May 13, and on May 16, 1908, collected $121.32 as accrued interest, but failed to remit either amount and appropriated the proceeds either to his personal use or that of his bank. He went to Chicago on the night of May 18th and was there during May 19th, in alleged effort to obtain means for carrying on the bank, returning to Ipava on the evening of May 19th and meantime Green had his son call up the Bank of Ipava, by telephone, to inquire about the collection, but ascertained only that Quillen was absent. The Bank of Ipava was not opened after Quillen's return from Chicago; and it appears from the evidence that its doors were closed on the morning of May 20th, with no cash on hand, except $730 in change—"mostly nickels, dimes, quarters and pennies"—and no "deposits of money in banks and elsewhere."

Petition for voluntary bankruptcy was filed by Quillen June 6, 1908, adjudication thereof was entered June 8th, and the appellant became trustee of the estate in due course. Insolvency of Quillen at all the above-mentioned dates is established, with indebtedness to depositors far in excess of assets.

On May 20, 1908, the bankrupt (without request thereto) executed a deed of conveyance, together with his wife, in favor of the appellee Green, for a village lot which the bankrupt had long theretofore owned, stating the consideration to be $1,700. This instrument was sent to the grantee by mail, together with two promissory notes (one of $575 and the other of $100.25) made by third parties, inclosed with the bankrupt's letter requesting "Green to hold the deed and notes until he heard definitely that he (Quillen) had closed the bank." Green received these papers May 20th, about noon, and "heard definitely," at about 2 p. m. of the same day, that the bank had closed. He immediately informed Trimmer thereof, executed conveyance of the lot to Trimmer, and delivered over both deed and notes above mentioned. Relief is sought by the trustee in bankruptcy, under the present bill, in respect of the above-mentioned transfer of real estate, without reference to the notes turned in; and the net value of the lot so conveyed appears under the testimony to be about $1,300.

We believe, therefore, these premises for the bill to be established: That the grantees (appellees) respectively accepted the transfer with ample notice of the bankrupt's insolvency; that it was made and received by way either of satisfaction or security for the amount theretofore collected for and withheld from the appellees, as above recited,

and not as a purchase of the lot, by either appellee, "in good faith and for a present fair consideration," within the exception provided in section 67(3)e of the bankruptcy act; that prior to such transfer by the bankrupt the lot so conveyed formed a part of his estate, and was neither obtained through nor in any sense represented the proceeds of the above-mentioned collection on account of the appellees; and that the effect thereof was to deplete the estate of the bankrupt for the benefit of the appellees as against general creditors in bankruptcy. Thus the transaction was plainly an unlawful preference, under section 60 of the bankruptcy act, unless the pre-existing relation of the parties—as one of agency or trust, and not that of debtor and creditor—exempts it from such provision.

The decree in favor of the appellees rests (as stated in the opinion filed below) upon these propositions in substance: That the collection was made by the bankrupt as the appellees' agent, and his "wrongful conversion of the money * * * could not establish the relation of creditor and debtor without the assent" of the principals; that such assent was not given; and that the transfer so made by the bankrupt "to make good or partially good the loss" caused by his conversion was (in effect) "an exchange of properties" made and accepted accordingly, and not in violation of the bankruptcy act. In support of this view the opinion cited Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933, and Holden v. Western German Bank, 136 Fed. 90, 92, 68 C. C. A. 554, and counsel for the appellee further cites numerous authorities reaffirming and defining the general doctrine that neither a collection thus made nor conversion of the proceeds by the collecting agent creates the relation of creditor and debtor therein, between principal and agent, unless the principal so elects—all in harmony with the well-settled rule applicable to such trust relation. So, the proceeds of the collection belonged to the principals, and the misappropriation vested no right to the fund in favor of the estate in bankruptcy, and the owner in such case is entitled to follow and recover the amount, in so far as it either remains on hand or is traceable into other investments or property derived therefrom. Failing such recourse to the trust fund, it is optional with the owner to treat the misappropriation as an indebtedness, thereby becoming a creditor on a par with other general creditors of the estate and subject to the bankruptcy provisions applicable to such relation. With neither the property nor its proceeds appearing on hand in any form, the fact that the indebtedness arose through conversion of the property gives the owner thereof no right of preference over general creditors.

When the bankrupt closed his bank on the morning of May 20th, with the proceeds of the collection dissipated and no funds (except the small change above mentioned) nor bank credits remaining to meet liabilities, the ensuing execution and transmission of the deed of real estate owned by the bankrupt, to be accepted by the appellees as indemnity (in part) for misappropriation of their proceeds, in the event of hearing "definitely that Quillen had closed the bank," can bear no interpretation otherwise, as we believe, than treatment of that transaction as an indebtedness for which the conveyance was thus tendered

by way of security or indemnity, and so recognized by the appellees in their immediate and unqualified acceptance, upon advice of closure of the bank. We are of opinion, therefore, that the conveyance was made and accepted as preferential security, out of the general estate of the bankrupt, in the relation of the parties as debtor and creditor, with the property so conveyed neither derived from the misappropriation, nor standing chargeable with the proceeds in any equitable sense; that the transaction is not within the rule upheld in Cook v. Tullis, ante, nor sustainable under any of the authorities cited in support of the decree.

In reference to the case of Cook v. Tullis, which arose under the bankruptcy act of 1867 (Act March 2, 1867, c 176, 14 Stat. 517) containing like provision against preferences, the exchange of securities was made at a time and under circumstances plainly distinguishable from the facts above recited. Homans (the bankrupt) was a banker and had purchased bonds for Tullis, from time to time, which were left with the banker for safe-keeping, inclosed in envelopes, distinctly marked in the name of Tullis and kept in an individual deposit box. Tullis had permitted Homans to take out and use $20,000 of these deposited bonds, upon his substitution of an equivalent amount of bills receivable and promise to replace the bonds when required; and the bonds were so replaced. Subsequently, in March, 1869, without permission or knowledge on the part of Tullis, Homans used from the deposit $6,000 of bonds, for which he first substituted bills receivable, and "in April," 1869, substituted for the bills transfer of a note and mortgage (belonging to him) for $7,000, due in 90 days. The mortgage was not paid at maturity, and "in August," 1869, was taken by Homans from its envelope and placed in the hands of an attorney for collection. On August 26, 1869, Homans failed and was adjudged an involuntary bankrupt September 20th. Tullis ascertained the taking and substitutions last mentioned soon after the failure, "signified his acceptance," and directed the attorneys having the mortgage in charge to commence foreclosure. In suit by the trustee in bankruptcy to set aside the transfer of this security as preferential, it further appeared that Homans was not insolvent when the substitution and transfer was made, and he testified that he inferred (from the earlier transactions) that it would be satisfactory to Tullis and that he "did not apprehend insolvency or bankruptcy." It was there held that the transaction was not in violation of the statute, and that Tullis was entitled to $6,000 of the mortgage proceeds. No sanction appears in that ruling, as we believe, for the present decree in favor of the appellees.

The decree of the District Court is therefore reversed, with direction to enter a decree for relief of the appellant as prayed in his bill.

WALLER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 8, 1910.)

No. 3,065.

1. CRIMINAL LAW (§ 301*)—WITHDRAWAL OF PLEA OF NOT GUILTY—MOTION TO QUASH—INDICTMENT—TIME FOR MAKING—DISCRETION OF COURT.
Where the defendant in a criminal case by leave of court withdrew his plea of not guilty and interposed a demurrer and motion to quash, which were overruled, on a second trial of the cause after limitation had run against a new indictment it was within the sound discretion of the court to refuse leave to defendant to again withdraw his plea and file a second motion to quash.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. § 301;* Indictment and Information, Cent. Dig. § 473.]

2. CRIMINAL LAW (§ 1167*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.
The refusal of the court in a criminal case to permit the defendant to withdraw his plea and file a motion to quash on the ground of duplicity in joining counts charging different offenses, if erroneous, was without prejudice, where the government dismissed as to one of the counts.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103; Dec. Dig. § 1167.*]

3. CRIMINAL LAW (§ 351*)—WITNESSES (§ 346*)—EVIDENCE—FEIGNED INSANITY BY DEFENDANT.
On the second trial of a defendant for a criminal offense it was not error to permit him to be asked on cross-examination, when testifying in his own behalf, if he did not feign insanity in the presence of the court and jury on his first trial, in which he interposed insanity as a defense, nor, on his denial, to admit the testimony of other witnesses as to his demeanor on the trial in and out of court both as affecting his credibility as a witness and as tending to show his guilt of the offense charged.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 778; Dec. Dig. § 351;* Witnesses, Cent. Dig. § 1133; Dec. Dig. § 346.*]

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

Clarence C. Waller was convicted of a criminal offense, and brings error. Affirmed.

Frederick W. Lehmann (F. A. Youmans, on the brief), for plaintiff in error.

Ira D. Oglesby (John I. Worthington, on the brief), for the United States.

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

AMIDON, District Judge. The defendant was convicted under an indictment which charged the using of the mails in furtherance of a scheme to defraud in violation of section 5480, Rev. St. (U. S. Comp. St. 1901, p. 3696), and the crime of conspiring to commit an offense against the United States, in violation of section 5440 (page 3676). The indictment was, therefore, subject to attack for duplicity. The defendant asked leave to withdraw his plea of not guilty for the purpose of interposing this objection, which the court denied, and this rul-

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

ing is assigned as error. The defendant was once before tried on the same indictment and convicted; but the conviction was set aside by this court. Lemon v. U. S., 164 Fed. 953, 90 C. C. A. 617. Previous to that trial he had been permitted to withdraw his plea of not guilty in order that he might attack the indictment both by demurrer and motion to quash. The objections were heard and overruled, and the defendant then renewed his plea of not guilty. At the time of the second trial the statute of limitations had run against the offenses. If the motion to quash had been permitted and sustained, no second indictment could have been found. We think the trial court exercised a sound discretion in refusing the motion. It is also true that every just ground of complaint against the ruling was removed by the voluntary election of the government to dismiss the prosecution as to section 5440, thus leaving the indictment to stand as a charge of violating section 5480 alone.

A more serious error is assigned to the ruling of the court permitting the defendant while under cross-examination to be asked whether or not on the first trial he did not feign insanity in the presence of the court and jury. This evidence was received both as affecting the credibility of the defendant as a witness, and as tending to show his guilt of the offense charged. It was objected to not only as improper cross-examination, but as incompetent, irrelevant, and immaterial for any purpose. The defendant denied that he feigned insanity, and the government was permitted to show his demeanor by other witnesses, both in the presence of the jury and out of its presence. At the first trial he interposed his insanity as a defense.

By the great weight of authority laymen may testify on the issue of insanity, describing not only the demeanor of the alleged insane person, but also expressing their opinion as to the state of his mind. Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536; Wigmore on Evidence, § 1938. The jury may, of course, trust such evidence, and yet it is now urged that the jury may not, like other laymen, observe the party's demeanor in court, and trust the evidence of their own senses. The law is not thus impractical. The testimony of lay witnesses, as compared to the direct observation of the jury, is secondary, and is subject to all the errors that are inseparable from the report of past observations. If the jury may be guided by the account which lay witnesses give of their past observations, they certainly may rely upon the direct and primary evidence of their own senses. Such has been the law from at least the time of Lord Hale. The authorities are referred to by Mr. Wigmore in his scholarly work on Evidence at section 1160. On an issue of insanity courts have insisted upon the presence of the person whose mental state is under investigation, and have regarded his demeanor as a primary source of information. It may be that in the earlier cases insanity was, as a rule, madness, and demeanor would thus be a more conspicuous revelation. It is, however, impossible to draw a line between the different grades of insanity and say that demeanor as to one may be considered, and as to another should be rejected. Whenever necessary, such evidence will be supplemented

not only by the testimony of medical experts, but also by the evidence of laymen who have had an opportunity to observe the person's conduct under more varied and normal conditions than would be possible in the courtroom. The fact, however, that other sources of information are desirable, does not render the primary source of personal observation by the jury incompetent.

The demeanor of the defendant is not only proper evidence, but it is impossible to prevent the jury from observing and being influenced by it. It is, therefore, better that jurymen should have the aid of counsel and the supervision of the court in interpreting such evidence rather than be left to their own unguided impressions. The decision of Purdy v. People, 140 Ill. 46, 29 N. E. 700, may be sound as to the instruction there under review, for it failed to present the subject to the jury with such explanations as ought always to be made. The general observations of the court, however, that the demeanor of a defendant in the presence of the jury cannot be considered, do not seem to us consistent with a practical administration of the law or with the weight of authority. Boykin v. People, 22 Colo. 496, 45 Pac. 419; Wigmore on Evidence, § 274. It is truthfully said by learned counsel that there is no standard as to how a defendant upon trial for an infamous crime ought to demean himself; that exhibitions of shame, temperament, and nervous strain are likely to be interpreted as signs of a guilty conscience. The same observation, however, may be made as to a person's demeanor when arrested or suddenly charged with crime. There is no standard as to how a person ought to behave under such circumstances. Conduct will vary according to sex, age, temperament, and past experience. Still demeanor on such occasions has always been held competent evidence as bearing on the question of the defendant's consciousness of guilt. With a proper explanation of all the circumstances, it may be safely left to the jury. The same is true as to a defendant's demeanor in the courtroom while undergoing a trial for crime. His demeanor, standing alone, and unexplained, might be a wholly untrustworthy source of information; but, when taken in connection with all the circumstances developed upon such a trial, it affords a valuable element in passing upon the question of guilt or innocence.

Upon the first trial the defendant interposed as one of his defences his own insanity at the times referred to in the indictment. It was possible for him to carry on a pantomime in the presence of the jury in support of that defense. Its success would depend in large measure upon his skill. Such demeanor would be intended to influence the jury, and if skillfully performed would be successful. Can it be said that the government would not be entitled to show, as bearing on the issue of insanity, that the defendant's conduct while out of the presence of the jury was wholly inconsistent with his demeanor in their presence? On the issue of insanity the demeanor of the defendant is surely competent evidence, and why should demeanor in the courtroom be excepted from all the other experiences of life? If the defendant may play the madman in the presence of the jury for the purpose of influencing their verdict, there is no sound reason why

the government may not answer such evidence by showing that his demeanor while out of the presence of the jury is that of a perfectly rational person.

Such being the situation as to the original trial, what were the rights of the government on the second trial? If the defendant feigned insanity in the presence of the jury in support of that defense upon the first trial, his conduct may be regarded in two lights: First, it was a species of fraud perpetrated by him in the very action as to which he was upon trial. Having taken the stand as a witness in his own behalf, it was open to the government, for the purpose of affecting his credibility, to show that in his defense he had been guilty of fraud. People v. Arnold, 43 Mich. 303, 5 N. W. 385, 38 Am. Rep. 182. Such examination is one of the commonest forms of impeachment. Second, feigning insanity in the presence of the jury would be a species of fabrication of evidence, and might be shown as indicating that the defendant was himself conscious of his own guilt, and that his defense could not be made out by a production of the truth. Such evidence has always been held admissible upon the trial of a criminal charge. Basham v. Commonwealth, 87 Ky. 440, 9 S. W. 284. Other authorities are collected in Wigmore on Evidence, § 278. It is quite true that feigning insanity is a thing in itself less easy of proof than the alteration of records or the spiriting away of witnesses. That circumstance, however, goes to the weight of the evidence rather than its admissibility. The testimony in this case tended to show that on the first trial the defendant for days carried on a pantomime in the presence of the jury in support of his defense of insanity. The witnesses state that he came into the courtroom from time to time and refused to recognize his wife or confer with his counsel, and took no apparent interest in the proceeding, but sat in one place looking steadfastly out of the window at a certain point; whereas, when he was out of the courtroom his conduct and conversation were normal. The defendant explained his demeanor as due to sickness and the strain of the trial. We think the whole subject was open to investigation by cross-examination. If defendant's demeanor was willfully assumed in support of his defense of insanity, it tended to show that he was both untrustworthy as a witness and was conscious of his own guilt.

The judgment should be affirmed.

KLOTS THROWING CO. v. MANUFACTURERS' COMMERCIAL CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 289.

1. BILLS AND NOTES (§ 144*)—NEGOTIABILITY.

A note is not negotiable merely because it contains no conditions precedent, performance of which must be alleged in suing on it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 360; Dec. Dig. § 144.*]

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

2. BILLS AND NOTES (§ 164*)—NEGOTIABILITY—ESSENTIALS.
It is elementary that a promise to pay must be absolute and unconditional to make the instrument containing it a negotiable note.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. 411; Dec. Dig. § 164.*]

3. BILLS AND NOTES (§§ 164, 315*)—NEGOTIABILITY—DEFENSES AGAINST ASSIGNEE OF NONNEGOTIABLE NOTE.
A note containing special stipulations and payable on a contingency is not negotiable, and is subject in the hands of an assignee to any defense available against the payee.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 411, 758; Dec. Dig. §§ 164, 315.*]

4. BILLS AND NOTES (§ 315*)—DEFENSES AGAINST ASSIGNEE OF NONNEGOTIABLE NOTE.
When payment of a note is expressly made subject to equities growing out of, and defenses based on, an existing or contemporaneous agreement, one taking the note holds it subject to such equities and defenses.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 758; Dec. Dig. § 315.*]

5. BILLS AND NOTES (§ 315*)—DEFENSES AGAINST TRANSFEREE.
A note "subject to terms of contract between maker and payee" of a specified date is subject to the maker's defenses in the hands of a transferee.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 758; Dec. Dig. § 315.*]

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

Action by the Manufacturers' Commercial Company against the Klots Throwing Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 170 Fed. 311.

Writ of error to review a judgment entered upon a verdict directed by the court in favor of the defendant in error who was the plaintiff below. In the following statement and opinion the parties are designated as in the Circuit Court.

The action was brought to recover upon a note† of which the following is a copy:

"$3,166.00 New York, January 15th, 1906.

"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."

The complaint alleged that the note had been indorsed and assigned by said Regenerated Cold Air Company to the plaintiff which was the lawful owner and holder thereof. The answer alleged, among other things, that said Regenerated Cold Air Company had failed to perform its part of the agreement referred to in the note, and set up by way of counterclaim a demand for damages for such nonperformance. Upon the trial the court ruled that the note was a negotiable instrument, basing its decision upon the opinion of this court

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

† If this instrument possesses the element of negotiability it is, manifestly, a negotiable note. If it is non-negotiable it is immaterial for the purposes of this case whether it should be described as a non-negotiable note or as a written agreement for the payment of money. Therefore, without defining terms and for convenience, it is designated as a note—negotiable or non-negotiable.

reported in 170 Fed. 311, 95 C. C. A. 203, reversing a judgment in the case sustaining a demurrer to the complaint. Consequently the court further ruled that the defendant was not entitled to establish defenses available as against the payee of the note, and directed a verdict for the full amount thereof.

Gould & Wilkie (John L. Wilkie and Chester A. Jayne, of counsel), for plaintiff in error.

Ivins, Mason, Wolff & Hoguet (Robert Louis Hoguet and William L. Ransom, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The trial judge misapprehended our former opinion in this case. We did not hold that the note in question was a negotiable note. We merely held that whether it was negotiable or not its indorsement and assignment gave the plaintiff the right to recover thereon. If the note were negotiable the plaintiff would recover as indorsee; if nonnegotiable, as assignee. It was unnecessary to determine the question of negotiability. The case as now presented turns upon this question of negotiability. If the note were negotiable the trial court properly directed a verdict for the indorsee, for the defendant was not entitled to establish against it the defenses offered. If, on the other hand, the note were nonnegotiable, the action of the court was manifestly erroneous.

In examining the question of negotiability, it is important to recognize at the outset the distinction between it and any question of pleading. The plaintiff throughout its brief insists that because a note contains no conditions precedent, performance of which must be alleged in suing upon it, it is a negotiable instrument. But this conclusion does not follow. The conclusion which does follow is that the plaintiff, upon proving the note, is entitled to recover the full amount thereof in the absence of defenses established by the defendant. Thus, in our former opinion, we said that performance of the contract referred to in the note was not made a condition precedent to the payment thereof; that, as a consequence, it was unnecessary to plead such performance, and that nonperformance could be set up, if at all, only by way of defense. But, as already pointed out, we did not hold that, on account of the absence of conditions precedent, the note was a negotiable instrument.

It is elementary that a promise to pay must be absolute and unconditional to make the instrument containing it a negotiable note. If payment be dependent upon a condition or contingency, the instrument is not negotiable. In many cases the contingency is expressed in the form of a condition precedent. But we do not think it necessary that it should be so expressed. In our opinion when a note contains special stipulations and its payment is subject to contingencies, it fails to possess the character of a negotiable instrument and is subject in the hands of an assignee to any defense which would be available if it were still held by the original payee. See McClelland v. Norfolk Southern R. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397. And, as bearing especially upon the facts in this

case, we think that whenever the payment of a note is expressly made subject to the equities growing out of, and defenses based upon, an existing or contemporaneous agreement, a person taking such note holds it subject to such equities and defenses.

The distinction between conditions precedent, performance of which must be alleged in bringing the action, and contingencies and equities which must be set up by way of defense and which yet serve to qualify the obligation to pay the note and deprive it of negotiability, may be shown by illustration. Thus, let us suppose that the note in suit contained the following stipulation:

"This note in the hands of all holders is subject to all defenses which would be available to the maker based upon the contract between the maker and the payee of October, 1905, in the same manner and to the same extent as if it were held by the payee."

Such a provision would not constitute a condition precedent. It would not be necessary to plead performance of the contract in a suit upon the note. And yet it could hardly be claimed that an assignment of the note would shut out the defenses which the parties had stipulated should exist in the case of an assignment. Any such claim, if sustained, would deprive the parties of their right to make lawful contracts. The obligation to pay in such a case as this would be qualified and conditional, but would not depend upon the fulfillment of any condition precedent.

The real inquiry in the present case is whether the promise in the note should be treated as the substantial equivalent of the suppositious promise we have examined. Manifestly if the provision "subject to terms of contract between maker and payee" constitutes merely a reference to the agreement or a statement of the consideration for the note, it does not impair the negotiability of the latter. So, if it merely constitutes notice of the existence of the contract and not of the breach thereof, it would not affect negotiability. But the evident purpose of the parties to this note was to go further and make it subject to and to impress upon it the defenses to which the maker would be entitled under the contract. The assignee took it in that condition. To deprive the maker of those defenses, upon the ground of the negotiability of the note, would work great injustice. And we think that we are not required to reach such result. As between the maker and the payee of a note, payment is, as a matter of law, subject to existing equities and defenses even in the absence of any statement to that effect in the note. It is not too much to hold that when a promise is expressly limited by a provision in the note itself, assignees should take it subject to such limitation. In our opinion, the special stipulation in the present note limits and qualifies the obligation to pay so that it is not absolute, but is a prima facie obligation subject to be defeated by the maker's defenses.

Authorities cited by the plaintiff as well as by the defendant support these views. Thus in Jewett v. Lyon, 3 G. Greene (Iowa), 577, referred to by the plaintiff, it was said in a suit by the assignee of a promissory note containing a stipulation for a deduction from the amount thereof in a certain contingency:

"The obligation to pay is in all respects a promissory note, and the stipulations attached to it do not change in any respect its character, or weaken the liability of the maker. It only provides for a certain contingency, the onus to establish which lies upon the defendant. Upon the introduction of this note in evidence, the plaintiffs made out a prima facie case, and in the absence of any rebutting testimony on the part of the defendant, the plaintiffs were entitled to recover, and hence the court did not err in overruling the motion for a nonsuit."

So, in Cushing v. Field, 70 Me. 50, 35 Am. Rep. 293, it was held that a note payable to order on the face of which was the following indorsement: "This note is subject to a contract made November 13, 1874"—was not negotiable, and that an assignee took it subject to all the equities between the original parties.

In American Exchange Bank v. Blanchard, 7 Allen (Mass.) 333, an instrument containing a promise to pay a stipulated sum at a fixed time "subject to the policy" was held—in a suit by the indorsee—not to be a negotiable promissory note because the promise was not absolute. The court said:

"Thus interpreted, it is too plain for discussion that the promise is in its nature contingent, and dependent for its fulfillment on other stipulations than those which are inserted in the body of the contract. To determine whether at its maturity any money would become due upon it, it would be necessary to have recourse to the policy therein referred to, and to ascertain whether any loss had occurred which would constitute a valid claim against the company in favor of the promisors, and operate as payment or set-off in whole or in part for the amount which the defendants had agreed by their promise to pay to the company."

In McComas v. Haas, 107 Ind. 512, 518, 8 N. E. 579, 582, the note contained the following clause: "This note is given in consideration of, and is subject to, one certain contract, etc.," and the court said:

"Although the note in suit was, by its terms, payable at a bank in this state, with the clause or condition quoted on its face, it was not negotiable as an inland bill of exchange and was not governed by the law merchant; but the appellant, as the assignee thereof before maturity, took such note subject to all the equities existing between the appellee as its maker, and S. B. J. Bryant as the payee and assignor thereof."

In Dilley v. Van Wie, 6 Wis. 209, 212, a note contained the following provision: "Subject to the provisions contained in an agreement this day made between said Carter and myself." In a suit by the indorsee the court said:

"The instrument in writing on which judgment was rendered is not a promissory note. Its payment is made subject to a contingency, or rather to the equities between the parties growing out of a contemporaneous agreement between the same parties. This is expressed upon the face of the (so-called) note, and deprives it of its commercial character."

In Bringham v. Leighty, 61 Ind. 524, a note contained the following provisions:

"This note was given for purchase money on said estate. If title defective, note void."

In an action on the note by an indorsee, it was held that it was not necessary to allege in the complaint that the title to the real estate

referred to was not defective; the subject of title in such connection being entirely a matter of defense.

Upon principle and upon what we regard as the weight of authority, we reach the conclusion that the note in question was not negotiable, and that the trial court erred in its rulings.

The judgment of the Circuit Court is reversed.

DAVIES v. MANOLIS.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,651.

1. ALIENS (§ 54*)—ENFORCEMENT OF IMMIGRATION LAWS—REVIEW OF DECISIONS OF EXECUTIVE OFFICERS.

The power of Congress is well settled either to exclude aliens altogether or to prescribe terms upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers whose decisions on questions of fact are conclusive; but it is equally well settled that their decisions on questions of law are not conclusive on the courts which have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by a department officer.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 54*)—ENFORCEMENT OF IMMIGRATION LAWS—QUESTIONS REVIEWABLE BY COURTS.

In proceedings under the immigration laws, the final determination of the statute applicable to the case and interpretation of the grant of power therein cannot rest with the executive officers under our system of government; but the ultimate decision of such questions must remain with the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—DEPORTATION—LEGALITY OF ORDER OR WARRANT OF DEPORTATION—NECESSITY OF HEARING.

Where the warrant of arrest, under which proceedings for the deportation of an alien were instituted, conducted, and concluded, charged alone a violation of Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), but the proof and findings of the inspector before whom the hearing was had showed that the accused arrived in this country in 1906, such proceedings do not authorize a warrant of deportation by the Department of Commerce and Labor for violation of Act March 3, 1903, c. 1012, 32 Stat. 1213, then in force, without a hearing on such charge, and the accused taken into custody on a warrant so issued is entitled to discharge on a writ of habeas corpus.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

Habeas corpus proceeding by Nicholas Manolis against Daniel D. Davies, Immigration Inspector in charge at Chicago. From an order discharging petitioner, respondent appeals. Affirmed.

This appeal is from a decree of the District Court, in habeas corpus proceedings, discharging the appellee, Nicholas Manolis, petitioner therein, from

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

the custody of the appellant, Immigration Inspector of the United States, under purported warrants and orders of deportation issued by the Department of Commerce and Labor. The matter was heard in the trial court, upon submission of the petition for a writ and the return to the writ, filed in behalf of the appellant, respondent therein, without introduction of other evidence.

The return filed by the appellant states that the petitioner "is held by respondent by virtue of the order of deportation" as follows:

"Department of Commerce and Labor,

"Bureau of Immigration and Naturalization.

"No. 52045/145. Washington, May 22, 1909.

"Immigrant Inspector in Charge, Immigration Service, Chicago, Illinois—Sir: The department has this day ordered the deportation of Nicholas Manolis, a Greek alien who was accorded a hearing by Inspector Seraphic at Des Moines, Iowa, as the evidence clearly showed him to be in this country in violation of the contract labor laws. The alien has been released upon his own parole into the custody of Chris Deckas and Gust Manolis (brother of the alien) who conduct a pool room and lunch room in the city of Des Moines. Inspector Seraphic is to present evidence to the United States attorney showing that the alien was imported by Seletos Bros. of Omaha, and therefore the deportation of Manolis is to be deferred during such time as the question of prosecution is being determined and for such time as his services as a witness may be required. You will therefore make arrangements to be informed by the U. S. attorney whether this alien need be detained as a witness in order that delivery at New York may be made as soon as possible. Whenever this alien is available for deportation you are instructed to cause him to be taken into custody and conveyed to New York, N. Y., for deportation, the expenses, both incidental and extraordinary, including the employment of an attendant at a nominal compensation of $1 and expenses, being authorized, payable from the appropriation, 'Expenses of Regulating Immigration.'

"Respectfully, Danl. J. Keefe, Commissioner General.

"Approved: Ormsby McHarg, Assistant Secretary."

It is further stated in the return "that the matters and things set forth in the petition" for the writ "respecting the facts upon which" deportation is ordered "have been decided by the Department of Commerce and Labor, and that there is no appeal to this" court therefrom. It furthermore refers to "a verified copy of the warrant for the arrest of petitioner and the evidence taken at the hearing" thereunder, held at Des Moines, Iowa, before Inspector A. A. Seraphic, together with his "recommendation and finding," as theretofore filed with the trial court and made a part of the return.

The warrant of arrest referred to reads as follows:

"United States of America,

"Department of Commerce and Labor,

"Washington.

"No. 52045/145.

"To A. A. Seraphic, Immigrant Inspector, Des Moines, Iowa, or to any Immigrant Inspector in the service of the United States: Whereas, from evidence submitted to me, it appears that Vedora Nikiforos (Nicholas) Manolis, alien, who landed at the port of New York, ex SS 'Francesca', on the 30th day of Sept. 1907, has been found in the United States in violation of the act of Congress approved February 20, 1907, to wit: That said alien is a member of one of the excluded classes in that he is a contract laborer and that he was induced or solicited to migrate by an offer or promise of employment or came in consequence of an agreement, express or implied, to perform labor herein. I, Wm. R. Wheeler, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and convey him before yourself, to enable him to show cause why he should not be deported, in conformity with law. The expenses of execution and detention pending dis-

position of his case are hereby authorized, payable from the appropriation 'Expenses of Regulating Immigration.' Pending a decision in his case the alien may be released from custody upon furnishing a satisfactory bond in the sum of $500. For so doing, this shall be your sufficient warrant.

"Witness my hand and seal this 17th day of March, 1909.

"Wm. R. Wheeler, Acting Secretary of Commerce and Labor."

The finding and testimony referred to establish the fact that the appellee (petitioner) landed at New York in August, 1906, instead of September 30, 1907, was there examined and admitted, and (as stated in the report) "had been in the United States nearly thirty-three months" at the date of his arrest.

In the brief submitted by the United States attorney on this appeal the testimony certified with the return is summarized at showing: That the petitioner "was born in Greka, Greece, is now 18 years old, came to the United States in August, 1906; that his brother, Gust Constantinos Manolis, who was then working in the shine establishment of Seletos Bros. at Omaha, Neb., wrote to his father, inclosing a prepaid steamship ticket for petitioner from Greece to the United States; that he worked in the shine places for Seletos Bros. at $160 per year; that he had spoken to his employers and made an agreement with them to bring petitioner Manolis to the United States to work for them in their business places; that his employers had agreed to place petitioner at work in their business places, at $160 per year, and to pay for his clothing in addition; that petitioner reached the port of New York on the 25th or 26th day of August, 1906, went immediately to Omaha, Neb., and was met at the railroad depot by his brother and George Seletos; that George Seletos then took petitioner out and bought his wearing apparel, and placed him at work on the same day, telling petitioner that he would pay him exactly as he had prearranged with the brother, Gust Constantinos Manolis, when he wrote for petitioner to come; that petitioner worked for Seletos Bros. one year and seven months, and was paid the first year at the rate of $160 per year and his clothes, and the second year was paid at the rate of $200 per year." The brief further states:

"Gust Constantinos Manolis, the brother of petitioner, testified at the said hearing that he sent his brother, Nicholas, a prepaid steamship ticket for him to come to the United States from Greece and wrote to his father to send Nicholas to him; that his brother, Nicholas, came to this country in August, 1906; that Peter Seletos wrote on the back of his letter to the father of petitioner that, 'As soon as your son, Nicholas, arrives here, we will put him to work in our place and he will earn money.' 'Seletos Bros. promised me to put my brother to work when he came here and they agreed to pay him, Nicholas, $160 for the first year.'"

Beyond the foregoing, the testimony also shows that the petitioner had removed to Des Moines, Iowa, and owned, in partnership with another, "the best shine parlor" there; that he had invested in it the savings of himself and his brother out of their previous work at Omaha, and they "were slowly paying off the indebtedness on the place"; that he was "entirely self-supporting and financially independent" and intended to establish himself "as a bona fide resident of this country and this state."

The return further tenders a so-called "warrant of deportation," with a copy attached as a part thereof, reading as follows:

"United States of America,

"Department of Commerce and Labor,

"Washington.

"Copy.

"52045/145.

"To Joseph Murray, Acting Commissioner of Immigration, Ellis Island, N. Y. H.: Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector A. A. Seraphic, held at Des Moines, Iowa, I have become satisfied that Nicholas Manolis, alias Nicolaos Manolis, alien, who landed at the port of New York, N. Y., ex SS 'Sannio,' on the 24th day of Aug. /06 is

in this country in violation of the acts of Congress approved February 20, 1907, to wit, Feb. 26, 1885, the subsequent immigration acts including those of March 3, 1903, and that the said alien is a member of the excluded classes in that he is a contract laborer; and whereas, the period of three years after landing has not elapsed: I, Ormsby McHarg, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to the country whence he came, at the expense of the steamship company importing him. You will be advised by the Chicago office when delivery will be made as a prosecution of the importers is being attempted. For so doing, this shall be your sufficient warrant.

"Witness my hand and seal this 22d day of May, 1909.

"Ormsby McHarg, Acting Secretary of Commerce and Labor."

Edwin W. Sims and John F. Voight, for appellant.

Herbert J. Freidman, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). For reversal of the decree of the District Court discharging the appellee, Manolis, from custody under the order and warrant of arrest issued by the Department of Commerce and Labor, this appeal is prosecuted by the United States attorney on behalf of the appellant, Immigration Inspector, against whom the writ of habeas corpus was allowed. The contentions of error in the decree are substantially as follows: (1) That "the decision of the department * * * ordering the deportation of petitioner Manolis is final" and "not reviewable by the courts"; and (2) that the case and order are within the provisions and governed by the act of Congress approved March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (Act March 3, 1903, c. 1012, 32 Stat. 1213–1222), and prior enactments in reference to the exclusion of contract laborers, although it is both conceded and unquestionable that the subsequent act, approved February 20, 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898–911 [U. S. Comp. St. Supp. 1909, p. 447]), on which the entire proceedings of the department were predicated, is not applicable to the case (as there found) of arrival in this country in August, 1906. See section 28 of the act.

1. The power of Congress is undoubted and well settled, either to exclude aliens altogether "or to prescribe terms 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." Lem Moon Sing v. United States, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082; Japanese Immigration Case, 189 U. S. 86, 98, 101, 23 Sup. Ct. 611, 47 L. Ed. 721; Pearson v. Williams, 202 U. S. 281, 284, 26 Sup. Ct. 608, 50 L. Ed. 1029. And this rule referred to, under which administrative powers are vested in the executive departments for enforcement of national policy thus prescribed, is alike settled in reference to other enactments administered by other departments respectively of the national government. In each instance the "questions of fact are for the consideration and judgment" of the department officials, and the act of Congress may make their decision final; and the general rule is equally well recog-

nized "that the decisions of the officers of departments upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers." School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 23 Sup. Ct. 33, 47 L. Ed. 90, and cases cited. Whether the limitations above mentioned may or may not be strictly applied to rulings of the Department of Commerce and Labor under either act of Congress referred to and authorities cited thereupon, we are not required to determine. We assume, therefore, without so deciding, that its alleged ruling recited in the so-called order of deportation addressed to the appellant—namely, that "the evidence clearly showed him [the appellee] to be in this country in violation of the contract labor laws," assumed by the officer to be applicable to the case—may not be reviewable as a conclusion, either of mixed law and fact, or of law upon undisputed circumstances, if the act of 1903 governs the case. Nevertheless, final determination of the statute applicable to the case and interpretation (to say the least) of the grant of power therein cannot rest with the executive officer under any authority cited; nor can such finality of executive decision have sanction under our system of government. Whatever may be the powers, even of judicial nature, vested in such officers for needful and summary enforcement of the governmental policy, we believe ultimate decision of the fundamental questions above stated must remain with the courts. The further question (under either of these acts referred to), whether the accused was granted a hearing in fact, upon the charge for which he is held in custody, is likewise open to judicial inquiry under the present writ, as settled in Chin Yow v. United States, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369.

2. Within the limitations above assumed we proceed to the inquiry: Do the warrant, proceedings, and order exhibited in the return to the writ afford justification for custody and deportation of the petitioner-appellee?

Review of the successive acts of Congress to regulate the immigration of aliens, inclusive of the act of 1885 and amendments thereof known as the contract labor laws, is not deemed needful, beyond references to certain sections of the act of 1903. Their policy and general import are well recognized and unquestionable.

On examination of the act of 1903, we are not satisfied that the case could be brought within its provisions, even were violation thereof charged in the warrant of arrest and proceedings instituted by the department, instead of charging violation of the act of 1907. Section 21 of the first-mentioned act is the only provision under which proceedings for deportation are authorized "within the period of three years after landing," and that relates only, in express terms, to "an alien found in the United States in violation of this act." Section 2 of the act expressly defines the "classes of aliens excluded from admission" thereunder, and no mention appears there or elsewhere in the act of "contract laborers," within the class to which either the testimony or purported ruling of the department may be attributable. Moreover, it appeared (as noted in Re Ellis (C. C.) 124 Fed. 637, 641,

642), not only that the previous omnibus act of 1891 (Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294]) contained an enumeration which expressly included this class of "contract laborers," thus omitted from the revision of 1903, but that before the passage of the act of 1903 an enumeration of like effect was contained in the bill and was stricken out in the course of adoption.

Without resting our conclusion for affirmance, however, on such seeming insufficiency of the act cited by counsel for detention of appellee, we are of opinion that no support for the alleged department warrants or order is allowable under such act, in any view of its provisions. The warrant of arrest, under which the proceedings were instituted, conducted, and concluded, charges alone "violation of the act of Congress approved February 20, 1907," with specification which appears to be within the express terms thereof (vide section 2), as a "contract laborer." In the proceedings thereunder, before the inspector—which was the only hearing granted—the proof established, and the inspector so certified the fact to be, that the accused had arrived in this country in August, 1906, long prior to this enactment; and motion was made on behalf of the accused, at the conclusion of such hearing for his discharge accordingly. The inspector withheld ruling upon such motion, stating in his report:

"I refrain from making any recommendation and forward the record of the hearing to the department for a decision."

Whether the accused was thereupon released or detained appears only from the subsequent (so-called) "order of deportation," which recites that he "has been released upon his own parole into the custody of Chris Deckas and Gust Manolis (brother of the alien) who conduct a pool room and lunch room in the city of Des Moines," and directs "that he be taken into custody * * * for deportation." Under this conceded state of the record, with no hearing granted by the department in any form for violation (as now alleged) of the act of 1903, we believe no sanction appears for the order or warrant of deportation, even on the assumption, (a) that such act authorized deportation for the cause stated in the order, and (b) that the testimony reported by the inspector disclosed violation of the contract labor laws. Whatever were the subsequent proceedings or conclusions in the department, they were ex parte, and the final orders for rearrest and deportation were without hearing and unauthorized. In such case the petitioner-appellee was "entitled to a writ of habeas corpus," as he was arbitrarily "denied such hearing and such opportunity to prove his right to enter the country as the statute meant that he should have." Chin Yow v. United States, 208 U. S. 8, 11, 28 Sup. Ct. 201, 202 (52 L. Ed. 369).

The decree of the District Court, accordingly, is affirmed.

FRENCH SILVER DRAGÉE CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 307.

FOOD (§ 5*)—PURE FOOD ACT—CONSTRUCTION—SILVER COATING ON CANDY—"OTHER MINERAL SUBSTANCES."

Pure Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), is entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors," and section 7 provides that an article shall be deemed adulterated, in the case of confectionery, if it contains terra alba, barytes, talc, chrome yellow, or other mineral substances or poisonous color or flavor, or other ingredient deleterious or detrimental to health. *Held* that, since the purpose of the act was to protect the purchaser of food products from having inferior and different articles passed off on him in place of those he desired, and to protect him from injury by prohibiting the addition to foods of substances poisonous or deleterious to health, the words "other mineral substances," under the doctrine of ejusdem generis, included other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence did not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

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

The French Silver Dragée Company was convicted of violating the pure food act, and it brings error. Reversed.

Writ of error to review a judgment convicting the plaintiff in error (hereinafter called the defendant) of a violation of Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), known as the "Pure Food Act." The indictment alleged the interstate shipment of a quantity of confectionery claimed to be adulterated, in that it contained "a certain mineral substance, to wit, metallic silver."

The confectionery in question is sold under the name of "Silver Dragée," and is a small article made of sugar and thinly coated with pure silver. It it used principally by confectioners for decorating boxes of candy. The object of the silver coating is to be conspicuous, and the silver is not employed for any purpose of deception. So, for the purposes of this case, the silver coating must be considered as being in no way deleterious or detrimental to health.

The trial judge ruled as follows: "I assume that it has no effect on the result of this case if it were overwhelmingly proved that the administration of pure silver into the human system in quantities such as are attached to these dragées was perfectly inoperative, and to that statement of what I conceive to be the effect of its action you can take an exception."

Section 7 of the act under which the indictment was framed—the section here in question—is printed in full in the margin† and the especially relevant

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

† Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: Provided, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly

portions thereof follow: "That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow, or other mineral substances or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug. * * *"

The rulings of the trial court were based upon the interpretation of the statute that all it was necessary for the government to establish—interstate traffic being admitted—was that the confectionery in question contained silver; it being a mineral substance.

L. T. Fetzer (William M. Seufert, of counsel), for plaintiff in error.

Henry A. Wise, U. S. Atty. (Robert Stephenson, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). In interpreting the provisions of the act now in question—the pure food act—it is of importance to ascertain at the outset the objects which Congress sought to accomplish by its enactment and the evils intended to be remedied by it. If we go outside the act itself, and consider the circumstances surrounding its adoption, we find a congressional committee report urging that the objects of the bill were:

(1) To protect the purchaser of food products from being deceived and cheated by having inferior and different articles passed off upon him in place of those which he desired to obtain.

(2) To protect such purchaser from injury by prohibiting the addition to foods of foreign substances poisonous or deleterious to health.

Or, briefly stated:

"That which is forbidden is the sale of goods under false pretenses, or the sale of poisonous articles for food."

Turning now to the act itself: An examination of the title indicates its purposes. It is entitled:

"An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors."

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stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterius or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constitutent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a deceased animal, or one that has died otherwise than by slaughter.

And, examining the particular section now in question, we find the purpose all through it to protect the public from deceit and injury. Drugs are declared to be adulterated if their strength or purity fall below certain standards. The intent to prevent both deceit and injury are here apparent. So food is deemed to be adulterated:

(1) If its quality or strength is reduced by the mixture of other substances;

(2) If one substance has been substituted for another;

(3) If a valuable ingredient has been abstracted;

(4) If it is mixed or colored so that damage or inferiority is concealed;

(5) If poisonous ingredients or ingredients making the article injurious to health are added;

(6) If the article consists of decomposed or putrid animal or vegetable substances.

The obvious purpose of provisions (1), (2), (3), and (4) is to protect the public from deceit and false pretenses; of provisions (5) and (6), from injury to health.

Other sections of the act also indicate the same objects. The terms "false," "misleading," "deceive," "poisonous," "deleterious," appear in many places. Indeed, a careful examination of the whole act clearly shows that its object is, as already indicated:

(1) To prevent deceit and false pretenses in the sale of food and drugs;

(2) To safeguard the public health.

Bearing these objects in mind, we must now examine the subsection of the act especially relating to confectionery. If we find upon such examination a possible construction of the provision which would not afford protection to the public from deceit or injury, and woud merely stop traffic in an article neither injurious nor capable of deceiving, we should seek to avoid it. General language should not be so construed as to ruin a legitimate business, and yet remedy none of the evils the statute was designed to remove. In the language of the Supreme Court of the United States in Holy Trinity Church v. United States, 143 U. S. 457, 459, 12 Sup. Ct. 511, 512, 36 L. Ed. 226:

"It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The interpretation given to the statute by the trial court was that the words "or other mineral substance," following the phrase "in the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow"—broadly included every mineral substance, including silver.

The defendant, on the other hand, contends that the different clauses of the subsection in question should be construed together and that, so construed, they embrace only those substances which are deceptive or are detrimental to health.

Interpreting the provision as embracing in the phrase "or other mineral substances" all mineral substances whatsoever, it is apparent that the use of the mineral substances, salt, sulphur, and baking soda, in the manufacture of confectionery—and it appears that they are so used—would render the product adulterated within the meaning of the statute and its sale unlawful. Similarly, the use of silver to coat these dragées would violate the act. But the product in which the salt, sulphur, baking soda, or silver was used would not be unhealthful, nor would there be any element of deceit present. The provision so construed would arbitrarily prohibit the use of all mineral substances in confectionery, would accomplish thereby none of the purposes of the act, and would apply a different standard in the case of confectionery than in the case of food or drugs. Unless the language of the statute imperatively requires such construction, it should not be adopted by the courts.

The construction of the provision contended for by the defendant is in accordance with the ejusdem generis doctrine. The rule that, when general words follow the enumeration of particular things, such words will be held to include only such things as are of the same kind as those specifically enumerated, is, of course, well settled. It is unnecessary to refer to more than one case to illustrate its application. Thus in Gundling v. City of Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, the court said:

"The articles, meats, poultry, fish, butter, and lard, which are expressly enumerated in the above paragraph, and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include by the express enumeration of articles only provisions to be used by man. The term 'other provisions,' by a familiar canon of construction, can extend only to articles of the same character as those especially enumerated. When general words follow an enumeration of particular things, such words must be held to include only 'such things or subjects as are of the same kind as those specially enumerated.'"

We think the ejusdem generis rule especially applicable in this case for the reason—as already pointed out—that any broad construction would arbitrarily interfere with legitimate business and in no way promote the accomplishment of the objects of the statute. Indeed, the government in its brief in this court seems not to controvert seriously the proposition that the ejusdem generis rule should be applied. It states at the outset:

"The only question is whether metallic silver is included in the class 'other mineral substances.' Is metallic silver ejusdem generis with the mineral substances which precede it?"

Now, it appears that terra alba, barytes, and talc are used to mix with confectionery and cheapen it. There is nothing in the record to show that they are injurious to health. They are well-known adulterants—using that term in its ordinary sense. They increase bulk and weight at the expense of quality. Confectionery containing them is

really sold under false pretenses. Chrome yellow is a cheap coloring matter, and is poisonous. Silver, as used in these dragées, and as considered in connection with this statute, is not the same kind of mineral substance as terra alba, barytes, or talc. It is used to attract attention, not to deceive. Of course, like those minerals, it may be insoluble and inert; but the comparisons to be made must have in view the objects of the statute. Thus similarity within the rule would not be established by showing that the substances were all of the same color. So the silver upon these dragées has no similarity to chrome yellow. Unlike that mineral substance it is not poisonous.

In our opinion the clauses "or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health," following the enumerated substances, should be taken and interpreted together and mean:

(1) That the use in confectionery of terra alba, barytes, talc, or any other mineral substance, whether injurious to health or not, for purposes of deception, makes it unlawfully adulterated;

(2) That the use in confectionery of chrome yellow or other poisonous mineral substance or poisonous color or flavor makes it unlawfully adulterated;

(3) That the use in confectionery of any ingredient whatsoever which is deleterious or detrimental to health makes it unlawfully adulterated.

It is true that under this construction the third class of cases would include the second. "Any ingredient detrimental to health" undoubtedly includes all poisonous substances. But the clauses do not conflict, and redundancy is not unusual in statutory provisions.

Stated in another way, we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the government should establish, with respect to products not specifically named, that they either deceive, or are calculated to deceive, the public or are detrimental to health; and, as no proof was offered in this case tending to show that the confectionery in question was either deceptive or injurious, the defendant was improperly convicted.

The judgment of the Circuit Court is reversed.

HEISEN v. CHURCHILL et al.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1910.)

No. 1,615.

1. PLEADING (§§ 36, 127*)—ADMISSION IN PLEADING—SCOPE AND EFFECT.

In an action against a number of defendants as partners, one of the defendants filed a special plea denying the partnership and also a plea of the general issue with notice of proof of a set-off consisting of an indebtedness on account; the heading on the copy of account attached stating the indebtedness to be to defendants as copartners under a company name. A motion by such defendant to withdraw the plea of set-off

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

was denied. *Held*, that while the statement in the heading of the account, conceding that the court rightly refused to permit it to be withdrawn, was open to use as an admission of the partnership, it was not conclusive and did not estop defendant from introducing evidence in support of his special plea that the company was a corporation and dealt with plaintiff as such.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81–86, 264–268; Dec. Dig. §§ 36, 127.*]

2. PLEADING (§§ 92, 369*)—INCONSISTENT PLEAS—RIGHT OF ELECTION.

In an action against defendants as partners, a plea denying the partnership and one of set-off are not inconsistent, where the first plea raises the question of the validity of an attempted incorporation; but even if so the defendants have the right of election between them, and the court cannot refuse to permit them to withdraw the second and give it effect as an estoppel to prevent the introduction of evidence under the first.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 188, 1201; Dec. Dig. §§ 92, 369.*]

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

Action by Charles T. F. Churchill, Alexander B. Sim, Thomas G. Sharp, Frederick E. Elliott, H. M. Taylor, and Charles S. G. Clark, copartners doing business as Churchill & Sim, against Charles C. Heisen, George W. Griffin, George C. Waddill, and G. M. Selden, copartners as the Chicago Export Lumber Company. Judgment for plaintiffs, and defendant Heisen brings error. Reversed.

The action in the Court below was by defendants in error, co-partners doing business as Churchill & Sim, London, England, against the plaintiff in error, Charles C. Heisen, and George W. Griffin, citizens of Illinois; George C. Waddill, a citizen of New York; and G. M. Selden, a citizen of Mississippi, co-partners as The Chicago Export Lumber Company. The suit was on an account and for money advanced. A separate plea was filed by Heisen (none of the other defendants joining in this proceeding in error) denying that at the times in the declaration mentioned, or at any other time, he was a co-partner of the other defendants; and the plea of the general issue. Accompanying these pleas, was notice to Churchill & Sim that on the trial the defendants would give evidence that Churchill & Sim were indebted to the defendants in the sum of $35,000 (the judgment prayed for in the declaration was for $10,000), on account of certain goods, chattels, etc., delivered to Churchill & Sim by the defendants, the copy of the account bearing the following heading: "Churchill & Sim, to C. C. Heisen, George Griffin, George C. Waddill, G. M. Selden, co-partners as The Chicago Export Lumber Company, Dr."

The bill of exceptions shows that upon the case coming up for hearing, and as the result of a colloquy between counsel, the Court ruled that owing to the language in the notice of set-off, to wit, the heading to the copy of the account sued on aforesaid, plaintiff in error was precluded from proving, in support of his special plea that he was not a partner, that the Chicago Export Lumber Company was a corporation and was not a copartnership. An exception having been saved to this ruling, plaintiff in error moved to withdraw the plea of set-off, which motion was denied and an exception duly reserved. Thereupon, defendants tendered as evidence that they were not co-partners, the original articles of incorporation, incorporating them under the name of the Chicago Export Lumber Company, Limited, under the laws of the State of Louisiana; the certificate of the proper officer of the State of Louisiana that the same was approved; the certificate of the clerk and ex officio recorder that the same had been recorded; as also the testimony of the plaintiff in error:

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

"That he is one of the defendants in this suit, and that he and the other defendants, Waddill, Griffin and Selden, were members of the corporation known as the Chicago Export Lumber Company, Limited; that this corporation is the one that dealt with the plaintiffs Churchill & Sim during the period covered by the transactions involved in this suit; that those transactions are the same as were had by the corporation Chicago Export Lumber Company, Limited, with the plaintiffs, Churchill & Sim and that there were no other transactions with them by these defendants; that in the fall of the year 1899 before these transactions were begun, he was in London, England, and that then and there he arranged to do business with the plaintiffs and then and there stated to the plaintiffs that he would return home and incorporate a company to deal with them in timber and lumber; that in the spring of 1900 he was again in London, England, and had an interview with the plaintiffs, in which he informed a member of the firm that his company was in process of incorporation and that said firm had actual personal knowledge of this fact; that many letters and drafts of the Chicago Export Lumber Company Limited to and upon the plaintiffs in the early part of their dealings were signed by himself as president of the company and Griffin as Secretary of the Company; that he was never a co-partner with the defendants Griffin, Waddill and Selden, and that therefore neither he nor either of the other defendants ever held themselves out as co-partners either to the plaintiffs or to anyone else";

—all of which was excluded upon the objection of defendants in error, and exceptions duly reserved. Thereupon, upon motion of defendants in error, duly excepted to by plaintiff in error, the jury returned a verdict against plaintiff in error and his codefendants for the sum of $8,805.24. Plaintiff in error then moved the Court to set aside the verdict and grant a new trial, which motion was overruled and judgment entered upon the verdict in favor of plaintiffs, to all of which exceptions were duly reserved.

Horace Kent Tenney and Edward M. Hammond, for plaintiff in error.

Charles S. Holt, for defendants in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). The principal question before us is, whether the so-called admission in the notice of set-off, filed under the general issue, that the plaintiff in error and his co-defendants were partners, was so conclusive upon them that it precluded them from withdrawing the plea of set-off and also from subsequently proving (the plea of set-off being compulsorily left in the case) their other plea that they were not partners in relation to the transactions sued upon. We are of the opinion that the matter contained in the plea of set-off did not prevent the plaintiff in error from supporting his special plea by showing that his company dealt with the London company as a corporation and not as a co-partnership —the matter contained in the plea of set-off being open to use only as an admission and not as a matter of estoppel. And especially is this true if, under the practice of Illinois, the application to withdraw the plea of set-off (no equities having intervened) was rightly denied.

Many cases in the Illinois Supreme Court are cited by counsel for defendants in error to the point that the admission of co-partnership, unwithdrawn, was properly admitted in evidence upon the issue raised by the plaintiff in error's denial of joint liability; Byrne v. Byrne, 47 Ill. 507, where it was said that an admission in a plea of set-off "was proper to go to the jury"; Miller v. Miller, 16 Ill. 296, where it was said that a plea of set-off, wholly inconsistent with the idea of the

relation of parent and child (the action being one by a daughter against her father for services, and the defense being that there was no intention that the services should be paid for), was a circumstance for the jury to consider; Miller v. Gable, 30 Ill. App. 578, and other cases in which the same rule was applied. Monroe v. Chaldeck, 78 Ill. 429, cited as an authority that the plea of set-off contained an admission of partnership that was conclusive upon the parties, was an action of covenant upon a lease, to recover $150 which had been paid in advance for the rent of the premises, and to recover damages for failure of the lessor to put the lessee in possession of the premises, upon which three pleas were filed, viz., non est factum, payment, and tender of $150; the Court deciding that, on the authority of Chitty on Contracts, a tender admits the contract, and the facts specially stated in the declaration, if the plea be applied to that part of the declaration. This, of course, does not sustain the contention here made.

But it is insisted that these pleas are inconsistent—that the purpose in the mind of the pleader in one plea was to defeat the plaintiff below by showing that he was not liable as a partner in the alleged co-partnership, and in the other plea that, should he be found to be liable as a partner, there was a sufficient set-off—the argument being that he cannot consistently take both positions. But why not? Why may he not, in perfect good faith (the question as to whether the attempt to incorporate the co-partnership was effectual or not being in doubt) insist that in either case he is not liable? Why may he not invoke the judgment of the Court as to whether the company was a co-partnership or a corporation (there might be honest doubt on that subject) without surrendering a genuine bona fide defense. The pleas are not in fact inconsistent in the sense that they are repugnant to each other.

But assuming that they are inconsistent, will the proof in favor of both be rejected? Does he lose his defense on both grounds? And if not, who is to choose upon which defense the trial shall proceed? Shall that choice be with his adversary? The most, it seems to us, that the Court below could have required would have been that plaintiff in error should elect upon which one of the two "inconsistent" pleas he would stand (that he should be compelled to elect, we are not deciding), and his motion for leave to withdraw the plea of set-off was, in effect, such an election. But what, in effect, was done by the Court below was to give, not to the party proffering the pleas the right of election, but to the party against whom the pleas were proffered, thus enabling the adversary to choose upon what issue the trial should be had.

The judgment of the Circuit Court is reversed and the cause remanded, with instructions to grant a new trial and proceed further in accordance with this opinion.

EARNHART v. SWITZLER.†

(Circuit Court of Appeals, Ninth Circuit. August 1, 1910.)

No. 1,801.

1. COURTS (§ 299*)—FEDERAL COURTS—FEDERAL QUESTION.

Federal jurisdiction is not conferred on the ground that the case arises under the Constitution and laws of the United States, when it does not really and substantially involve a controversy as to the effect or construction of the Constitution or some law or treaty of the United States, on the determination of which the result depends, and which appears from the plaintiff's statement of his own claim unaided by allegations as to defenses which may be interposed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

2. COURTS (§§ 282, 285*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

Since the only statute recognizing the right of an entryman to settle on unsurveyed lands of the United States is Act May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), providing that a homestead settler on public land surveyed or unsurveyed shall be allowed the same time to file his application and perfect his original entry as is allowed to settlers under the pre-emption laws, a suit by a homestead settler on unsurveyed public land to protect his possessory right as against an adverse claimant does not involve a construction of the Constitution and laws of the United States so as to sustain federal jurisdiction on that ground.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820, 827, 828; Dec. Dig. §§ 282, 285.*]

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

Action by John B. Switzler against F. E. Earnhart. Judgment for complainant, and defendant appeals. Reversed and remanded, with directions.

Douglas W. Bailey, for appellant.

R. J. Slater and James A. Fee, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The appellant brings this appeal from a decree rendered against him in a suit which was brought by the appellee to protect a possessory right to an island in the Columbia river. The bill alleged that the land is unsurveyed public land of the United States, that the appellee had settled thereon with the intention to acquire the same under the homestead laws of the United States as soon as the same should be surveyed, and it sets up the facts which showed the invasion of his right by the appellant.

The appellant raises in this court, for the first time, the question of the jurisdiction of the Circuit Court to entertain the bill. There is no averment of diversity of citizenship of the parties; but the appellee contends that there was jurisdiction by reason of the federal question involved. In Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046, the Supreme Court reaffirmed the rule of

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

† Rehearing denied August, 1910.

numerous of its previous decisions that a cause can only be maintained in the Circuit Court of the United States on the ground that it arises under the Constitution and laws of the United States, when it does really and substantially involve a controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends, and that this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to defenses which may be interposed. It is not shown, nor can it be, that any such constitutional or statutory question is involved in the present case. There is no allegation in the bill that any such question is presented, or that the appellee's rights depend upon the answer thereto. It is true that the right of settlers upon unsurveyed public lands as against all except the United States is recognized by the courts, and that such a settlement, while it confers no right as against the government, is a valid settlement and possession thereunder may be protected. In Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, the court said:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who, in good faith, intend, when the surveys are made and returned to the local land office, to apply for their purchase."

And in Clements v. Warner, 24 How. 394, 16 L. Ed. 695, the court said:

"The law deals tenderly with one who, in good faith, goes upon the public land with a view of making a home thereon."

The only statute which, in express terms, recognizes the right of an intending homestead claimant to settle upon unsurveyed public land is Act May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), which provides that a homestead settler on public land, whether surveyed or unsurveyed, shall be allowed the same time to file his homestead application and perfect his original entry "as is now allowed to settlers under the pre-emption laws," and that his right shall relate back to the date of settlement.

The mere fact that the appellee settled on the land in controversy with the permission of the United States does not raise a federal question. No clause or provision of that statute is presented for construction, nor in dealing with the issues involved is the court called upon to apply or construe any provision of the federal Constitution or statutes. The case is unlike McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237, and Spokane Falls, etc., Ry. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79, cited and relied upon by the appellee. In the first of those cases, decision turned upon the construction of that portion of the homestead act which authorizes the issuance of a patent to the widow of a deceased homestead settler. In the second case, the plaintiff's complaint disclosed the case of a contest between a settler claiming title under the pre-emption law of the United States, and a railroad company claiming a right under an act of Congress, and the court was required to construe the pre-emption act and define the rights of a settler thereunder. The case at bar is similar to Butler v. Shafer et al. (C. C.) 67 Fed. 161; King v. Lawson (C. C.) 84 Fed. 209; California Oil & Gas Co.

v. Miller (C. C.) 96 Fed. 12; State of Washington v. Island Lime Co. (C. C.) 117 Fed. 777; Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771, 37 L. Ed. 610; Budzisz v. Steel Co., 170 U. S. 41, 18 Sup. Ct. 503, 42 L. Ed. 941; Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656.

It follows that the court below had no jurisdiction of the cause, and that the decree must be reversed, and the cause remanded, with instructions to dismiss the bill.

UNITED STATES v. COHEN.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 292.

ALIENS (§ 61*)—NATURALIZATION—PERSONS CAPABLE—WIFE OF ALIEN.

The alien wife of an alien husband cannot become a naturalized citizen of the United States.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 61.*

Citizenship of married women, see note to Hopkins v. Fachant, 65 C. C. A. 5.]

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

Proceeding for naturalization by Henrietta Cohen. From an order admitting the applicant to citizenship, the United States appeals. Reversed.

A. S. Pratt, Asst. U. S. Atty.

Before COXE and WARD, Circuit Judges, and HAZEL, District Judge.

COXE, Circuit Judge. The United States appeals from an order of the Circuit Court for the Southern District of New York admitting Henrietta Cohen to citizenship. The appellee is 60 years of age, was born in Germany, arrived in this country in October, 1869, and has resided in New York since that date. She filed her declaration of intention in July, 1907, and her petition for naturalization on August 6, 1909. In, or about, the year 1870, she was married to Tobias Cohen who was, and still is, a subject of the Emperor of Russia. They are still living together as husband and wife and during their married life six children have been born to them.

The record presents the single question—whether the alien wife of an alien man, both having resided in this country as husband and wife for over 30 years, can become a citizen? We are unable to find a decision of the Supreme Court or of a Circuit Court of Appeals upon the precise question here in issue, but there is attached to the brief of the District Attorney an unreported decision of Judge Adams, of this circuit, denying an application based upon, substantially, identical facts. The question is interesting and is, by no means, free from doubt, but

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

we incline to the opinion that both on principle and authority it should be answered in the negative.

The admission to American citizenship is a high privilege which should not be granted upon a doubtful interpretation of the law. It must be conceded that there is no specific provision of the statutes which permits the naturalization of the alien wife of an alien husband. On the contrary, as was pointed out by Judge Henry B. Brown in Peguingot v. Detroit, 16 Fed. 211, the general trend of legislation has been constantly toward the recognition of the proposition that the husband is the head of the family and that his wife and minor children take his citizenship, it being inconsistent with the theory of our laws that the wife shall be a citizen and the husband an alien and vice versa.

The expatriation act of March 2, 1907 (Act March 2, 1907, c. 2534, 34 Stat. 1228 [U. S. Comp. St. Supp. 1909, p. 438]), provides as follows:

"Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. * * *

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the matrimonial relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein."

It is plain that Congress here intends that the wife shall assume the nationality of her husband even to the extent of expatriation in the case of an American woman. Though an American citizen prior to her marriage she cannot resume that citizenship while the marriage relation continues. It seems wholly inconsistent with the spirit of this legislation to permit an alien to acquire rights which are denied to a citizen. If an American woman had married Cohen she would immediately have become a Russian citizen and would be such to-day with no power to change her citizenship until the matrimonial relation is terminated by death, or otherwise. And yet it is argued that the appellee who was an alien when she came to this country and who married an alien while here and has during her entire life owed allegiance either to the Emperor of Germany or the Emperor of Russia, may do what she could not have done had she been born an American citizen. We cannot think that the lawmakers intended so anomalous a situation.

The order is reversed and the case is remanded to the Circuit Court with instructions to cancel the certificate of naturalization.

UNITED STATES v. POSLUSNY.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 278.

ALIENS (§ 68*)—NATURALIZATION—TIME.

Rev. St. § 2168, as amended by Act Cong. June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 480), provides that when an alien, who has declared his intention to become a citizen of the United States, dies before he is actually naturalized, his widow and minor children, by complying with the other provisions in the act, may be naturalized without making any declaration of intention. *Held* that, where an alien declared his intention to become a citizen July 31, 1889, and died March 6, 1892, without having been admitted to citizenship, petitioner, his son, who came to the United States April 25, 1891, when between eight and nine years of age, and filed a petition for naturalization on April 22, 1909, three years after the passage of Act June 29, 1906, was not guilty of such laches as barred his right to citizenship, though he delayed his application for six years and five months after he became of age, and for nine years and five months after he became eighteen, when he could have first taken the required oaths.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*

Citizenship under state and federal laws, see note to City of Minneapolis v. Reum, 6 C. C. A. 37.]

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

Leo Poslusny was admitted to citizenship, and the United States appeals. Affirmed.

Henry A. Wise, U. S. Atty. (Addison S. Pratt, Asst. U. S. Atty., of counsel), for the United States.

Walter A. Hirsch, for appellee.

Before COXE and WARD, Circuit Judges, and HAZEL, District Judge.

COXE, Circuit Judge. The question at issue is a simple one. Leo Poslusny was born in Austria, November 24, 1881, and came to this country April 25, 1891, when he was between nine and ten years of age. On April 22, 1909, he petitioned for naturalization, based upon a declaration of intention filed by his father July 31, 1889, and was admitted to citizenship July 22, 1909, pursuant to the provisions of section 4 of the act of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1909, p. 480]). His father died March 6, 1892. The appellee's application was made less than three years from the date of the passage of the amended naturalization act, and the sole question is, was this an unreasonable delay?

Section 2168 of the Revised Statutes (U. S. Comp. St. 1901, p. 1332) was in force until June 29, 1906, and provided as follows:

"When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

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

It was conceded at the argument that had this section remained on the statute book unamended the appellee could have become a citizen at any time upon taking the oath prescribed by law; in short, that after the appellee became of age no limitation whatever was set upon his right to take these oaths.

The act of 1906 amended the provision of the Revised Statutes, quoted above, as follows:

"When an alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized, the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."

Here, too, there is no express limitation as to the time when the applicant must take the oaths of allegiance and renunciation and comply with the other provisions of the act. But it is contended by the appellant:

"That in view of the many opportunities of which the appellee could have availed himself to become naturalized in one manner or another under the provisions of the Revised Statutes prior to the act of June 29, 1906, he has, by delaying until six years and five months after he became of age and nine years and five months after he became eighteen, when he could first have taken the oaths, waited too long before applying for naturalization, and has by such delay evidenced an intention of repudiating the status of a naturalized citizen which was impressed upon him by his father's death."

We are unable to give our assent to this contention. Under the Revised Statutes delay could not deprive the appellee of his rights; he was, therefore, under no compulsion to take the oaths until the amendment of 1906. Assuming that this act required that he should comply with "the other provisions" within a reasonable time—and as to this we express no opinion—we think that by filing his petition less than three years after the passage of the act he is clearly within its provisions.

Order affirmed.

MANN et al. v. DEMPSTER.

(Circuit Court of Appeals, Second Circuit. April 26, 1910.)

No. 234.

1. APPEAL AND ERROR (§ 272*)—EXCEPTIONS—TAKING—TIME.

Exceptions to the charge, taken after the jury has retired, are improperly reserved, and cannot be considered on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1611; Dec. Dig. § 272;* Trial, Cent. Dig. § 680.]

2. TRIAL (§ 317*)—EXCEPTIONS.

An exception to the court's directing the jury to retire before plaintiff in error had an opportunity to take his exceptions to the charge while the jury were at the bar, as required to make the exceptions available, must be sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 751; Dec. Dig. § 317.*]

Noyes, Circuit Judge, dissenting in part.

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

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

Action by Samuel Dempster against William D'Alton Mann and another. Judgment for plaintiff, and defendants bring error. Reserved for further hearing.

See, also, 157 Fed. 319.

Albert A. Wray, for plaintiffs in error.

Charles O. Maas, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The action was for libel. At the close of the testimony the trial judge asked if there were any requests to charge. Both sides replied that they had no requests to hand up. Thereupon the court charged the jury quite fully. At the close of the charge defendant's counsel said, "If the court please, I desire to except—" when the court interrupted him, saying, "You will note your exceptions to the charge to the stenographer; it is not necessary for the jury to wait." Thereupon, as the record shows, the jury retired and the judge retired. Defendant's counsel then dictated to the stenographer three exceptions to three different parts of the charge.

The thirty-third assignment of error reads as follows:

"In not allowing the defendant's counsel to note his exceptions in the presence of the court and jury, so that any error committed in the charge could be corrected."

In Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643, the Supreme Court said:

"It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them except to them while the jury were at the bar. The statute of Westminster II, which provides for the proceeding by exception, requires in explicit terms that this should be done; and, if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticated it, to have been so taken."

This court also has repeatedly held that exceptions to the charge taken after the jury has retired are improperly reserved and cannot be considered here. Park Bros. v. Bushnell, 9 C. C. A. 140, 60 Fed. 583; Commercial Travelers' Accident Co. v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Berwind-White Coal Co. v. Firment, 170 Fed. 151, 95 C. C. A. 1. See, also, opinion of Circuit Court of Appeals, Ninth Circuit, in Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392, and cases therein cited. The error assigned was so manifest that, when attention was called to it on the oral argument, it seemed to the majority of the court that but one disposition could be made of the appeal, whereupon argument on the merits was not heard, and the cause was taken for decision, with an intimation that the judgment would probably be reversed.

In the Firment Case, however (170 Fed. 151, 95 C. C. A. 1), after calling attention to the circumstance that the improper practice was suggested by the defendant (appellant), we said:

"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."

In the case now at bar, counsel for the defendant (appellant) did not himself suggest the course pursued, but he apparently acquiesced in it without protest and dictated his exceptions to the stenographer. Had he taken an exception, when the court instructed the jury to retire, on the ground that their doing so would prevent his reserving exceptions to the charge, which an appellate court could consider, and refused to take exceptions in the presence merely of the stenographer, there would have to be a reversal, because under the authorities the appellate court has no discretion to consider belated exceptions, and a refusal to allow exceptions to be taken in time is manifest error. But as the case stands it is substantially the same as Berwind-White Coal Co. v. Firment, supra, and we must dispose of it solely on the exceptions which were lawfully reserved.

There has been no oral argument on these exceptions, but the case seems to be so fully briefed on both sides that we can determine it quite as well on submission. If, however, either side is solicitous to argue it orally, and notice to that effect be given to the clerk within five days, it may be set for hearing on the third Monday of the May session.

NOYES, Circuit Judge (dissenting). Accepting the conclusion of the majority that this court has no right to consider the exceptions to the charge, because they came too late, I think that the action of the trial court in depriving the plaintiffs in error of their right to take lawful exceptions constituted plain error in a matter vital to their interests, which this court, under the circumstances shown upon the record, without formal exception, should correct.

Ex parte HOFFMAN.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 320.

ALIENS (§ 1*)—DEPORTATION—RESIDENTS IN UNITED STATES—TEMPORARY ABSENCE ABROAD—PROSTITUTES—"ALIEN"—"IMMIGRANT."

Act Cong. Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459), provides that any "alien" who shall enter the United States, in violation of the law, and such as become public charges from causes existing prior to landing, shall, on the warrant of the Secretary of Commerce and Labor, be deported at any time within three years after the date of entry. *Held*, that the word "alien," as so used, was not synonymous with "immigrant," but was intended as a broader term, and includ-

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

ed a Russian unmarried woman, who entered the United States in 1897 or 1898, and remained therein continuously until March, 1908, when she returned to Russia, after having engaged in prostitution for a considerable time, and who attempted to re-enter the United States in June, 1908; she being within three years thereafter an alien of the excluded classes and subject to deportation.

[Ed. Note—For other cases, see Aliens, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 302–306; vol. 8, p. 7571.]

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

In the matter of the application of Samuel Hoffman, petitioner for Annie Palina, alias Annie La Pina, for a writ of habeas corpus. From an order dismissing the writ, and remanding petitioner to the custody of the Commissioner of Immigration, for deportation under Act Cong. Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459), petitioner appeals. Affirmed.

Archibald Palmer, for appellant.

D. D. Walton, Asst. U. S. Atty., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The petitioner, an unmarried woman, a native of Russia, came to this country in 1897 or 1898 at the age of 12. She remained here continuously, living in various parts of the United States, until March, 1908, when she returned to Europe to go to the assistance of her mother, who was then living at Kishineff, Russia. She re-entered this country on June 2, 1908, by the steamship Finland, with her mother, and for the purpose of facilitating her landing falsely represented that she was Mrs. Joseph Fiore and the wife of an American citizen. Prior to her leaving this country, and subsequent to her return thereto, she was engaged in the occupation of a prostitute. On September 21, 1909, she was arrested in a house of prostitution in Phœnix, Ariz. The above facts being established, an order of deportation was made under Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447); it being held that as a prostitute, she was within the excluded classes enumerated in section 2. She obtained a writ of habeas corpus, and after a hearing the writ was dismissed by the District Court, Southern District of New York. From this order of dismissal, appeal was taken.

The single question presented is whether the provisions of the act of 1907 apply to an alien, who after original entry into this country has remained here more than three years, and then, after a brief absence abroad, again seeks to enter the United States. We had this question of construction of Act March 3, 1903, c. 1012, 32 Stat. 1213 (which is in this particular substantially the same as the act of 1907), before us in Taylor v. U. S., 152 Fed. 1, 81 C. C. A. 197, and do not think it necessary to repeat the long discussion which will be found in that opinion. We referred in that case to the history of the act as disclosed in the Congressional Record. It therein appeared that the

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

question whether the new act should, like the original one of March 3, 1891 (26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, p. 1294]), be restricted to alien immigrants, or should be broadened so as to cover aliens, whether immigrants or not, was thoroughly discussed in Congress. As the bill left the House it was broadly phrased. The Senate amended it in several particulars, so as to restrict its operation to immigrants. Upon conference, however, the House nonconcurred in these amendments, and the Senate withdrew them. We held that these proceedings clearly indicate that Congress was satisfied that the use of the word "immigrant" had given rise to a construction of the earlier acts which rendered them inadequate to accomplish their purpose, and made it necessary to adopt the broader term "alien." The Taylor Case was reversed by the Supreme Court (207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130), the court holding that the facts did not warrant a conviction (under section 18 of the act) of the captain of a vessel from which one of the ship's crew had deserted while in this port; but we find nothing in the opinion of the Supreme Court which indicates that this court was in error in holding that, despite its title, the excluding sections of the act applied to aliens generally, and not solely to alien immigrants.

Examination of the cases cited by appellant—In re Buchsbaum, (D. C.) 141 Fed. 222; Rodgers v. United States, 152 Fed. 355, 81 C. C. A. 454; In re Ota (D. C.) 96 Fed. 487; U. S. v. Aultman Co. (D. C.) 143 Fed. 922; U. S. v. Nakashima, 160 Fed. 842, 87 C. C. A. 646—has not satisfied us that these later acts of 1903 and 1907 should be given the narrower construction contended for. The construction approved in the Taylor Case has been the one accepted in this circuit. In re Moses (C. C.) 83 Fed. 995; In re Kleibs (C. C.) 128 Fed. 656; United States v. Watchorn (C. C.) 164 Fed. 152; Ex parte Crawford (D. C.) 165 Fed. 830.

The order is affirmed.

In re CORN.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 264.

BANKRUPTCY (§ 304*)—LIENS—EFFECT OF INSTRUMENT.

On petition to require a receiver in bankruptcy to turn chattels over to petitioner, an auctioneer, under a claimed lien, it was improper to summarily dispose of an instrument as not giving a lien, where it recited receipt of a sum of money by the bankrupt from the petitioner as an advance on the chattels, and that petitioner was to sell the chattels at public auction and pay the proceeds to the bankrupt, less a commission and expenses and such advance, since evidence that, under the agreement as the parties construed it, petitioner took immediate possession of the chattels in good faith to sell them, might result in a finding that he was entitled to hold them or their proceeds to secure repayment of the advance.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 304.*]

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

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

In the matter of Robert Corn, bankrupt. On petition by Frank Walker to review an order of the district court. Order reversed.

Philip Cohen (M. Spencer Bevins, of counsel), for petitioner.

Hastings & Gleason (Mervyn Mackenzie, of counsel), for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Petitioner is a licensed auctioneer, whom the alleged bankrupt, prior to the filing of petition in bankruptcy, had engaged to sell certain of his chattels at auction. The sworn petition of Walker asserts that at the time this arrangement was made he advanced to Corn the sum of $600, taking as security for such advance the articles thus to be sold. The receiver in reply to the petition submitted the following receipt:

"Received from Frank Walker the sum of $600.00 (six hundred dollars), as advance on all fixtures, cabinets, jewelers' materials, one Diebold safe No. 37, roll-top desk, showcases, counters, cabinets with crystals, electric fans, now my own personal property, contained in the second story loft room 27, in premises 37 Maiden Lane. Said Walker is to sell the above chattels at public auction on Monday, November 15, 1909, at 10:30 a. m. and Walker is to receive ten (10%) per cent. commission and advertising expenses, and all moneys left after deducting these moneys advanced and commission, balance Walker is to turn to Robert Corn, the above to be free of all chattels or incumbrances.

"R. Corn."

Thereupon the District Judge filed the following memorandum:

"I think the instrument, a copy of which is annexed to Mr. Mackenzie's affidavit, did not give Mr. Walker a lien on the property. He loaned $600 to be repaid out of the proceeds of the sale. No sale having taken place, he remains a general creditor. If the instrument had created an apparent lien, the circumstances of the transaction are so suspicious that an investigation would have been necessary."

The record before us seems to indicate that a sale did in fact take place. We are not inclined to agree with the conclusion that this instrument was wholly inoperative to create a lien. Evidence that under this agreement, as the parties construed it, the auctioneer took immediate possession of the property in good faith for the purposes of sale, might result in a finding that he was entitled to hold it or its proceeds to secure repayment of his advance of part of the purchase price. We think petitioner should have been given an opportunity to establish the averment of his petition by competent proof, and that the question should not have been thus summarily disposed of.

The order is reversed.

In re CLIPPER MFG. CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 293.

BANKRUPTCY (§ 391*)—STAY OF SUITS.

Since a suit to require defendant corporation to issue a certificate of stock, and for damages for refusing to issue it, involves a claim from which a discharge in bankruptcy would not be a release, the suit cannot be stayed, under Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing for the stay of certain suits pending on bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 651; Dec. Dig. § 391.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of the Clipper Manufacturing Company, bankrupt. Petition by Adna G. Bowen to review an order of the District Court. Order reversed.

George H. Mallory, for petitioner.

William D. Moore (Leopold Leo, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The suit in the state court is founded upon allegations that Adna G. Bowen, plaintiff therein, was the owner of three shares of stock in the Clipper Manufacturing Company, defendant, and was the holder of a stock certificate therefor; that he delivered the certificate to the secretary of the company, with a request to issue a new certificate for the same shares in the name of Emma K. Bowen, and to deliver the same to him; that some months subsequently, not having received such new certificate, he notified the company of the withdrawal of his request for a new certificate and demanded the return to him of the old one; that the company refused so to do, stating that the old certificate was canceled, and that a new one had been issued to Emma K. Bowen; that he had repeatedly demanded the return to him, either of his old certificate, or of a new one in its place, which the company had refused to do. The prayer was for "judgment requiring defendant to issue to plaintiff a certificate in plaintiff's name for said three shares of the capital stock of defendant corporation, awarding to plaintiff his damages sustained by reason of the acts of defendant to the amount of $1,000."

In our opinion, the claim upon which this suit is founded is not one from which a discharge would be a release, and therefore section 11a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), providing for the stay of certain pending suits does not apply.

The order is reversed.

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

NIAGARA FIRE EXTINGUISHER CO. v. HIBBARD.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,640.

1. PATENTS (§ 213*)—LICENSES—TRANSFER BY LICENSEE.
A corporation which took from another corporation, afterward dissolved, all of its property, contracts, and good will, by a bill of sale which warranted title, and without assuming any of the liabilities of the grantor, was not the legal successor of such grantor and did not succeed to its rights under a contract granting it a license under a patent which by its terms was not assignable without the consent of the patentee.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 315–320; Dec. Dig. § 213.*]

2. PATENTS (§ 213*)—LICENSE—TRANSFER BY LICENSEE.
A finding that a patentee had not given his consent to the transfer of a license contract from the licensee to another corporation and was not estopped to deny the validity of such transfer *held* sustained by the evidence.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 213.*]

3. PATENTS (§ 311*)—SUIT FOR INFRINGEMENT—ISSUES AND PROOFS.
A defense of noninfringement pleaded in the answer in an infringement suit is not waived by a further defense of license, but raises an issue of fact under which complainant has the burden of proof, and defendant is not estopped by pleading the license from contesting such issue.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 311.*]

4. WORDS AND PHRASES—"RESPONSIBILITY."
The primary meaning of "responsibility" is the state of being answerable for an obligation. A secondary meaning is the ability to pay.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6179.]

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

Suit in equity by George E. Hibbard against the Niagara Fire Extinguisher Company. Decree for complainant, and defendant appeals. Reversed in part.

George T. Buckingham, for appellant.

C. C. Linthicum and Archibald Cattell, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Hibbard sued the company on account of alleged infringement of his patents, Nos. 733,646 and 733,962, for improvements in automatic fire extinguishers.

The defenses pleaded were: First, that the company in fact did not infringe; and, second, that Hibbard was barred from charging infringement because (a) the company by succession was entitled to the benefits of a license contract between its predecessor and Hibbard, (b) by an express consent in writing as provided for in said license contract Hibbard had confirmed the assignment thereof to this company, and (c) with full knowledge that this company was carrying on all the business and executing all the contracts of the other company which

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

had been dissolved Hibbard had accepted from this company and retained the stipulated pay for royalties and services.

A cross-bill, counting on the matters stated as the second defense, and alleging that Hibbard was about to use the patents in defiance of the company's rights, prayed for an injunction against Hibbard. At a hearing on affidavits a temporary restraining order was issued on the cross-bill. These affidavits, by agreement of counsel, were in evidence at the hearing on the merits.

By the decree the restraining order was dissolved, the cross-bill was dismissed for want of equity, and on the bill the company was perpetually enjoined and ordered to account.

Hibbard's license contract was with Niagara Fire Extinguisher Company, a corporation organized under the laws of West Virginia and having its plant and main office at Akron, Ohio. The contract, among other things, provided that the West Virginia corporation for 10 years from February 1, 1901, should have the exclusive right to make, use, and sell automatic sprinkler devices under all patents then owned or thereafter obtained by Hibbard; that Hibbard should be paid $2,000 a year as royalties; that Hibbard should be chief engineer in charge of the corporation's engineering department and should give his best skill and ability to devising and perfecting automatic extinguishing devices for the use of the corporation, at a salary of $2,500 a year; that as soon as Hibbard should have perfected certain named new devices the corporation at its expense should send Hibbard to Europe to sell European rights, the net proceeds of sale to be equally divided; and that the corporation should not assign the contract without Hibbard's written consent.

Regarding the cross-bill and the second defense:

(a) The present company, Niagara Fire Extinguisher Company, was organized under the laws of Ohio in May, 1907. By a bill of sale, July 12, 1908, the West Virginia corporation conveyed all its property, contracts, good will, to the Ohio corporation. According to the terms of this bill of sale the grantee neither assumed, nor took the property subject to, the liabilities of the grantor; but the grantor warranted that it would defend the property against all lawful claims and demands whatsoever. Stockholders and officers were substantially the same. Proceedings from July 15 to October 12, 1908, dissolved the West Virginia corporation.

The Ohio Company was not the successor (or heir) of the West Virginia company. Dillingham v. Snow, 5 Mass. 554; Overseers of the Poor v. Sears, 39 Mass. 122. Hibbard's contract, being personal, could not pass to the Ohio company save by assignment, and the assignment could not be effective without Hibbard's consent. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369; Boston Ice Co. v. Potter, 123 Mass. 28; Bowers v. Lake Superior Co., 149 Fed. 983, 79 C. C. A. 493.

(b) On August 7, 1908, Allen, the company's general manager wrote from Akron to Hibbard at Chicago:

"I wish to transfer our charter from West Virginia to Ohio (to save taxes). I would like to have you sign the inclosed paper."

The paper was a form for Hibbard's consent to the assignment. It contained no agreement that the Ohio company should be responsible (answerable) to Hibbard for the West Virginia company's past conduct under its covenants. Hibbard wrote to Allen on August 8th:

"I infer that you mean that I should agree that the West Virginia company should assign or transfer my contract to the Ohio company. Now I will be pleased to do so upon receiving a letter from you that this new company is identically the same company, having the same stockholders, and the same responsibility that the old company gives to me."

Allen replied, August 10th:

"The stockholders are exactly the same. We are simply making the transfer from one state to another to save expense."

Hibbard to Allen, August 12th:

"It appears the old company goes out of existence and the Ohio company takes its place. To make the contract binding on the new company, it must by its president and secretary accept the assignment of the contract and guarantee to be bound by and to carry out all its conditions. As there is a lot of dead wood in the old contract, will it not be better to make a new contract? It appears to me that this would be the proper thing to do, so that all old matters will be amicably settled."

No answer. Hibbard to Allen, August 19th:

"I wrote you last week expressing my willingness under proper conditions to allow the company to assign my contract to the new company. I have not heard a word from you since."

No answer. Hibbard to Allen, October 9th:

"I am sorry that you got out of town (Chicago) before I saw you as I wished to have the matter of the new company and myself settled and off my mind. You of course understand that I do not agree to the old company's assigning my contract with them to the new company without the new company's making definite arrangements with me as to their responsibility, etc., as I indicated to you in the first instance; and if the new company simply wish to assume the responsibilities of the old company without any changes as suggested, I wish to have that definitely arranged for. Also that my signature has to be secured before the same can be done, as per our contract."

No answer. On January 27, 1909, Hibbard sent a registered letter to the company itself. After reciting the foregoing correspondence, he proceeded:

"Within the last few days I have heard in the office of the company in Chicago that the West Virginia company has surrendered its charter and gone out of business, and that the Ohio company is manufacturing my devices without any contract with or license from me. On inquiry I find the West Virginia company did actually surrender its charter and was formally dissolved on October 12, 1908, and that the Ohio corporation was chartered May 2, 1907. Under these circumstances I request that you at once officially inform me of the exact condition of affairs upon all of these points and what has been and is being done and by whom in the manufacture and use of my devices."

On February 1st Allen answered:

"You are right, this matter should be attended to at once. The only excuse is that I have not found time to go over the old contract. I am having the necessary papers prepared today. I expect to be in Chicago by the middle of this week and will discuss this matter with you while there in person."

On February 2d Hibbard wired and wrote:

"Make no transfer of my contract. I will not recognize any transfer made without my consent in writing, and after an opportunity to examine and consider the transfer and after a satisfactory adjustment of all troubles growing out of the refusal of the old company to perform its contract with me."

Allen to Hibbard, February 4th:

"I inclose the papers I referred to in my recent letter. You are certainly aware that it takes two to make a bargain, and that without your signature no transfer can be made. I expect to be in Chicago Monday, at which time we will discuss this matter fully."

In the proposed form of assignment and consent the Ohio company was to assume nothing but the obligations of the contract "from and after the date of this assignment." Hibbard to the company, March 4th:

"Mr. Allen has again been here and again has gone without taking up with me our affairs. What if anything do you intend to do?"

Allen to Hibbard, March 8th:

"The contract as it stands is perfectly satisfactory to us, and if you have any proposition to make in the way of alterations of the contract, we will be glad to take the matter under advisement and give you an early answer."

Hibbard to the company, March 24th:

"Herewith find two checks, dated Feb. 25 and Mar. 10, payable to my order. You have no right to use any device covered by my patents. In case you do not give me at once satisfactory assurance that you will forthwith cease infringing, I shall take action."

The bill of complaint was filed April 5th.

After Hibbard's peremptory telegram of February 2d forbidding the making of the assignment without his written consent, and Allen's acknowledgment that it takes two to make a bargain (thus impliedly representing that no assignment had been attempted and promising that none would be without Hibbard's written consent), it would seem that it should be a matter of mutual astonishment to the parties to learn that Hibbard on August 10th had given his written consent to an assignment which had been made on July 12th. Such, however, is the company's contention. The argument is that after Hibbard on August 8th expressed his willingness to give his written consent on certain conditions, the company on August 10th fully complied with the conditions, and thus there was "a full meeting of the minds, made in writing, sufficient to create a new contract." More explicitly, that Hibbard's conditions were that the new company should be identically the same company as the old, should have the same stockholders, and should have the "same responsibility that the old company gives to me," and that Allen's reply that "the stockholders are exactly the same; we are simply making the transfer to save expense"—was a complete compliance because if the stockholders were exactly the same the company would be identically the same, and if the assets were all transferred the "responsibility" of the new company would be the same as that of the old. Passing over the fact that Allen's proposal of August 7th was made on the basis of not disclosing what had actually been done, and the fact that there were changes in stockholders, we

take up the meaning of the word "responsibility" in Hibbard's letter of August 8th.

The meaning should be gathered not only from the context, but also from the relations of the parties at the time. The old company had obtained a license to do business in Illinois and had opened a sales office at Chicago with salesmen in charge. Hibbard thought he was entitled to be in actual charge of the engineering department. The company kept him at a desk in the Chicago sales office, with practically nothing to do. He claimed the right to work in the factory for the purpose of "devising and perfecting automatic extinguishing devices for the use of the corporation." He asserted that he was prevented from doing so. He asked to be sent abroad to sell European rights. He avowed that the company refused. When the foregoing correspondence opened, Hibbard had an action for damages pending against the old company.

The primary meaning of "responsibility" is the state of being answerable for an obligation. A secondary meaning is the ability to pay. From the context, wherein Hibbard was demanding that he have from the new company "the same responsibility that the old company gives to me," and from the relations between the parties, wherein Hibbard was demanding that the old company should account for its conduct under its affirmative covenants, we think it clear that Hibbard intended that the new company should affirmatively assume the liabilities of the old company to him—not merely that the new company should have the financial ability to respond if it were liable to respond. We are inclined to believe that Allen on August 10th must have understood Hibbard's expression. But if there was any ambiguity, Allen should have asked for the clearer definition which Hibbard gratuitously furnished in his letter of August 12th and thence on. Our conclusion is that there was no meeting of the minds, expressed in writing.

(c) Allen's testimony, supported by that of two employés in the Chicago office, was to the effect that he and the others between August, 1908, and February, 1909, had frequently informed Hibbard that the old company had dissolved, that the new company had taken over all the business and contracts, and that the payments of royalties and salary to Hibbard were being made by the new company. Hibbard denied all this. These witnesses testified orally before the chancellor. His estimate of the credibility of the company's witnesses should not be overturned on account of mere numbers. But further, Allen's story is inconsistent with the documentary and other unquestionable evidence in the record.

It is hardly credible that Hibbard would have assumed the attitude he did throughout the correspondence if he knew and knew that Allen knew that the position was false in fact. It is more incredible that Allen over his signature should have repeatedly acquiesced in such an assumption.

Every outward sign indicated that the business was being carried on by the old company. In the Chicago office the license to act as a corporation in Illinois, procured by the old company, was displayed on the wall as long as Hibbard remained. The new company did not

take out an Illinois license until after this suit was started. At Akron no changes were made. No deed of the plant from the old company to the new was put on record. Signs, stationery, books, bank accounts, continued the same.

The alleged estoppel is particularly predicated on Hibbard's retention of a check of February 10th. True, on January 27th Hibbard had written to Allen that within the last few days he had heard in the Chicago office that the old company had surrendered its charter and gone out of business, and that the new company was manufacturing his devices without any license from him. But he made that the reason for demanding that he be informed officially and at once as to the truth of the report. The preceding correspondence had all been conducted on the basis of Allen's representation that the assignment of the contract was a matter of the future. In Allen's letter of February 4th he virtually repeated the representation and assured Hibbard that no transfer would be attempted without his written consent. When Hibbard received and retained the check of February 10th, he had had no letter answering his demand of January 27th. The check itself was upon the form of the old company, bore the name of the old company signed by the same officer, was drawn upon the same bank, and exhibited the number 15,694 in series with former checks. Hibbard's attorneys (having failed to learn by examination of records or otherwise that the transfer of the business had in fact been made) advised him that the old company, though formally dissolved, could still do business not inconsistent with winding-up, including the right to keep his contract alive by making the stipulated payments and the right to assign his contract with his consent.

So all the circumstances, we think, corroborate Hibbard's denial of any knowledge on his part that the old company had gone out of business and that the check of February 10th was drawn against the funds of the new company. There is, therefore, no substantial basis for challenging the dismissal of the cross-bill and the rejection of the second defense.

Regarding the first defense:

With the other matters eliminated, the case stands simply as an infringement suit against a stranger.

Hibbard claims that he was entitled to a decree on the pleadings—that after the company in its answer admitted that the old company was his licensee and was manufacturing devices which it put forth as the devices of the patents, and that the new company had taken an assignment of the license and was making and selling the same devices that the old company had made and sold, it was no longer incumbent on him to introduce proof of infringement in fact. We do not consider this a fair construction of the answer. If all matters relating to the license were stricken out, the answer would still contain the distinct averment of noninfringement, and thus an issue of fact would be joined, under which Hibbard would have the burden of proof. Such a defense is not waived by pleading a further defense of license, for the latter defense is not a confession of infringement in fact. The

defendant thereby merely takes the legal position that the complainant by reason of the license is precluded from charging infringement.

If the suit were against the old company for further royalties, that company would be estopped from contending that the devices stamped and put forth by it as the patented devices were not in truth within the patents. Sproull v. Pratt (C. C.) 97 Fed. 807; Piaget Novelty Co. v. Headley, 108 Fed. 870, 48 C. C. A. 116. But, as to the new company, Hibbard cannot both deny the relation of licensor and licensee and also claim the benefit of the estoppel that would arise from the relationship.

The company asserts that the record is barren of proof that the devices made by it are in fact covered by the patents. We find it unnecessary to set forth the items which have led us to believe that a prima facie case was made, for, when the company offered competent evidence to support its claim of noninfringement, the court sustained Hibbard's objection, and the company was not permitted to go into that defense at all. Hibbard's objection was that the testimony was immaterial and was offered too late. The court ruled that "under the pleadings the testimony would not be material to any issue, so the objection is sustained." Order of proof was within the discretion of the court; but the objection as to time was in effect overruled. The refusal to hear the company's evidence was based on a construction of the pleadings which, in our judgment, involved substantial error.

As to the cross-bill, the decree is affirmed; as to the bill and the defense of noninfringement, the decree is reversed, with the direction to grant the parties leave to take proofs.

NEUREUTHER v. MINERAL POINT ZINC CO.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1910. Petition for Rehearing Denied June 10, 1910.)

No. 1,627.

1. PATENTS (§ 16*)—INVENTION—NATURE OF PATENTABLE INVENTION.
   A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 15; Dec. Dig. § 16.*]

2. PATENTS (§ 328*)—INVENTION—REGENERATIVE RETORT—HEATING FURNACES.
   The Neureuther patent, No. 666,390, for a regenerative retort-heating furnace, is for a zinc-smelting furnace differing from the Siemens furnace of the prior art only by increasing the number of ports in the combustion-chamber from one to three and also the number of retorts, is void for lack of patentable invention, especially in view of the building and use by the patentee for several years before the application was filed of two-port furnaces.

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

In Equity. Suit by Charles F. Neureuther against the Mineral

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

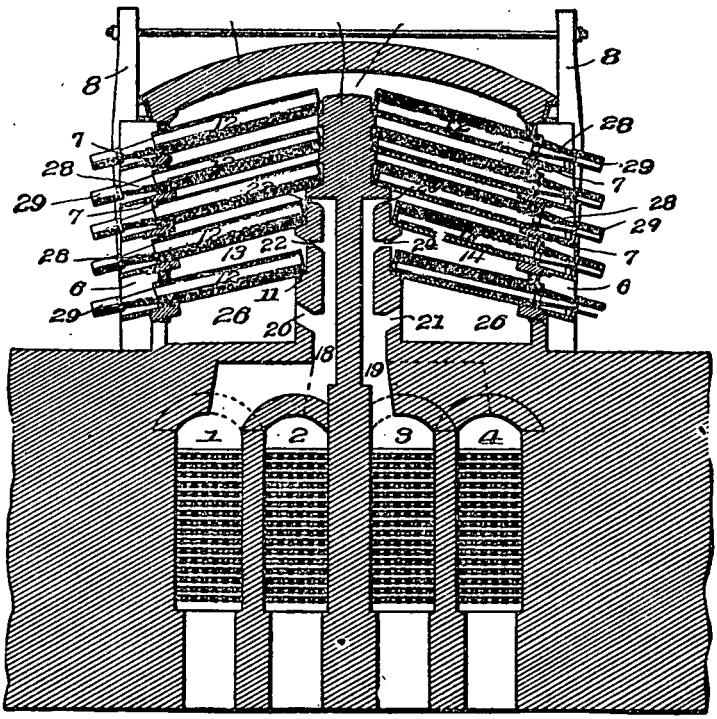
Point Zinc Company. Decree for defendant, and complainant appeals. Affirmed.

The appellant, as patentee and owner of letters patent No. 666,390, filed his bill against the appellee to enjoin an alleged infringement of claims in the patent; and upon final hearing of the issues the bill was dismissed for want of equity. This appeal is from the decree thereupon.

The patent is entitled an "Improvement in Regenerative Retort-Heating Furnaces"; was issued January 22, 1901, on an application filed August 1, 1900, and the objects are thus stated:

"My invention relates to regenerative furnaces for heating zinc-distilling retorts and other like retort-furnaces; its object being to provide a means in such a furnace for the higher and more even heating of the retorts, and therefore the more even distillation of the material contained within the retort and greater proportionate recovery of zinc or other substance from the ore or other material under treatment. The difficulty in the ordinary regenerative zinc-distilling furnaces has been that the zinc ore contained in the upper tier or tiers of retorts has not been as highly heated as that contained in the lower tier or tiers thereof, so that the time required for distilling the zinc from the charge has been longer than desirable, and there was liability of some zinc remaining in the ore. By the present invention the retorts within the chambers of these regenerative furnaces can be more highly and evenly heated, and therefore the more rapid and perfect distillation of the zinc or other vapor from the charge contained in the retort be obtained." Also this further statement: "I also find it practicable to employ at least one more tier of retorts in the furnace as compared with the regenerative furnaces in use prior to my invention and to heat the same without appreciable increase in fuel, so increasing the output and reducing the cost of distillation."

The drawing illustrating the invention is as follows:



The following is the description in the specification:

"In the furnace illustrated the regenerators 1, 2, 3, and 4 are located under the combustion-chamber, 5, and this construction is considered the more desirable, because the flues enter the center instead of the ends of the combustion-chamber. The combustion-chamber, 5, is formed of the side walls, which are provided with cast-iron frames comprising the vertical plates, 6, and horizontal plates, 7, supported in any suitable way and held in place by the buckstaves, 8, which buckstaves also support the roof, 9. Extending up within the combustion-chamber, 5, is the central division-wall, 10, which is provided with ledges, 11, on which the inner ends of the retorts, 12, rest, the outer ends of the retorts resting upon the horizontal plates, 7, above referred to. This division-wall, 10, extends up toward the roof, and so divides the combustion-chamber, 5, into two compartments, 13 and 14, which communicate with each other above the division-wall, and, as shown in the drawing, each compartment contains five tiers of retorts, 12, such retorts extending up close to the roof, 5.

As shown in the drawing, the furnace is provided on each side of the central wall, 15, with both gas and air regenerators, having the air-regenerator, 1, and gas-regenerator, 2, on one side thereof, and the air-regenerator, 4, and gas regenerator, 3, on the other side thereof, these regenerators leading through the regular pits to the ordinary reversing valves, which are not shown. A series of flues, 18, connected alternately with the air and gas regenerators on one side of the furnace, extend upwardly on one side of the center of the partition-wall, 10, and a similar series of flues, 19, connected alternately with the air and gas regenerators on the other side of the furnace, extend upwardly on the other side of the center of said partition-wall. The flues, 18, lead through the ports or opening, 20, into the base of the combustion-chamber, 13, and then extend upwardly within the division-wall, 10, toward the upper end thereof, and are provided with the ports, 22 and 23, opening into the compartment, 13, of the combustion-chamber at different heights and among the tiers of retorts, as shown, and acting to carry the gas or the air within such flue toward the upper end of the chamber before it passes into and forms combustion within the same. In the same manner the flues, 19, lead through the ports or openings, 21, into the base of the combustion-chamber, 14, and then pass upwardly within the division-wall and open by ports, 24 and 25, at different heights into the compartment, 14, and among the tiers of retorts in such compartment. It is to be noted that the ports, 20 and 21, are of greater area than the ports above them. They are so constructed, because it is desired to throw the main volume of gas and air and the flame and heat from the combustion thereof into the lower part of the compartment to circulate in the open space, 26, before rising among the retorts, the heat being supplemented by the combustion of the gas and air entering at different heights, as above described, and economy of fuel being thus obtained. The lower portion of the division-wall, 10, is made sufficiently thick to inclose and protect the flues, 18 and 19, and their ports; but the upper part, 27, thereof is made of less thickness, as shown, and this provides for the use of longer retorts in the upper part of the furnace.

"The retorts illustrated are the ordinary zinc-distilling retorts, which are usually cylindrical in cross-section, closed at one end, as shown, and carrying at the other end the nozzles or condensers, 28, the spaces around such retorts and within the frames, 8, being then closed by fire-clay or any other like way, so as to seal the retorts and the inner ends of the nozzles in the furnace-wall. Beyond the nozzles metal fume-collectors, 29, may be employed, if necessary. It is evident, however, that the arrangement of the retorts in the furnace will depend upon the material under treatment, and the connections for the carrying off of the vapors, fumes, or gases may be arranged as found most suitable for the purpose."

The claims are:

"1. A retort-heating regenerative furnace having a combustion-chamber, a vertical wall extending upwardly into the same and dividing it into two compartments, and serving with the outer walls to support the tiers or rows of retorts, and regenerators communicating with the compartments of the combustion-chamber, each regenerator having a port entering the base of the com-

partment on one side of the division-wall, and flues extending upwardly from said ports within such division-wall and opening at different heights into the compartment, one set into one compartment, and the other set into the other compartment, substantially as set forth.

"2. A retort-heating regenerative furnace having a combustion-chamber, a vertical wall extending upwardly into the same and dividing it into two compartments, and serving with the outer walls to support the tiers or rows of retorts, and regenerators communicating with the compartments of the combustion-chamber, each regenerator having ports entering at the base of the compartment on one side of the division-wall, and flues extending upwardly from said ports within such division-wall and opening at different heights into the compartment, one set into one compartment, and the other set into the other compartment thereof, the ports opening into the base of the combustion-chamber being larger than the ports opening at different heights above the same, substantially as set forth."

For defenses, numerous prior patents are exhibited to prove that the alleged "invention was substantially anticipated by the prior art," and it is contended that the device "is destitute of patentable novelty"—in reference to which the controlling facts are stated in the opinion.

Charles C. Buell, for appellant.

Edward Rector, for appellee.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The patent in suit, No. 666,390, was issued to the appellant January 22, 1901, for an "improvement in regenerative retort-heating furnaces," having special reference to zinc-smelting furnaces. In the light of the prior art, including the conceded facts of regenerative zinc-smelting furnaces in prior use for many years, the test of patentable novelty in the appellant's device rests on a single feature—disclosing a "three-port" form of such furnace, as distinguished from the "one-port" and "two-port" forms in prior use—with no serious complications of fact involved in the inquiry.

For recovery of metallic zinc, after treatment of the ore in a calcining kiln to drive off the sulphur, reduction or "distillation" in a furnace is the zinc-smelting provision of the patent device; and the improvement is in the way of saving loss of zinc which occurs in distillation, said to arise in escaping either volatilization or condensation. The furnaces employed for this zinc-smelting process have been of two different types: (a) The earlier, known as the Belgian direct-fired furnace; and (b) Siemens' gas regenerative retort-heating furnace, invented by Dr. Siemens and patented in British patent No. 1,575, May 21, 1869, as "improvements in calcining and smelting ores," etc.; and the type adopted for improvement in Neureuther's patent (No. 666,390 in suit) is Dr. Siemens' invention, which shows a single horizontal row of ports opening into each of the compartments of the furnace—corresponding to the lower ports (Nos. 20 and 21) of Neureuther's patent—known as the "one-port" furnace.

The patentee, Neureuther, is superintendent of the furnace department of the Illinois Zinc Company, at Peru, and has been such superintendent since 1869. In his plant Belgian furnaces were originally installed, but in 1877 he introduced a Siemens furnace, later installing two others of like one-port type—operated conjointly with their Belgians—each having three horizontal rows of retorts in each com-

partment (instead of four rows as shown in Siemens' patent drawing), which are heated by the combustion of air and gas admitted through the single rows of ports. These one-port furnaces are referred to in the record as furnaces Nos. 1, 2 and 3. In 1892, they installed an additional Siemens' type of furnace, provided with two horizontal rows of ports opening into each compartment (the upper ports half the size of the lower) and four rows of retorts instead of three—referred to as two-port furnace No. 4—and in 1893 a duplicate thereof was installed, called No. 5. Two of the one-port furnaces (2 and 3) were changed to two-port furnaces in 1894 and No. 1 was so changed in 1897—in each instance making four rows of retorts and two rows of ports on each side, increasing the number of retorts from 144 to 192. Thus five two-port furnaces were in operation (with the first one in use about seven years), when a sixth furnace was added in 1899, provided with a third row of ports and a fifth row of retorts (No. 6) which was the structure described in the present patent, for which Neureuther's application was filed August 1, 1900; and in reference to such structure, it may well be remarked that no deviation appears from the prior two-port form, except the additional rows of retorts and ports, of like size and form with the upper rows of the two-port furnace, together with raising the arch sufficiently for their accommodation. During 1900 and 1901 the five two-port furnaces were changed over by raising the arch and adding the fifth row of retorts and third row of ports, conforming to No. 6; and in 1903 a seventh three-port furnace was built, called No. 7.

Through the above-recited evolution of furnace building and trial, in the plant of the Illinois Zinc Company, Neureuther achieved superior results in the three-port form of furnace, as an improvement both on the original Siemens device and on his own two-port furnaces, after the latter had continued in practical operation for about seven years. The outcome of his efforts was an improved zinc-smelting furnace of the Siemens type, and its superiority over other forms of furnace, at least in economy of fuel and space, appears from the testimony. Were the new and useful qualities of the three-port furnace, therefore, the test of patentability, no difficulty would appear in upholding the patent; but invention is the test which must be applied, and for solution of that inquiry under the facts stated, we believe one rule to be well settled and applicable, namely: That "a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent." Smith v. Nichols, 21 Wall. 112, 119, 22 L. Ed. 566; 8 Notes U. S. Rep. 389; Wilce v. Bush Temple of Music Co., 134 Fed. 389, 391, 67 C. C. A. 371.

The disclosure of invention in this patent, beyond that of the Siemens patent, is stated in the appellant's brief to reside in the following statement of the specifications:

"Flues extending upwardly within such division-wall and opening at different heights into the combustion-chamber, one set into one compartment and the other set into the other compartment thereof, so that the gases and flame

will enter the combustion-chamber at the base of one compartment and at different points above the base within the mass of retorts."

And the contention is, in substance, that the heat was thus evenly distributed and utilized, greatly improving distillation in the retorts, and saving the overheating and breaking down of retorts under the prior methods.

While it satisfactorily appears, as we believe, that the one-port arrangement of the Siemens patent was insufficient for this desirable even distribution of the heat, and that additional ports, with additional height for the retort-heating chambers, tend to better distribution, we are of opinion that the problem thus presented was solved, except it may be in degree, by the two-port furnaces, which were installed and constantly used in the plant for a period of seven years prior to the patent device. If these changes of structure to that end amount to invention—in the light of numerous patents introduced showing like provision in other types of furnace—it became vested in the public through such use, and the above-stated rule governs alike whether the prior conception rests in the Siemens patent or in such public use. Smith v. Nichols, ante.

The only departure from the Siemens patent in either of these new forms of furnace introduced by the appellant, as before stated, is in the combustion-chamber, making additional ports and retorts, with corresponding increase in the height of the chamber; and both departed alike, except in degree. The testimony in reference to the practical operation of the two-port and three-port furnaces respectively is convincing that both were substantial improvements over the primary device, and that the three-port is the superior form. It is not convincing, however, that the two-port furnaces were impracticable for the improvement sought, in better distribution of heat, nor that they failed to disclose the means to that end. The facts in evidence, showing both their length of actual service and efficiency, and their retention in service long after the three-port furnace had demonstrated its value, are more persuasive upon that issue than the oral criticisms which are now offered as to their defects, unsupported by other evidence. They clearly anticipate the above-stated claim of invention in the three-port device, and the multiple-port conception therein (1892) having become public property, was not patentable subject-matter in 1900, when the application was filed for a patent. The alleged improvement then made was the expedient of the mechanic, carrying out the original conception as exemplified by the testimony of appellant's construction engineer, that the change was made "simply to run the furnace more economically; that is, to get more retorts on the same ground, the same space." It provided 720 retorts in No. 6 and 800 in No. 7, whereas, each of the first three two-port furnaces had only 384 retorts.

We are of opinion, therefore, that the grant of a patent was unauthorized, and the decree accordingly is affirmed.

STAR MFG. CO. v. CRESCENT FORGE & SHOVEL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910.)

No. 1,647.

1. PATENTS (§ 75*)—VALIDITY—PRIOR USE.

The commercial use of a machine for more than four years, although its operation was unsatisfactory to the inventor, leading to frequent experiments to improve the combination and finally to the addition of an element of such value that a patent was applied for, was an abandonment to the public of the invention so far as it was embodied in the combination before the addition of such improvement, and invalidates a claim of the subsequent patent from which the new element is omitted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 93-97; Dec. Dig. § 75.*

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

2. PATENTS (§ 328*)—PRIOR USE—UPSETTING MACHINE FOR PLOWSHARES.

The Clark patent, No. 734,161, for an upsetting machine for plowshares, claim 1, is void for prior public use for more than two years of the combination claimed therein.

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

Suit in equity by the Star Manufacturing Company against the Crescent Forge & Shovel Company and O. B. Thorp. Decree for defendants, and complainant appeals. Affirmed.

The appellant, Star Manufacturing Company, was substituted as complainant—through its purchase of the patent in suit—in the place of the Weyborn Company, original complainant in a bill filed against the appellees, alleging infringement of letters patent No. 734,161; and this appeal is from a decree on final hearing, dismissing the bill for want of equity. The patent referred to was issued to W. A. Clark July 21, 1903; on an application filed April 17, 1903, for "upsetting machine for plowshares." Its specifications state:

"The object of my invention is the production of a machine for upsetting, and thereby thickening, the oblique ends of plowshares to adapt such upset plowshare ends to be more perfectly and firmly welded to their landsides; and it consists, essentially, of a longitudinally-slidable carriage carrying two sets of rolls, in form frustums of cones, each set mounted at substantially right angles to the other, the bases of the set of horizontal rolls being uppermost and the tops—small ends—of the set of vertical rolls being adjacent to and very nearly in contact with the edges of the bases of the horizontal rolls. For the carriage described above a track is provided; also a holder to support the plowshares while being upset. Suitable mechanism for operating the reciprocating carriage is likewise requisite."

The several parts of the machine are shown in drawings and described with references thereto, including "a presser-foot rigidly connected with and projecting from the longitudinally slidable carriage * * * in front of the upsetting rolls, * * * and into close proximity to the upper face of the plowshare."

And it is further stated in the specifications:

"By reason of the thinness of a plowshare, that it may not be too clumsy and heavy, and the difficulty of maintaining it at a welding heat for a sufficient length of time, on the one hand, and the danger of burning the metal composing it, on the other, the welding of the same to a landside is a difficult operation, and when the welding is accomplished the thickness of the share at and about the weld is usually considerably diminished. By upsetting the oblique end of the share a greater body of metal is brought together at the

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

place of welding, thereby reducing the difficulty of the operation and leaving its thickness ample along the line of the weld between the share and landside."

Three claims are contained in the patent—whereof claims 2 and 3 include the above-mentioned "presser-foot" in the combination—but infringement is asserted only in respect of claim 1, which reads:

"1. In a machine for upsetting plowshares, in combination, a longitudinally-slidable carriage, two sets of upsetting-rolls in form frustums of a cone—each set mounted therein, at substantially right angles to the other set, the bases of one set of rolls being horizontal and uppermost, and the tops or small ends of the other set of rolls being vertical and adjacent to the bases of the horizontal rolls and very nearly in contact with the edges thereof, a track for the carriage to travel upon and a holder to support a plowshare while it is being upset, substantially as and for the purpose specified."

The questions and facts in controversy which are involved for consideration on this appeal are stated in the opinion.

Otto R. Barnett, for appellant.

George B. Gillespie, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The patent in suit, No 734,161, is for an "upsetting machine for plowshares," issued to W. A. Clark, July 21, 1903, on his application filed April 17, 1903, and the utility is unquestionable of the means described for making plowshares in finished condition, to be sold as "commercial shares" for replacing those which have been worn out in use. Its improvement over prior patents in evidence, for like object, is undoubted, although any invention which may be disclosed in the combination is of narrow scope. The defenses set up against the appellant's bill for infringement were: (1) That the patent was invalid for want of novelty and invention; (2) that the device thereof was not infringed by the appellees' machine; and (3) that the patent device was in public use for more than two years prior to the application for a patent. On final hearing the bill was dismissed for want of equity. As the charge of infringement rests alone on claim 1, with no dispute in reference to the alleged infringing structure, the inquiry hinges on the scope and validity of that claim.

The specifications of the patent (and as well the claims) limit the alleged invention to a combination of various means in a machine (as a unitary structure) for making plowshares, and patentability of the device rests alone on invention and novelty in such combination of elements—conceded to be severally old—in the patent structure as an entirety. Its mechanism is not complicated, consisting of a slidable carriage and track for horizontal travel, upsetting rolls, holder for the plowshare and a so-called "presser-foot" to prevent buckling up of the metal in the process of upsetting. The main elements (and only ones in controversy) are: (1) The means for upsetting the metal to make the desired form of plowshare, consisting of two sets of rolls—shown in the patent as two upper and three lower rolls—"in the form of frustums of cones, which operate respectively and simultaneously upon the edge and side of the share;" and (2) co-operating means, described as "a presser-foot rigidly connected with and projecting from the longitudinally-slidable carriage in front of the upsetting rolls and

into close proximity to the upper face of the plowshare." The testimony submitted on behalf of the appellant (patentee) dwells upon this presser-foot provision as the culminating feature of the invention, which made the machine a success, after the inventor had devised and used upsetting rolls alone as the new means for making plowshares wherein fault had developed in "buckling up" of the metal, causing extra work to fit the shares for use. Claims 2 and 3 of the patent include this presser-foot in the combination, but it is omitted in the enumeration of elements set forth in claim 1 as the subject-matter of invention.

In the appellees' machine, alleged to be an infringement, neither the presser-foot nor any equivalent special means for its purpose is employed, although its arrangement alone of upsetting rolls appears to operate without the above-mentioned defect of buckling. This machine—which was made and used in the appellees' shops long before the patentee (Clark) filed his application in the Patent Office—differs otherwise from that described in the patent in these particulars: That it has duplicate upsetting means, so that two shares instead of one are upset in one movement of the carriage; that each of these means has a single upper roll, instead of two, and two lower rolls, instead of three, shown in the patent; that it has a weighted block, to be wedged down upon the share to hold it in position, instead of the plate (of the patent) clamped on the share by means of a cam lever. The appellant recognizes that the appellees are not chargeable with infringement of claims 2 and 3, but contends that claim 1 is infringed, and that the essence of the invention is thereby appropriated. On the face of the patent, force appears for the contention, in substance, that two combination inventions are disclosed, with claim 1 allowed for the primary (operative) device and claims 2 and 3 for supplemental improvements. Under the undisputed facts in evidence, however, we are of opinion that claim 1 cannot be sustained upon such interpretation; that the validity of the patent must rest on the combination described in the other two claims not infringed by the appellee; and that we are not required to ascertain from the testimony whether priority appears in the patentee for such (assumed) primary invention.

The facts referred to as inconsistent with the monopoly sought under claim 1 are these: The patentee, Clark, introduced in the shops of the Weyborn Company (the original complainant in the present bill) a machine, wherein upsetting rolls were substituted for upsetting means in prior use, which was completed and in service as early as December, 1898; and the machine, with rolls arranged substantially as described in the patent, was used for upsetting plowshares for a constant and growing trade in the product, up to "about June or July, 1901," when another machine was completed, having the further device of the patent called "a presser-foot." It is conceded that the last-mentioned machine was the perfected combination described in the patent—for which the patentee filed his application April 17, 1903—and that it was used continuously in making plowshares for commercial sale during the intervening time. The witnesses—patentee and several employés of the Weyborn Company—do not furnish definite dates for either of the equipments referred to, nor accurate descrip-

tions of the first-mentioned machine, nor of alleged changes made to improve its operation; but we believe no later date than above stated for commencement of operations with the first machine is fairly deducible from their testimony, and the patentee's own version is adopted as the best evidence of the date when the patent combination was completed and entered into commercial use. Their testimony, however, leaves no room for doubt that the machine of 1898 embodied the combination set out in claim 1 of the patent, namely, the elements (a) slidable carriage, (b) two sets of upsetting rolls, each mounted at right angles to the other as needful for their function, (c) a holder for the plowshare, and (d) a track for the carriage, and that such combination was not only operative, but in regular commercial use in the shops (successively in one and the other machine) during a period of four years and more prior to the application for a patent.

The above-mentioned use of the machines successively appears from many pages of testimony, introduced by one and the other party upon the issue of public use raised by the answer, as affecting the validity of the patent, and the evidence is discussed entirely in that view in all the briefs. Counsel for the appellant contends, in substance, thereupon: That it establishes the unsatisfactory operation of the earlier machine throughout its use; that a considerable portion of the shares made therewith were defective, having a crimp or buckle in their upset edges which required extra work to fit them for sale, although the major portion of the product was free from fault; that the patentee was constantly working over the machine and devising means to correct this failure, succeeding therein only when he introduced the "presser-foot" in 1901; and that all such preliminary use was experimental, not within the inhibition of the statute. In reference to the ultimate combination (claims 2 and 3), we assume that the defense of abandonment to the public, in commercial use for more than two years, is not proven; that the machine was not perfected earlier than June, 1901, and such prior use of the combination as may be inferred from the testimony was experimental in its nature, not amounting to abandonment of the invention. This view, however, does not include the first machine, which plainly was a complete and operative embodiment of the alleged primary invention (of claim 1), nor the transfer and use of all of its means, as an entirety, in the new combination. In so far as the patentee exercised invention therein, it was completely formulated and disclosed in the machine of 1898, and it is immaterial that its operation was unsatisfactory to him, inducing frequent experiments to improve the combination. His undoubted election to use the invention, independently and commercially, over four years before applying for a patent, followed by at least two years of such use in the first machine, constitutes an abandonment thereof to the public. Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 255, 8 Sup. Ct. 122, 31 L. Ed. 141, 11 Notes U. S. Rep. 415; Eastman v. Mayor, etc., New York, 134 Fed. 844, 858, 69 C. C. A. 628. So that claim 1 furnishes no support for the charge of infringement.

We are of opinion, therefore, that the appellant's bill was rightly dismissed, and the decree, accordingly, is affirmed.

MEYERS v. SKINNER et al.

(Circuit Court, E. D. New York. May 31, 1910.)

PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted to restrain alleged infringement of an unadjudicated patent of recent date, where the defenses involve issues of fact, and where complainant cannot in any event be subjected to more than a small amount of damages before the case can be heard on the merits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489–495; Dec. Dig. § 301.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. Suit by Willard F. Meyers against John R. Skinner, Percy C. Skinner, and John J. S. McFarland. On motion for preliminary injunction. Motion denied.

Henry D. Williams, for complainant.
Johnson & Galston, for defendants.

CHATFIELD, District Judge. The complainant seeks an injunction pendente lite upon a patent based upon certain improvements in the essential parts of a device for casting steel teeth to be used in sawing stone. Uncut diamonds are embedded in the teeth, which are revolved by means of an appliance similar to a circular saw, and the rough edges of the diamonds do the actual cutting.

The patentee (who filed his application on the 16th day of December, 1908, and received the patent, No. 932,488, upon the 31st day of August, 1909) successfully met in the Patent Office the questions of anticipation from the Hubert patent, No. 382,088, May 1, 1888, the Foerster, No. 340,204, April 20, 1886, and the Myer patent, No. 387,986, August 14, 1888, which last was a prior patent for a mold to be used for exactly similar purposes.

The new patent, therefore, covered in terms both an improvement in the construction of certain parts and also the combination of known elements with those improved parts. The patentee claimed, and the patent presumptively established, the invention by this combination of a new principle rather than a different or improved way of carrying out exactly the old method of the earlier Myers patent.

The time which has elapsed since the issuance of the patent has not been sufficient to allow events which would furnish satisfactory proof of acquiescence on the part of the public. The narrowness of the field of operation and the nature of the subject-matter of the patent is such that it falls directly within the decision in the case of Wright v. Paulhan (C. C.) 177 Fed. 261.

The defendants herein separately deny their joint participation in the acts claimed to be infringements, they deny the validity of the patent as to invention, patentability, and novelty, and in addition one of the defendants claims to be the actual inventor, thus taking issue with the claims of the complainant and with the presumption afforded by

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

the allowance of the patent. The defendants further allege that they obtained the drawings for their devices, and actually had models made, prior to the application of the complainant for his patent. But they do not furnish any testimony, by way of statements of fact, which would indicate that their ideas were not obtained from the complainant's devices themselves, during the two years preceding the application for the patent.

A cursory examination of the patent and of the prior art, as well as of the drawings submitted, would indicate that the defenses of invention and patentability are not likely to be sustained, and that the decision of the Patent Office was correct in allowing the patent to the complainant. This merely substantiates the assumption of validity which the issuance of the patent and the possession of the letters patent give to the complainant's claims and rights.

The issue as to whether the complainant or the defendants are the real inventors, and hence whether the patent was valid as an invention of the complainant, can hardly be determined upon the present affidavits, although again the method of defense and the relations of the defendants to the business of the complainant do not impress the court with the feeling that this defense will succeed, unless strong evidence is brought in support of it.

The entire situation is one in which the court would feel inclined to grant relief in the way of temporary injunction to the complainant, if the patent were not so recent, and if the situation of the parties were not such that a speedy determination on the merits is of more importance than the temporary preservation of what may ultimately appear to be the complainant's rights.

In the case of Karfiol v. Rothner, 151 Fed. 777, this court attempted to provide for a similar situation by ordering the defendants to give a bond, unless an injunction should issue. No bond was given, and an injunction pendente lite ultimately did issue. But the course of procedure was such as to indicate that the difficulties considered were not obviated either by the provision for the bond or the temporary injunction, and no practical advantage, especially in view of the comparatively small amount of damage that can be proven upon reference, would seem to result from such practice. On the other hand, with an unadjudicated patent, where the defenses involve such pure questions of fact as whether the complainant was the individual inventing the device, the court is unwilling to issue a temporary injunction, and thereby cause severe loss to the defendant if his position should be substantiated, when the interval before final hearing need not be great.

It is stated in the affidavits that the testimony will be completed during the month of July, and the court would prefer to set the case down for final hearing immediately upon the completion of the taking of testimony, than to decide, under the present circumstances, that the complainant is reasonably certain to prevail.

The motion will be denied on condition that the testimony be completed and the case submitted before August 1, 1910.

SKINNER v. FRANKLIN COUNTY.

(Circuit Court, E. D. Illinois. June 28, 1910.)

1. CONSTITUTIONAL LAW (§ 43*)—PERSON ENTITLED TO RAISE QUESTION—ESTOPPEL.

Where, in proceedings on bonds issued by a county in aid of a railroad, the county invoked the jurisdiction prima facie conferred by a statute, by which unknown bondholders were made parties, and service thereon had by notice by publication, it was not in a position to argue that the court had no jurisdiction, because the statute was unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

2. DAMAGES (§ 68*)—INTEREST.

Where bonds and coupons issued in aid of an improvement contracted for interest at the rate of 8 per cent., conditional "on the presentation and surrender at the place in the city of New York, where the treasurer of the state of Illinois pays the interest and debt of said state, of the coupons hereto attached as they severally become due," and they were not so presented, the rate of 8 per cent., which was not usurious when the contract was issued, did not apply, and the holder was entitled only to interest incidental as damages in the case, and not by virtue of the contract, so that the rate would be 5 instead of 8 per cent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143; Dec. Dig. § 68.*]

Action by Elizabeth Skinner against the County of Franklin. Judgment for plaintiff.

William Jack and I. C. Pinkney, for plaintiff.
Joplin & Spiller and Walter C. Lindley, for defendant.

WRIGHT, District Judge (orally). This suit is brought upon 25 bonds issued by the defendant in aid of the Belleville & Eldorado Railroad under an act of the General Assembly of the state of Illinois of 1861 (Priv. Laws 1861, p. 485). It is not my purpose to enter into an elaborate discussion of the questions argued in this case, or to give a neat opinion upon any of the questions involved, but merely to indicate in a general way the reasons of the court for its conclusions.

In the argument of the case at bar counsel for the plaintiff conceded that 10 of the bonds in suit were out of the case, and that there could be no recovery upon them, for the reason, as I understood the counsel, that the evidence shows that the 10 bonds so eliminated were owned and in the possession of the plaintiff at the time of the decree or adjudication in the case of Franklin County v. Unknown Bondholders, hereafter to be more specifically referred to, and at such time she, the plaintiff, was a nonresident of the state of Illinois, and for that reason, in the opinion of the counsel, the court in the case referred to obtained no jurisdiction of her, or of the bonds that she at that time owned. At the time of the decree in the case of Franklin County v. Unknown Bondholders, decided by the Circuit Court of the United States for the Southern District of Illinois, the remaining 15 bonds involved in this suit were owned and possessed by Andrew Pinckney, then a resident and a citizen of Peoria, Ill. He made no personal appearance, either in

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

the state court, while the suit was pending there, or in the federal court after its removal. It was said in the argument by counsel for the plaintiff, as I understood them, that but for the decree of the United States Circuit Court in the case of the County of Franklin v. Unknown Bondholders there could be no recovery upon the 15 bonds remaining in this suit. And it is contended that by that decree an estoppel was created against the county of Franklin, by force of res judicata, from denying the validity of the bonds in question. And the case of the County of Franklin v. German Savings Bank, 142 U. S. 93, 12 Sup. Ct. 147, 35 Ed. 948, is referred to as sustaining this position. If the decision in that case is applicable to the bonds now in suit, there is no question that the defendant is estopped from further litigating these bonds.

It is contended by the defendant, however, that case can have no application in this case, for the reason, as argued by counsel, that the court had no jurisdiction of Pinckney, nor of the bonds then owned by him, and now involved in this suit; that the statute of Illinois by which unknown bondholders were made parties, and service thereon had by notice by publication is invalid as in contravention of the Constitution, in that it deprived Pinckney of his property without due process of law. Without attempting to reproduce the argument by which this proposition is sought to be maintained, or that by which it is claimed to be refuted, I merely pass it with the observation that defendant invoked the jurisdiction prima facie conferred by the statute, and, having obtained a different result than expected, is in no position to question its own voluntary action or proceeding instituted by it, where, had Pinckney appeared in fact, and by proper amendment been made party by name, there would now be no ground upon which to rest the argument now insisted upon by the defendant.

Pinckney, after this decree, gave the bonds to the plaintiff, who is his daughter, in part distribution of his estate. Whether the fact that no diversity of citizenship existed between the defendant here and Pinckney at the time of the decree by which it is claimed the bonds were validated is a question to be here considered has not been raised or argued, and I express no opinion upon it. The Circuit Court of the United States for the Southern District of Illinois gave its decision, Judge Humphrey presiding, that the defendant was estopped, in the case of Furry v. Franklin County, by force of res judicata of the decree alluded to in the case of Franklin County v. Unknown Bondholders. A writ of error was prosecuted on that judgment to the Circuit Court of Appeals, but was there dismissed, without a decision upon the merits. See 144 Fed. 663, 75 C. C. A. 465.

The defendant in this case has interposed a plea to the effect that the plaintiff is estopped by reason of its having been defeated in an action prosecuted by her in the United States Circuit Court for the Southern District of Illinois in the year 1887 for a recovery upon the coupons attached to these same bonds. Upon an inspection of that record it appears that the former adjudication in the case of Franklin County v. Unknown Bondholders was not passed upon or determined by the court, and for that reason I am inclined to hold that the result of that suit is not a bar to this. So, upon the whole case, without entering upon further or more elaborate discussion of the questions in-

volved, I am inclined to follow the decision of Judge Humphrey, who had the same facts before him as proved in this case; and, being of that opinion, it follows that the plaintiff is entitled to recover in this suit upon the 15 bonds remaining after eliminating the 10 bonds conceded by the plaintiff to be out of the case.

It was also conceded by counsel for plaintiff that the statute of limitations, having been pleaded in the case, was and is a bar to all of the interest coupons attached to the bonds except the last one. Plaintiff insists that she is entitled to recover upon these 15 bonds of $1,000 each, and the last coupons thereon of $30 each, with interest at the rate of 8 per cent. per annum. Under the statute of Illinois, as I understand it, it was lawful at the time these bonds were issued to contract for 8 per cent. interest. Hence such contract was not then usurious. But, upon an examination of the bonds and coupons the contract rate of 8 per cent. was a conditional one, namely:

"On the presentation and surrender, at the place in the city of New York where the Treasurer of the state of Illinois pays the interest and debt of said state, of the coupons hereto attached as they severally become due."

Therefore I am of the opinion that the contract rate of 8 per cent. has no application to these bonds, or to the coupons thereto attached, after maturity. Being of that opinion, the plaintiff would be entitled only to interest incidentally as damages in the case, and not by virtue of any contract. Hence the rate of interest would be 5 per cent. instead of 8 per cent.

Judgment may therefore be entered in this case for the amount of the 15 bonds, and the last coupons of $30 each thereto attached, with 5 per cent. interest from the dates of their respective maturity.

In re C. K. HUTCHINS CO.

(District Court, W. D. New York. May 7, 1910.)

No. 2,615.

1. BANKRUPTCY (§ 228*)—REPORT OF REFEREE—CONCLUSIVENESS.

A referee's report, on conflicting evidence, in favor of a creditor, on an issue as to whether a sale of machinery to a bankrupt was absolute or conditional, will be affirmed, in the absence of a clear showing that it was erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 140*)—CONDITIONAL SALE CONTRACT—OWNERSHIP OF GOODS.

Where there was an understanding, at the time certain machinery was delivered to the bankrupt, that it should be incumbered by a conditional sale contract, the seller's rights were not affected by the fact that the conditional contract was not signed until six months after the machinery was delivered, or that the sale was pursuant to a secret understanding between the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

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

In the matter of the C. K. Hutchins Company, bankrupt. On petition of creditor for delivery of certain machinery alleged to have been sold to the bankrupt pursuant to a conditional sale, and not paid for. Referee's report affirmed.

Kenefick, Cooke & Mitchell, for petitioner.
Thomas E. Lawrence, for trustee.

HAZEL, District Judge. The entire controversy hinges upon the conflicting testimony of Mr. Coupal and Mr. Hutchins. The petitioner claims that the motor and compensator were delivered and installed on the express understanding that a lease or conditional sale contract should later be executed. The trustee claims that the bankrupt declined to purchase under contract of sale, or with the understanding that title should remain in the vendor until the debt was fully paid, and, in short, that the motor was acquired by the bankrupt absolutely free from lien of any kind.

It would serve no useful purpose to specifically allude to the discrepant versions of the transaction. The referee has had the benefit of hearing the witnesses testify, and he has decided the disputed question of fact adversely to the trustee, and in favor of the petitioning creditor, holding that the sale was conditional, and that the title in fact was not to pass until full payment of the purchase price. In the absence of a clear showing that this finding was erroneous, the court must presume it to be correct. On examining the testimony, the court is unable to say that the decision on the facts is manifestly erroneous. Certainly there are circumstances which would incline the court to a similar conclusion as that reached by the referee, had the matter come before it in the first instance. That the conditional sale contract was signed by the bankrupt about six months after the motor was delivered, or that the sale was under a secret understanding with him, is of no material importance, if it is true that such understanding at the time of delivery was that the articles should be incumbered by the conditional contract.

Under the circumstances, the case is controlled by Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and New York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and not by the adjudications cited in the brief of counsel for trustee, holding that an unfiled chattel mortgage is void as against creditors.

The report of the referee is affirmed.

UNITED STATES v. BUFFALO COLD STORAGE CO.

(District Court, W. D. New York. April 30, 1910.)

FOOD (§ 12*)—SHIPPING ADULTERATED FOODS—STATUTES—PERSONS LIABLE.

The federal pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), providing that any person who shall ship or deliver for shipment, from any state or territory to any other

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

state or territory, any foods, drugs, medicines, or liquor, etc., adulterated or misbranded, shall be guilty of a misdemeanor, is not limited to a manufacturer or dealer, but applies as well to a warehouseman shipping adulterated or misbranded goods from one state to another.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

On demurrer to indictment of the Buffalo Cold Storage Company for violating the pure food law. Demurrer overruled.

John Lord O'Brian, U. S. Atty.
Kellogg & Baker, for defendant.

HAZEL, District Judge. The demurrer of the defendant, Buffalo Cold Storage Company, to the indictment, is predicated upon the claim that the statute (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) entitled "An act for preventing the manufacture, sale, or transportation of adulterated, misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other puposes," was intended solely to apply to a manufacturer or dealer, and, as it is not charged in the indictment that said defendant was either a manufacturer, owner, or dealer in the commodity, the indictment is fatally defective and must be dismissed.

With this contention I do not agree. The statute forbidding the act provides that:

"Any person who shall ship or deliver for shipment from any state or territory, etc., to any other state or territory any such article so adulterated or misbranded shall be guilty of a misdemeanor."

Concededly the shipment and delivery of the commodity for transportation from Buffalo to Pittsburg in adulterated or impure condition is within the letter of the statute. It is unquestionably true that the inhibition of an act may be so plainly expressed by a statute that he who runs and thinks may comprehend its complete import and still not be within the contemplation of the lawmakers; but the provision under consideration does not fall within this class. Congress by its enactment intended to promote honesty and fair dealing in trade and secure to the public pure and wholesome food and drugs, and manifestly there must be a reasonable construction of the act to carry out the intention of Congress in this regard. There is nothing in the act which will result in any absurdity or lead to injustice or oppression, as was the case in Church of the Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, and other cases of similar description cited in defendant's brief.

I have carefully read the excerpts of the debates in Congress on the subject prior to the passage of the act, and I think from what was said by Senators Reyburn and Money that the prohibition was expressly couched in broad language to include those who ship or deliver for transportation commodities of the character forbidden by the statute. It is quite true that warehousemen who deliver such commodities for transportation may not have knowledge of the deleterious character of the food and may be wholly innocent of crim-

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

inal intent; but this is a question which may be safely left to the trial jury. The indictment charges the offense in the language of the statute, and particularizes the nature of the offense in such a way as to apprise the defendant as to what he will be required to meet on the trial, and under the authorities this is sufficient. Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057.

The demurrer is overruled.

LUBE v. PHILADELPHIA RAPID TRANSIT CO.

(Circuit Court, E. D. Pennsylvania. May 16, 1910.)

No. 732.

NEW TRIAL (§ 14*)—GROUNDS—THEORY OF CAUSE.

Where a street car passenger sued for injuries alleged to have been sustained in a collision, and the evidence showed that the collision was purely nominal, and that plaintiff could not have been injured by the impact, plaintiff and his witnesses having deliberately committed themselves to the theory that his injury was the result of a collision, he was not entitled to a new trial, in order to establish a cause of action on the theory that his injury was the result of fright at what he had reason to believe would be a dangerous collision.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 20; Dec. Dig. § 14.*]

At Law. Action by Charles Lube against the Philadelphia Rapid Transit Company. Verdict for defendant, and plaintiff moves for a new trial. Denied.

Walter Thomas, for plaintiff.
Russell Duane, for defendant.

J. B. McPHERSON, District Judge. The plaintiff, who had been a passenger in one of the defendant's cars, sued for personal injuries, and put his cause of action upon a violent collision of the car with a passing wagon:

"Nevertheless, the said defendant, its duty in this respect wholly disregarding and neglecting, so negligently, and carelessly operated said car on Girard avenue, whereby it, the said car, by reason of the carelessness and negligence of its servants or employés so violently struck a wagon, throwing the said Charles Lube with great force against the seat of said car, causing great physical injury, and wrecking his nervous system, and thus incapacitating him from the day of his injury to the day of his death from doing any labor and making a helpless invalid."

At the trial he attempted to prove the collision, and asserted that the violence of the impact had painfully injured his body, and had thus done much harm to his nerves. But the overwhelming evidence on behalf of the defendant showed that there had been no collision whatever, save of a purely nominal character, and that the plaintiff's

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

story was apparently the product of his fancy. The physicians, his own as well as the defendant's, agreed that he was suffering from hysteria; and the jury, disregarding the strong appeal to their sympathy that was made by the plaintiff's deplorable condition upon the witness stand, followed properly the nearly irresistible testimony and rejected his claim. Upon the argument of this motion, the cause of action declared upon was abandoned, and it was urged that the plaintiff's injury was the result, not of bodily harm, but of fright at what he had reason to believe would be a dangerous collision, although the actual impact was so trifling as to be barely perceptible, and that he should be permitted to try the case over again upon this new theory. I do not feel called upon to discuss the elaborate brief of his counsel, in which the numerous and somewhat conflicting decisions upon the subject of injury from fright are carefully collected and considered; for such an injury was not the ground of recovery that was relied upon at the trial, and, indeed, it can hardly be said to need consideration even upon this motion. For, assuming, as I must assume, that the plaintiff and the other witnesses who have given their respective accounts of the occurrence have already told us what they each believed to be the truth, I do not see how the plaintiff upon another trial could possibly account for his condition upon the ground of fright, unless he should then testify to radically different facts from those to which he has deliberately committed himself. In my opinion, one careful and thorough investigation has been made of the plaintiff's story, and no reason appears for affording him the opportunity to try a second experiment.

The motion is refused.

AMERICAN ICE CO. v. POCONO SPRING WATER ICE CO. et al.

(Circuit Court, E. D. Pennsylvania. May 24, 1910.)

No. 19.

1. COURTS (§ 365*)—FEDERAL COURTS—STATE LAW AS RULE OF DECISION.

The measure of damages for evicting a lessee under a lease of lands in Pennsylvania applied in a suit in the United States Circuit Court should be the rule adopted by the Supreme Court of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*

State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. LANDLORD AND TENANT (§ 180*)—EVICTION—MEASURE OF DAMAGE.

Ordinarily a lessee's measure of damage for wrongful eviction is the consideration paid by the lessee; but, where the eviction is due partly or wholly to the lessor's fraud or collusion, a different rule governs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 723–727; Dec. Dig. § 180.*]

3. LANDLORD AND TENANT (§ 180*)—EVICTION—DAMAGES RECOVERABLE.

A lessee wrongfully evicted is properly allowed the cost of removing from the premises and an allowance for failure of consideration of his

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

agreement to assume contract obligations as a part consideration for the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 723–727; Dec. Dig. § 180.*]

4. COSTS (§ 172*)—ATTORNEY'S FEES—RIGHT TO.

On a bill for an accounting for the benefit of creditors, no fee should be allowed defendants' counsel, where they were engaged solely in defending their individual clients from personal liability.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 172.*]

In Equity. Bill by the American Ice Company against the Pocono Spring Water Ice Company and others. On exceptions to the master's report. Decree directed.

Frank R. Savidge, Henry R. Edmunds, and John G. Johnson, for complainant.

Ira J. Williams, Aaron Goldsmith, and Simpson & Brown, for defendants.

J. B. McPHERSON, District Judge. The facts of this case are stated in a former opinion, reported in 165 Fed., at page 714. I was in a good deal of doubt at that time what measure of damage should be applied, and only with some reluctance reached the conclusion that one of the elements was the value of the unexpired term. The master was right in following the court's instruction upon that point (whatever his private opinion may have been), and, while I am now obliged to disagree with him, I do so only because further examination of the question has convinced me that I should myself have followed the Pennsylvania rule. The point arises under a lease of lands in Pennsylvania, and the rule of the state court should be adopted. That rule is definitely announced in Lanigan v. Kille, 97 Pa. 120, 39 Am. Rep. 797, and I therefore rely upon the authority of that case, and of the numerous kindred decisions referred to in the defendants' brief, to sustain the proposition that, where an eviction has broken the lessor's covenant for quiet enjoyment, the measure of damage is ordinarily the consideration paid by the lessee. Where the eviction is wholly or partly due to the fraud or collusion of the lessor, a different measure is proper; but, as the Supreme Court of Pennsylvania has decided that no fraud is to be found in the present case, Lanigan v. Kille furnishes the rule that should be applied. But I see nothing in that decision to prevent the allowance under the facts in proof of two other items, about which there is evidence, namely, the cost of removing from the premises, and the partial failure of consideration growing out of the Van Orden litigation. Based upon these sums, I think the complainant is entitled to a decree.

I agree with the master that no fee should be allowed to the defendants' counsel. They have been engaged neither in raising nor in protecting a fund for the benefit of creditors. They have been solely occupied in defending their individual clients from personal liability, and to these clients they must look for compensation.

The interlocutory decree—to which neither party made any objection in this particular—describes the fund to be accounted for as

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

composed of two items, $50,250 and $14,338.81, making an aggregate of $64,588.81. A decree may be drawn making distribution of this sum in accordance with this opinion; one-half of the costs of the entire proceeding, including the fee of the examiner and master, to be paid by the complainant, and one-half to be paid by the defendants.

In re GREEN.

(District Court, W. D. Pennsylvania. April 27, 1910.)

No. 5,167.

BANKRUPTCY (§ 196*)—ADMINISTRATION OF ESTATE—LIENS ON PROPERTY OF BANKRUPT—STAYING PROCEEDINGS FOR ENFORCEMENT.

The lien of a judgment and execution against a bankrupt for a fine imposed for illegal liquor selling is not excepted from the operation of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that all liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy shall be deemed void in case he is adjudged a bankrupt; and hence the execution will be stayed pending the bankruptcy proceeding, whether the claim for the fine is provable or not, and whether it will be affected by the discharge of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306–316; Dec. Dig. § 196.*]

In the matter of the bankruptcy of Garfield Green. Heard on certificate by the referee. Decision of referee setting aside restraining order reversed, and restraining order reinstated.

T. H. W. Fergus, for the Commonwealth of Pennsylvania.

ORR, District Judge. This matter comes before the court upon certificate by the referee. It appears that the commonwealth of Pennsylvania, on February 21, 1910, recovered a judgment against the bankrupt and issued an execution thereon. The judgment appears to have been recovered in the court of common pleas of Washington County. The basis for the judgment, however, is a fine imposed upon the bankrupt by the court of quarter sessions of that county for illegal liquor selling, etc., which fine and costs were certified from the court of quarter sessions into the court of common pleas in pursuance of an act of the assembly of Pennsylvania.

The bankrupt filed his voluntary petition some 10 days after the issuance of the execution upon the judgment, and at his instance an injunction issued to restrain proceedings upon said execution. Subsequently, upon application of the district attorney of Washington county, representing the commonwealth of Pennsylvania, the referee revoked the order staying that execution. From the decision of the referee revoking such order the matter now comes to the court.

The grounds for the referee's decision seem to be that the claim of the commonwealth, being a fine, is not a provable claim in bankruptcy; that, not being provable, it will not be affected by a discharge of the

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

bankrupt; and that, not being provable and not affected by the discharge of the bankrupt, the remedies provided by the state of Pennsylvania for the recovery of the judgment should not be affected by the bankrupt act.

It does not seem to us necessary to determine whether or not the judgment in favor of the commonwealth is provable, or whether or not the claim would be affected by the discharge of the bankrupt. It is sufficient to note that the commonwealth of Pennsylvania has recovered a lien upon the bankrupt's estate within four months prior to the filing of the petition in bankruptcy. I am satisfied that section 67f of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) makes no exceptions in favor of any lien creditor whose lien has been obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition, other than such person who may have obtained title by virtue of such proceedings and has been a bona fide purchaser for value without notice or reasonable cause for inquiry. It is not pretended that the commonwealth of Pennsylvania has obtained title by virtue of the legal proceedings. At most, the commonwealth has a lien by judgment and as well by execution, and the order restraining the commonwealth of Pennsylvania from proceeding thereon should not have been rescinded.

The purpose of the bankrupt act would be destroyed in this proceeding, if the commonwealth of Pennsylvania should realize the full amount due her upon the judgment at the expense of other creditors of the bankrupt, and particularly so if the claim of the commonwealth will not be discharged, while the claims of other creditors would be. It is not necessary to determine whether or not the claim of the commonwealth is provable, or whether it will be affected by the discharge of the bankrupt, if a discharge be granted.

The restraining order should be reinstated. To this extent the decision of the referee must be reversed.

In re DAVIS.

(District Court, W. D. Pennsylvania. April 28, 1910.)

No. 4,018.

BANKRUPTCY (§ 318*)—ADMINISTRATION OF ESTATE—CLAIMS AGAINST ESTATE.

A claim by the vendor of land against a bankrupt purchaser for the balance of the price due, less the value of the land, will not be allowed, where the trustee has delivered and the vendor has accepted a quitclaim deed to the land; the contract of sale to the bankrupt being thereby virtually rescinded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

In the matter of the bankruptcy of Harry Davis. Heard on certificate of a referee. Decision of referee, refusing the claim of Thomas Kenyon, sustained.

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

Marron & McGirr, for claimant.
S. S. Robertson, for trustee.

ORR, District Judge. This matter comes before the court upon a certificate by Wm. R. Blair, Esq., one of the referees in bankruptcy, as to whether the claim of Thomas Kenyon should be allowed as a claim against the estate. The referee's opinion is as follows:

"On May 28, 1908, Thomas Kenyon filed a proof of claim, claiming the sum of $52,174.41, alleged to be the purchase money for certain lands sold to the bankrupt, and costs and taxes paid by the claimant thereon, less the valuation of the land, to wit, $70,000. Objection was made to this claim, and at the hearing the following appeared: Some time prior to the bankruptcy the claimant sold to the bankrupt a lot in the city of Allegheny under an article of agreement which Davis refused to carry out. The claimant thereupon filed a bill in equity in the court of common pleas of Allegheny county, which was so prosecuted that a decree of specific performance was entered, ordering Davis to pay the purchase money according to the terms of the sale. Subsequently the buildings on the premises were burned down, and a very large amount of insurance money was realized and paid to Mr. Kenyon, which, on being brought to the attention of the court of common pleas, resulted in a modification of the decree by crediting the amount of the insurance money on the purchase money as appeared just to the court of common pleas. The claim here is for the balance of the purchase money, taxes, etc., as already stated, less the alleged value of the real estate.

"The decree of specific performance above mentioned provided that Kenyon should deed the property to Davis upon the payment of the purchase money. Mr. Kenyon has never deeded the property to the bankrupt, and the purchase money was never paid to him. At the hearing before the referee the claimant treated the claim as if the contract between the claimant and the bankrupt had been executed, and that the title had passed to Davis, and he (Kenyon) had as security for the balance of the unpaid purchase money the land in question. The record further shows that on the petition of Mr. Kenyon the trustee has been heretofore authorized to execute a quitclaim deed to Mr. Kenyon, relinquishing any title that might have passed to Mr. Davis, the bankrupt, under the articles of agreement. At the hearing before the referee some testimony was offered, both on behalf of the claimant and on behalf of the trustee, to show the value of the property, and the testimony varied from $40,000, the lowest estimate furnished on behalf of the claimant, to $110,000, which was the highest estimate furnished on behalf of the trustee. The referee is of opinion, under the authority of Wolfe's Appeal, 110 Pa. 126, 20 Atl. 410, that this claim cannot be allowed. The contract between Kenyon and Davis was wholly executory, and under this authority the claimant is not entitled to prove his claim here.

"The claim of Thomas Kenyon is refused."

It is not necessary to add much to what the referee has already said. It was admitted at the argument by counsel for Kenyon that the quitclaim deed which the trustee was ordered to execute and deliver was executed and delivered and accepted by Kenyon. Therefore there then became a reunion of the equitable with the legal estate in Kenyon. This, under the authorities, works a rescission of the executory contract of sale. The referee cited Wolfe's Appeal, 110 Pa. 126, 20 Atl. 410, without showing its application to this case; but it supports the principle that where the equitable and legal estate become reunited there is virtually a rescission of the contract. That case holds that this is always the case where the vendor himself becomes the purchaser. In this case Kenyon became the purchaser of the

equitable title of Davis by virtue of the deed from Davis' trustee in bankruptcy delivered to Kenyon and accepted by him.

The decision of the referee should therefore be sustained.

WARK v. MOORE.

(Circuit Court, E. D. Pennsylvania. May 17, 1910.)

No. 768.

CONTRACTS (§ 240*)—BUILDING MATERIALS—PERSONS LIABLE.

Where plaintiff became a subcontractor to furnish part of the labor and materials for the construction of a building, under a construction company with which defendant had no individual connection, and the only proof of defendant's substitution for the construction company was an alleged agreement by defendant's partner, who was without authority to act except for the interests of the firm, which had nothing to do with the construction of the building, defendant was not liable on plaintiff's contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1125; Dec. Dig. § 240.*]

At Law. Action by W. E. Wark against William G. Moore. Verdict for plaintiff, and defendant moves for judgment nothwithstanding the verdict. Granted in part.

Thos. Raeburn White, for plaintiff.
Henry P. Brown, for defendant.

J. B. McPHERSON, District Judge. So far as the Wolf building is concerned, the plaintiff's right to recover depends primarily upon the question whether the defendant Moore originally made the contract to erect that building. He is sued as an individual, and therefore an individual liability must be proved. After an attentive study of the stenographer's notes it is my opinion that no evidence whatever exists to justify a finding that such a contract was made. There is a little evidence that the contract was regarded as belonging to the firm (of which the defendant was a member) that did business under the partnership name of "William G. Moore"; but, as I think, not even a scintilla exists that William G. Moore as an individual ever made an agreement to erect the Wolf building, or, indeed, either of the other buildings referred to in the evidence.

Further, the plaintiff's proposal to become a subcontractor upon the Wolf building was made to, and was accepted by, the Reinforced Cement Construction Company, with which the defendant had no connection of any kind; and the plaintiff's case cannot possibly be maintained unless Moore as an individual (whether or not he had originally undertaken the building in that character) agreed to step into the place of the Reinforced Cement Construction Company, and thus to become liable upon this subcontract. It is not contended that the defendant made any such agreement of substitution personally; but the plaintiff claims that the substitution was agreed to

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

by Russell Smith as the defendant's agent. But here again the plaintiff's case breaks down, as it seems to me. There is no evidence, either strong or weak, that Smith had any authority to bind the defendant as an individual in this, or in any other, matter. He had authority to some extent to bind the defendant as one of the partnership in which they both were members, but only in partnership affairs; and the partnership related solely to two other buildings, and not to the Wolf building at all. The partnership did not extend to that building, and Smith had no authority otherwise to act as the defendant's agent in reference thereto. The plaintiff's remedy would seem to be for goods sold and delivered against the corporation that signed the contract, erected the building, and used the plaintiff's labor and material. In my opinion, the defendant did none of these things.

The defendant concedes that the finding of the jury is right in part; and, to avoid the needless formality of a second trial, I shall therefore venture to make the following somewhat irregular order:

For the sum thus admitted to be due, $400.68, the plaintiff may enter judgment, without prejudice to his right to prosecute a writ of error against the judgment to be entered under the remaining clause of the order.

As to the rest of the verdict—$3,404.19—the clerk is directed to enter a judgment in favor of the defendant notwithstanding the verdict.

In re THOMPSON.

(District Court, W. D. Pennsylvania. April 14, 1910.)

No. 4,840.

1. BANKRUPTCY (§ 97*)—INVOLUNTARY PROCEEDINGS—EXAMINATION OF BANKRUPT.

An alleged bankrupt cannot be subjected to examination on written interrogatories before adjudication at the instance of petitioning creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 139; Dec. Dig. § 97.*]

2. COURTS (§ 96*)—RULES OF DECISION—PREVIOUS DECISION AS CONTROLLING.

A United States District Court is bound by the decisions of the Circuit Court of Appeals in the same circuit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 327; Dec. Dig. § 96.*]

In the matter of the bankruptcy of F. T. Thompson. On petition for a rule to show cause why the alleged bankrupt should not be attached for contempt for failing to answer interrogatories by petitioning creditors. Petition refused.

C. D. Gillespie, for creditors.

W. S. Maxey and L. B. Cook, for bankrupt.

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

ORR, District Judge. To the original petition the bankrupt filed an answer, denying insolvency, and demanding a trial by jury. No further steps were taken in the case until the petitioning creditors applied for a rule upon the bankrupt to show cause why he should not be attached for contempt for failing to answer certain interrogatories filed by them. The matter before the court is whether or not the court should grant the rule to show cause.

By the interrogatories the creditors seek disclosure by the bankrupt of matters relating to a transfer or transfers of real property and disclosure of assets generally. There is no provision in the bankrupt law for such interrogatories before adjudication, and compulsory parol examination of the bankrupt prior to adjudication, although allowed at the instance of his receiver in the Second circuit (see In re Fleischer [D. C.] 18 Am. Bankr. Rep. 197, 151 Fed. 81), is not permitted under the construction of the bankrupt act by the Court of Appeals in this circuit. See Skubinsky v. Bodek, 172 Fed. 332, 97 C. C. A. 116, 22 Am. Bankr. Rep. 689. Why, then, should the bankrupt, before adjudication, at the instance of one or more petitioning creditors, be subjected to examination upon written interrogatories. There seems to be no reason for the one which does not exist for the other. This court is bound by the decision of the Circuit Court of Appeals in this circuit.

The petition for the rule is refused.

RISLEY et al. v. CITY OF UTICA et al.

CITY OF UTICA v. CONSOLIDATED WATER CO. OF UTICA et al.

(Circuit Court, N. D. New York. June 7, 1910.)

1. COURTS (§ 414*)—FEDERAL COURTS—DISMISSAL FOR WANT OF JURISDICTION.

Where the Circuit Court can maintain jurisdiction, if at all, under Act Cong. March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), giving the court original concurrent jurisdiction with the state courts of civil suits, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arises under the Constitution or laws of the United States, if it appears plainly, on complainant's own showing that the amount in controversy does not exceed the specified sum, or that complainants have not been deprived of their property without due process of law, it is the duty of the court on its own motion, even, to dismiss the suit under section 5, providing that if, in any suit commenced in a Circuit Court, it shall appear to the satisfaction of such court at any time after the suit has been brought or removed thereto that the suit does not really involve a dispute properly within its jurisdiction, the suit shall be dismissed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 414.*

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. MUNICIPAL CORPORATIONS (§ 961*)—CONSTITUTIONAL LAW (§ 283*)—LEGISLATIVE POWER.

Where a state creates municipal corporations, it may authorize them to do things necessary for their welfare and existence, to preserve prop-

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

erty from loss or destruction by fire, and to assess, levy, and collect taxes to pay the expense of so doing, and may go to any reasonable extent within the limit of the state Constitution, so long as the United States Constitution is not violated, and Laws New York 1867, c. 393, authorizing the city of Utica to contract with a waterworks company for a supply of water for extinguishment of fires, to fix and agree upon the sum to be paid therefor, such sum to be added each year to the tax authorized to be raised by the city charter and collected therewith, and to make it obligatory on the company on the contract to furnish water to the city for extinguishing fires, to extend its mains on such streets as the council should designate, and provide suitable reservoirs to constantly supply the city with sufficient water to extinguish fires, was a valid exercise of such power, being general in application, including all fires on all property within the city, and not authorizing taxation by illegal or arbitrary methods nor without due process of law.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 961;* Constitutional Law, Cent. Dig. §§ 891, 892, 904–906; Dec. Dig. § 283.*]

3. COURTS (§ 263*)—FEDERAL COURTS—JURISDICTION.

When suit is brought in the United States Circuit Court, and both state or local questions and federal questions are involved, the federal questions give jurisdiction, assuming that the amount involved is sufficient, and the federal court may decide the case on the federal questions or on the local questions alone, if the latter dispose of the whole controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*

Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purch. Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

4. WATERS AND WATER COURSES (§ 200*)—CONTRACTS—RIGHT TO TERMINATE—NOTICE.

A contract between a city and a water company fixed no time for termination thereof, but provided that the city should pay at the rate and on the basis stated, so long as the company should supply water. *Held*, that the city could terminate the contract on giving due and reasonable notice of its election so to do.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 200.*]

5. SPECIFIC PERFORMANCE (§ 32*)—CONTRACTS ENFORCEABLE—CONTRACT NOT MUTUALLY ENFORCEABLE.

The contract not being mutually enforceable, neither party could compel specific performance for all time.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89–99; Dec. Dig. § 32.*]

6. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A city given by the state the power to contract for a supply of water for extinguishment of fires, and to tax property in the city to pay therefor, made and continued a contract which was unreasonable, and provided for an excessive compensation to the water company. The state itself had not approved or sanctioned the contract by its legislative, executive, or judicial authority. *Held*, that any illegal act of the city under the contract was done without the authority of or contrary to the state law, and persons who had paid the taxes could not seek equitable relief in the federal court, on the ground of deprivation of property without due process of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–824; Dec. Dig. § 282.*]

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

7. MUNICIPAL CORPORATIONS (§ 956*)—POWERS—TAXATION.
The power to tax is inherent in a municipal corporation duly created, whether expressly granted or not.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. § 956.*]

8. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
The amount involved in a suit is not measured by the actual recovery, but by the amount claimed, provided it is claimed in good faith, and is not merely a colorable claim to give the court jurisdiction.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.*]

9. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
Several taxpayers cannot unite in one suit, each having a separate demand to recover back the taxes paid by them so as to confer jurisdiction on the Circuit Court of the United States by aggregating their demands to make the amount in controversy within the cognizance of such court; each person having a separate and distinct demand in which the others are in no way interested.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 891; Dec. Dig. § 328.*]

10. MUNICIPAL CORPORATIONS (§ 977*)—SUIT TO RECOVER TAXES—LACHES.
Laches in seeking and enforcing a remedy would bar recovery of taxes paid for compensation under a contract between a city and water company, from about 1900, where suit was not brought for nearly 10 years.
[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 977.*]

Bill by Edwin H. Risley and others against the City of Utica, the Consolidated Water Company of Utica, and others, in which the city filed a cross-bill. On motions of the water company to dismiss and of complainant Risley to be allowed to discontinue. Motions allowed.

Risley & Love, for complainants in original suit.

Thomas S. Jones and Charles E. Snyder (William H. Corbin, of counsel), for Consolidated Water Co.

George C. Morehouse, for City of Utica.

RAY, District Judge. All the parties of these suits are citizens of the state of New York, and this court has and can maintain jurisdiction, if at all, under Act Cong. March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), which provides:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the Constitution or laws of the United States * * * or in which there shall be a controversy between citizens of different states."

It is contended that the amount in controversy does exceed the sum of $2,000 exclusive of interest and costs, and that the suit arises under the Constitution of the United States and presents a federal question or questions, in that the rights of complainants guaranteed by the fourteenth amendment have been and are being violated. Said amendment provides:

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

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The contention of the complainants is that the complainant parties have been and are being deprived of their property by unjust and unlawful taxation by instrumentalities of the state without due process of law in violation of the constitutional provision referred to.

It must now appear by some evidence that the amount in controversy does exceed the sum of $2,000 exclusive of interest and costs, and, also, that the complainants by some act of the state have been and are being deprived of their property, by means of taxation, without due process of law, or this court has no jurisdiction; and when the absence of this fact or these facts appear plainly and conclusively on the complainants' own showing, if they do, it is the duty of the court, on its own motion, even, to dismiss the suit.

The act of Congress provides:

"Sec. 5. That if in any suit commenced in a Circuit Court * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, * * * the said Circuit Court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

There are many cases holding it to be the duty of the court under this statute to dismiss when want of jurisdiction in the Circuit Court appears. It would, it seems to me, be folly to put the parties to the delay and expense of a further hearing when this fact appears on the complainant's own showing. Why a party defendant should be put to his defense when no case of which the court has jurisdiction has been made against him, or when no equity or ground of relief is shown, is a proposition not easily comprehended. Allegations in a bill of complaint are one thing; proof to sustain them is quite another. The allegations of this bill as now framed—and it is quite different from the one first filed—have been fully considered. Risley v. City of Utica (C. C.) 173 Fed. 502.

The city of Utica is one of the cities of the state of New York of the second class existing under the provisions of chapter 18, Laws 1862, and the acts amendatory thereof and supplementary thereto. The common council of said city has the general power "to establish, make and regulate public wells, acqueducts and reservoirs of water for the convenience of the inhabitants of the city and its protection against fires, and to prevent the unnecessary waste of water." The city has no waterworks or reservoirs of its own and depends for its supply of water for domestic and all public uses, including the extinguishing of fire, on the Consolidated Water Company of Utica. That company came into existence in this way: Pursuant to chapter 154, Laws N. Y. 1848, the Utica Waterworks Company was incorporated. The West Canada Waterworks Company was organized in May, 1898. In November, 1899, the defendant company was organized, and thereafter the other companies named sold, assigned, and transferred all

their properties and property rights to the Consolidated Company. I do not find any evidence that these transfers were made with bad motives, or for illegitimate purposes, or for the creation of a monopoly, or to enable said Consolidated Company to impose upon the taxable inhabitants of said city illegal charges or taxation, or to confiscate property. There are no facts proved from which these conclusions or similar ones can legitimately be drawn. So far as appears, it was a business proposition entered into in good faith with the expectation, undoubtedly, that the company would make money or obtain a fair return on the money invested. I find no federal question presented by evidence under this feature of the bill. It is claimed on the one hand, and denied on the other, that the contract hereafter referred to was assigned and transferred to the Consolidated Company by the Utica Waterworks Company, and assumed by it, and that the parties have been acting under it for many years last past. Whether or not it was assigned or capable of being assigned is a local and state, not a federal, question.

By chapter 393, Laws N. Y. 1867, the common council of the city of Utica was expressly authorized and empowered to make a contract with the said Utica Waterworks Company: (1) For a supply of water for the extinguishment of fires in said city; (2) to fix and agree upon the sum to be paid annually therefor; (3) said sum so fixed to be added each year to the tax authorized to be raised by the city charter of the city and collected therewith and by the same power and authority. The act made it obligatory on the company, when such contract was made, to: (1) Furnish water to said city of Utica for the purpose of extinguishing fires; and (2) to lay and extend its pipes and conduits on such streets as the common council should designate; and (3) provide suitable reservoirs to constantly supply said city with sufficient water for the said purpose of extinguishing fires. This act of the Legislature of the state of New York, it will be noted, authorized a contract between the city of Utica by its common council and the Utica Waterworks Company; the Consolidated Company not being in existence at that time. I can discover nothing in this act beyond the power of the state, by its Legislature, to do. Where a state creates municipal corporations, cities and villages, it has the power, clearly, to authorize and empower them to do the things necessary for their welfare and existence; to guard its people against contagious diseases; to lay out and improve streets and avenues for public travel; to prevent crime against person and property; to preserve public and private property from loss or destruction by fire; and to assess and levy and collect taxes to pay the expense of so doing. The Constitution of the state may limit the exercise of these powers by the Legislature; but unless it does the Legislature may go to any reasonable extent in these directions so long as the Constitution of the United States is not violated, as no state may "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Should a state assume to deprive one or more persons of their property, under the guise of taxation or otherwise without due process

of law, it would violate the mandates of the federal Constitution, and one complaining of the acts and injured thereby would have the right to seek and obtain redress in the courts, and, in so doing, a federal question would be presented, and the federal courts would have jurisdiction of the case. The state, having created the city of Utica, had the right to authorize it to protect the property of its citizens against loss or destruction by fire for the common good and welfare and to tax the taxable property of the residents of the city for the purpose of defraying the expense of so doing. The act of the Legislature of the state of New York referred to does not say in terms that the taxing power conferred shall be exercised by due process of law; but it does not authorize its exercise by illegal or arbitrary methods, or without due process of law. It does not authorize the taxation of one person and the exemption of others, similarly situated, for the purposes mentioned, but authorizes the taxation of all. It does not limit the supplying of water for the extinguishing of fires to one section of the city, or to any one or more classes of property, but is general in application and includes all fires and all property within the city. The water company is to lay and extend its pipes and conduits in such streets as the common council shall designate, but this was done to give the city control over its streets and avenues, the tearing up, etc., of streets, and not for the purpose of authorizing it, by its common council, to obtain a supply of water for one street and the extinguishment of fires on that street and deny it to others having need therefor and tax those denied protection for the benefit of favored streets or individuals. The act cannot be read in any such light or given any such construction. That the act of the Legislature referred to is not violative of the Constitution of the United States is beyond question, and, indeed, the acts complained of in the bill of complaint and alleged to be illegal are stated by the complainants to have been done, not by virtue of and pursuant to said act, but in violation thereof and contrary thereto.

Suppose that the Utica Waterworks Company could not assign to the Consolidated Company its contract with the city of Utica, and that no legal or valid assignment of it has been made, what is the situation? Both parties have recognized it as a valid, legal, and subsisting contract between them for eight or more years, and have acted under it; the city taking and using the water of the Consolidated Company for fire and other purposes, ascertaining the compensation to be paid in the mode and manner specified in the contract and levying and collecting taxes as it does other taxes to pay for such water, and the company on its part laying and extending mains and conduits and furnishing water as demanded and also presenting bills and receiving pay for the water on the basis fixed by the contract made by the city and Utica Waterworks Company. Clearly here has been the mutual recognition of a contract subsisting between the city and the Consolidated Company, and in the absence of fraud, of which there is no proof, or of a mutual mistake of fact, of which there is no evidence, as all the facts have been well known, the city can recover nothing that has been paid, for it has been paid voluntarily in recognition of its obligation to pay, and it cannot refuse or escape liability to pay what it has impliedly

agreed to pay for the water furnished by the company and accepted and used by the city. If the written contract was not assignable and is not binding as a written contract between the city and Consolidated Company, still it is evidence of what the contract has been from year to year, for both said named parties have recognized its terms as measuring their rights and liabilities as between themselves. The Consolidated Company insists that it was and is assignable, and that it was duly and lawfully assigned to and assumed by it and binds the city as much as though the Consolidated Company had been named in the act of the Legislature authorizing a contract with the Utica Waterworks Company and had executed and signed the contract originally or when made. If the city denies this position of the Consolidated Company, which it has not done by any act or acts until it filed its cross-bill of complaint in this suit, it may repudiate the said written contract as a valid and subsisting contract, give notice that it will not pay according to its terms or accept water under it, and refuse to pay in the future, and thus drive the Consolidated Company into a suit in the proper tribunal to enforce the provisions of the said written contract. Such a suit would involve no federal question and would not be one of federal cognizance. It could assume two aspects, one to recover the price agreed to be paid for water furnished, the amount of recovery to be measured in a certain way as specified in such contract, and the other for the specific performance of the contract, or one of that nature. It would be a local and a state question of which the state courts would have full and complete jurisdiction, but one of which the federal courts would have no jurisdiction for the reason there would be no diversity of citizenship, and there could be no claim that any person had been or was being deprived of property without due process of law or denied the equal protection of the laws by the state of New York.

How can the city of Utica come into this suit as a complainant in the federal court and ask to have it determined that a written contract which it has always recognized as a valid and subsisting contract between it and the Consolidated Company, and under the terms of which it is still acting, was not assignable, is not owned by that company, and not binding on the city? Does the city of Utica present any federal question? Has the state done any act to deprive it of its property or any part of it without due process of law, or any act to deprive its citizens of their property in any such way? It is the city of Utica by its common council and other officers that assesses, levies, and collects the taxes to pay the water company. If it has no power granted to it by the state so to do, its officers are mere wrongdoers and are violating the laws of the state of New York, acting in opposition thereto, and should cease its unlawful acts. If the state has granted to it the power to make a contract for a supply of water for the extinguishment of fires, and it has made none, it should do so. If it has made one, it should live up to it. If it has made one that ought to be ended or canceled for any reason, let the city summarily end it and pay damages, if any are awarded, or appeal to the state courts for appropriate relief. If the city has made a contract the terms of which are not authorized or permitted by any law of the

state, such contract is void or voidable. As I have before stated, the act of the Legislature of the state of New York which authorized a contract between the city and the Utica Waterworks Company does not violate the Constitution of the United States or authorize the common council of the city of Utica so to do. The cross-bill of the city and the proofs presented under it and in support thereof present no federal question; that is, the city makes no case for equitable relief of which the Circuit Court of the United States has jurisdiction.

Do the other complainants present such a case on the proofs; that is, one showing jurisdiction in the Circuit Court of the United States? If they do, or if either of them does, then, perhaps, the city may sustain its cross-bill, if it presents any case at all calling for or warranting any relief inasmuch as it is a party defendant, and the court, having jurisdiction, may settle the whole controversy, the state or local questions as well as the federal questions. When a suit is brought in the Circuit Court of the United States, and both state or local questions and federal questions are involved, the federal questions give jurisdiction, assuming that the amount involved is sufficient, and the federal court may decide the case on the federal questions or on the state or local questions alone if the latter dispose of the whole controversy. Siler et al. v. Louisville, etc., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753. But when a federal question is found in a bill, it must be set up in good faith, and not be merely colorable to give the court jurisdiction. If it is merely colorable, it is the duty of the court to dismiss the bill. Now when the proof of the complainants is in and before the court, if it affirmatively appears that no federal question is involved in the suit, that the questions involved are purely state or local, it is the duty of the court to dismiss the suit.

Now suppose that the common council of the city of Utica has assessed and levied and collected a tax from year to year to pay the sum agreed to be paid by the contract mentioned for water for the extinguishment of fires in said city; such compensation being measured as therein provided, and that such levy and collection of such tax was not authorized by the law of the state of New York or was contrary thereto, what is the remedy of the complainants? In Barney v. City of New York, 193 U. S. 430, 438, 24 Sup. Ct. 502, 503, 48 L. Ed. 737, Mr. Chief Justice Fuller, giving the opinion of the court, no dissent, says, citing cases:

"And the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law."

The state of New York in creating the city of Utica and conferring upon it general power to supply itself with water for public purposes, or in authorizing the making of a contract between it and the Utica Waterworks Company, has not descended to details or prescribed the terms of such contract or contracts, and, if the city has made an illegal or improvident and oppressive contract, it has done so "without the authority of state law," and "it is for the state courts to remedy acts of state officers (the common council) done without authority of or contrary to state law." If on appeal to such courts the illegal acts done in violation of the rights of the citizens of Utica under the pro-

visions of the Constitution of the United States are upheld as legal and valid, then the state has adopted them, and they become its acts, and an appeal may be had to the courts of the United States.

The contract complained of is found in full in Risley v. City of Utica (C. C.) 168 Fed. 737, 741, 742, and it is not necessary to insert it here. This contract was made in 1868, when conditions were vastly different from what they are to-day. Complaint was made by the complainant, Risley, that he had real property with buildings thereon in said city valued at $2,000, and on which he was annually taxed and had heretofore paid taxes to defray the expense of water furnished under said contract for the extinguishment of fires, but that he had been afforded no protection whatever, and that the city had declined to lay mains or pipes to convey water to the vicinity of his property, the nearest being something like a mile away, and that he was being deprived of his property without due process of law, and that such levy and collection of taxes from him and all others similarly situated was illegal and in violation of his and their constitutional rights under the fourteenth amendment referred to. He had refused to pay his taxes. On demurrer this court in the case last cited held that the demurrer must be sustained, as the amount in controversy was far less than $2,000, being in fact less than $22. Permission to amend was given, and, as the suit was brought by Risley in his own behalf and in behalf of all others similarly situated, others came in and joined in an amended bill in which some of the old allegations were dropped and many new ones inserted. The new complainants have no complaint that they are not afforded full protection against fires. They own, and for many years have owned, taxable property in said city and have been assessed for taxes and, without protest, have paid their taxes, including their proportion of the amount included annually to pay the Consolidated Company for the water furnished by it for fire protection purposes; the amount to be paid and collected by tax and paid being ascertained according to the terms of said contract. The amended bill also contained allegations already referred to and the further allegations in substance that the Consolidated Company had laid mains and pipes outside the city of Utica, and that in fixing the amount to be paid for water supply the cost of these mains had been included and the 7 per cent. mentioned in the contract figured and included in the tax levy with the assent and by the acts of the taxing officers of the city of Utica.

The proofs show that the city of Utica, since the making of the contract mentioned, has been extended so as to include a portion of the town of New Hartford, and that the Consolidated Company, being the owner of the mains and pipes theretofore laid in said territory added to the city, has made the same charge on the same basis for water furnished for fire purposes in said added territory. The water has been furnished, and the city has had the benefit of it. The mains, etc., belong to the company, and it was a matter of agreement between the city and the Consolidated Company as to compensation and the mode of ascertaining what such compensation should be. If there was and is no law of the state authorizing this action, then it was the act of

the city officers, or state officers clothed by the state with the power of taxation, done "without the authority of state law," and "it is for the state courts to remedy acts of state officers done without authority of or contrary to state law." If there is a state law authorizing such a contract with all its terms and modes of ascertaining the compensation to be paid, it has not been called to my attention, and, if such law be in existence, its constitutionality is not challenged, for it has not been alleged or proved. The claim is that there is no law of the state authorizing such a contract, and it follows that the claim is that the officers of the city of Utica are acting "without authority of state law." It also appears that in laying mains or conduits for water, and in order to furnish a supply of water for the extinguishing of fires, it was more convenient, as well as reasonably necessary, to lay some 700 feet of such mains in and along a street on the boundary line of the city but just outside such line. The cost of this main has been included in getting at the cost of mains and figuring the amount to be paid for water. How this act of placing its own conduits or mains just outside the city line for conducting water to suitable points in the city for fire purposes constitutes an invasion of the constitutional rights of the complainants or of any citizen or taxpayer of the city of Utica I am unable to see. The vice of the contract is in the mode and manner of getting at or ascertaining the compensation to be paid by the city, and consequently by its taxpayers, and the ignoring of the value of the water furnished and the cost to the company of furnishing it.

This contract binds the company:

(1) To furnish water for the city for the extinguishment of fires and to extend its pipes and conduits to certain streets designated on a certain map and to provide suitable reservoirs for water for such purpose and, if requested, to extend its pipes and conduits.

(2) To furnish a supply of water for the city hall and other buildings occupied by the city for municipal purposes without payment of water rent.

(3) To erect six fountains and supply same with water for drinking purposes, not including horses, cattle, etc., without charge for the water; but the city to pay the entire expense of procuring, erecting, putting down, and connecting the fountains.

Summarized, the Utica Waterworks Company was to provide reservoirs for water, extend its pipes and conduits to such streets as the city should demand, furnish water for the extinguishment of fires and to the buildings occupied for municipal purposes and to six fountains for drinking purposes. For such water for such purposes the city was to pay $10,000 annually; also one-half of all taxes on said company or its works or property in the city and "taxes thereon in excess of the sum of $1,000"; also 7 per cent. on the cost of all extensions of pipes and mains. The city to put in and keep in repair all hydrants and keep same in repair at its own expense.

From the recitals and certain other conditions in the contract, it is evident that the waterworks company was then engaged in providing reservoirs, etc., and that the city was anxious to encourage the enter-

prise so as to secure water for fire purposes. No time is fixed for the termination of the contract, and in terms it is not perpetual unless it is made so by the following:

"And the city of Utica agrees that when the said company shall have furnished by the said reservoirs and by the said pipes and conduits a supply of water in manner and for the purpose aforesaid and so long as they shall continue to supply sufficient water for said purpose it will pay therefor to the said company," etc.

The company did not agree to supply water for any length of time, but the city agrees to pay at the rate and on the basis stated so long as the company supplies water. These same pipes and conduits convey the water of the company for supplying the citizens of Utica for which they pay at certain established rates. The city is a customer, but pays for its supply on an entirely different basis.

I have no doubt that the city of Utica, assuming that the said contract was assignable and duly assigned to the Consolidated Water Company and is binding during the election or consent of both parties to operate under it, may terminate such contract on giving due and reasonable notice of its election so to do. It is not a contract that can be enforced in perpetuity by either party. There is no word or clause in it that binds the company to continue to furnish water under it, and I do not think the city could compel specific performance for all time. Neither can the company. It is not mutually enforceable. Its continuance is optional, but to terminate same notice must be given and a reasonable time fixed when such termination shall take effect. Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. R. Co. et al. (C. C.) 44 Fed. 456, 458; Western Union Tel. Co. v. Pennsylvania Co. (C. C.) 125 Fed. 67, 71; Jones v. Newport News Co., 65 Fed. 736, 13 C. C. A. 95 (op. by Taft, C. J.); Texas & Pac. R. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; 3 Page on Contracts, § 1361, p. 2110; Savage v. Surgical Association, 59 Mich. 400, 26 N. W. 652; Philadelphia, etc., R. Co. v. River Front R. Co., 168 Pa. 357, 31 Atl. 1098; Quin v. Distilling Co., 171 Mass. 283, 50 N. E. 637; Echols v. New Orleans R. Co., 52 Miss. 610, cited and approved 125 Fed. 71.

In 3 Page on Contracts, p. 2110, § 1361, it is said:

"If no time is fixed by the contract for its duration, and the contract from its nature is one which might last indefinitely, either party may at his option terminate such contract. * * * A reasonable notice of the exercise of such option must be given," etc.

The complainants have given evidence showing that under present conditions the price paid by the city for water for the purposes mentioned is excessive, at least five or more times what it should be or what is fair and reasonable and would afford a fair return and compensation to the Consolidated Company for the service rendered. This of course operates unjustly on the taxpayers of the city of Utica, but it does not follow that this court has jurisdiction of an action brought by certain taxpayers of the city of Utica to cancel the contract, restrain operations under it, and collect of the city or company the amount of taxes paid without protest, assessed, levied, and collected in years gone by to pay the sums agreed to be paid for water for such purposes.

It appears: (1) That the city had and has no water supply of its own; (2) that it made the contract before described; (3) that it was assigned or attempted to be assigned as stated; (4) that both the city and Consolidated Company have recognized the contract as in force between them; (5) that the Consolidated Company has furnished the water and extended its pipes and conduits as agreed and rendered bills therefor; (6) that the city has accepted the service, audited the bills, levied and assessed and collected the taxes to pay same, and that the complainants, except Risley for two years, have paid their taxes without protest; (7) that the sum so agreed to be paid and paid for such service is excessive and, we will say, unjust; (8) the contract is one the city may terminate at any time on giving reasonable notice; (9) Risley, the original complainant, asks to discontinue; (10) the other complainants ask to have the contract declared void, one which, in its execution, violates the rights of all taxpayers and is confiscatory of their property, and prays that its further execution be enjoined, and also ask to recover all taxes paid under it; (11) the city of Utica files a cross-bill and asks to have the contract declared nonassignable, nonenforceable, etc., and really joins in the prayer for relief.

On the argument the Consolidated Company offered to cancel the contract and make a new one. The city insists on pressing this suit to a termination. The Consolidated Company denies jurisdiction in this court as stated.

It seems to me that the question is: Do these facts present a federal question? The authorities of the city of Utica, given by the state the power to make a contract for a supply of water for municipal purposes and to tax the taxable property of the city to pay for the same, has made and continued in force from year to year a contract, or has made a continuing and perpetual contract, for a supply of water which is unreasonable and provides for an excessive compensation to be paid the Consolidated Company. The state itself has not approved or sanctioned this contract by its legislative, executive, or judicial authority, unless the authorities of the city of Utica in doing what they have done without express authority of the Legislature to do those particular things have acted for the state so that it can be said such acts have been done by the state itself.

In Chicago, Burlington, etc., R. v. Chicago, 166 U. S. 226, 233, 17 Sup. Ct. 581, 583, 41 L. Ed. 979, Mr. Justice Harlan, in giving the opinion of the court, said:

"It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the fourteenth amendment. For the state Constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions to the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning and 'the state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S. 339, 346, 347

[25 L. Ed. 676]; Neal v. Delaware, 103 U. S. 370 [26 L. Ed. 567]; Yick Wo v. Hopkins, 118 U. S. 356 [6 Sup. Ct. 1064, 30 L. Ed. 220]; Gibson v. Mississippi, 162 U. S. 565 [16 Sup. Ct. 904, 40 L. Ed. 1075]. These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34 [14 Sup. Ct. 1108, 38 L. Ed. 896], in which it was held that the prohibitions of the fourteenth amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the fourteenth amendment."

In New Orleans Waterworks Company v. Louisiana S. R. Co., 125 U. S. 18, 30, 31, 8 Sup. Ct. 741, 747, 748, 31 L. Ed. 607, the court, per Mr. Justice Gray, considering the clause of the Constitution which declares that no state shall pass any law impairing the obligation of contracts, said:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. 'It must be the Constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.' Railroad Co. v. Rock, 4 Wall. 177, 181 [18 L. Ed. 381]. 'We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' Knox v. Exchange Bank, 12 Wall. 379, 383 [20 L. Ed. 287].

"As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. * * *

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. United States v. New Orleans, 98 U. S. 381, 392 [25 L. Ed. 225]; Meriwether v. Garrett, 102 U. S. 472 [26 L. Ed. 197]. Accordingly, where the city council of Charleston, upon which the Legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the

obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the state. Murray v. Charleston, 96 U. S. 432, 440 [24 L. Ed. 760]. See, also, Home Ins. Co. v. City Council of Augusta, 93 U. S. 116 [23 L. Ed. 825]."

If this last-cited case is applicable here, we inquire what law of the state of New York has authorized the making of a contract by the city of Utica which is virtually confiscatory of the property of its citizens. The acts done have not been pronounced valid and legal by the courts of the state of New York. The taxing power has been exercised to impose and collect an excessive tax; but the complaint is not of error in determining what persons and property shall be taxed (assuming that Mr. Risley is out of the case as a complainant, he insisting that he could not be taxed at all for fire purposes), but in levying and collecting an excessive and unjust tax—one amounting to confiscation of property. While it is decided that determining who and what property are liable to be taxed is a legislative act, it is not held that in making and executing a contract and assessing, levying, and collecting a tax to pay the consideration agreed to be paid thereby the authorities of a municipal corporation are performing a legislative act. In Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed. 760, the city council determined to assess a tax on certain bonds of the city, and by so doing diminished the amount of interest the city had agreed to pay. This was held to be a legislative act of the council and the act of the state because it had conferred on the council the power of taxing persons and property within the city. But in that case the state court had upheld the power, and the decision of the state court was appealed from. The court held:

"Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere."

In City R. Co. v. Citizens' Street R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, both parties were citizens of Indiana, and the suit was brought in the Circuit Court of the United States. The common council of the city of Indianapolis passed an ordinance authorizing the Citizens' Street Railroad Company to lay tracks on designated streets with the right to operate for 30 years, which time was subsequently extended to 37 years, and the ordinance provided that:

"During such time the city authorities were not to extend to other companies privileges which would impair or destroy the rights so granted."

The Citizens' Company acted on the ordinance and made great outlay in the erection of buildings, etc. The city authorities, claiming that the right would expire in 30 years from the original grant, granted to the City Railway Company the right to lay tracks on many of the streets on which the Citizens' Company had laid its tracks, and suit was brought to enjoin the City Company from disturbing, etc. The jurisdiction of the court was upheld. The case seems to settle the proposition that the common council of a city given general power over certain matters represents the state, and that its acts are the acts of the state, unless, of course, forbidden by the law of the state. In

Penn. M. L. Ins. Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626, the last-cited case is approved, and the court also said:

"Not only were the averments of the bill as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and were, therefore, in legal intendment the equivalent of laws enacted by the state itself."

In Spring Valley Water Co. v. City and County of San Francisco et al. (C. C.) 165 Fed. 657, it was held:

"Whether rates to be charged by a water company fixed by a municipal ordinance under constitutional or statutory authority are reasonable or unreasonable is a judicial question, and the company has the right to invoke the jurisdiction of a federal court to determine whether such rates are such as to deprive it of its property without due process of law."

If this is so, it would seem clear that the taxpayers of the city ought to have the right to invoke the jurisdiction of a federal court to determine whether such rates, or the price to be exacted from them by way of taxation, are such as to deprive them of their property without due process of law. The rights of the taxpayers of a municipality paying for the water used for municipal purposes ought to be as sacred in the eye of the law as those of the water company furnishing the water. There is, however, a wide difference between the power of the officers of a municipality to agree with a water company on the sum to be paid it for a supply of water for a given public purpose and the power to fix absolutely the sum it shall charge and receive for such a supply. The last is clearly a legislative act and equivalent to an act of the Legislature itself. The first is merely the execution of the power given by the Legislature to make a contract, and, if it has the power to incur the obligation, it has the power to raise the money by tax to discharge it. The power to tax is inherent in a municipal corporation duly created, whether expressly granted or not. Of course, the Legislature can regulate it and confer it on any specified officers, and thus limit the exercise of the power by the municipality. If a municipal corporation has the general power to make a contract for a supply of water for the extinguishment of fires, and it makes the contract, but in so doing agrees to pay an exorbitant sum, and having the power to tax for the payment of the sum agreed to be paid imposes such tax, may taxpayers maintain a suit in equity to restrain the execution of the contract and the collection of such taxes? And if such taxes have been collected, paid without protest, may the taxpayers recover the taxes paid? If such suit may be maintained, may it be maintained in the Circuit Court of the United States for the Northern District of New York; all of the parties being citizens of the state of New York and of said district? Clearly not under the statute unless the amount involved is upwards of $2,000 exclusive of interest and costs. The amount involved is not measured by the actual recovery, but by the amount claimed, provided it is claimed in good faith and is not merely a colorable claim to give the court jurisdiction.

The contention of the Consolidated Company here is: First, that the complainants (aside from Risley) having paid their taxes volun-

tarily cannot recover them back; and, second, that in no event can they recover more than the sum paid on account of taxes for fire extinguishing purposes, and that so estimated the amount is far less than $2,000. On the other hand, the complainants contend that the suit is really in the interest of all the taxpayers of the city of Utica, and that the sum in actual dispute is the entire tax for fire and municipal purposes for two years, amounting to something like $80,000. They contend that this is the claim made, and made in good faith, and that it is not colorable or made for the purpose of giving this court jurisdiction; that the sum collected and now held in the city treasury, some $80,000, and claimed by the Consolidated Company, is the sum in dispute. The city of Utica, having made the contract and having levied and collected the tax for the purpose of paying for the water for fire and said municipal purposes, now interposes the same claim.

It is said that the city of Utica, having incurred the obligation and having assessed, levied, and collected these taxes, the $80,000, or thereabouts, to pay the Consolidated Company, cannot now maintain a suit to enjoin the payment of the money to that company, and that the complainants, aside from Risley, having voluntarily paid their taxes, can neither recover them nor enjoin the payment thereof to the company with those paid by other taxpayers to said city. The law of the state of New York and the charter of the city of Utica make all taxes a lien on real estate, and, if such taxes are not paid, the property may be sold. But no such coercive measures were used in this case. No one, except Risley, protected or declined to pay, and the taxes were paid voluntarily, unless it can be truly said that when taxes are made a lien on real estate payment without protest is such coercion that they may be recovered back, if illegally assessed and levied, and constitutes an involuntary payment. I am cited to People ex rel. Am. Nat. Bank v. Purdy et al., as Commissioners, 196 N. Y. 270, 89 N. E. 838, where it was held that:

"Payment under the compulsion of a statute making a tax a direct lien upon shares of stock in a bank is an involuntary payment as to stockholders."

In Ætna Ins. Co. v. Mayor, 153 N. Y. 331, 339–341, 47 N. E. 593, the same doctrine is held. If the authorities imposing a tax are without jurisdiction to impose it, and it is made a lien on the property, and thus hampers the ownership, and follows it when transferred, and there is no escape except to institute a proceeding to annul the tax and prove such want of jurisdiction, it would seem that, if the facts are known to the party against whom the tax is assessed, he should be allowed to protest and then pay and then sue and recover back. And in the case first cited it was held that when the bank pays for the stockholders no protest was necessary. But this is not a case where the taxing officers of the city of Utica acted without jurisdiction. By far the greater part of the taxes for city purposes included in the same assessment and collection were legal, and no complaint is made. The only complaint as to the tax for fire purposes is that it was excessive and confiscatory. There is no evidence that any compulsion whatever was used in the collection; there was no refusal to pay, and no seizure or detention of property or advertisement for sale. In Chesebrough v.

United States, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432, Mr. Chief Justice Fuller, in giving the opinion of the court, said:

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although, generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. Little v. Bowers, 134 U. S. 547, 554 [10 Sup. Ct. 620, 33 L. Ed. 1016]; Railroad Company v. Commissioners, 98 U. S. 541, 544 [25 L. Ed. 196]; Radich v. Hutchins, 95 U. S. 210 [24 L. Ed. 409], citing Brumagim v. Tillinghast, 18 Cal. 265 [79 Am. Dec. 176], a case in respect of stamps purchased, in which the subject is discussed by Mr. Justice Field, then Chief Justice of California."

See, also, Cooley on Taxation (2d Ed.) p. 809; Dillon on Municipal Corporations (3d Ed.) §§ 944–946; Yates v. Royal Ins. Co., 200 Ill. 202, 65 N. E. 726.

The case at bar is more like Railroad Company v. Commissioners, 98 U. S. 541, 25 L. Ed. 196, as in New York no demand for taxes is required, but notice is given of times and a place where payment is to be made. It seems to me an embarrassing doctrine to hold that taxpayers of a municipality may pay their taxes with knowledge of all the substantial facts and without protest or notice of intent to recover, and then, when the taxes are all in and ready to be paid to the parties entitled thereto under contracts with the city, maintain a suit and an injunction to prevent the payment of the moneys so collected and to recover the taxes paid in. And it seems equally embarrassing to hold that a city may make a contract, verbal or in writing, incur an obligation under it, collect the money to pay the consideration, and then, there being no fraud or mistake of fact, either sue or join in a suit to annul the contract or be relieved from paying over the money. But, if so, may several taxpayers, each having a separate demand to recover back the taxes paid by him, collected illegally we will say, unite in one suit, and thus by aggregating their demands confer jurisdiction on the Circuit Court of the United States? It seems not. Each complainant has a separate and distinct demand in which the others are in no way interested. True, the claim of each arises out of the same alleged wrong, but the one has no interest in the recovery of the other. It seems to me that the case is within the principle enunciated in the following cases: Northern Pac. R. Co. v. Walker, 148 U. S. 391, 392, 13 Sup. Ct. 650, 37 L. Ed. 494; Walter v. Northeastern R. Co., 147 U. S. 370, 373, 13 Sup. Ct. 348, 37 L. Ed. 206; Fishback v. Western Union, etc., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; Seaver v. Bigelow, 5 Wall. 208, 18 L. Ed. 595; Russell v. Stansell, 105 U. S. 303, 26 L. Ed. 989.

In Walter v. Northeastern R. Co., supra, Mr. Justice Brown, giving the opinion of the court, said:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in Seaver v. Bigelow, 5 Wall. 208 [18 L. Ed. 595]; Russell v. Stansell, 105 U. S. 303 [26 L. Ed. 989]; Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265 [1 Sup. Ct. 131, 27 L. Ed. 115]; Hawley v. Fairbanks, 108 U. S. 543 [2 Sup. Ct. 846, 27 L. Ed. 820]; Stewart v. Dunham, 115 U. S. 61 [5 Sup. Ct. 1163, 29 L. Ed. 329]; Gibson v. Shufeldt, 122 U. S. 27 [7 Sup. Ct. 1066, 30 L. Ed. 1083]; Clay v. Field, 138 U. S. 464 [11 Sup. Ct. 419, 34 L. Ed. 1044].

It is quite true that the complainants go back to about 1900 and show the taxes paid for fire protection purposes under the contract for all the succeeding years, and thus make an aggregate paid in excess of $2,000. But I think it self-evident that no such recovery can be had. Laches in seeking a remedy and enforcing it, if nothing more, would prevent such a recovery.

In Russell v. Stansell, supra, it was held:

"Where the land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged, and the bill of complaint, filed by a number of them, praying for an injunction against the collection of the assessment, was dismissed, and they appealed here, held, that the several amounts cannot be united to make up the sum necessary to give this court jurisdiction."

And in Seaver v. Bigelow, supra, it was held:

"In a creditor's bill, several creditors joining, to set aside a conveyance of property as fraudulently made, this court has no jurisdiction on appeal if the judgment of the creditor appealing do not exceed $2,000. The fact that the fund in litigation exceeds it is not sufficient."

Russell v. Stansell, supra, seems quite conclusive.

I have but little doubt of the right and duty to dismiss for want of jurisdiction at this stage of the case, and it seems to me that if the case were now finally submitted it would be my duty to dismiss. I do not see how a further expenditure of time and money, unless it be on appeal, can avail anything to the complainants or to the city. I cannot agree with the contention that the $80,000 collected and now held by the city constitutes or is to be treated as a trust fund. The allegations of the amended bill upon which the demurrer was overruled are not sustained by evidence.

Risley desires to discontinue, and he may do so as to himself without costs. As to the other complainants, including the city of Utica, in the cross-bill, the suit is dismissed for want of jurisdiction, without costs, and the injunction dissolved.

ZIKOS v. OREGON R. & NAVIGATION CO.

(Circuit Court, E. D. Washington, E. D. June 4, 1910.)

No. 1,394.

1. MASTER AND SERVANT (§ 189*)—WHO ARE "FELLOW SERVANTS"—SECTION FOREMAN AND CREW.

A railroad section foreman and the members of the crew working under him are "fellow servants" within the rule of the federal courts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 428; Dec. Dig. § 189.*

For other definitions, see Words and Phrases, vol. 3, pp. 2716–2730; vol. 8, p. 7662.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. COMMERCE (§ 58*)—POWER OF CONGRESS—REGULATION OF RAILROADS—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), has not perpetuated the infirmities which rendered Act June 11, 1906, c. 3073, 34 Stat. 232 (U. S. Comp. St. Supp. 1909, p. 1148), unconstitutional. Under the present statute a railroad company engaged in interstate commerce is liable to the extent therein provided to an employé injured while assisting in carrying on such commerce when the injury results from the negligence of a fellow servant, if such fellow servant is also engaged in interstate commerce. The facts disclosed by the complaint do not make it necessary to decide whether, if injury should result through the negligence of an employé engaged in intrastate commerce, there would be a liability under the act. The purpose to render a carrier engaged in interstate commerce liable to employés so engaged being apparent, the provisions are separable, whatever be the rule regarding an injury resulting to an interstate employé from the negligence of an employé not so engaged.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.*]

3. COMMERCE (§ 58*)—POWER OF CONGRESS—INTERSTATE CARRIERS—LIABILITY TO EMPLOYÉS.

Congress has authority under its constitutional power to regulate interstate commerce to prescribe rules of liability as between an interstate carrier and its employés in such interstate commerce in cases of injury to the employés while actually engaged in such commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.*]

4. COMMERCE (§ 58*)—EMPLOYER'S LIABILITY ACT—EMPLOYÉ ENGAGED IN "INTERSTATE COMMERCE."

A sectionhand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in "interstate commerce" within the meaning of Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), and within the protection of such act.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.*

For other definitions, see Words and Phrases, vol. 4, pp. 3724–3731.]

5. REMOVAL OF CAUSES (§ 10*)—JURISDICTION OF FEDERAL COURT.

The jurisdiction of a federal court in a cause removed from a state court must rest on that of the state court from which the removal was made.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 28; Dec. Dig. § 10.*]

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

6. COURTS (§ 42*)—JURISDICTION OF STATE COURTS—RIGHTS CREATED BY FEDERAL STATUTE.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), does not attempt to delegate judicial power of the United States to state courts, in violation of article 3 of the Constitution but creates substantive rights not solely cognizable in the federal courts, but which may be availed of in any court of competent jurisdiction, state or federal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 42.*]

7. COMMERCE (§ 58*)—POWER OF CONGRESS—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), conceding it to be otherwise within the constitutional power of Congress to regulate interstate commerce, is not invalid because it results in establishing rules and measures of liability in cases to which it applies different from those which exist under the state laws in other cases arising from the relation of master and servant, nor because it gives the right of recovery in case of the death of an employé to different parties; but in cases to which it applies it is paramount and governs in the state as well as the federal courts.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.*)

8. STATUTES (§ 64*)—PARTIAL INVALIDITY—EMPLOYER'S LIABILITY ACT.

The provision of Employer's Liability Act April 22, 1908, c. 149, § 5, 35 Stat. 66 (U. S. Comp. St. Supp. 1909, p. 1173), making void any contract, rule, regulation, or device, the intent of which shall be to exempt any carrier from liability under the act, is clearly separable from the other provisions of the act, which are not involved in the question of its constitutionality.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 59; Dec. Dig. § 64.*]

9. CONSTITUTIONAL LAW (§ 70*)—EMPLOYER'S LIABILITY ACT—CONSTITUTIONALITY.

Whether or not Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is effective to carry out the purpose intended, and thus promote interstate commerce, is a legislative and not a judicial question, which cannot affect the constitutional power of Congress to enact it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

10. CONSTITUTIONAL LAW (§ 245*)—EQUAL PROTECTION OF LAWS—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is not unconstitutional as denying the equal protection of the laws to the carriers affected thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.*]

At Law. Action by Makes Zikos against the Oregon Railroad & Navigation Company. On demurrer to complaint. Demurrer overruled.

Birdseye & Smith, for plaintiff.

Ralph E. Moody (W. W. Cotton, Arthur C. Spencer, and Samuel R. Stern, of counsel), for defendant.

WHITSON, District Judge. Plaintiff, a citizen of Washington, commenced this action in the superior court of Spokane county, against the defendant, a citizen of Oregon, for personal injuries al-

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

leged to have been sustained by him within this state, while employed by the defendant "as a sectionman and extra gangman." The cause was removed to this court as a controversy wholly between citizens of different states, and as one arising under and depending upon the construction of a federal statute.

Briefly stated, the grievance set out in the complaint is that at the times mentioned the defendant was engaged in operating a railroad in and between these states; that the plaintiff was, on the 7th day of December, 1908, and for several months prior thereto had been, engaged as aforesaid in repairing the defendant's main track; that while acting under the instructions of the defendant's section boss upon said date he was directed to drive partially driven spikes further into the ties with a spike maul, for the purpose of tightening the joints of the rails, in pursuance of which he struck a spike, when, from the force of the blow, the head flew off and striking him in the left eye, destroyed the sight, and inflicted other injuries. It is alleged that this spike was old, worn out, defective, and insufficient, which was known to the defendant and to its employés who had theretofore placed it in position to be driven.

The provisions of the Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), are expressly invoked in order to bring the defendant within the rule of liability established by that act where injury results from the negligence of fellow servants. While it has been contended, in aid of the defendant's demurrer to the complaint, that the allegations are not sufficient to render the defendant liable, in that the defect, if any, must have been as apparent and manifest to the plaintiff as it was to the servants of defendant, and therefore no cause of action is stated in any view, the broad averments relating to the condition of the spike are strongly suggestive of proof that defendant observed the care which the law imposed upon it. A far-reaching question grows out of the denial of the power of Congress over the subject-matter of the action. A case involving the validity of the statute is pending before the Supreme Court, and but for the fact that this case is said to present phases not there in issue, without the decision of which it cannot further proceed, the authoritative interpretation of that court would be awaited for guidance.

Before passing to the contentions made regarding the constitutionality and applicability of the statute, it is proper to observe, because the plaintiff's brief would seem to indicate a contrary view, that the section foreman, as well as those of the other crew, were the fellow servants of the plaintiff. Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 33 L. Ed. 1009; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atchison, Topeka & Santa Fé R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051.

The rule, therefore, prevailing in this state, to which attention has been called, is not one to be followed here in view of the decisions of the Supreme Court upon this general rule of law. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

The argument that the statute is an attempt to exceed the powers of Congress, and, in any view, if it is not subject to this criticism, that it was not intended to include such controversies as the present, has been presented from several view points.

1. The position is taken that the act which, according to common knowledge, was passed for the purpose of curing defects of the Act June 11, 1906, c. 3073, 34 Stat. 233 (U. S. Comp. St. Supp. 1909, p. 1148), has perpetuated infirmities that the Supreme Court in Employer's Liability Cases, 207 U. S. 463, 502, 28 Sup. Ct. 141, 52 L. Ed. 297, regarded as fatal to the validity of the earlier act. The specific objection is that, while liability is carefully limited by the preceding clauses of section 1 to common carriers while engaged in commerce between the states, etc., and to injuries to employés while engaged in such commerce, the final clause of that section holds the carrier liable for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier," etc. Hence the conclusion that the vice pointed out by the Supreme Court in the act of 1906 has been preserved in the present act by the provision that the carrier is chargeable by an interstate employé with the negligence of one not engaged in interstate commerce, a matter, it is contended, with which the states only are concerned. But the ground upon which the court rested its decision was that interstate and intrastate employés were inseparably embraced within the statute, the latter not being within the purview of congressional legislation. The same point was made in Watson v. St. Louis, I. M. & S. Ry. Co., 169 Fed. 943. In passing upon it Judge Trieber in a learned opinion accepted the literal construction of the statute as constituting the legislative intent, but disposed of the argument by holding to the competency of Congress in virtue of the commerce clause of the Constitution. That it was the purpose to make an interstate carrier liable to an employé engaged in interstate commerce for the negligence of a fellow servant, also engaged in such commerce, is beyond controversy. It is not necessary, in view of the facts disclosed by the complaint, to go further than to hold that interstate and intrastate service are separable by upholding liability when injury results from the negligence of fellow servants engaged in interstate commerce and denying it when resulting through the negligence of an intrastate employé to one engaged in interstate commerce; and this if the act could be held subject to the objection urged against it. This would appear at first blush to run counter to the reasoning which resulted in the overthrow of the first attempt to regulate the matter; but the distinction lies in the definite designation as to when the interstate carrier shall be liable, namely, when engaged in interstate commerce, and to whom it shall be liable, that is, to the employé so engaged, a segregation not made in the original act.

2. But even admitting the sufficiency of the act in other respects, it has been said that Congress may not regulate the relation of master and servant. Counsel base this conclusion upon language used by Mr. Justice White in the Employer's Liability Cases, supra, but the opinion, carefully read, does not bear out the contention. The following seems to put the matter at rest:

"We think the unsoundness of the contention that, because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that, because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, it is not a regulation of interstate commerce." Page 495 of 207 U. S., page 144 of 28 Sup. Ct. (52 L. Ed. 297).

That the four nonconcurring justices understood the majority opinion as upholding the power of Congress in this regard appears from their dissenting opinions. Pages 504, 540, 541 of 207 U. S., pages 148–163 of 28 Sup. Ct. (52 L. Ed. 297). Subsequently, in Adair v. United States, 208 U. S. 178, 28 Sup. Ct. 282, 52 L. Ed. 436, the court, referring to the decision, gave unqualified indorsement of that view by the language following:

"In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employés in such interstate commerce, in cases of personal injuries received by employés while actually engaged in such commerce."

3. Giving full scope to the power of Congress over interstate commerce, and admitting sufficient breadth of the act to include the right to regulate the relations of employer and employé while each is engaged in such commerce, still it is contended that it appears from the complaint that the plaintiff was not so engaged; that repairing the track wholly within the state is in no sense within that term. But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. Having reference to that phase of the subject, the Supreme Court has said:

"That assumption is this: That commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1 [6 L. Ed. 23] and which has not since been open to question." Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 Sup. Ct. 155, 161, 54 L. Ed. —.

"The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged." Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

"Commerce is a term of the largest import. * * * The power to regulate it embraces all the instruments by which said commerce may be conducted." Weldon v. State of Missouri, 91 U. S. 275, 280, 23 L. Ed. 347.

No doubt there may be situations, indeed we have the highest authority for it (Employer's Liability Cases, supra, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297) when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic, where there could be no ground for claiming liability under the act of Congress, even though the carrier in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose.

In re Debs, 158 U. S. 564, 579, 15 Sup. Ct. 900, 39 L. Ed. 1092, is an authority sustaining this view. The following from Ex parte Siebold, 100 U. S. 371, 395, 25 L. Ed. 717, was there quoted with approval:

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield: 'This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land.'"

4. By comparing the act with article 3 of the Constitution, the theory is deduced that it attempts to delegate the judicial power of the

United States to state courts in violation of that article. Carrying the argument a step further, it is said that, since Congress cannot confer judicial power upon state tribunals, the state court being without jurisdiction, this court acquired none on removal; that the jurisdiction here must rest upon that of the court of original jurisdiction must be accepted as the rule. Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737; Crowley v. Southern Railway Co., 139 Fed. 851.

But with due respect for the able counsel who have so well presented this view, it would seem to confuse rights with remedies.

As to how far Congress may invest state courts with judicial power was fully considered by the Circuit Court of Appeals in Levin v. United States, 128 Fed. 826, 63 C. C. A. 476 (Eighth Circuit), where the conclusion was reached that the Supreme Court in the early decisions of Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97, and Houston v. Moore, 5 Wheat. 1, 5 L. Ed. 19, had reference only to the power over that class of cases specified in section 2 of article 3; and those cases which have upheld the authority of the state courts in such matters as the naturalization of aliens, the arrest and holding for trial of offenders against the laws of the United States by state officers, and the like, were cited and fully considered. But if the act does not attempt to delegate judicial power, a discussion of the point would be of no avail. Of that we proceed to inquire.

It is not enough to sustain federal jurisdiction that the right claimed may be traced to an act of Congress. Thus:

"The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a federal question arises." Joy v. St. Louis, 201 U. S. 341, 26 Sup. Ct. 480 (50 L. Ed. 776).

"This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a federal question." Blackburn v. Portland Gold Mining Co., 175 U. S. 579, 20 Sup. Ct. 225 (44 L. Ed. 276), elaborated and affirmed in Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864, and in Sweringen v. St. Louis, 185 U. S. 45, 22 Sup. Ct. 569, 46 L. Ed. 795.

"It has often been held that the validity of a statute or treaty of the United States is not 'drawn in question,' within the meaning of section 709 (Rev. St. [U. S. Comp. St. 1901, p. 575]), every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210 [9 Sup. Ct. 503, 32 L. Ed. 908]; Cook County v. Calumet, etc., Canal Company, 138 U. S. 635, 653 [11 Sup. Ct. 435, 34 L. Ed. 1110]; Borgmeyer v. Idler, 159 U. S. 408 [16 Sup. Ct. 34, 40 L. Ed. 199]; Blackburn v. Portland Mining Company, 175 U. S. 571 [20 Sup. Ct. 222, 44 L. Ed. 276]; Florida Central Railroad Company v. Bell, 176 U. S. 321, 328 [20 Sup. Ct. 399, 44 L. Ed. 486]; Water Power Company v. Street Railway Company, 172 U. S. 488 [19 Sup. Ct. 247, 43 L. Ed. 521]." Kennard v. Nebraska, 186 U. S. 308, 22 Sup. Ct. 879 (46 L. Ed. 1175).

"Moreover, the state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do so. Robb v. Connolly, 111 U. S. 624, 637 [4 Sup. Ct. 544, 28 L. Ed. 542]; Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S. 556, 583 [16 Sup. Ct. 389, 40 L. Ed. 536].

"And, we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. Chicago & Alton Railroad v. Wiggins Ferry Co., 108 U. S. 18 [1 Sup. Ct. 614, 617, 27 L. Ed. 636]; Shreveport v. Cole, 129 U. S. 36 [9 Sup. Ct. 210, 32 L. Ed. 589]; Neal v. Delaware, 103 U. S. 370, 389 [26 L. Ed. 564]; New Orleans v. Ben-

jamin, 153 U. S. 411, 424 [14 Sup. Ct. 905, 38 L. Ed. 764]." Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 67 (48 L. Ed. 140).

"A state court having original jurisdiction of the parties before it may consistently with existing federal legislation determine cases at law or in equity arising under the Constitution and laws of the United States or involving rights depending upon such Constitution and laws. * * * Upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof whenever those rights are involved in any suit or proceeding before them." Robb v. Connolly, 111 U. S. 637, 4 Sup. Ct. 551 (28 L. Ed. 542).

"The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification: That where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in The Moses Taylor, 4 Wall. 429 [18 L. Ed. 397], and Story, J., in Martin v. Hunter's Lessee, 1 Wheat. 334 [4 L. Ed. 97]; and of Mr. Justice Swayne, in Ex parte McNeil, 13 Wall. 236 [20 L. Ed. 624].

"The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the laws of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

"It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506 [16 L. Ed. 169]; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied." Claflin v. Houseman, Assignee, 93 U. S. 136, 137, 23 L. Ed. 833.

The act does not attempt to delegate to the courts of the states that which is only cognizable in the national courts, but it creates substantive rights in virtue of the power of Congress over interstate commerce. These may be availed of in any court of competent jurisdiction. When the amount in controversy is sufficient to warrant the Circuit Courts of the United States in entertaining a cause, and there is either diversity of citizenship or the right sought to be enforced nec-

essarily involves the validity or interpretation of a Federal statute, it is subject to removal unless the act which confers the right expressly prohibits (Claflin v. Houseman, Assignee, supra), as does the amendment passed since the cause of action in this case arose.

State courts enforce rights arising under the laws of the different states, applying the rule lex loci contractus. They uphold rights arising in foreign nations which depend upon the construction of foreign laws. Let it be admitted that this is through comity only, yet it would appear even then that the analogy ought to follow. But there is a stronger reason growing out of the more intimate relation of the states to the general government. The Constitution of the United States being the supreme law of the land, state and federal courts are alike subject to its provisions, and the refusal of the former to enforce rights conferred by Congress would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an anomaly in our system if state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to congressional legislation, should refuse to further do so because of the fact that there has been provided by a power clearly competent, different rules of liability for those engaged in interstate commerce from those which may be fixed by statute or recognized by decisions in the several states. All government rests upon acquiescence in the established order. When common consent is withdrawn, prescribed rules of conduct are overthrown and anarchy reigns; and it is not to be supposed that state courts will or can refuse to abide by the result when the Supreme Court, the final arbiter, has decided that they have jurisdiction. If that should occur, the Constitution would cease to be the supreme law of the land, and its express provision that "the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding" would become null and its application inoperative.

So, the holding in Hoxie v. N. Y., N. H. & H. R. R. Co., 82 Conn. 352, 73 Atl. 754, that it was not intended by Congress that the rights granted should be enforceable in the state courts, cannot be followed for the reasons already assigned and for the additional reason that jurisdiction of the state courts is attributable to the powers conferred upon them by the states. To defeat the exercise of this power there must be an express prohibition by Congress.

"If an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement, there is no reason why it should not be enforced if not provided otherwise by some act of Congress by a proper action in a state court." Claflin v. Houseman, supra, 93 U. S. 137 (23 L. Ed. 833).

"The Legislature of a state cannot abrogate or modify any of the provisions of the federal Constitution nor of the acts of Congress touching matters within congressional control; but the courts of the state, in the absence of a prohibitory provision in the federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States." Murray v. Chicago & N. W. Ry. Co., 62 Fed. 24.

Since this cause was submitted, the statute has been amended by the Act approved April 5, 1910. Sess. Laws 1909–10, p. 291. That part of the amendment germane to the present inquiry reads:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, but no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Attention has been called to the amendatory act as fortifying the position taken by counsel before its enactment. It is assumed that it is a legislative construction of an existing statute, and, inasmuch as the amendment now expressly confers jurisdiction in terms upon state courts that it was not intended to give such jurisdiction in the first instance. While it is said by Sutherland on Statutory Construction, § 229, that the Legislature cannot authoritatively declare what the law is or has been—that to do so is a judicial function—the author gives his adherence to the following:

"A legislative construction of a statute is entitled to consideration, and will often have much weight. In cases of doubt and uncertainty the solemn declaration of the legislative branch of the government, or practical construction by the executive department, gives a certain sanction, and will be influential with the courts."

Sedgwick on the Construction of Statutory & Constitutional Law, p. 227, thus states the rule:

"The opinion of a Legislature subsequent to that which enacted the statute, as to its construction, should have no more weight than that of private persons."

But giving the rule its broadest application, in the report of the Senate Judiciary Committee presented by Senator Borah, we find the following reference to the amendment to make the jurisdiction of the courts of the United States "concurrent with the courts of the several states":

"This is proposed in order that there shall be no excuse for courts of the states to follow in the error of the Supreme Court of Errors of Connecticut in the case of Hoxie v. N. Y., N. H. & H. R. R. Co., ([82 Conn. 352] 73 Atl. 754), in which case the court declined jurisdiction upon the ground, inter alia, that Congress did not intend that jurisdiction of cases arising under the act should be assumed by state courts.

"It is clear under the decisions of the Supreme Court of the United States that this conclusion of the Connecticut court is erroneous."

In the report many decisions of the Supreme Court are collected to show, and which do show, that the act needed no amendment; that state courts had jurisdiction without it. The suggestion, therefore, that the amendatory act amounts to a legislative construction, can have little weight. Rather should it be said that it was intended as a legislative precaution, for it was plainly the purpose of the committee at least, in this respect, to remove doubt rather than to supply a deficiency.

There is a more serious aspect growing out of the amendment, pertinent to the present discussion. If it is not competent for Congress to delegate the judicial power of the United States to state tribunals, and the act could be held to be an attempt to do so, the amendment has not met the objection, nor can it be met, for if, on the one hand, state courts had no jurisdiction for that reason, the amendment is open to the same objection as that of which it is amend-

atory; if, on the other, they did have jurisdiction under the act before its amendment, it was not because Congress had conferred the power, but because of jurisdiction in the rightful exercise of their own powers.

5. Objections to validity that have seemed insurmountable to defendant's counsel are: Inconsistencies, discriminations, and conflicts between state and federal authority, which it is claimed a practical administration of the law will necessarily result in. These found their fullest expression through the Supreme Court of Connecticut in Hoxie v. Railroad Company, supra. There the position was illustrated in this way: By the common law or state statutes certain rules prevail regarding the accountability of employers to employés for negligence, and in case of death the statutes designate who shall be entitled to recover. What was apparently regarded as a fatal defect would exist, in that juries might be led into confusion as to the measure of liability, for in determining the case of an interstate carrier one rule might prevail, whereas, in that of an intrastate carrier another would control; the statute thus introducing different rules of liability in the same tribunal. But all these objections rest upon that which, when followed to an ultimate conclusion, would deny the power of Congress to regulate those acts which do in fact include interstate commerce within the state, and it would exclude the extention of its authority across state lines and render it null and void within the borders of a state, while the contrary rule has been repeatedly laid down. Mississippi R. R. Co. v. Illinois Central R. R., 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; Atlantic Coast Line R. R. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Employer's Liability Cases, supra; Pullman Company v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. ——; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 191, 54 L. Ed. ——, and cases there cited.

As to the designation of those who may succeed to the rights of deceased persons, if Congress may legislate in the exercise of its powers over interstate commerce regarding employés at all, as we have seen that it may, certainly it is competent and incidentally incumbent upon it to declare who shall be entitled to recover in case of the death of an employè. If this interferes with the administration of estates, which may well be doubted, it is because Congress has plenary power over the subject. It is denying nothing to the states, for the regulation of the subject is wholly with the federal government. If it is interstate commerce, then state authority is excluded because it is so. An illustration is found in McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237, where the right to take under the homestead law was considered. It was held that the widow took under the federal statute, and that the children were not entitled to take as heirs under the state statute. While the Supreme Court in the Liability Cases (pages 491, 492 of 207 U. S., page 143 of 28 Sup. Ct. [52 L. Ed. 297]) did not notice all of these objections, those which were mentioned were regarded as being within legislative discretion. Having reference to them, they were thus disposed of:

"But without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning

merely the expediency of the act and not the power of Congress to enact it. We say this in testing the constitutionality of the act; we must confine ourselves to the power to pass it and may not consider evils which it is supposed will arise from the execution of the law whether they be real or imaginary."

So the argument that the act is discriminative, in that a person not entitled to claim an amount which would give this court jurisdiction might be precluded from brnging any action at all, fails for the reason already assigned. It is not every controversy arising under federal statutes that may be heard in the federal courts. A certain amount has been fixed by Congress before those courts may entertain causes which do require the interpretation of such statutes, and even then it is optional with litigants, yet removal statutes are not discriminative and void for that reason.

6. It is provided by section 5 that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from the liability created by the act, shall be to that extent void. This, it is said, violates the fifth amendment, in that it deprives of property without due process of law by its restraint upon the right of both carrier and employé to contract as to personal employment concerning matters which are purely and solely vested in the discretion of the contracting parties, contrary to the rule laid down in Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, and Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937. In this case it does not appear that any contract has been made which is violative of the section referred to.

The provisions of the act in this regard are clearly separable; there might be a statutory liability in the absence of contract, and yet the parties be left free to contract in avoidance of it without overturning the provision which would control in the absence of contract. El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. ——.

7. It has been urged that the act must rest, if it can be upheld at all, upon the purpose to render the occupation of employés less hazardous, and in that way promote interstate commerce. The practical effect of the act is said to be that it will encourage carelessness in the place of inducing the exercise of greater care; that a servant, knowing that an employer would be liable for his negligence if it should result in injury to his fellow servants, would not exercise the same degree of diligence as where he knew that there would be no such liability. But this is referable to legislative discretion, not to excess of power in the exercise of legislative functions. Opinions might differ concerning the practical effect of the provision, but Congress only may judge of it. The control of the subject admitted, the courts must accept the conclusion of that branch of the government charged with the duty of making laws.

8. Finally, the invalidity of the act is based upon the failure to include all interstate carriers as class legislation violative of the fourteenth amendment. This view was discredited by the Supreme Court in Employer's Liability Cases, 207 U. S. 503, 28 Sup. Ct. 141, 52 L.

Ed. 297, upon the authority of Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis, etc., Ry. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Chicago, etc., R. R. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675. The same contention was met in Watson v. St. Louis R. Co., supra, as follows:

"In every instance in which state statutes abolishing or modifying the fellow-servant rule and limiting the act to railroads only, as in the act now under consideration, have been attacked as being in violation of the equal protection clause of the fourteenth amendment, the Supreme Court has overruled the contention and sustained the validity of the acts, declaring that such classification by the legislative department is permissible and not within the prohibition of that amendment."

The holding also in United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, is an adherence to the same rule.

Jyntaro Tamura v. Great Northern Railway Company, handed down by the Supreme Court of the state since the argument of this case (108 Pac. 774), has been cited as supporting the view that the act is unconstitutional; but the decision was based upon the failure of the plaintiff to affirmatively establish that the work engaged in was that of interstate commerce. It not so appearing, the constitutionality of the act was not involved.

It follows that the demurrer must be overruled.

NELSON v. CITY OF MURFREESBORO et al.

(Circuit Court, M. D. Tennessee. March 13, 1909.)

1. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A municipal ordinance legislative in character, in the exercise of delegated authority to make laws which the Legislature might have made, has the force of a state law within the contract clause of the Constitution, and, where such ordinance impairs the obligation of a prior contract made by the city, a suit to enjoin its enforcement involves a question arising under the Constitution of the United States, of which the federal courts have jurisdiction, where the requisite amount is involved, without regard to the citizenship of the parties.

Ed. Note.—For other cases, see Courts, Cent. Dig. § 821; Dec. Dig. § 282.*

Jurisdiction of cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purch Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

2. MUNICIPAL CORPORATIONS (§ 682*)—POWERS—LIGHTING CONTRACTS.

Murfreesboro City Charter, § 8, subsec. 6 (Laws Tenn. 1903, c. 120), gives the city council authority to license, tax, and regulate all businesses and corporations lawful to be carried on within the city. Subsection 11 gives the city complete control over the city streets, and subsection 13 gives power to provide for the erection of lamp posts, lamps, electric fixtures, and lamps for the lighting thereof, for strictly municipal purposes. Section 12 provides that no order or ordinance shall be made involving the expenditure of money or the contraction of a debt against the corporation unless money shall be actually in the city treasury to pay such debt or expenditure, or the same shall be within the amount of the

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

current year's taxes for such purposes. Section 12 was amended by Laws 1905, c. 41, declaring that the provisions of section 12 should not apply to contracts made by the city council for the furnishing of lights for the city streets, and that the council should have power to make all necessary and proper contracts with any individual or corporation for the lighting of the streets for any period not longer than 10 years, and to make appropriations annually for such purposes. *Held*, that the amendment was not intended to enlarge the power of the city council so as to permit it to give a franchise generally in the city streets in reference to any matter distinct from that of street lighting, but that its primary purpose was to do away with the original limitation upon the council's power so as to permit it to make such contracts for 10 years and appropriate money therefor, and the section does not confer the power to incorporate in such contract, under the guise of an additional consideration to the contractor, an exclusive franchise permitting the furnishing of electricity to the inhabitants of the city for lighting, heating, and power during the term of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1468; Dec. Dig. § 682.*]

3. MUNICIPAL CORPORATIONS (§ 682*)—IMPLIED POWERS—EXCLUSIVE PRIVILEGES IN STREETS.

A municipal corporation has no general implied power to grant exclusive privileges in the streets, such power not existing unless given by the Legislature in express language or necessarily implied from other powers, and, if inferred from other powers, it is not enough that the authority be convenient to them, but it must be indispensable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1468; Dec. Dig. § 682.*]

Bill by John H. Nelson against the City of Murfreesboro and others. Bill dismissed.

This case was heard upon demurrers to the complainant's bill, and on the complainant's application for preliminary writ of injunction.

The bill, which was filed by John H. Nelson, a resident and citizen of Rutherford county, Tenn., doing business under the name of the City Gas & Electric Light Company, against the city of Murfreesboro, a municipal corporation located in Rutherford county, Tenn., and John A. Davis and David F. Elam, residents and citizens of said county, alleged: That the city of Murfreesboro on June 16, 1905, enacted an ordinance granting to the complainant, under the name of said company, a franchise or right to establish and maintain a plant for the manufacture of gas and electricity and poles, wires, and pipes for the transmission thereof in, through, and along the streets, alleys, and sidewalks of the city for the purpose of supplying and furnishing the city and its inhabitants with light, heat, and power; this ordinance providing that in order to be binding it should be accepted by the company and a contract entered into pursuant thereto between the city and the company whereby the city should be furnished electric light at specified prices for not less than 10 years, for the use and lighting of the city, and the eleventh section of the ordinance specifically providing as follows: "It is hereby agreed, intended and understood that a perpetual gas anl electric light franchise, with a ten-year exclusive feature, expiring with the contract, is hereby granted to said City Gas & Electric Light Company in consideration of the contract to be entered into for street lights, and in further consideration that all consumers and patrons of said company shall at no time be charged in excess of the present rates for gas and electricity"—such rates being specifically set forth in said section. That said ordinance was accepted by the company and a written contract entered into between the city and the company in compliance with said ordinance and acceptance. That since said time the company had furnished and supplied all lights required by the city under the contract, and had been paid therefor by the city, without objection or complaint, and had continuously supplied and furnished light, power, and heat to all inhabitants of the city desir-

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

ing the same pursuant to the terms of said contract and ordinance, and in order to meet the requirements of said ordinance and contract and the demands of its patrons had expended in erecting and fitting up its plant many thousands of dollars. That the income or receipts from the city for lights supplied under said contract are not remunerative alone, and the income or receipts from the inhabitants of the city for the light, heat, and power are not remunerative alone; but both together are sufficient to be remunerative and to yield a fair return as an investment. That on November 4, 1908, the city had enacted an ordinance granting to the defendants Davis and Elam, and their associates, the right to erect and maintain a line of poles and wires in, over, and along the streets and alleys of the city, and to furnish and supply light, heat, and power, produced by electricity; to the inhabitants thereof at rates specified in the ordinance and being the same as those specified in the ordinance and contract of complainant, which ordinance had been accepted by the said Davis, Elam, and associates. That by the ordinance of June 16, 1905, the acceptance thereof, and the contract executed pursuant thereto, a valid contract was made and entered into between the complainant and the city whereby complainant was vested with the sole and exclusive right to furnish and supply the city and its inhabitants with light, heat, and power at the prices fixed therein for the 10-year period covered by the ordinance and contract, and whereby the city contracted and agreed and bound itself not to authorize or permit any other person during such 10-year period to sell, furnish, or supply gas or electric light, power, and heat to the city or any of its inhabitants, and to forbid and prevent the occupancy of its streets for such purpose. That under the laws of Tennessee the city of Murfreesboro was authorized to make and enter into said contract with complainant granting him the exclusive right with which he was vested by said ordinance and contract. That the ordinance of November 4, 1908, authorizing Davis, Elam, and their associates to erect and maintain poles and wires in, over, and along the streets and highways of the city for the purpose of furnishing and supplying electric light, power, and heat to the inhabitants of the city, and also to the city should it desire to take the same, is in violation of the Constitution of Tennessee and of section 10 of article 1 of the Constitution of the United States. That the injury done complainant thereby, and which he will suffer from the competition of the defendant Davis and associates, is great and irreparable, the value of which will amount to more than $2,000 a year during each of the remaining years of his exclusive term.

The complainant prayed that the defendants Davis and Elam be enjoined from erecting and maintaining poles and wires within the corporate limits of the city and from supplying its inhabitants with electric light, heat, and power prior to the expiration of the 10-year term of complainant's contract; that the city be enjoined from suffering or permitting this to be done; that it be adjudged and decreed that under the contract between complainant and the city the complainant is vested with and has the sole and exclusive right to furnish and supply the city and its inhabitants with gas and electric light, heat, and power, and to maintain the plant, wires, and poles necessary and proper therefor until the expiration of said 10-year term; and that the ordinance of November 9, 1908, impairs the obligation of complainant's contract, is in violation of his rights under the Constitution of the United States, and to that extent is null and void.

The defendants demurred to the bill, first, for want of jurisdiction in the court; second, for want of equity on the face of the bill.

John J. Vertrees and Thos. B. Lytle, for complainant.

James D. Richardson, Jr., and Jesse W. Sparks, Jr., for defendants.

SANFORD, District Judge (after stating the facts as above). The bill alleges, in effect: That the complainant acquired by the contract and ordinance of June 16, 1905, the exclusive right, for the period of 10 years, not merely of lighting the streets of the city, but also of furnishing gas and electricity to the city and its inhabitants for light,

heat, and power, with an exclusive right of way in the streets of the city during such period, for such purposes; that the obligation of this contract is impaired by the ordinance of November 9, 1908, granting the defendant Davis and his associates the right to furnish electricity to the inhabitants of the city, for heat, light, and power, and a right of way in the streets of the city for such purpose; and that irreparable injury will result to complainant unless the defendants are enjoined from carrying this last-mentioned ordinance into effect in violation of the contract and exclusive franchise claimed by the complainant.

1. The first ground of demurrer is, in effect, that as all the parties are citizens and residents of Tennessee, and as the bill does not allege that the state of Tennessee has passed any law impairing, or attempting to impair, the obligation of the complainant's alleged contract, no federal question is presented giving this court jurisdiction.

This ground of demurrer must be overruled.

It is well settled that a municipal ordinance, legislative in character, passed in the exercise of delegated authority to make laws which the Legislature might have made, has the force of a state law within the meaning of the contract clause of the Constitution, and that, where such ordinance impairs the obligation of a prior contract made by the city, a suit to enjoin its enforcement involves a federal question arising under the Constitution of the United States, of which the federal courts have jurisdiction, where the requisite amount is involved, without regard to the citizenship of the parties. Hamilton Gaslight Co. v. Hamilton City, 146 U. S. 248, 13 Sup. Ct. 90, 36 L. Ed. 963; City Ry. Co. v. Citizens' Street Railway Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Pa. Mut. Life Insurance Co. v. City of Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; Iron Mountain Railroad Co. v. City of Memphis, 96 Fed. 113, 37 C. C. A. 410; Capital City Gaslight Co. v. Des Moines (C. C.) 72 Fed. 828; Mercantile Trust Co. v. Collins Park Co. (C. C.) 99 Fed. 812; American Waterworks Co. v. Water Co. (C. C.) 115 Fed. 171. And in Walla Walla City v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed 341, Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808, and Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, this principle was applied even where the ordinances sought to be enjoined were not passed by the municipalities in their direct legislative characters, but in their proprietary capacities for the purpose of constructing municipal waterworks. See, also, Water Co. v. Knoxville, 200 U. S. 22, 32, 26 Sup. Ct. 224, 50 L. Ed. 353.

2. The second ground of demurrer is, in effect, that it appears from the allegations of the bill and the exhibits made a part thereof that in so far as the city, in the ordinance under which complainant claims, sought to give the complainant an exclusive right of furnishing the individual inhabitants of the city with gas and electricity, such contract was ultra vires and beyond the power of the city under its charter, and therefore null and void, and that as the ordinance of 1908 purports to grant the defendant Davis and associates only the right to furnish the individual inhabitants of the city with electricity, and in

no wise interferes with complainant's street lighting contract, the bill is without equity on its face.

After careful consideration, I am of opinion that this ground of demurrer is well taken.

I think it fairly clear, and assume for the purposes of this opinion, that it was intended by section 11 of the ordinance of 1905 to give the complainant an exclusive "franchise" for 10 years, not merely for lighting the streets of the city with electricity under his contract, but also for furnishing the city and its inhabitants with gas and electricity for light, heat, and power. I further assume that, in so far as this contract and ordinance purported to give the complainant the exclusive right to furnish street lights during the 10-year contract, it was entirely within the scope of the corporate power—this, in fact, not being denied by the defendants. However, I am of opinion that the city was not authorized, either as a term of the contract which it made with complainant for street lighting, or otherwise, to grant him, in addition, the exclusive right during the period of this contract of furnishing the inhabitants of the city with gas and electricity for light, heat, and power; that to the extent that the ordinance purported to confer such additional right it was ultra vires and void; and that, as the ordinance of 1908 does not purport to give the defendant Davis and his associates the right to do anything more than to use the streets of the city for the purpose of furnishing electricity to the inhabitants of the city for light, heat, and power, and does not conflict in any way with the rights of complainant in the matter of street lighting, it does not impair any contract rights with which he is lawfully vested; and hence that the bill exhibits no ground of relief.

Under section 8 of the city charter, as contained in Acts Tenn. 1903, c. 120, p. 216, the city council was given the authority to license, tax, and regulate water companies and all other businesses and corporations lawful to be carried on within the limits of the city (subsection 6), to have complete control over the streets of the city (subsection 11), and to provide for the erection of lamp posts, lamps, electric fixtures, and lamps for the lighting thereof for strictly municipal purposes (subsection 13); but the right to enter into contracts for municipal purposes was restricted by a provision in section 12 of the charter (page 224) that no order or ordinance should be made involving the expenditure of money or the creation or contraction of a debt against the corporation, unless money should be actually in the city treasury to pay for the same, or the same be within the amount of the current year's taxes for such purposes, as ascertained and reported by the city treasurer.

In 1905, apparently for the specific purpose of doing away with this restriction in the matter of a contract for lighting the streets, the charter was amended so that section 12 of the original charter should thereafter read as follows (Acts Tenn. 1905, c. 41, p. 85):

"Provided, that the provisions of said section 12 shall not apply to any contracts that the city council may hereafter make for the purpose of furnishing lights to light the streets of said city of Murfreesboro, and that the city council shall have the power under this act to make all necessary and proper contracts, with any individual or corporation, for the purpose of lighting said streets

with lights, for any period not longer than ten years, and make appropriations annually, for the purpose of meeting the provisions of any such contract."

Upon the construction of this amendment depends primarily the rights of the parties to this litigation.

It is earnestly insisted in behalf of the complainant that this amendment was intended to enlarge the general power of the council in the making of contracts; that, in giving the city council in express terms the power to make all necessary and proper contracts for lighting the streets of the city for the space of 10 years, there is necessarily involved the power to include in such contract any provision which in the opinion of the city council is necessary and proper for the purpose of obtaining a satisfactory contract for lighting the streets of the city; and that as the city council in 1905 deemed it proper, as part of the consideration furnished the contractor for lighting the streets of the city, to give him also an exclusive franchise for furnishing gas and electricity to the inhabitants of the city during the period of the city contract, such exclusive franchise was authorized under the power given to the city to make all necessary and proper contracts for lighting the streets of the city.

I cannot regard this contention as well taken. I am of opinion that this amendment was not intended to enlarge the power of the city council so as to permit it to give a franchise generally in the streets of the city in reference to any matter distinct from that of street lighting; that its primary purpose was merely to do away with the original limitation upon the power of the city council, by permitting it in this matter to make contracts covering a period of 10 years and involving appropriations forbidden by the original charter limitation; that the power thus given the city council to make all necessary and proper contracts relates directly to the matter of street lighting, the character of the service to be rendered, and the payment to be made therefor, and other incidents of such contract, and does not, either in express terms or by necessary implication, confer the power to incorporate in such contract, under the guise of an additional consideration to the contractor, an exclusive franchise in reference to any separate and distinct matter, such as that of furnishing gas and electricity to the inhabitants of the city, not merely for lighting purposes, but also for heat and power, which is entirely foreign to a street lighting contract; and that the incorporation in the ordinance of 1905 of such an additional, independent, and exclusive franchise, as a term in the contract for street lighting, was beyond both the letter and the spirit of the authority conferred by the amendment.

It is obvious that if the city council, as an incident to its express power to make a contract for lighting the streets of the city, could incorporate as a term of the contract an exclusive franchise for furnishing gas and electricity for heat, light, and power to the inhabitants of the city, because it believed this to be necessary and proper in order to obtain a satisfactory contract for lighting the streets, it could likewise, by parity of reasoning, give, as a part of the consideration, an exclusive franchise for a waterworks or for a street railway system, or incorporate into the contract for street lighting any other

exclusive franchise of a public character which it might deem necessary and proper in order to obtain a satisfactory contract for street lighting. None of such separate franchises, however, in my opinion, are authorized under the power to make necessary and proper contracts in reference to street lighting, which must be limited in its terms, in so far as it is sought to confer rights in the streets of the city, to the direct matter of street lighting, and in which the city council may in its discretion make the direct compensation to be paid large enough in every case to obtain a necessary and proper contract without incorporating as a part of the consideration an independent and unauthorized privilege in reference to an entirely different matter.

It is well settled that a municipal corporation has no general implied power to grant exclusive privileges in the streets of a city; that the power to grant such exclusive privileges does not exist unless it has been given by the Legislature "in language explicit and express, or necessarily to be implied from other powers"; and that, "if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." Citizens' Street Railway Co. v. Detroit Railway Co., 171 U. S. 48, 53, 18 Sup. Ct. 732, 43 L. Ed. 67; Freeport Water Co. v. Freeport City, 180 U. S. 587, 598, 21 Sup. Ct. 493, 45 L. Ed. 679; Water, Light & Gas Co. v. City of Hutchinson, 207 U. S. 385, 394, 28 Sup. Ct. 135, 52 L. Ed. 257; Grand Rapids Electric L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co. (C. C.) 33 Fed. 659; Water, Light & Gas Co. v. City of Hutchinson (C. C.) 144 Fed. 256; Dillon on Municipal Corporations (4th Ed.) § 80; and many other authorities.

In Detroit Citizens' Street Railway Co. v. Detroit Railway, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, it was held, applying this rule of construction, that a statute providing that no company should be authorized to construct a street railway through the streets of any city without the consent of the municipal authorities and upon such terms and conditions as said authorities might prescribe, if did not, either expressly or by necessary implication, give the municipal authorities the power, in prescribing the terms and conditions upon which the streets might be used by a street railway company, to confer an exclusive privilege in such use of the streets for the period of the grant.

And in the case of Water, Light & Gas Co. v. City of Hutchinson, it was held, both by the Circuit Court and by the Supreme Court (144 Fed. 256; 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257), that a statute authorizing certain towns to make contracts for lighting the streets of the city and to give the contractor the privilege of furnishing light for the streets of the city for not exceeding 21 years did not authorize a provision in the contract giving the contractor the exclusive right of supplying the city and its inhabitants with light, heat, and power by means of electricity and gas.

I regard this case as identical in all essential respects with the case at bar, and the decision of the Supreme Court as conclusive of the question now at issue. While it is true that in the last paragraph of the opinion it is stated that the conclusion reached is re-enforced by a change which had been made in the state statutes by an amendment

which did away with a former provision expressly authorizing the granting of an exclusive privilege, it is nevertheless true that this is stated, not as the ground of the opinion, but merely as a re-enforcement of the reasoning, and that the opinion itself is primarily and directly based upon the construction of the statute and upon the rule of strict construction of municipal charters, which is directly controlling of the present case; it being further said in this opinion, in answer to the complainant's contention, based upon alleged equities arising from the expenditures which it had made in the construction of its plant upon the faith of the municipal ordinance, that the rule of strict construction of municipal power is "too firm of authority to be disregarded upon the petition of equities, however strong." Page 397 of 207 U. S., page 140 of 28 Sup. Ct. (52 L. Ed. 257).

Furthermore, in Parfitt v. Ferguson, 3 App. Div. 176, 38 N. Y. Supp. 466, where a special statute authorized a board of improvement in the town of New Utrecht to contract with any gas company to supply gas for lighting the city's streets for not exceeding 20 years upon such terms and conditions as the board should deem expedient, the general laws of the state in force at the time authorizing any gas company to lay conductors in the streets of any city with the consent of the municipal authorities, the Supreme Court of New York expressed the opinion, obiter, that a provision in a contract made by the board with a gas company for supplying the town with gas, that during the period of the contract the board would not grant its consent to any other company to lay pipes in the streets, was one beyond the power of the board to enter into.

In the light of the foregoing authorities, and especially in view of the rule of strict construction laid down and applied by the Supreme Court in the Detroit and Hutchinson Cases, without citing many other cases in which the same rule of strict construction has been applied in various cases wherein it had been sought to confer exclusive privileges in the streets of the city, I am unable to reach any other conclusion than that, so far as the ordinance of 1905 went beyond the matter of street lighting and sought to confer upon the complainant an exclusive privilege of furnishing gas and electricity to the inhabitants of the city for heat, light, and power, during the term of the contract, it was beyond the scope of the municipal power, ultra vires, and void.

The authorities relied on in support of complainant's contention appear to me to be clearly distinguishable from the case at bar. Without referring to them all, those principally relied on may be distinguished as follows:

In Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, in which it was held that a statute, empowering the city of Omaha to contract for the construction and maintenance of "waterworks on such terms and under such regulations as may be agreed on," authorized the city, as one of the terms of an ordinance constituting a contract for the construction of waterworks, to provide for the rates at which the contractor should furnish water to private consumers, there was, in the first place, no attempt to confer any exclusive privilege and no question of this character involved

in the case, while, in the second place, the Nebraska statute did not merely give the city the right to make a contract for supplying water to the city hydrants, but extended broadly to the construction and maintenance of a waterworks system, which necessarily authorized as a term of the contract the rates at which water should be supplied to all users, both public and private. The case would not be at all analogous to the one at bar, even if the question of an exclusive privilege had been involved, unless the Tennessee statute had similarly authorized the city of Murfreesboro to contract for a gas and electric plant, instead of being limited to the matter of street lighting; as it is, they are entirely different.

In Walla Walla City v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, in which the Washington statute expressly empowered the city of Walla Walla to erect or authorize the erection of waterworks for the purpose of furnishing the city or its inhabitants with sufficient supply of water and to permit the use of the city streets for the purpose of laying the pipes for furnishing such supply for not exceeding 25 years, it was merely held that this provision authorized the city, in a contract granting a water company the right to lay pipes for the period of 25 years, to agree that so long as the contract remained in force the city would not itself construct waterworks. There was, however, in this case no attempt to grant an exclusive franchise and no question of this kind involved, and the statute furthermore expressly empowered the city to authorize the erection of the waterworks for the purpose of supplying not merely the city but the inhabitants also.

And in the cases in the Supreme Court involving the Vicksburg waterworks it was merely held that under a Mississippi statute authorizing the city of Vicksburg to contract for the erection and operation of "a system of waterworks" to supply the city with water, and under the laws of Mississippi as construed by its highest court, the city might lawfully, as a term of the contract for the construction of such waterworks, give the grantee the exclusive right to erect and maintain waterworks for a definite period, during which it could not erect its own system in competition with that of the company (Vicksburg Water Co. v. Vicksburg, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102), and that it might also as a term of such contract lawfully fix the maximum rate at which water should be supplied to the inhabitants during the period of the contract. Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155.

The Walla Walla Case and the two Vicksburg Cases, it is further to be noted, were specifically discussed in the subsequent opinion in Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 394, 28 Sup. Ct. 135, 52 L. Ed. 257, and the first two were held to support and the last to be not inconsistent with the holding in that case, that a statute authorizing a town to make contracts for lighting the streets of the city did not authorize a provision in the contract giving the grantee the exclusive right of supplying the city and its inhabitants with light, heat, and power by means of electricity and gas.

I should add that while it is alleged in the complainant's bill that the ordinance of 1908 authorized Davis and associates to use the streets of the city for the purpose of furnishing light, heat, and power to the inhabitants of the city, "and also to the city should it desire to take the same," I do not find this latter provision in the ordinance itself, which is made part of the bill as exhibit No. 5; the right conferred thereby appearing to be limited to the furnishing of electricity to the inhabitants of the city for these purposes. Sections 1, 2, 3, and 9. As there is, furthermore, no allegation in the bill that the city desires to take any heat, light, and power from Davis and associates, or that any such action is contemplated or threatened, I am of opinion that the allegations of the bill, read in connection with the exhibit, are not sufficient to predicate any relief in reference to this matter upon the mere possibility that this question may hereafter arise, and have therefore not considered the question whether the power given the city to make contracts for its street lighting implies the power, as an incident of such contract, to grant the exclusive privilege of supplying the city itself with gas and electricity, for light, heat, and power, during the period of the contract.

3. Holding therefore that the second ground of the demurrers is well taken, and that the bill should be hence dismissed, this necessarily disposes of the application for the preliminary writ of injunction.

A decree will, accordingly, be entered sustaining the second ground of the demurrers, and dismissing the bill at the cost of the complainant.

UNITED STATES BANK v. CITY OF KENDALL.

(Circuit Court, D. Kansas, Second Division. June 6, 1910.)

1. MUNICIPAL CORPORATIONS (§ 51*)—DISSOLUTION.

Where a municipal corporation has once been organized, it does not become dissolved by a mere failure to elect officers, or by a failure of such officers elected to perform corporate functions, but, for the purpose of being sued for corporate debts, continues to exist per se.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 138–140; Dec. Dig. § 51.*

Dissolution and reincorporation—effect on indebtedness, see note to City of Uvalde v. Spier, 33 C. C. A. 506.]

2. PROCESS (§ 141*)—SERVICE—RETURN—RIGHT TO ATTACK.

Where, in a suit against a city, the marshal returned that he had served the writ by delivering a true and certified copy to J., mayor, and there was no attempt to charge such officer with an individual liability, the marshal's return was conclusive on the defendant until vacated in the regular course of procedure, and J. had no capacity to appear specially and object to the service on the ground that, though he had been elected mayor of the city, the election was illegal, and that the city had passed out of existence.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189–192; Dec. Dig. § 141.*]

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

Action by the United States Bank against the City of Kendall. On motion of J. E. Johnson to set aside the service. Denied.

Charles Blood Smith, for complainant.

PHILIPS, District Judge. The plaintiff brought an action in assumpsit against the defendant, a municipal corporation of Hamilton county, Kan., to recover judgment on certain improvement bonds and coupons issued by it. Writ of summons was duly issued thereon, directed to the United States marshal of this district, who made the following return thereon:

"Received the within writ March 21, 1908, and served the same upon the within-named city of Kendall, in the county of Hamilton, in the state of Kansas, by delivering to J. E. Johnson, mayor, personally, a true and certified copy of this writ with all indorsements thereon, at Randall, Kan., on the 24th day of March, 1908."

There was no appearance by the defendant at the time as required, or at any other time. But at the return term the said J. E. Johnson, appearing only for the purpose of the motion, filed motion to set aside said service of summons, on the ground that he had never been, and is not now, mayor, officer, or representative of any kind or in any capacity of the defendant city; that the said city had been for over 15 years last past, and still is, incapacitated from appearing herein as a municipal corporation; that it had ceased to exist as such for a long time prior to the commencement of this action. With the motion the said Johnson presented his affidavit showing that he resides about one-quarter of a mile west of the boundary line of what is known as the city of Kendall; that he had not resided therein for four years; that he is not the mayor of said city or town, and never had been; but admits that there had been some sort of an election held in said town about 12 years ago to elect a mayor and city council, but that the same was not legally called or held; that at said pretended election he had been elected mayor, but was never lawfully notified thereof; that he had never qualified as such mayor; and that said town had not had for about 15 years any acting mayor or city council. The plaintiff has moved to strike from the files said motion, for the reason that said Johnson is not a party to the suit, has no interest in the controversy, and, therefore, the motion is impertinent.

No question is made that the service of summons on said Johnson as mayor of the defendant city was not in form and substance conformable to the statute of Kansas. Therefore the return of the marshal is conclusive on the defendant, until set aside and vacated by order of court in due and regular course of procedure.

The question to be decided is: What right or standing in court has said Johnson to move for the vacation of said return? He is not a party to the action, and does not disclose any interest whatever in the controversy. He does not claim to be a resident within the corporate limits of the defendant city, nor does he disclose that he has any property interests therein to be in any wise affected by the judgment against the city. No judgment is asked against him, and none can be rendered against him in this action.

It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein. Indeed, it would seem to confound the reason of the law, in a mere action at law, requiring pleadings to make up issues to be tried between the parties named in the action, that one not interpleaded as a party, neither for nor against whom the court could render any relief or judgment, could, sua sponte, come into the litigation for any purpose. If this motion be denied, Johnson could not sue out writ of error thereon, as there would be no final judgment. What standing would he have to prosecute a writ of error to have final judgment reviewed to which he would not be a party, and by which he would not be aggrieved? If he have no such right, he does not sustain the relation of a litigating party to any phase of the matter in controversy.

The case of Estate of Aveline, 53 Cal. 259, is apposite. A public administrator had defaulted. A proceeding was brought in the probate court against him by the successor. The estate in question was not settled at the expiration of the term of office of the defendant, in 1874. In 1876 he obtained an order for the sale of certain property of the estate which he sold. Afterwards he left the state without accounting therefor, and thereupon the probate court ordered the successor to collect the amount from the sureties of the defaulting administrator. The sureties appeared and filed an application to set aside the order of the probate court, for the reason that no citation had been issued to the defaulting administrator. The court held "that one who is not a party to a proceeding cannot make a motion therein." In the course of the opinion the court said:

"The sureties, however, were not parties to the proceeding which eventuated in the order of the 24th day of March, 1877, determining the amount due from Rogers as such administrator of the estate; and were not authorized in their own names to move that the order be set aside, and, therefore, their motion to that effect was properly set aside."

There was certainly more reason for the motion made by the sureties, who were interested in the result of the pending litigation, than for the motion of Mr. Johnson, who is in no wise interested in the result of this litigation.

In Piggott v. Kirkpatrick, 31 Ind. 261, it was decided that a motion to dismiss the action because of some defects in the petition could not be made by one not a party to the suit, nor could he be regarded as amicus curiæ.

So in Howell v. Railroad Co., 79 S. C. 493, 60 S. E. 1114, the syllabus recites that:

"Service of summons and complaint would not be set aside on the motion of one not a party to the action."

The court said:

"Copies of the summons and complaint were served on A. S. Morrall, as agents of the defendants, whereupon he made a motion before his honor, Judge Watts, to set aside the service as to all the defendants, except the Atlantic Coast Line Railroad Company, on the ground that he was not the agent of said defendants, and that they had ceased to exist. The motion was re-

fused on the ground that A. S. Morrall was not a party to the action. The order of the circuit judge is sustained by the case of Copeland v. Insurance Co., 17 S. C. 116. See, also, Beattie v. Latimer, 42 S. C. 313, 20 S. E. 53."

Pertinent to this rule is the language of the court in O'Mahoney v. Belmont, 62 N. Y. 133, where a receiver had been appointed while the adverse parties were endeavoring to compromise the matter of such appointment as made without their consent. In the opinion the court said (pages 142, 143, of 62 N. Y.):

"Where such a right exists, it is usually called in exercise upon the application of one or more of the parties in interest. While the court may upon its own motion nominate a receiver where the case requires it, such a proceeding cannot according to the regular practice be inaugurated and conducted by outside parties, who have no connection with the case, or interest in the subject-matter of the litigation. A person not having any interest cannot propose a receiver, and it is contrary to the orderly and regular proceedings of a court of justice to allow a stranger to participate in a motion for such an appointment."

Equally pertinent is the holding of the court in Steinhaus v. Enterprise Vending Machine Co., 39 Misc. Rep. 797, 81 N. Y. Supp. 282, in which the court said:

"The reason of the rule permitting appearance and answer is to enable a person wrongfully served, and yet sought to be held, to plead that he is not liable to the plaintiff because he is not the person against whom the plaintiff's alleged claim exists. In the present case, William N. Funk, before he made his motion, had been notified in writing to the effect that no claim was made against him individually, which protected him completely, and yet he attempted to compel the plaintiff to accept an answer, which, in addition to a denial of any connection on his part with the defendant corporation, also contained a general denial of the merits of the complaint. This attempt was not made in self-protection, but unmistakably in the interest of the defendant corporation, for in his affidavit he averred that 'plaintiff's attorneys intend to enter judgment against the said Enterprise Machine Company,' and then asked that 'all proceedings on the part of the plaintiff and his attorneys be stayed in the above-entitled action until five days after the service of notice of entry of an order determining this motion.' William N. Funk should not have been permitted to succeed in this attempt to answer upon the merits for the benefit of the defendant exclusively. Nor should the defendant corporation be permitted to question the validity of the service in the underhanded manner in which it was attempted."

In Life Association v. Fasset, 102 Ill. 315, in a suit against the corporation certain lands were attached. Thereafter the superintendent of insurance of another state entered special appearance, by leave of court, in the attachment proceeding, for the purpose of presenting suggestions of the dissolution of the corporation under legal proceedings therefor in his state. Motion, filed by the plaintiff in the pending suit, to strike said motion from the files, was sustained.

With some force it is urged in opposition to the foregoing general rule the plea of necessity to prevent a conceived injustice, and an invocation of the doctrine of estoppel imposed upon the plaintiff, that, while claiming the defendant corporation is brought into court by service of process on Johnson as mayor, he ought not to be heard to deny the right of Johnson to come in and assert that he was not mayor. Counsel, with keen humor, suggests that Johnson ought not to be stigmatized as ever having been mayor of an incorporated community that

had lapsed into a "prairie dog town," without the privilege of his "day in court" to vindicate his wounded pride. But a man's sensibility may be quite apart from a legal right.

The case principally relied upon to support Johnson's contention is Kelley v. Mississippi Central R. Co. (C. C.) 1 Fed. 684. It is somewhat difficult to comprehend the force and applicability of the discussion of Judge Hammond for the reason that the facts out of which the proceeding arose are not stated. One thing, however, is manifest: The suit was against a railroad company, and it is inferable that the person to whom the writ of summons was delivered was a share holder in the private corporation, and, as such, it was assumed that he had such interest in the corporate assets and property to be affected by a judgment against the corporation as ought to entitle him in advance to challenge the truth of the officer's return; otherwise, as the corporation was extinct in so far as there were no existing officers to represent it, a judgment against it would preclude any subsequent inquiry respecting such preliminary jurisdictional fact.

If the corporation as a legal entity was extinct, a judgment against it would be unavailing. Thornton v. Railway, 123 Mass. 32. Therefore there would be no occasion to invoke an appeal to the inexplicit and undefined law of ex necessitate. The only American authority cited by the learned judge tending to support the first proposition is that of Callender et al. v. Painesville & Hudson R. R. Co., 11 Ohio St. 516. The suit was against the defendant railroad company, a corporation, to recover damages for breach of contract. The writ of summons was served by leaving a copy at the principal business office of the defendant at Painesville. One Steele, on whom the service was made, or to whom the service was delivered, filed motion therein stating that he was a member and the secretary of the company, and resided at Painesville, in Lake county; that the said railroad company is not an incorporated company; that it had for its chief officer one Avery, whose usual place of business was at said Painesville, on whom service could have been had; that said railroad company is not a corporation, but only an association of persons residing in Painesville; and that the organization certificate was insufficient. He set out the certificate of organization in his affidavit.

The court in its opinion said:

"It is always the right of a party in a case to invoke the action of the court in this manner, for proper cause. And this right of making and being heard on his motion has also very properly been extended by courts to those having an interest in the subject-matter, though not parties. Thus, in actions of replevin, attachment, and in cases of distribution of money, it has been the practice to entertain and hear motions made by persons in interest, though strangers to the record."

The court then quotes the statute of the state authorizing a motion in an application for an order to the court or judge, "by any party to a suit or proceeding, or one interested therein." The opinion then proceeds as follows:

"In applications of the kind, the court will judge of the relation of the party so making the motion to the subject-matter of the action or proceeding; and the entertaining of the motion is an act of discretion on the part of the court. I think that the person making the motion in this case is certainly

not shown by the motion to have been a mere intruder. Steele represents himself, in his motion, to be a member of an unincorporated company, against which judgment is sought in the action. And, if so, a judgment rendered against the company, by the name of the company, would be a judgment against all the members collectively, including him as an individual member of the association. Any member of the company, under these circumstances, I think, might very properly be admitted to make this motion, and be heard upon it, in the case."

That case does not by any means support the right of Johnson. He was not a member of the defendant municipal corporation. He says he does not reside within its limits. He does not appear to have therein any property interests possibly to be subjected to the payment of any judgment against the city.

The case of Rand et al. v. Proprietors of the Upper Locks and Canals in the Conn. River, 3 Day (Conn.) 441, was a suit against a corporation wherein the writ commanded the sheriff to summon James Bull, one of the principal proprietors and directors of said company, and as proprietor of the Upper Locks and Canals of the Connecticut River in the County of Hamilton. The corporation itself put in a plea of abatement for the want of service. Bull also pleaded in abatement that no service was made upon the corporation only by leaving a copy with James Bull of Hartford, Conn.; whereas, the corporation was established only within the jurisdiction of Massachusetts. No question was raised as to Bull's right to so plead. It was sufficient that the corporation itself interposed the plea of abatement. All the court said in its opinion is in the following paragraph:

"In this case the writ and process has been no otherwise served than by leaving a copy thereof at the usual place of abode of James Bull of Hartford, Conn., who is described therein as one of the principal proprietors, and one of the directors of the corporation. Serving a summons upon a private individual of a corporation is not due and legal notice to the corporate body."

Neither is the right of Johnson aided by the ruling in the case of Mumma v. Potomac Co., 8 Pet. 281, 8 L. Ed. 945. The plea in abatement was signed by one Chase, as attorney for the bank against which judgment had been rendered, setting up the dissolution of the bank by the act of the Legislature of Indiana, and its extinction thereby. Not only was the plea thus made in effect in the name of the bank, but no question was raised by opposing counsel as to the right of the attorney to thus represent the bank. More than that, the parties to the pending suit filed an agreed statement of facts submitting the question of fact and law as to whether or not the corporation was nonexistent at the time of the rendition of the judgment against it. The court simply said:

"The dissolution of the corporation, under the acts of Virginia and Maryland, cannot, in any just sense, be considered within the clause of the Constitution of the United States as impairing the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts."

And further it was stated that by the act of incorporation itself it was made the duty of the president and directors of the company, so long as there shall remain any creditor of the Potomac Company, who shall not have vested his demand or stock in the Chesepeake & Ohio

Canal Company, to pay such creditor annually, etc.; so that there was provided an equitable mode of distributing the assets of the company among its creditors.

So, in Bronson v. La Crosse R. R. Co., 2 Wall. 283, 17 L. Ed. 725, the stockholders of the corporation were allowed to put in answer, nem. con., to protect their interests where the directors negligently or covenously failed to act. The court simply held that they could not be regarded as answering for the corporation itself. That in such case the court, in its discretion, can permit a stockholder to become a party defendant for the purpose of protecting his own interests against unfounded or illegal claims against the company.

"But this defense is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong."

The court further, to qualify the case, said:

"Although the appearance and answers of the stockholders were irregularly allowed by the court, as each was permitted to appear and answer in the name of the company, yet, as the defense set up is doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character."

The Supreme Court of Massachusetts maintains the doctrine that the fact that a person is a stockholder, or formerly a director of the company, and may be ultimately liable to pay judgments recovered against the corporation, does not give him the right to assume matters of defense to the action; that he is in no sense a party to the action, and he is only summoned in to afford him an opportunity of trying the incidental question whether any judgment obtained by the plaintiff shall be capable of being enforced against his goods and estate. Robbins v. Justices, etc., 12 Gray (Mass.) 225, 226; Byers v. Franklin Coal Co., 14 Allen (Mass.) 470.

It is also held in Townsend v. First Freewill Baptist Church, 6 Cush (Mass.) 279:

"That if the defendant intend to deny its existence, or its organization as a corporation, it must do so by plea in abatement, or in bar, under the old system of pleading; and since the statute abolishing special pleading, it must give notice of its intention to do so in a specification of defense."

In American Express Company v. Haggard, 37 Ill. 465, 87 Am. Dec. 257, Haggard sued the express company as a corporation; service upon the agent at Bloomington in the manner prescribed by statute. The agent came in and denied that he was the agent of such corporation, that he knew no such corporation, and on his affidavit moved to quash the return. Livingston et al. appeared and filed a plea in abatement, stating that they were engaged in the business of express carriers under the general name of the "American Express Company," asserting that it was never a body politic or corporate. The court said of the affidavit that its object was to raise the question as to whether the

defendants were a corporation; that this was a matter dehors the record; the question should be presented by plea in abatement, and not by motion. Thereupon counsel filed a plea in abatement in the name of Johnston, Livingston, Fargo, Wells, et al., setting up the fact that they were doing business under the name of the "American Express Company," but denying that it was a corporation. Demurrer to the plea was sustained, without otherwise passing on the question here involved.

Furthermore, the affidavit of Johnston in support of his motion does not assert that the defendant was never duly created a municipal corporation, or that it had ever been dissolved. It only represents that it had failed to elect a board of directors for a series of years, and that the attempt to nominate him as mayor was abortive. The statute of Kansas (Gen. St. Kan. 1905, c. 23, art. 5) declares how such corporation may be dissolved:

"First, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

By another provision of the statute it is provided that the term of all elective or appointive officers shall be for specified period, and until their successors are elected and qualified.

Dillon in his work on Corporations (4th Ed. vol. 1, § 166), speaking to this subject, says:

"Here it is the people of the locality who are erected into a corporation, not for private, but for public or quasi public, purposes. The corporation is mainly and primarily if not wholly an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. The qualified voters or electors have, indeed, the right to select officers; but such officers are the mere agents or servants of the corporation, and hence the doctrine of a dissolution by the loss of an integral part has, in such cases, no place. If all the people of the defined locality should wholly remove from or desert it, the corporation would, from necessity, be suspended or dormant, or perhaps entirely cease; but the mere neglect or mere failure to elect officers will not dissolve the corporation, certainly not while the right or capacity to elect remains. In this respect municipal corporations resemble ordinary private corporations, which exist per se, and consist of the stockholders who compose the company. The officers are their agents or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation."

See Welch v. Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 13,372.

It is matter of public history that some communities under municipal charters, with more enterprise than discretion—optimistic of the future, but little reckoning of the day of redemption—have in the past put upon open market bonds, garish with gilt and tempting with high rates of interest. When the confiding purchaser comes to demand payment he finds a bankrupt town. Under the suggestion of some leader resort is taken to the coup d'etat of either having the governing board resign, or the voters to forget to hold any more elections. So

that when the process server comes with the writ of summons the village school master appears and proclaims, "ilium fuit," suggesting a return of non est inventus. But the law says in such contingency the writ may be served upon the designated officer last in office. Salamanca Township v. Wilson, 109 U. S. 627, 3 Sup. Ct. 344, 27 L. Ed. 1055; Welch v. Ste. Genevieve, 1 Dill. loc. cit. 133, Fed. Cas. No. 17,372; Muscatine Turnverein v. Funck, 18 Iowa, 469. If in such contingency it be disputed that the person served was not such officer, de jure or de facto, the question may be tested by the undissolved corporation by recognized plea. If it has no representative to thus protect it, it is the author of its own misfortune. The way of the transgressor always has been and always will be hard.

It results that the motion is sustained.

DENVER ENGINEERING WORKS CO. v. ELKINS et al.

(Circuit Court, W. D. Pennsylvania. July 29, 1909.)

No. 66.

1. CORPORATIONS (§ 398*)—CORPORATE ACTS—ACTS OF STOCKHOLDERS.
   Stockholders of a corporation cannot enter into contracts with third persons binding on the corporation, which can act only through its directors.

   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1593–1594; Dec. Dig. § 398.*]

2. SALES (§ 384*)—CONTRACT—BREACH—DAMAGES.
   Where a purchaser of a part of the property of a corporation failed or refused to carry out the contract, so that the corporation still retained the property sold, the purchaser was liable to the corporation, not for the price he had agreed to pay, but for damages for breach of contract consisting in the difference in the value between the property and the contract price.

   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 1098; Dec. Dig. § 384.*]

3. ASSIGNMENTS (§ 89*)—FOR COLLECTION.
   M., having contracted to purchase part of the property of a corporation indebted to plaintiff, and desiring to use such debt in settlement of the purchase price, obtained from plaintiff without consideration an assignment of its claim against the corporation, which agreed to accept plaintiff's claim in part payment. The contract of sale, however, was never carried out by reason of the purchaser's default, and thereafter, notwithstanding the corporation's insolvency, the claim was reassigned to plaintiff. *Held*, that the original assignment to M. was for collection only, and hence, on the sale not being consummated, the corporation's agreement to accept the claim in part payment of the price did not constitute a satisfaction of plaintiff's claim.

   [Ed. Note.—For other cases, see Assignments, Cent. Dig. § 137; Dec. Dig. § 89.*]

4. PRINCIPAL AND SURETY (§ 102*)—ASSIGNMENT OF CLAIM—DISCHARGE OF SURETY.
   Assignment of a claim against a corporation to a purchaser of a part of its assets for collection only, to be used as a payment of part of the price, but which was not so used because of a failure of the sale, though the corporation had agreed to receive it as such, did not constitute a

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

discharge of sureties for the corporation's payment of the debt; there being no time when the creditor was under a binding obligation not to sue the principal, under the rule that the release of a surety without payment of performance can only result from such act or omission of the creditor which proves or may prove injurious to the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 181–185; Dec. Dig. § 102.*]

5. PRINCIPAL AND SURETY (§ 129*)—SECURED SURETIES—DISCHARGE.

Where defendants became sureties for the payment of a corporate debt for machinery purchased, which the corporation on the day before the contract of suretyship was made had placed on the part of its property which it assigned to defendants, defendants thereby acquired property of the corporation for their indemnity, and while holding such property could not claim that they were discharged from liability because of an assignment of the claim to a prospective purchaser of a part of the corporation's property and an agreement by the corporation to receive the claim in part payment.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 366–372; Dec. Dig. § 129.*]

Action by the Denver Engineering Works Company against John P. Elkins and another. Judgment for plaintiff.

Griggs, Baldwin & Pierce and Martin Conboy, for plaintiff.
Watson & Freeman, for defendants.

ORR, District Judge. The plaintiff seeks to recover from the defendants as sureties $9,500, a balance of an account with interest alleged to be due the plaintiff for mining equipment and material claimed to have been furnished by the plaintiff to the Terrenates Consolidated Mining Company, a corporation of the territory of Arizona, under a contract between the plaintiff and said company. By agreement of the parties the cause was referred. It now comes before this court upon exceptions to the report of the referee, who found for the defendants.

Some time prior to January 30, 1903, the Terrenates Company was incorporated. It had assets of prospective value in the shape of mining properties. For convenience the properties have been classified as the old Terrenates mine proper and the San Antonio group of mines. On the date last mentioned, the said company entered into a written contract with the plaintiff, whereby the latter agreed to manufacture, sell, and deliver, and the former agreed to take and pay for, certain mining equipment and material. Afterwards in the spring of 1903 the defendants, with some of their associates, purchased a majority of the capital stock of the company and took over its management and control; the defendant Elkin being elected president of the company and the defendant Eyre its treasurer. On the 29th of August, 1903, said company, as appears by those portions of its minutes offered in evidence, caused to be transferred to the said Elkin and Eyre the San Antonio group of mines and all property, real, personal, and mixed, belonging to the company to be held by them in some trust relation for the use of the company. On the 31st day of August, 1903, the said Terrenates Company took up the matter of amending its contract with the plaintiff with the intention of limiting the material and apparatus to

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

be furnished by the plaintiff and limiting the amount to be paid therefor by said Terrenates Company. The plaintiff agreed to this alteration by which the amount agreed upon to be paid to the plaintiff for the apparatus thus agreed upon to be furnished was $15,956, of which $6,456 should be paid within 10 days after presentation of bills of lading, and the balance, $9,500, within 30 days after the arrival of the apparatus at Parral, if in successful operation, and, in any event, within 60 days after such arrival, unless the apparatus should have been tried and proved unsuccessful in its operation. The said defendants, being in possession of the corporate assets transferred to them, did at the time of making the supplementary contract with the plaintiff, agree in writing by the hand of the defendant Elkin to become "responsible for the carrying out of the terms of the modified contract and the payment of the balance due thereon."

That the plaintiff performed the contract on its part is clear. It was never at any time seriously disputed. The defendants rely upon their plea of payment, which is in harmony with the averments in the affidavit of defense. The affirmative of the issue thus raised is therefore upon the defendants. See 1 Troubat & Haly's Practice, § 540, and the cases there referred to.

Pending the completion by the plaintiff of the supplementary contract, the Terrenates Company had under consideration various matters with a view to reorganizing or otherwise putting the properties in better shape for the benefit of those who were interested therein. A meeting of the stockholders was held on December 29, 1903. At that meeting there were several resolutions presented, two of which embraced two several propositions, both of which it seems necessary to consider. The first proposition was read by the defendant Elkin, and was an offer for the purchase of the title to the San Antonio group of mines and other property then held by the said defendants under the article of agreement hereinabove referred to as dated August 28, 1903. The second was a proposal from one Andrew D. Meloy for the acquisition of practically all the other assets of the said Terrenates Company, including the Terrenates mine proper. These two propositions were accepted at that stockholders' meeting. They were presented and accepted in the successive order as herein stated. They are so correlated one with the other that a consideration of the latter alone, as was done by the learned referee, would not be illuminating.

The substance of the first proposition is that the proposing syndicate should purchase the property held by Elkins and Eyre and pay for the same when good and sufficient deeds and conveyances were made and when titles had been vested in a corporation proposed to be formed; that the new corporation would assume payment of the then existing indebtedness of the Terrenates Company, assume the payment of money advanced to Elkins and Eyre on account of the machinery for the development work in the properties amounting at that time to about $33,000, take up certain outstanding notes, etc.; that the new company would take out a charter with certain shares of preferred stock and certain shares of common; that it should exchange stock of its company with the stockholders of the Terrenates Company upon a certain basis; that it should set aside in the name of a trustee to be

selected by the Terrenates Company a sufficient number of shares to make such exchange; and that the new corporation would agree "to furnish your company with power to operate your Terrenates mine, which is not included in this offer to purchase, at the actual cost of furnishing such power to your company, together with 6 per cent. interest annually on the investment in machinery and power plant added to such cost." The stockholders at that time assembled by resolution ratified and confirmed the plan as thus outlined and resolved that the board of directors through its proper officers be given full power to make all agreements, contracts, execute leases, deeds, etc., and do everything necessary to effectuate the proposition to make title to all of said property, real and personal, so that the indebtedness of the company may be canceled in the manner set out in said proposition. After such action, which was intended to determine the policy of the corporation with respect to the properties enumerated in the first proposition, the following resolution was offered by or on behalf of Andrew D. Meloy:

"Whereas, the proposition submitted by the board of directors to the stockholders with reference to the organization of a new company and the exchange of stock of this corporation has been approved by all the stockholders present in person or by proxy; and whereas, Andrew D. Meloy has made a proposition to the corporation to purchase from it all its stock so exchanged, including the stock in the treasury, and also all its rights and interests in and to the so-called 'Terrenates mine' proper, with all of the privileges, rights and leases thereof, and the right to the use of power as provided in the body of this resolution, for the sum of $15,000, and also has agreed that 28,000 shares of the stock of this company shall not be offered for exchange for stock in the new corporation under the plan proposed and adopted by the resolutions at this meeting: Now therefore be it resolved, by the stockholders, that this proposition be and is hereby accepted, and that the board of directors and the proper officers of the company are hereby directed to enter into a contract or contracts with the said Meloy which shall provide in substance as follows:

"(1) That all the rights of the company in and to the lease and option to purchase the said 'Terrenates mine' proper, and the right to the use of power from the new company (subject to its ability with the machinery now on the ground over and above what it may use for its own operations), upon the payment of the actual cost of producing such power, plus 6 per cent. per annum of the total cost represented by the entire machinery and power plant; or a fixed rental per horse power, if the parties may hereafter be able to agree upon same.

"(2) There shall be conveyed and assigned to Andrew D. Meloy at least 410,000 shares of the capital stock of this company, and as much more of said stock as may be turned into the new company by the stockholders of the Terrenates Consolidated Mining Company for exchange, together with the necessary assignments and transfers of said stock and the resignations of all the members of the board of directors and the officers of the company, and also the turning over of the minute books and other documents and papers in the possession of the company. It is understood and agreed that none of these acts herein specified shall take place until the formal contracts herein provided for have been executed and delivered, and the $5,000 provided to be paid has been fully paid, and the remaining $10,000 of the purchase money has been satisfactorily secured.

"(3) The said Meloy is to pay for the same the sum of $15,000, as follows: $5,000 upon the execution and delivery of the contract or contracts herein provided for, and the remaining $10,000 on or before the 1st day of July, 1904; the $10,000 last referred to to be secured satisfactorily to the new company upon the execution and delivery of the contract or contracts aforesaid.

"(4) Said Andrew D. Meloy also to agree that 28,000 shares of the stock of this company shall not be offered for exchange for stock of the new company, and the holders of at least 28,000 shares shall execute and deliver cotemporaneously with the execution and delivery of the contract or contracts by these resolutions provided for, a release to the new company of any and all claim or claims to the right of exchange of said 28,000 shares of said stock or any portion thereof, and also any and all claim or claims to any interest of any kind or character in and to the mines or property which are transferred or to be transferred to the new company.

"(5) It is understood that the 'Terrenates mine' proper is held under a lease and option to purchase, and it is also held subject to a contract with the consolidated Kansas City Smelting & Refining Company.

"The board of directors are hereby directed to prepare and enter into with the said Andrew D. Meloy a formal contract or contracts which are embodied substantially by the terms herein set forth. The contract or contracts by these resolutions provided for are to be executed and delivered on or before the 1st day of February, 1904; and until the $5,000 is paid, and the contracts executed and delivered, the possession and ownership of the property remains in this company, and all rights incident thereto."

This resolution was not quite, but almost, unanimously adopted by the stockholders. Said Meloy voted his own shares in favor of it and voted the shares for which he held proxies.

The referee held that this offer by Meloy and acceptance by the stockholders at the stockholders' meeting constituted a valid contract binding upon the corporation, as well as upon Meloy, and held that by such stockholders' action in which Meloy participated, and under the very terms of the resolution itself, Meloy became bound to pay absolutely and unconditionally the sum of $15,000. To this resolution of the referee assent cannot be given. Meloy's plan necessarily depended upon the carrying out of the first proposition presented at the stockholders' meeting, which was to be carried into effect by the board of directors. Particularly it contemplated the carrying out of the first proposition with respect to the power to be furnished by the new corporation to operate the Terrenates mine, and it contemplated the acquisition of stock which would be surrendered for shares to be issued by the new corporation intended to be formed as indicated in the first proposition.

The referee has gone a long way in arriving at the conclusion that the direction in the second resolution looked to the carrying out of contracts by the board was a direction looking to the carrying out (through further contracts) of an already existing contract, which the resolution itself disclosed. All present at that meeting could not have had other views than that an actual contract was to be entered into in pursuance of the stockholders' resolution, not only from the complexity of the matters therein and the reference to contracts to be entered into by the board, but also from the principle so commonly recognized that the stockholders of a corporation cannot enter into any contract binding the corporation. The law seems clear that stockholders cannot enter into contracts with third persons on behalf of the corporation. Such contracts must be entered into by the directors. The law is well stated in Cook on Corporations, § 709, and cases cited in the notes. See particularly Humphreys v. McKissock, 140 U. S. 304, 312, 11 Sup. Ct. 779, 35 L. Ed. 473.

The importance of noting the relation of Meloy to the Terrenates Mining Company is observed by a consideration of the following facts: In November of 1903, the Terrenates Company had paid to the plaintiff on account of the amount due or to become due on the supplementary contract $6,456, leaving a balance of $9,500, which would become due in acordance with the terms of the contract. Meloy having made his proposition to the corporation, knowing that in time, if everything were consummated, he would have $15,000 to pay, and knowing the representatives of the plaintiff, suggested to the plaintiff that the plaintiff assign to him its claim under the supplementary contract, so that he could use it when he came to pay the $15,000 as a part thereof, and representing to the plaintiff that he would thus be able to secure payment for them of the balance soon to become due under the contract, the plaintiff thereupon executed and delivered to the said Meloy, without consideration, such assignment under date of February 3, 1904, and notified the Terrenates Mining Company, through the said Elkin and Eyre, of such assignment, and that the said Andrew D. Meloy was authorized "to receive all sums due or to grow due thereon, and to receipt therefor and discharge the same as fully as we ourselves might do."

The officers or directors of the Terrenates Company and Meloy never signed a contract such as contemplated by the Meloy resolution. The subsequent negotiations between them resulted in a parol contract. Negotiations were had looking to the final consummation of the arrangement. The certificates of stock of the Terrenates Company never left the possession of the defendants. The contract relative to the use of power, although signed by the new corporation, called the United States Mining Company, was never completed by the execution of it on the part of the other contracting party. The resignations of the directors, being qualified "to take effect when the contracts provided for in the resolution of the stockholders and the shares of stock therein named have been transferred," did not become effective. The minute books and other documents and papers in the possession of the company were never turned over. Other papers were prepared to be, but never were, executed by Meloy. Meloy did not carry out his part of the arrangement. He therefore became liable to pay, not the price, but damages for the breach of his contract. "The general rule of the English law, and of many states in this country, denies an action for the price unless the property has passed, and the reason for the rule is plain. As the seller still is owner of the goods, he ought not to be given also the price for them. His damage is the difference in value between what he now has, namely, the goods, and what he would have had, if the defendant had not broken his contract, namely, the price." Williston on Sales, § 562. Note the following Pennsylvania cases: Unexcelled Fire Works Company v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; Jones v. Jennings, 168 Pa. 493, 32 Atl. 51; Puritan Coke Co. v. Clark, 204 Pa. 556, 54 Atl. 350.

Having in view, then, the nature of the liability of Meloy if, as happened, he should refuse to carry out his contract, let us consider

the application by the defendants of the plaintiff's claim as a credit upon such liability, by which application defendants insist the plaintiff's claim has been paid in full. Prior to May, 1904, Meloy had continued negotiations with the defendants and had proposed that the defendants should accept the plaintiff's claim as part payment of the money to be due by him. Beginning with May the negotiations were continued by one Muhleman, as attorney in fact for Meloy. No changes in arrangements were suggested. In a proposed "contract of settlement," prepared by the defendants for the United States Mining Company, party of the first part, it was provided: "The first party will receive in part payment" the claim of the plaintiff. Under date of July 5, 1904, the defendant Elkins wrote to Muhleman:

"In concluding the deal it will be necessary for the following papers to be executed: (1) The release by Andrew D. Meloy representing 28,000 shares of the stock of the Terrenates Consolidated Mining Company. (2) The power contract which has already been agreed to. (3) The contract in reference to right of way. (4) The contract of settlement, a copy of which is herewith inclosed. (5) You will hand to us at that time original power of attorney, executed by Andrew D. Meloy, to M. L. Muhleman, giving him power to close out all contracts."

This letter and the contract of settlement contains no agreement for an actual present set-off of one demand against the other.

Another paper to be executed on final settlement, as corrected in the handwriting of the defendant Elkin, is as follows:

"I hereby acknowledge to have received payment in full of the accompanying claim of the Denver Engineering Works Company for $9,500, and release John P. Elkin and T. L. Eyre and United States Mining Company from all and every manner of liability on account of the same. Witness my hand and seal in the city and state of New York, this ——— day of ———, 1904. In the presence of ———."

Between the 5th and 13th days of July, 1904, the defendants credited Meloy on their books with the plaintiff's claim, and thereby wiped out their obligation to the plaintiff. I am unable to find sufficient evidence in the case of their right or authority to do so. It was clearly the intention that the claim should be wiped out when the agreement would be consummated, but not before.

The matter having "apparently died a slow death and disappeared," as Mr. Muhleman puts it, the plaintiff received a reassignment by Meloy of his claim and later brought this action.

The referee has also found that the defendants were discharged as sureties because the Terrenates Company, the principal, was insolvent in February, 1904, and because the plaintiff had put it out of his power to sue by its assignment to Meloy. This defense should not be sustained, not only because it does not appear in the affidavit of defense, as required by the rules of this court, but also because it is without merit. It must be remembered that the assignment to Meloy was without consideration for purposes of collection only. That being the case, plaintiff had not deprived itself of the right to sue the principal. But even if it had so deprived itself, the defendants were not discharged from liability because the sureties were not prejudiced thereby. The release of a surety without payment or performance can only result from some act or omission by the

creditor which proves or may prove injurious to the surety. 1 Story's Equity Jurisprudence, § 325. Even delay on the part of the creditor, where no valid contract for such delay exists, will not discharge the surety. Id. § 326. This is upon the theory that such delay may be beneficial to the surety. In this case at no time was the creditor or his assignee under binding obligations not to sue the principal.

Another important fact is shown by the minutes of the Terrenates Company. It appears that the machinery, etc., for which the debt was contracted, was placed on that part of the property which said company had assigned to the defendants the day before the contract of surety was made; that the right of the said Terrenates Company to the money and securities to be paid and delivered by Meloy were also assigned to the defendants and their associates; that nothing remained in the said Terrenates Company but the Terrenates mine proper. It is seen therefore that the defendants had in their hands and control assets of the principal with which to pay and discharge their liability upon the contract. The conclusion is irresistible that because of the payments made and liabilities incurred by the defendants, including the one in suit, the Terrenates Company had placed such assets in their hands for their security and indemnity.

A careful consideration of this case in all its aspects presented by the testimony, the report of the referee, and the arguments and briefs of counsel, lead me to but one conclusion; that is, that the exceptions to the report of the referee must be sustained, and that judgment must be entered for the plaintiff for the amount of its claim with interest from April 1, 1904, at which time there is no doubt the plaintiff was entitled to receive the balance due upon this contract.

It is therefore ordered that judgment be and is hereby entered in favor of the plaintiff and against the defendants in the sum of $12,536.85.

In re MEDINA QUARRY CO.

(District Court, W. D. New York. June 17, 1910.)

No. 2,035.

1. BANKRUPTCY (§ 175*)—FRAUDULENT CONVEYANCES—LEASE TO NEW CORPORATION.

Where, after the insolvency of a quarry company, and within four months prior to its adjudication in bankruptcy, a new corporation was organized at the instance of a bondholders' committee to take over the insolvent's assets and operate the quarries, and a lease of the insolvent's property to the new corporation was made within the three-months period with intent to hinder, delay, and defraud the insolvent's general creditors, and the new corporation did not buy the insolvent's property in good faith, or give a present appropriate consideration therefor, the lease and transfer were void in bankruptcy, as provided by Bankr. Act July 1, 1898, c. 541, § 67 (e), 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 175.*]

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

2. BANKRUPTCY (§ 186*)—TRANSFERS—ACCOUNTING.
Where a new corporation, organized to succeed the bankrupt, took over its assets under a lease which was void for fraud as against creditors, and operated the bankrupt's property for a considerable period, the lessee corporation should not be treated as a trespasser in an accounting of its acts done under the lease, but was only liable for net profits earned after allowance of expenditures other than taxes.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

3. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE.
Where, on the insolvency of a corporation, a bondholders' committee was formed with which bonds were deposited, the title to the bonds so deposited being vested in the committee which was authorized to act in their discretion for the benefit of the bondholders who subsequently accepted the bonds and stock of a new corporation therefor, there was no such novation as precluded the committee, on using the bonds in part payment for the assets of the bankrupt corporation, to prove the balance of the bonds as an unsecured claim against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

4. BANKRUPTCY (§ 336*)—CLAIMS—AMENDMENT.
A claim against a bankrupt alleged to be defective because verified by an attorney who failed to assign a reason why it was not personally verified by the claimant as required by bankruptcy general order 21 (89 Fed. ix, 32 C. C. A. xxii) was amendable.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 336.*]

5. CORPORATIONS (§ 478*)—MORTGAGES—PROPERTY COVERED.
A mortgage executed by a corporation recited that whereas the mortgagor desired to raise money to purchase certain quarries, machinery and other property, the mortgage should cover all the tenements, hereditaments, and appurtenances belonging to the property conveyed, or in any wise appertaining thereto, and all the estate, right, title, interest, property, possession, claim and demand in or to the same, and any and every part thereof, with the appurtenances and all other real property, and all easements, rights of way, buildings, fixtures, tools, appliances, rolling stock, machinery, plants, and franchises. *Held*, that the mortgage as against general creditors covered the after-acquired real estate and after-acquired tools, appliances, horses, hay, etc., and also profits of the business and stone quarried and inventoried after the corporation's assets had been leased to another corporation in fraud of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. § 478.*]

6. BANKRUPTCY (§ 312*)—SECURED CREDITORS—FRAUD—SURRENDER OF SECURITY—PROOF OF CLAIM.
A committee representing bondholders of a bankrupt corporation by conniving to transfer the property so as to hinder and delay creditors, did not deprive itself of its right to a pro rata share of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 312.*]

7. BANKRUPTCY (§ 310*)—SECURED CREDITORS—PROOF OF CLAIM.
Mortgage creditors of a bankrupt were entitled to prove their claims without surrendering their lien, and if on foreclosure the proceeds of the sale were insufficient to pay the debt in full, they were entitled to share pro rata in the distribution of the general assets, as to the balance.

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

In the matter of Medina Quarry Company. On exceptions to the report of the special master. Affirmed.

The Medina Quarry Company (hereinafter called the Medina Company) was incorporated in March, 1902, and conducted stone quarries in Orleans county,

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

N. Y. Its capital stock was $2,000,000, for which bonds were issued amounting to $1,200,000, secured by a trust mortgage on all its property, real and personal, and such as thereafter should be acquired. The bond issue was to raise money to pay the purchase price of the quarries, machinery, and other property. Out of the total sale of bonds $410,980 was expended in the purchase of real and personal property and the balance, $264,700, remained in the treasury of the company. After purchasing certain other properties, and paying therefor out of the bonds in the treasury of the company, there remained in the treasury on April 4, 1904, bonds amounting to $56,500. On April 1, 1904, a partial default was made in the payment of interest on the bonds, and on October 1, 1904, the company completely defaulted in the payment of interest upon its bonded indebtedness. The insolvency of the company was recognized by the directors and understood by the bondholders. The company, however, continued business with borrowed capital until late in the year 1904, when Kessler & Co., bankers, assumed charge of the business. To secure advances made by Kessler & Co., amounting in the aggregate to $85,000, chattel mortgages were executed by said Medina Company to said company on quarried stone, and assignments of bills receivable were also made to it. A bondholders' committee of 11 members was formed by the directors, and efforts were made to continue the business and to reorganize or readjust the affairs of the company. Subsequently the bondholders' committee and directors acting together organized the Orleans County Quarry Company (hereinafter called the Orleans Company), a corporation, and in the month of December, 1904, they caused to be transferred to it by bill of sale all the property and assets of the Medina Company under an agreement that the latter would pay full value therefor, said value to be ascertained by appraisers. No appraisal, however, was made nor any consideration paid whatever although the Orleans Company took possession under bill of sale and lease and conducted the business up to February 1, 1906. Soon afterwards the attorneys for the Medina Company and several of its officials to whom the company was indebted filed a petition in involuntary bankruptcy against the Medina Company and it was subsequently adjudicated bankrupt in this court. The plan or scheme of reorganization of the affairs of the Medina Company, as indicated by a circular letter dated January 12, 1905, and mailed to the bondholders, was the formation of the aforesaid Orleans Company for the purpose of buying for the bondholders the property and assets of the Medina Company at foreclosure or bankruptcy sale. To carry out this intention the Orleans Company was capitalized at $600,000, and upon acquiring the property of the Medina Company as above stated, first-mortgage bonds were issued, amounting to $350,000, to be secured by trust mortgage upon all its property. Second-mortgage income bonds were also issued, amounting to $200,000, which it was agreed would be divided among such of the first-mortgage bondholders of the Medina Company as had deposited their bonds with the bondholders' committee of 11 members. In accordance with this intention a large number of such bondholders deposited their bonds with the bondholders' committee, the total thereof being $960,400. Subsequently the property and assets of the bankrupt were sold by order of the court to the Orleans Company for the sum of $228,000, and the bondholders' committee were allowed by order of the bankruptcy court to use the bonds to pay the purchase price to the extent to which said bonds were entitled to share in the distribution of the amount realized on the sale. After the sale the bondholders' committee filed a claim as unsecured creditors against the bankrupt for the difference between the par value of the bonds in their possession and the amount for which it was permitted to turn in the bonds in payment of the purchase price. Other facts are so fully stated in the opinion of the special master as to make it unnecessary to repeat them here.

William W. Storrs, for trustee.

Martin Conboy, for certain claimants excepting to report of special master.

Wilber E. Houpt, John J. Ryan, and Lincoln A. Groat, for certain unsecured claimants excepting to report of special master.

HAZEL, District Judge (after stating the facts as above). The matter comes before me on exceptions to the report of the special master to whom a reference was made to take testimony and report to the court on the issues presented. The issues are: (1) Whether the lease and bill of sale dated in December, 1904, by the Medina Company to the Orleans Company, and all claims arising thereunder, are valid or invalid; (2) whether certain claims presented against the bankrupt estate by certain individuals, the Orleans Company, and the bondholders' committee should be allowed as valid claims or expunged; (3) whether the chattel mortgages made by the Medina Company to Kessler & Co., creditor, on April 18, 1904, August 30, 1904, and December 23, 1904, and the claims arising thereunder are valid and subsisting liens. The master has reported inter alia that the lease and bill of sale made by the Medina Company to the Orleans Company within four months of the adjudication in bankruptcy was given with the intent and purpose on its part to hinder, delay, or defraud its creditors, and that the Orleans Company did not buy the property in good faith or give "present appropriate consideration therefor," and in his opinion, in which I concur, such transfers and conveyances were null and void, under section 67 (e) of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). And from the facts as found by him, based upon the manner in which the Orleans Company was organized, the acts of the bondholders and their interest in the new company, the evident purpose to defraud the creditors of the Medina Company by engaging in a pretended plan of reorganization, the occupancy of the quarries under the lease by the Orleans Company and its conduct of the business for one year under the lease, he concluded that the accounting by the Orleans Company should be on a basis of the earnings and profits during the time it occupied the property and conducted the business under the lease. The principal objection to the confirmation of the special master's report arises from the latter conclusion, it being strongly urged that the Orleans Company was chargeable and should be required to account to the bankrupt estate as a willful and intentional trespasser upon the lands of the bankrupt from the time it took possession under the bill of sale and lease in 1905, to the time of its purchase of the assets in the bankruptcy court. If the facts and circumstances justify the contention of willful and intentional trespass the rule of accounting adopted by the master in which he allowed the Orleans Company to credit itself with the expenses of operating the quarries, an amount aggregating $177,394.12, and requiring an account only for net profits amounting to $8,924.05, was obviously erroneous. Counsel for objecting creditors have directed my attention to many citations in the courts of the United States and of the state of New York which are claimed to disclose the principle upon which the question of equitable accounting should have been decided by the special master, but to follow along and closely differentiate such cases from the case at bar would be a work of supererogation, and perhaps involve the court in a maze of unnecessary difficulties. Hence I am content to have familiarized myself sufficiently with the facts and circumstances contained

in the voluminous record to enable me to determine that the leasing of the property of the Medina Company to the Orleans Company pursuant to plan of reorganization adopted by the bondholders and directors, through a fraudulent transfer of property, was not a willful trespass and the application of the strict rule of accounting contended for, namely, that the bankrupt, besides the return or value of the property and assets, be awarded the profits thereof without making allowance to the Orleans Company for its expenditures by which such profits were earned, except the amount paid for taxes, is not warranted. The adjudications relating to mining claims or properties, for instance, where the mine has been wrongfully converted, and wherein no credits are allowed to the wrongdoer for improvements or services rendered by him while in wrongful possession seem to me to be entirely inapposite. So, also, the cases relating to wrongfully cutting timber on lands of another and then selling it to a stranger. In such cases the wrongdoer who has increased the value of the thing stolen, for example, by taking out the ore or sawing the timber into boards knowing it to have been wrongfully taken, cannot have his labor or his expenses paid as the price of the return to the original owner. As stated in Wooden Ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, quoting from Lord Hatherly in the House of Lords, in the case of Livingstone v. Rawyards Coal Co., 5 App. Cas. 25:

"There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement."

But this rigorous rule it will be noted is based wholly upon the felonious taking of a peculiar specie of property belonging to another, and in my mind is inapplicable to a case where the owner meaning to defraud creditors gives another who is a party to the fraud the right to enter and conduct the business of the transferror. The special master in my opinion properly accepted as a guide the equitable principle of accounting enunciated in Loos et al. v. Wilkinson, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 495, and therefore the exception is overruled.

The next question is based upon the exception that the bondholders' committee obtained an assignment of the Medina Company bonds from certain of the bondholders in trust, and, said bondholders having subsequently accepted the bonds and stock of the Orleans Company, that such acceptance was in legal effect a novation. The question is not entirely free from difficulty or doubt. The argument proceeds upon the theory that the bondholders who deposited or surrendered their bonds to the bondholders' committee received full equivalent in the new company, and are therefore estopped to receive anything on their claims from the bankrupt estate. Upon this subject the special master found as follows:

"XIII. The legal title to bonds represented by the said bondholders' committee was vested in said committee by each of the holders of said bonds at the time of the assignment thereof to said committee, and furthermore, each of the holders of said bonds of the Medina Company did make, constitute and appoint the said bondholders' committee as his attorney in fact to do any and all things it may deem necessary to be done to carry out the intention and purpose of the said bondholders' committee agreement, and that the acts of said committee were ratified and confirmed by said agreement by each of the said bondholders; that the signing, verification and proof of the said claim by the said bondholders' committee were authorized by each of the bondholders of the Medina Company whose bonds were placed with the bondholders' committee; that the bonds represented by the claim of the said bondholders' committee have been duly filed with the trustee of the bankrupt herein."

I am satisfied by the record that the bondholders who deposited their bonds with the bondholders' committee under the conditions contained in the printed circular letters of September, 1904, vested in such committee the legal title to the bonds with power and authority to do with them as they saw fit towards conserving the property of the Medina Company, and providing means for their protection. No evidence is found to show that a novation was intended or implied. The subsequent transactions indicated the intention of the bondholders' committee to buy the properties of the Medina Company with the bonds and then make a claim against the bankrupt estate as unsecured creditor for the difference between the amount allowed as dividends and the par value of the bonds.

In connection with this question the point is urged that the said claims for allowances filed herein were not properly authenticated or proved. They were personally verified by only eight out of ten members of the bondholders' committee, and by an attorney who acted as agent and proxy for M. B. Chapman and H. Leroy Randall, the two remaining members of the committee. The verification of the attorney failed to assign a reason why the claimants had not personally made it as required under general order 21 (89 Fed. ix, 32 C. C. A. xxii). I think in view of the relations of the bondholders and the committee as evidenced by their agreement that the filed claims sufficiently conform to the provisions of section 57 of the bankrupt law. While the verification by the attorney is thought defective yet under the doctrine of the cases of In re Roeber, 127 Fed. 122, 62 C. C. A. 122, and Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, an amendment to conform more strictly to the requirements of the bankrupt act and general orders would not be improper. This ruling also applies to the objection to the verification by Kilborn of the claim of Kessler & Co. While the irregularity was pointed out and insisted upon at the time of the filing with the referee and overruled by him, still upon the authorities cited, I think it is within the power of the court to permit the claimant to amend its claim. According to the objecting creditors the claims of Griggs, Baldwin & Baldwin, L. D. Baldwin, L. D. & A. J. Baldwin, Coler & Co., Burd S. Coler, Randall, Fancher, Scanlon, Edmund Seymour & Co., W. K. Gillette, Kessler & Co., and O'Brien & Co., have actually been paid in full by the Orleans Company, and they should therefore be disallowed herein.

As to the claims of Griggs, Baldwin & Baldwin, Leonard D. Baldwin, L. D. & A. J. Baldwin, the special master found on review of the testimony that such claims were not paid by the Orleans Company. as contended by the trustee. I concur in his findings of fact upon these various matters. As to the claims of Coler & Co. of $8,952.52, Randall of $8,877.75 and of Baldwin of $4,440.84, the special master found that the money paid them was advanced by the Orleans Company after they filed their claims of indebtedness and that in May, 1906, such claims were assigned to the Orleans Company. Under the circumstances there is no substantial reason why said claims should be allowed in this proceeding. Bradley v. Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426.

The next important question is whether the special master erred in holding that certain property of the bankrupt consisting of tools and appliances, etc., valued at $39,000, and two pieces of land described as parcels Nos. 27 and 28, bought by the Medina Company after the trust mortgage was delivered were covered by the lien and whether the general creditors should not participate in the distribution of such amount to the exclusion of the bondholders. The mortgage contains the following clauses:

"Together with all and singular the tenements, hereditaments, and appurtenances belonging to the property hereby conveyed, or in any wise thereto appertaining, * * * and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, to the party of the first part in or to the same, and any and every part thereof with the appurtenances and all other real property."

And further—

"all easements, rights of way, buildings, fixtures, tools, appliances, rolling stock, machinery, plant and franchises now owned by the company."

And in the opening paragraph:

"Whereas the said party of the first part desires to raise money for the purpose of purchasing certain quarries, machinery and other property," etc.

It will be noted that the language covers both real and personal property in general and specific terms, and from the last excerpt the assumption is not unwarranted that the creditors had notice of the scope of the lien when their course of dealing with the Medina Company began. Reliance is placed upon the decision by the Court of Appeals of this state in Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, affirming 109 App. Div. 406, 96 N. Y. Supp. 633, and New York Security Co. v. Saratoga Gas Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132, in support of this contention. In the New York Security Company Case the mortgage in addition to covering all the property and plant purported to include future earnings in the business and the product of manufacture. In default in payment of interest the mortgagee was empowered to enter and conduct the business and appropriate the income to the payment of the lien. The Court of Appeals at the close of the opinion stated the controlling principle as follows:

"We think that justice and equity are best promoted by limiting the right or lien of the bondholders to such earnings only as shall accrue after the

mortgage trustee of the receiver shall have actually taken possession. The earnings prior to that time should in equity be awarded to the general creditor."

In the Zartman Case, supra, the terms of the trust mortgage were not unlike the mortgage in controversy. There possession was taken by the mortgagee on default in the payment of interest a few days before proceedings in bankruptcy were instituted, and the primal question was whether the clause of the mortgage covering after-acquired personal property was enforceable as to the stock and material on hand at the time possession was taken under the mortgage. It was not questioned but that the lien of the mortgage covered the machinery, tools and appliances in the plant, and reading the opinion will show, I think, that the court did not intend to disturb its prior ruling that after-acquired securities, as distinguished from supplies, product, or material, and not in existence at the time of making the mortgage were equitably included therein. Central Trust Co. v. West India Co., 169 N. Y. 314, 62 N. E. 387; Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43; N. Y. Security & Trust Co. v. Saratoga Gas Co., 88 Hun, 569, 34 N. Y. Supp. 890, affirmed 157 N. Y. 689, 51 N. E. 1092; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Pennock et al. v. Coe, 23 How. 117, 16 L. Ed. 436.

Hence the special master was right in holding that the real estate, the lots above mentioned, the tools and appliances, the horses and hay, acquired after the date of the mortgage, are included in the lien. Assuming this to be the law as to after-acquired property, it is nevertheless insisted that the effect of said decisions is that the profits of the business wrongfully conducted by the Orleans Company in 1905, together with quarried stone or "stone inventoried" not covered by subsisting liens, and not in existence at the time the mortgage was made to secure bondholders, not only belong to the bankrupt estate, but, because of the failure of the bondholders to cause the prosecution of the foreclosure action, the general creditors only are equitably entitled to participate in the proceeds realized on sale of such properties. I am unable to accept this view. The bondholders, it is true, had rights under the mortgage of which they did not avail themselves, but under the bankruptcy law they still had the absolute right to relinquish their security and prove their debt in the bankruptcy court. They could have proven their claims without surrendering the lien, and if they had foreclosed the mortgage and the proceeds of the sale had been insufficient to pay the debt in full they were not barred from sharing pro rata in the distribution of the general assets. Such was the rule under bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517; In re Ruehle, 2 N. B. R. 175, Fed. Cas. No. 12,113), and is the rule under the act of 1898 (sections 57e and 57b). The bondholders' committee waived and surrendered its security, and elected to file claims in the bankruptcy court entitling it to participate in the distribution of the assets as general creditors. By conniving to transfer the property to hinder and delay creditors the bondholders' committee did not deprive itself of its pro rata share in the estate.

There remains to briefly consider the objection that Kessler & Co. received a preference within four months of the bankruptcy in that

bills receivable were assigned to said firm, they knowing of the insolvency of the Medina Company, and hence that their debt of $83,625, which was allowed by the master as an unsecured claim, should be rejected unless such preferential payments are surrendered. The transactions between the Medina Company and Kessler & Co., consisting of an agreement to advance to the company at different times large amounts of money, the three chattel mortgages giving the bankers the quarried stone or stone inventoried, the assignments of book accounts as collateral security for promissory notes and renewals thereof, and the question of priority of payment under the chattel mortgage of August 26, 1904, are detailed with considerable care in the opinion of the special master. His conclusion on the evidence that the two earlier chattel mortgages and the assignments of bills receivable were made in good faith, and that the chattel mortgage of December, 1904, upon future products to secure loan of $25,000, was an intentional preference is approved. I also concur in the reasoning which prompted the master to refuse priority of payment on the chattel mortgage, dated August 26, 1904.

In passing upon the principal exceptions argued at the bar by the dissentient creditors represented by Messrs. Houpt, Groat & Ryan, it was necessary to also familiarize myself with the exceptions filed to the report of the master by Mr. Conboy, counsel for other creditors and the bondholders' committee, and I have carefully considered them, but in my judgment they are without merit and are therefore overruled save as to the claim that the Orleans Company should be allowed $8,320.41, which it paid for stone on which the contractors are claimed to have had liens and the asserted mistake of charging the Orleans Company with certain items of stone shipped to Chapman & Company. These indicated errors counsel and the trustee in bankruptcy will doubtless be able to agree upon, and the order may incorporate the necessary provision in respect thereto. If no agreement is reached as to these items a hearing may be had in relation to the same on settlement of the order.

In closing I wish to add that the comprehensive findings of fact and conclusions of law by the special master, together with his able opinion have been of much assistance to me on this review. The objecting creditors have vigorously contended that the larger claimants and the bondholders' committee were parties to a willful and deliberate scheme to defraud the general creditors of the Medina Company and that therefore there were no equities in their favor on any of the questions herein presented, but in the solution of the various problems submitted and studied, the fact that the Medina Company from the time of its incorporation was in financial straits cannot be ignored. It is undeniable that the scheme to reorganize was fraudulent and designed to benefit the larger creditors and bondholders, but I think the special master comprehended the equities on all sides and from my point of view correctly stated the law. The trustee in bankruptcy has not opposed the confirmation; he frankly taking the position that the dispute had been fairly considered and decided by the master.

The report of the special master is affirmed.

STEPHENS v. GALL et al.

(District Court D. Kansas, First Division. June 6, 1910.)

1. CORPORATIONS (§ 370*)—POWERS—SCOPE.
The scope of a corporation's business is limited by its charter.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.*]

2. CORPORATIONS (§ 400*)—AGENT'S AUTHORITY—LIMITATION.
A corporation's agent has no implied authority to bind a corporation by contracts not within its charter powers.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1587; Dec. Dig. § 400.*]

3. CORPORATIONS (§ 379*)—POWERS—PARTNERSHIP RELATIONS.
A corporation chartered to buy and sell grain, etc., for its customers, cannot form a partnership relation with another.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1538; Dec. Dig. § 379.*
Power to form partnership, see note to Wallerstein v. Ervin, 50 C. C. A. 131.]

4. PRINCIPAL AND AGENT (§ 69*)—RIGHTS OF AGENT—INTEREST IN CONTRACTS.
An agent cannot use his fiduciary relation to obtain personal advantages from a contract made for his principal, and there can be no implied understanding between them of a joint interest in such contracts.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130-145; Dec. Dig. § 69.*]

5. PRINCIPAL AND AGENT (§ 69*)—AGENT'S ACTS—VALIDITY.
Acts of an agent tending to violate his fiduciary duty are not only invalid as to the principal, but are against public policy.
[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 69.*]

6. ACCOUNT (§ 10*)—JOINT RELATIONS.
Since an agent of a commission company could not make a valid brokerage contract with complainant whereby the company was made the agent's partner in the transaction and he would share in the profits, of which disability complainant knew, complainant cannot compel a joint accounting between the agent and the company.
[Ed. Note.—For other cases, see Account, Dec. Dig. § 10.*]

7. EQUITY (§ 228*)—DEMURRER—SUFFICIENCY.
Under the express terms of Equity Rule 31, a demurrer to a bill is insufficient when not accompanied by a certificate that it is well founded in law and by an affidavit that it is not interposed for delay.
[Ed. Note.—For other cases, see Equity, Dec. Dig. § 228.*]

Bill by William A. Stephens against J. E. Gall and the Christie Grain Company. On defendants' demurrers to the bill. Defendant Gall's demurrer sustained and the company's dismissed.

Francis C. Downey and J. B. Larimer, for complainant.
Wheeler & Switzer, for defendant Gall.
Getty & Carson, for defendant Christie Grain Co.

PHILIPS, District Judge. This is a bill in equity for an accounting. Its substantive recitations and allegations are that the Christie Grain Company, at the times in question, was and is a corporation

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

organized under the laws of Kansas, engaged in the transaction of a general brokerage business at Kansas City, Wyandotte county, Kan., including the business of purchasing and selling grain, stocks, and bonds for its customers; that the defendant Gall at the times in question was the agent of said Christie Grain Company, representative and correspondent thereof, authorized to represent said corporation in its business matters at Topeka, Kan.; that in August, 1907, the complainant entered into an agreement with said company, through its said agent Gall and with said Gall that the company and he as brokers of the complainant would purchase on his behalf corn, wheat, oats, and corporate stocks, or securities, known as Chicago, Milwaukee & St. Paul Railway stocks or shares, Union Pacific Railway stocks or shares, Great Northern Railway stocks or shares, Amalgamated Copper stocks or shares, and other stocks and securities too numerous to enumerate, the purchase money of which the defendants were to advance, the complainant to pay lawful interest thereon; that said property and securities so purchased were to be left in the hands and possession of the said brokers as security for money advanced the Christie Grain Company through its agent and representative Gall, and with said Gall, such sums of money as should be demanded from the complainant from time to time for the protection and reimbursement of the defendants, and to take, receive, and pay for grain, stocks, and securities upon demand of the defendants, and to pay defendants the customary commission and compensation for said services.

The bill then proceeds to state that between August, 1907, and April, 1908, the complainant directed the said company, through its agent Gall and said Gall, to make numerous purchases for him of corn, wheat, stocks, and other securities; that the complainant in compliance with request of the defendants paid to said company, through its agent Gall, and to said Gall, the sum of $2,700.50 in the course of their employment as such brokers; that they failed and refused to perform the commissions intrusted to them, and neglected to make purchases of various stocks as directed by the complainant; and that they falsely represented to the complainant that they had executed the commissions intrusted to them.

The bill further charges that various moneys confided by the complainant to the custody of the defendants were used by them for such purposes, but they falsely claimed that said moneys had been lost in investments made by them which resulted adversely and in loss to the complainant, or that the moneys had been applied in payment of interest on large sums of money which defendants had advanced for him under said contract, and that they had been compelled to sell the grain, stocks, and securities so purchased to make good balances on advances made by them; which the bill charges were false statements.

The bill further charges a failure and refusal of the defendants to render to complainant an accounting as such agents, and prays for disclosures and accounting.

To this bill the defendant Gall has demurred on the grounds: (1) That the complaint does not show that the complainant is entitled to relief prayed for by the bill against this defendant; and (2) that the

bill is exhibited against him and another defendant for several distinct and independent matters and causes which have no proper relation to each other for a joint accounting.

It must be confessed that this bill is somewhat unique, if not sui generis. So far as I am advised, it has no precedent in kind. It must, therefore, stand or fall as tested by established principles or reason of the law. It is to be kept in mind that in so far as the Christie Grain Company, a corporation, is concerned, the contract in question, claimed to have been made by it, was through Gall as its agent doing business for it at Topeka, Kan. The bill discloses that the business of the corporation was the purchase and sale of grain, stocks, and bonds for its customers. Its business was limited of course by its charter. Gall, the agent, had no implied authority to make any other kind of contract or enter into any other character of transaction than the purchase and sale of such grain, stocks, bonds, and securities from and for its customers. The entire commissions and profits arising from such brokerage business would inure to the benefit of the principal, in which Gall, as agent, on well-settled rules of the law of agency, could not participate. This fact, in so far as the allegations of the bill are concerned, the complainant was aware of when he dealt with Gall, for he knew that he was dealing with Gall as the agent of the defendant company. Yet the bill baldly asserts that Gall made the arrangement in question as agent for the corporation, and also for himself, whereby Gall consented as agent of the corporation with himself individually to act as broker for the complainant in a transaction in which he was to participate in the usual broker's commission with his principal, and this without any averment of knowledge thereof on the part of the principal, and without asserting any ratification thereof by the company. In other words, the agent of the company entered into a contract in effect of a copartnership relation between his principal and himself individually, whereby he and his principal are claimed to have become jointly liable as agents of the complainant, and whereby he was to share jointly with his principal in conducting a brokerage business, and sharing the fees and compensations with his principal.

Such corporation cannot enter into a copartnership relation with another person. Neither can a person enter into a contract with himself. And there is no rule of law more firmly rooted in sound policy and morals than that an agent cannot use his fiduciary relation to obtain for himself the advantages or rewards of a contract made in the name of his principal. Nor will the law imply an understanding between him and his principal of a joint interest in contracts made by him in his fiduciary relation.

"It is the primary purpose of the creation of an agency to authorize the agent to act for and in behalf of the principal. It is, therefore, the primary duty of the agent in executing the authority to so act as to secure to the principal the benefits to be derived from the performance, and to impose upon him the responsibilities arising therefrom. In other words, it is the primary function of the agent to bind the principal and not himself, to third persons, and likewise to bind such third persons to the principal and not to himself." Mechem on Agency, § 408.

Therefore it is axiomatic in the law of agency that it looks with jealousy upon all transactions of the agent "and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance." Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600. So Mechem on Agency, § 455, thus expresses the rule:

"Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal."

This doctrine, as stated by the court in Tisdale v. Tisdale, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775, "has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"

Gall without the consent and authority of the company could not, as its agent, purchase grain, stocks, and securities, and at the same time by agreement with himself as agent and in his own right for their joint benefit. Such a transaction was contrary to sound public policy, and this complainant, so far as it appears from the bill of complaint, knew at the time that Gall was claiming to act as agent for the defendant corporation, and as matter of law he knew that Gall was not authorized to enter into such arrangement so as to bind the company jointly with himself in his independent, individual character.

It is not necessary, however, for the court on this demurrer to decide whether or not if Gall agreed expressly or impliedly with the complainant that he would act for him, and so received the complainant's money, which he misapplied or failed to render an account of, he could be held liable in a separate action against him for his stewardship. What I do hold is that on the facts disclosed by this bill Gall, as agent of the Christie Grain Company, had no authority to enter into a contract with the complainant whereby he undertook to make his principal, a corporation, his partner in the transaction, whereby he could share in the commissions and profits arising therefrom; that, as the complainant knew at the time of the engagement of Gall's disability, he has no joint cause of action against Gall and the company for a joint accounting; that inasmuch as the liability of the two defendants, if any, arises out of and depends upon different facts and rules of law as applied to them respectively, they cannot be called upon after this fashion for a joint accounting. The demurrer is sustained.

The defendant Christie Grain Company has filed a separate demurrer stating as grounds thereof that it appears that the bill and its allegations are uncertain and indefinite as to what stocks the complainant claims were to be handled and purchased for him; what purchases were directed or ordered by him; what moneys were expended therefor by defendants or this defendant; what purchases were wrongfully reported by defendants to complainant; or which of the many engagements or many commissions intrusted to them this defendant failed to perform.

Why this defendant did not file a general demurrer to the bill raising the questions above discussed, instead of the special demurrer, is not perceived. But it is sufficient to say that this demurrer cannot be entertained for the reason that rule 31 of equity rules provides that:

"No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and that the plea is true in point of fact."

No such certificate to the demurrer is made by counsel, nor is it supported by the proper affidavit of the defendant that it is not interposed for delay.

In re MALLOY.

(District Court, W. D. North Dakota. July 20, 1910.)

1. HOMESTEAD (§ 23*)—EXEMPTIONS—REQUISITES—HEAD OF A FAMILY.
A bachelor, who is not the head of a family, is not entitled to a homestead exemption under the laws of North Dakota.
[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 32; Dec. Dig. § 23.*]

2. HOMESTEAD (§ 32*)—PROPERTY ACQUIRED BEFORE MARRIAGE.
Property acquired by a bachelor before marriage may be exempt as a homestead, provided he takes steps to actually reside thereon as the head of a family within a reasonable time thereafter.
[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 32.*]

3. HOMESTEAD (§ 32*)—EXEMPTION—RESIDENCE—INTENTION.
Where a bankrupt before marriage had acquired title to 160 acres of land under the United States homestead law, and three months after making final proof left the land, leaving only the furniture usually found in a settler's cabin, and after marriage began housekeeping in a city, and had never at any time resided on the land with his wife, his mere mental intention to occupy the land as his homestead was insufficient to entitle him to sustain an exemption thereof in bankruptcy.
[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 40–43; Dec. Dig. § 32.*]

In the matter of M. F. Malloy, bankrupt. On referee's certificate to review an order directing the trustee to set apart certain land as the bankrupt's homestead. Reversed.

Bessie & Greer, for trustee.
Palda, Aaker, Greene & Kelso, for bankrupt.

AMIDON, District Judge. This matter comes before the court upon the certificate of John Hart Lewis, referee, dated May 16, 1910, certifying to the court for review the order made by the referee on April 28, 1910, directing the trustee in bankruptcy to set apart to the bankrupt as exempt the homestead claimed by him. Messrs. Bessie & Greer are attorneys for the trustee in bankruptcy, and Messrs. Palda, Aaker, Greene & Kelso are attorneys for the bankrupt.

The property consists of 160 acres of land, which the bankrupt obtained from the government under the homestead law. He made

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

final proof during the year 1908, and continued to reside upon the land for three months after making final proof. He then went to Williston, where for some time he led a life of dissipation. For the purpose of recovering from this experience he entered a hospital at Fargo. He was married in June, 1909. Since his marriage neither he nor his wife have ever lived upon the land, or done any outward act to prepare it for occupancy as a homestead, or done any outward act indicating an intent to take up their residence upon the land. On the contrary, plaintiff and his wife, after his marriage, leased a house in Williston until April 1, 1910, and set up housekeeping therein; the plaintiff being employed in that city as an accountant at a salary of $80 a month. The referee finds that both the bankrupt and his wife at all times since their marriage have entertained a bona fide intention to make the land in question their permanent home, and to return thereto and actually reside thereon as soon as circumstances rendered it feasible. The only circumstances mentioned by the referee which prevented their going upon the land are these: First, because they did not have sufficient money at the time to live there; and, second, because it was then June, too late in the year to start any farming. Learned counsel for the bankrupt, appreciating the necessity for some outward act in support of the intention to make the land a homestead, relied upon the fact that the bankrupt left in the house upon the land the furniture which he placed there to establish a residence under the federal homestead laws. It also appears that, while the bankrupt was occupying the land as a homestead, his future wife also held a similar claim about 10 miles distant from his land, and that at some time during this period she placed some furniture in the house. The character of the house is not described in the summary of the evidence made by the referee, nor is the furniture therein described. I think it may fairly be inferred that both the house and the furniture are such as are usually found in the abode of homestead claimants under the federal law for the purpose of complying with the requirements of that statute as to residence.

The bankrupt filed his petition in voluntary bankruptcy in the month of December, 1909, and was adjudicated a bankrupt. In the schedules filed in connection with the petition he claimed the land in question as a part of his exemptions under the homestead laws of North Dakota. The referee sustained this claim. I think he fell into error in doing so.

Before any homestead right can attach to property the claimant must possess the status required by the statutes of the state, namely, must be the head of a family. Residence upon the land by a person who does not possess this status cannot be tacked on to his intention after he acquires the status for the purpose of perfecting the homestead right. At the time a man marries, any property which he then holds may be claimed by him as a homestead. Property, however, held at the time of marriage cannot be distinguished from property afterwards acquired. What is necessary to establish a homestead right in the one case is necessary in the other. It is not necessary for a man immediately upon his marriage to go into the actual possession of his

homestead in order to save it from the claims of his creditors, any more than it is necessary for a married man to go immediately into possession of property which he acquires for the purpose of making it his homestead. But when a man marries, if he goes to housekeeping, it must be upon his homestead; or, if the homestead is not then ready for occupancy, he may take up temporary quarters elsewhere, and proceed promptly to prepare the homestead for occupancy. Mere mental intention, however, will not impress upon property the homestead right. It must be followed with reasonable promptness by outward acts which lead directly to the actual occupancy of the property, such as erecting buildings thereon, repairing the same, or moving furniture or other property upon the land preparatory to taking up actual residence upon it.

In the present case, so far as the evidence discloses, the property, when the bankrupt and his wife commenced housekeeping, was ready for actual occupancy. Down to the time of the hearing before the referee, nothing was done either by the bankrupt or his wife towards occupying the land in question, or preparing the same for occupancy. Leaving a settler's furniture in his claim shanty is at most merely passive. It cannot be regarded as an outward act sufficient to convert a mere mental intent into a homestead right. If the bankrupt and his wife had actually dwelt upon the land together, and then left the house with their furniture therein, for a temporary absence even of some months, coupled with an intent to return to the land, this would probably not have amounted to an abandonment of the homestead. Here, however, there had been no occupancy of the land by the bankrupt or his wife after their marriage. The furniture was placed there by the bankrupt when he did not possess the status of the head of a family. Leaving it there after he attained that status cannot, in my judgment, be regarded as an outward act indicating an intent to make the land the homestead of his family.

The law on this subject is stated with accuracy by an able judge in the case of Davis v. Kelly, 62 Neb. 642, 87 N. W. 347, as follows:

"Actual occupancy is not absolutely required in every case where a homestead is claimed. Nevertheless occupancy is the test established by the statute, and it is only through liberal construction to meet the beneficent ends of the statute that certain substitutes therefor have been permitted. The most usual is what has been called constructive occupancy, as, for example, where property occupied as a homestead has been temporarily vacated without abandonment, and with a bona fide and subsisting intention to return. Another has been permitted in case of vacant and unimproved property in present process of preparation for a home, and in other cases where property purchased for use as a homestead is for some temporary reason not available as such, but is being prepared as fast as may reasonably be expected. In such cases, where there is a bona fide present intention to occupy the property as a homestead, followed by actual occupancy within a reasonable time, it is entirely within the bounds of legitimate construction to hold the property as a homestead. * * * There must be a present intention to occupy it as a homestead as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention."

A large number of authorities are cited in support of the law as thus declared. Such was the interpretation of the statute of North Dakota

in the case of Brokken v. Baumann, 10 N. D. 453, 88 N. W. 84. See, also, Clark v. Evans, 6 S. D. 244, 60 N. W. 862.

As to property held by a man at the time of his marriage, or acquired by him after his marriage, with the intent in either case of making it the homestead of his family, he is not required to institute a race with the sheriff in order to save the property from the claims of his creditors. Cameron v. Gebhart, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832. But if the land is ready for occupancy as a home, it is necessary that he go into possession of it with reasonable promptness. If the land is not ready for occupancy, and he takes up his residence upon other land, he must then proceed with the same promptness by outward acts to prepare the homestead for actual occupancy. If he takes up his residence upon other property, and for months, as in this case, does nothing to prepare the homestead for actual occupancy, his mere mental intent to take possession of it as a homestead at some future time will not impress the homestead right upon the property.

The order of the referee is reversed.

THE MARY E. MORSE.

(District Court, D. Massachusetts. March 6, 1908.)

No. 1,794.

1. COLLISION (§ 95*)—CONSTRUCTION OF RULES—OVERTAKING VESSEL—"PAST AND CLEAR."

Where a schooner, which had left Norfolk and was beating down the channel against a head wind, when she was overtaken and passed by a tug and tows, which left Norfolk later, was on the starboard tack, moving toward Old Point Comfort and away from the tug and tows, the latter were "finally past and clear," within the meaning of article 24, of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]); and when the schooner came about on the port tack, heading toward the tug and tows, and being more than two points abaft their beam, an entirely new risk of collision arose, as to which she was the overtaking vessel, and bound under such rule to keep out of the way, while the tug and tows were required by article 21 to keep their course and speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

2. COLLISION (§ 95*)—OBSERVANCE OF RULES—TUGS WITH LONG TOWS.

Tows of the length of 4,000 feet or more, when navigating frequented waters, are *held* to an extremely strict observance of the rules for preventing collisions.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

3. COLLISION (§ 95*)—SCHOONER AND TUG WITH TOWS—FAULT OF TUG.

A tug with a number of tows on hawsers, the total length of the tow being over 2,000 feet, which, while passing down Hampton Roads in the daytime and while an overtaking schooner was approaching the rear barge of the tow on an oblique course, slowed down to half her speed and

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

signaled the tows to let out their hawsers to double their former length, was solely in fault for a collision between the schooner and barge, where the schooner was carefully and properly navigated, and would have passed under the stern of the barge if the latter had maintained her speed, as required by article 21 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

In Admiralty. Suit by Charles C. Sparks against the schooner Mary E. Morse. Decree for respondent.

Hughes & Little, for libelant.

Blodgett, Jones & Burnham, for claimant.

DODGE, District Judge. The libelant was master and his wife owner of the barge Kathleen. He sues for damage to the barge received in a collision with the schooner Mary E. Morse, which occurred at about 6 p. m. on April 15, 1906, in full daylight and fair weather, near Old Point Comfort, Va. The barge was the last in a line of seven barges, all being towed to sea from Norfolk by the tug Helen and bound for Philadelphia. The schooner, which was a three-masted vessel, had all sail set except her foretopsail, and was also bound to sea on a voyage to Colon. The barge was without motive power of her own, and had on board only one man and a boy. The operation of towing her was under the sole control and direction of the tug.

Tug and barges constituted one steam vessel for the purposes of the statutory rules of navigation, so far at least as to put upon them the burden of avoiding the schooner, unless the schooner was with regard to them an overtaking vessel, within the meaning of article 24 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), and therefore bound to avoid them. The schooner had been at anchor in Hampton Roads above Sewall's Point. She was obliged by the wind, which was N. N. E. and light, to beat down the channel, making successive tacks from one side of it to the other. When the tug and barges passed out of the Elizabeth river into Hampton Roads by Sewall's point, the schooner was further down the channel than they were. They afterward passed her, and upon her coming about from the starboard tack to the port tack, on which she was sailing when she struck the barge, they were all further down the channel than she was. She came about, at the time referred to, quite close to the shore and near Old Point Comfort, and when she did so the tug and barges had all passed the Rip Raps and were heading obliquely across the channel in the direction of the Thimble Light, which is about three miles below the Rip Raps, and on the opposite, or Old Point Comfort, side of the channel. As the Morse headed when fairly on the port tack after coming about, her direction was about E. by N. by compass, and she had the tug, with most of the barges, on her port bow, while the Kathleen, with the next barge ahead, bore on her starboard bow. According to the evidence from on board her, the Kathleen then bore 3 or 4 points on her star-

board bow. According to the evidence from the tug and the Kathleen, the Morse was on the Kathleen's port quarter. If the vessels thus bore from each other, the Morse was more than two points abaft the beam from the Kathleen, and still further abaft the beam from the tug and from every other barge in the fleet. This is true, even if their direction was not directly for the Thimble Light, as they say it was, but more to the northward as the schooner claims it to have been. The Morse therefore, steering E. by N., was "coming up with" the "Kathleen" from a direction more than two points abaft her beam. To avoid this conclusion the direction of tug and barges must be found to have been much more northerly and more directly across the channel than any one claims or than anything in the evidence indicates. The schooner was therefore bound to avoid the Kathleen as an overtaking vessel under article 24.

It is argued on her behalf that the tug and barges were overtaking her above Old Point Comfort, and that they therefore continued to occupy that relation to her, by virtue of the provisions of article 24 that—

"no subsequent alteration of the bearing between the two vessels shall make an overtaking vessel a crossing vessel, * * * or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear."

In my opinion, however, the tug and barges were "past and clear" of her when she was standing toward Old Point Comfort on the starboard tack, and they had passed the Rip Raps on their way to sea. At that time she was sailing away from them and they from her, without any risk of collision whatever. Article 24 had then ceased to have any application, and it continued to have none until the fresh risk of collision arose, which was involved in her tacking and standing toward them again on the port tack. Her duties must be determined by the relative positions and courses of the vessels when this renewed risk of collision became involved.

The Morse's collision with the barge on this tack was not for want of a careful lookout on her part. While crossing so much of the channel as lay between her and the tug and barges, her master had the wheel, all hands except the steward were on deck, her mate was on lookout forward, and there is every indication that a careful and constant watch was kept upon the tug and barges and their movements for the very purpose of getting by them safely.

The Morse's speed on this tack was probably little, if at all, in excess of three knots an hour. The tug and tow were moving at a somewhat faster rate. As the Morse kept on toward them close-hauled, they passed across her bow until she had the Kathleen ahead or nearly so, and had all the other barges on her port bow. Her helm was then put up in order to pass astern of the Kathleen and her spanker sheet slacked. Regarding her as the vessel bound to keep clear, this was a proper method of attempting to perform that duty. The only alternative was to come about and again head away from the barges on the starboard tack. There were two reasons against adopting this course. First, the Morse naturally desired to run out her tack to the channel limits; and she had the right to do so unless

she would necessarily endanger the tug and barges by attempting it. The other reason was the presence on her port quarter, not far behind, of another schooner, the P. T. Barnum, also close-hauled on the port tack and crossing the channel, and therefore on a course nearly parallel with and to windward of her own course. Under the circumstances I do not think she can be held in fault because she did not come about. It cannot be said, in my opinion, that the attempt to pass astern of the Kathleen necessarily endangered that vessel. The course and speed of the Kathleen at the time were such as to encourage the belief that the attempt would succeed. It was, of course, incumbent on the Morse to keep off before getting so near the Kathleen as to make the attempt to pass astern of her necessarily dangerous for want of sufficient room. She was bound to keep clear by a sufficient margin and avoid dangerous proximity. But what proximity is to be considered dangerous, or what margin sufficient, must obviously depend upon all the circumstances. In broad daylight, and giving special attention to the duty of avoiding the Kathleen, as I think the Morse was doing, she might properly allow herself to approach that vessel much more closely than would be proper after dark or under circumstances in any way obstructing accurate observation and judgment. I think the evidence shows that the Morse kept off soon enough and at a sufficient distance from the Kathleen to have passed her in safety, had the Kathleen kept her course and speed as required by article 21. The Morse, in my opinion, had the right to act upon the assumption that tug and barges would keep their course and speed, so that the Kathleen would continue to move out from under her bow at the same rate as before her helm was put up.

This, however, the Kathleen did not do, on her own showing. The tug and barges had left Norfolk with from 45 to 50 fathoms of hawser between each two members of the tow. If any of the barges had paid out their hawsers to the length considered desirable for towage at sea (about 100 fathoms), no such general change was made until some time after the whole tow had passed the Rip Raps. The tug then signaled by whistle to the barges generally to lengthen the hawsers, and slowed to half speed in order that this might be more easily done. At this time the rear barge, by the testimony of the master of the tug, was some three-quarters of a mile past the Rip Raps, the tugs and barges were about in mid-channel, heading about for the Thimble Light, and the Morse was on the port tack, headed therefore toward the barges, and was about 400 yards from the rear barge. I think the evidence shows that when the Morse had come so near as to require her to maneuver in order to avoid the Kathleen, and had begun to do so, the Kathleen's headway was checked by the slowing of the tug, that the Kathleen's previous rate of progress, upon which the Morse had the right to rely, was changed, and that the effect of thus altering the relative speeds of the two vessels on their crossing courses was to leave the Kathleen under the Morse's bow at a moment when the Morse had properly expected her to have passed ahead out of danger. Although the Morse's wheel was hard up, and notwithstanding that her spanker sheet was allowed to run out as far as the knot when the Kathleen's progress was seen

to be thus arrested, in an attempt to make her keep off as rapidly as possible, she did not quite succeed in swinging clear of the barge's stern, and struck the port side some 10 feet forward of the stern.

With only 45 fathoms of hawser between each two of its members, the total length of this tow considerably exceeded 2,000 feet. To lengthen the hawsers to 100 fathoms was to double this total length. Tows of such length, when navigating frequented waters, are held to an extremely strict observance of all precautionary requirements. The Gertrude, 118 Fed. 130, 55 C. C. A. 80; The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417; The Bee, 138 Fed. 303, 70 C. C. A. 593; The Gladys, 144 Fed. 653, 75 C. C. A. 455. It would be difficult under any circumstances to justify the attempt to double the already dangerous length of this tow, made as it was while occupying the middle of a channel which other vessels, not far off at the time, were also using. Resulting as it did in changing the Kathleen's speed, in violation of the rule then applying between the Kathleen and the Morse, I hold it to have been the sole cause of this collision.

The evidence affords no ground for charging the barge with independent fault of her own, in which the tug had no share. The fault which caused the collision was a fault on the part of the whole tow to which she belonged at the time, and is chargeable to the tug, which controlled and directed its movements. The tug is not before the court; no proceedings having been taken against her. The effect of her fault for the purposes of this case is to prevent the conclusion that the Morse was negligent, and therefore to require the dismissal of the Kathleen's libel against her.

The libel is to be dismissed, with costs.

HAMILTON v. DAVID C. BEGGS CO.

(Circuit Court, S. D. Ohio, E. D. January 5, 1910.)

No. 1,434.

1. SALES (§ 474*)—CONDITIONAL SALES—FAILURE TO FILE—EFFECT—"CREDITORS."

Rev. St. Ohio 1908, § 4155—2, provides that all conditional sale contracts shall be void as to all subsequent purchasers and mortgagees in good faith and "creditors" unless evidenced by a writing, signed, etc., and also unless a statement under oath by the seller, of the amount of the claim, deposited with the county recorder of the county where the person signing the instrument resides at the time of its execution, if a resident of the state, and, if not, with the county recorder of the county in which the property sold is situated. Section 4150 provides that a chattel mortgage not accompanied by immediate delivery, and followed by actual and continued change of possession of the things mortgaged, shall be void as against the creditors of the mortgagor, unless a true copy is filed, etc. *Held*, that the word "creditors," as used in section 4155—2, included the same persons as were included by the same word used in section 4150, and, the latter having been construed by the Ohio court of last resort to include all creditors of the mortgagor represented by a duly appointed receiver, section 4155—2 should be construed to invalidate an unfiled conditional sale contract as against all creditors of the buyer represented by a re-

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

ceiver appointed by the federal court, under the rule that the construction of state statutes by the highest court of the state is conclusive on federal courts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. § 474.*

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1728; vol. 8, pp. 7622, 7623.]

2. COURTS (§ 367*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—RULES OF PROPERTY.

Under Rev. St. U. S. § 721 (U. S. Comp. St. 1901, p. 588), providing that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply, the Ohio rule that, if property covered by an unfiled chattel mortgage passes into the hands of a receiver, the mortgage lien is lost, and the rights of creditors are the same as if the mortgagor had given an assignment in trust for their benefit, will be regarded as a rule of property and applied in proceedings in a federal court sitting in that state to administer assets of an insolvent through a receiver, as against the holder of an unfiled conditional contract of sale of goods to the insolvent, and not the federal rule that the possession of a receiver is only that of the court, and adds nothing to the previously existing title of the mortgagee, the receiver holding for the benefit of whomsoever it shall be found to concern.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 942, 944, 958; Dec. Dig. § 367.*

State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

Action by John Hamilton against the David C. Beggs Company. On petition for the allowance of the claim of the National Cash Register Company. Claim allowed as a general claim.

Wilson & West, for National Cash Register Co.
Arnold, Morton & Irvine, for receivers.

SATER, District Judge. The National Cash Register Company, under contracts of conditional sale, delivered to the defendant company on May 21, 25, and June 30, 1908, a number of cash registers for use in its department store. On July 17, at the instance of complainant, a creditor, this court appointed receivers, who took possession of all the property of every kind and character belonging to and held by the defendant, which subsequently proved to be insolvent, including the registers in question. The contracts of sale were not filed in the county recorder's office until July 20. The defendant had defaulted in the payment of the first installment of the purchase price of the registers. The receivers used them in operating the store, but paid nothing on them. By the terms of the several contracts, the default in payment rendered the whole of the purchase price at once due and payable and gave the register company the right to repossess itself of the registers and remove them from the defendant's place of business. Its first demand for possession followed the appointment of the receivers. It now seeks restoration of the registers or full payment of their purchase price. The receivers dispute its right to either. Section 4155—2, being so much of the Ohio conditional sales act as is material, is as follows:

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

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors unless such conditions shall be evidenced by writing, signed by the purchaser, lessor, renter, hirer or receiver of the same, and also a statement thereon, under oath, made by the person so selling, leasing or delivering any property as herein provided, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that the same is a copy, deposited with the county recorder of the county where the person signing the instrument resides at the time of the execution thereof, if a resident of the state, and if not such resident, then with the county recorder of the county in which said property so sold, leased, rented, hired or delivered is situated at the time of the execution of the instrument; and the officer receiving any such instrument shall proceed with the same in all respects as he is required to do by section four thousand one hundred and fifty-two of the Revised Statutes of Ohio, and shall receive the same fees as are allowed by law for similar services in other cases."

Were this a proceeding in bankruptcy, and not a suit of a purely equitable nature, the case would be controlled by York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. No reported case involving the Ohio act has been found which determines the status of a vendor who, having sold his property, failed to file his contract of conditional sale with the county recorder until after receivers, duly appointed by a federal court in a case purely equitable, had taken possession of such property as a part of that of the vendee.

The solution of the question involved may be wrought out by an application of the rule which fixes the status of the owner of a chattel mortgage which has not been filed as required by statute, or until after the mortgagor's property has passed into the hands of a receiver, or of an assignee in trust for the benefit of creditors. Section 4150, Rev. St., relating to chattel mortgages, provides that:

"A mortgage, or conveyance, intended to operate as a mortgage, of goods and chattels which is not accompanied by an immediate delivery and followed by actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next section."

The next section (4151) provides that a chattel mortgage shall be deposited with the county recorder of the county where the mortgagor resides at the time of its execution, if a resident of the state, and, if not such resident, then with the county recorder of the county in which the property so mortgaged is situated at the time of the execution of the instrument. Section 4152, referred to in the last clause of section 4155—2, provides for the indorsements to be made by the county recorder on chattel mortgages when filed or refiled, for their indexing and preservation, and for noting the date of their refiling or cancellation. A chattel mortgage, like a contract of conditional sale, must be verified before filing. The framers of the act regulating conditional sales manifestly borrowed the language of the

chattel mortgage statute, and imposed on the vendor the same mode of procedure to preserve his rights as is exacted of a chattel mortgagee.

So long as the mortgagee retains possession of the mortgaged property, and no creditor seizes it on execution or attachment or by any other process known to the law, the mortgage, though unfiled, is good as between the mortgagor and mortgagee. Wilson v. Leslie, 20 Ohio, 161; Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741. But if the mortgagee makes an assignment under the state law, the mortgage, if invalid as against creditors, whether from want of filing or otherwise, then becomes void as against the assignee for the benefit of creditors, antecedent as well as subsequent to the date of its execution and without regard to notice, whether they have secured a specific lien on the property covered by the mortgage or not, because under the statute the assignee not only takes the assignor's property for the exclusive benefit of the creditors, but their rights may be asserted through the assignee for their benefit as fully as such rights could have been asserted by judgment and execution against the property. Hanes v. Tiffany, 25 Ohio St. 549; Westlake v. Westlake, 47 Ohio St. 315, 24 N. E. 412; Kilbourne v. Fay, supra; Besuden v. Besuden, 57 Ohio St. 508, 49 N. E. 1024; Blandy v. Benedict, 42 Ohio St. 295. As is said in the Blandy and the Westlake Cases, every right which the creditors might have asserted against the property before the assignment the assignee is bound to secure for their benefit after the assignment.

In Ohio the relation which a receiver bears to property given into his possession is so similar to that sustained by the assignee of an insolvent debtor that, if the property covered by an unfiled chattel mortgage passes into the hands of a receiver, the lien of the mortgage is lost, and the rights of the creditors are the same as if the mortgagor had made an assignment in trust for their benefit. The reason for this is found in the Ohio doctrine that the receiver's appointment "is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law; the appointment being treated as an equitable execution. The purpose is to secure means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court. Railroad Co. v. Sloan, 31 Ohio St. 1." Cheney v. Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207. The word "creditors," used in the statute requiring the filing of contracts of conditional sale, refers to the same class as the word "creditors" found in the chattel mortgage act, and consequently the former act renders the unfiled contract void as to the same class of creditors as is mentioned in the latter act. York Mfg. Co. v. Cassell, supra; Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526. It follows, therefore, that if the property of a vendee, held under an unfiled contract of conditional sale, has passed into the hands of a receiver, and if no specific lien has been fastened on it, it is to be administered for the benefit of the vendee's creditors, unless the federal rule as to the status of receivers and of property involved in a receivership necessitates a different conclusion. That rule is that:

"The possession of the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagee. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place." Fosdick v. Schall, 99 U. S. 235, 251, 25 L. Ed. 339; Thompson v. Phœnix Ins. Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; White v. Ewing, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. Ed. 67.

Section 721, Rev. St. U. S. (U. S. Comp. St. 1901, p. 581), provides that:

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

In Bucher v. Cheshire Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 978, 31 L. Ed. 795, it was said that:

"Where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and the possession thereto, they are to be treated as laws of that state by the federal courts."

The law of a state, therefore, is to be found, not only in its statutes, but also in the course of decisions, if there be such, rendered by its highest courts in reference to a given subject-matter, which have become rules of property.

Federal courts will, in actions at common law, on causes of action not created by federal statutes, follow the recording acts and statutes relating to chattel mortgages, conditional sales, and insolvents' assignments, so far as they are not affected by the bankruptcy act. Foster's Fed. Prac. (4th Ed.) § 375. In Etheridge v. Sperry, 139 U. S. 276, 277, 11 Sup. Ct. 569 (35 L. Ed. 171), Mr. Justice Brewer defined the attitude of federal courts as to chattel mortgage laws as follows:

"The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein. Chicago Union Bank v. Kansas City Bank, 136 U. S. 223 [10 Sup. Ct. 1013, 34 L. Ed. 341]."

In harmony with the foregoing are Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817, and In re Shirley, 112 Fed. 301, 50 C. C. A. 252, decided by the Circuit Court of Appeals of this circuit. Bayne v. Brewer Pottery Co. (C. C.) 90 Fed. 754, was a suit instituted in the Circuit Court of the Northern District of Ohio, in behalf of general creditors, and involved a receivership. It was there held that the receiver succeeded

to the rights of the creditors as well as the corporation and might avoid a chattel mortgage given by the corporation which was void as to creditors by the state statute for want of filing, although such mortgage was valid as against the insolvent corporation. In other words, effect was given to the state statute and the decisions thereunder, notwithstanding the federal rule as to the status of receivers and of property passing under their control. So, too, by way of further illustration, the Indiana conditional sales act and the decisions thereunder by the state courts were followed in Re Gilligan, 152 Fed. 605, 81 C. C. A. 595. Contracts of conditional sale, however, like chattel mortgages, are instruments of general use for the transfer of property, and, as the state by legislative enactment determined for itself what rights should be conferred by such contracts and how those rights may be preserved, a federal court will give force to the law.

In view of the sameness of language employed in the chattel mortgage and the conditional sales acts, it may be presumed that the Ohio Supreme Court will apply the same rule to property in the hands of a receiver which is covered by an unfiled contract of conditional sale, as it has heretofore applied, in an unbroken line of decisions, to property covered by an unfiled chattel mortgage. When the language of a statute, like the chattel mortgage act, for instance, which has been for a time in force has received a fixed and settled construction, it is rational to conclude that the lawmaking body, acquainted with the interpretation which such language has received, in using it in another statute intended to adopt its received interpretation. Lessee of Gray v. Askew, 3 Ohio, 466; Grogan v. Garrison, 27 Ohio St. 63; In re Guggenheim Smelting Co. (C. C.) 121 Fed. 153; U. S. v. Central Park R. Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173. And while a federal court, in cases within its jurisdiction involving rights arising under state statutes which had not at the time been construed by the state courts, may exercise an independent judgment, it will nevertheless give effect to any rules of construction that may have been previously established by the highest court of the state when interpreting similar statutes, and for the sake of harmony, and to avoid confusion, should lean toward an agreement of views with the state courts, if the question seems balanced in doubt, and endeavor to avoid any unseemly conflict with well-considered decisions of such courts upon questions of local law. O'Brien v. Wheelock, 95 Fed. 883, 905, 37 C. C. A. 309; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

Giving effect, therefore, to the state statute relating to conditional sales, and applying the settled rule repeatedly announced by the state Supreme Court in interpreting a similarly phrased statute (the chattel mortgage act), the conclusion follows that the register company is not entitled to possession of the registers or to payment in full of their purchase price. Its position is that of a common creditor. As such it may prove its claim, and share in the distribution of the proceeds arising from the sale of the defendant's property. Besuden v. Besuden, supra.

POSTAL TELEGRAPH-CABLE CO. v. CITY OF MOBILE.

(Circuit Court, S. D. Alabama. March 11, 1909.)

No. 269.

1. COURTS (§ 289*)—UNITED STATES COURTS—JURISDICTION—NATURE OF SUBJECT-MATTER.
The United States Circuit Court has jurisdiction of an action by a telegraph company to restrain the enforcement of a tax of $1,000 by the municipality, on the ground that it is a tax on interstate commerce and is discriminatory; it being alleged that the damage to the complainant was greatly in excess of $2,000.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

2. COMMERCE (§ 72*)—MEANS OF REGULATION—TAXATION.
No state can levy a tax on interstate commerce in any form, whether by duties laid on the transportation of subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 123-136; Dec. Dig. § 72.*
Taxation of interstate commerce by state, see note to Board of Assessors v. Pullman's Palace Car Co., 8 C. C. A. 492.]

3. COMMERCE (§ 28*)—INTERSTATE COMMERCE.
Telegraph business is interstate commerce, and the telegraph company is engaged in interstate commerce.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. § 28.*
For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

4. INJUNCTION (§ 152*)—PRELIMINARY INJUNCTION—HEARING—BURDEN OF PROOF.
On a motion for preliminary injunction, the burden is on complainant to satisfy the court that there is at least a reasonable probability of ultimate success on the question of jurisdiction as well as on the merits of the controversy.
[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 152.*]

5. INJUNCTION (§ 144*)—PRELIMINARY INJUNCTION—HEARING.
On a motion for preliminary injunction, allegations of the bill are to be taken as true.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

In Equity. Bill by Postal Telegraph-Cable Company against the City of Mobile. Decree for complainant.

Fitts & Leigh, for complainant.
B. B. Boone, for defendant.

TOULMIN, District Judge. The allegations of complainant's bill are as follows:

First. The complainant, the Postal Telegraph-Cable Company, is a corporation, incorporated under the laws of the state of Delaware, and that it has accepted the provisions of the act of Congress approved July 24, 1866 (chapter 230, 14 Stat. 221), and the amendments and supplements thereto, and is operating under the terms of said

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

act and in accordance with its provisions. That by virtue thereof its poles and wires have been at all times, and are now, used for the transmission of telegraph messages for the United States government and the various departments thereof at prices fixed from time to time by the Postmaster General of the United States in accordance with the terms of said act of Congress. And that the highways upon which said poles and wires are constructed and operated are post roads and post routes within the meaning of said act of Congress, and the other acts of Congress defining post roads and post routes.

Second. That the city of Mobile is a municipal corporation, vested with certain delegated powers; the same being the corporate name of a municipality in the Southern division of the Southern district of the state of Alabama.

Third. That the said complainant is engaged in business as a public service corporation in sending messages by wire throughout the United States, and, by means of connection with cable lines, to all portions of the world. That as such public service telegraph corporation the said complainant maintains an office in the city of Mobile for the purpose of receiving and transmitting messages from the citizens of the city of Mobile and vicinity to the outside world, and for the purpose of receiving and delivering messages from the outside world to the citizens of the city of Mobile and vicinity. That the wires of the complainant telegraph company diverging from the city of Mobile and from the state of Alabama connect with other wires in other states, and telegraph messages are transmitted thereon into and through other states of the United States, and to all of the principal towns and cities therein; and connection is also had with cables under and across the Atlantic Ocean. And the company is engaged in sending and transmitting messages to all of the states of the United States and receiving and delivering messages from all of the states of the United States, and is engaged in interstate commerce.

Fourth. That the mayor and general council of the city of Mobile, which is the governing body of said city, by an ordinance approved on the 31st day of December, 1908, commonly called the "license ordinance," has exacted, and does exact, of and from each telegraph company doing business in the city of Mobile in the year 1909 an annual license or privilege tax in the sum of $1,000. That the said ordinance in question is unreasonable, unjust, and excessive, and is illegal and void, because it is designed and intended to provide revenue by this form of taxation for the general expenses of the city of Mobile, and that no other object than this exists or has at any time existed for the exaction of the large sum of money imposed by the ordinance. That the city of Mobile is under no expense whatever in connection with issuing the license required to be taken out by the said ordinance, and has not been at any time heretofore, nor will it be during the year 1909 put to any expense or charge whatever in connection with inspecting and regulating the poles, wires, or business of this complainant. That this privilege tax or license fee imposed by the said ordinance complained about is not based on the cost and expense to the city incident to any inspection and supervision and

regulation of the complainant's lines and business within the said city; but that it is imposed notwithstanding it is more than 20 times the amount that could possibly be incidental to any such inspection, supervision, and regulation, together with all reasonable measures and precautions that might possibly and could be required to be taken by the said city of Mobile for the safety of its citizens and the public. That the license or privilege charge by the said ordinance is grossly excessive, and that, if every town or city in the state of Alabama in which the complainant company maintains an office should pass similar ordinances, the total amount exacted from the complainant company would exceed $25,000 per annum; and if the same kind of ordinances, providing for excessive privilege taxes for the towns and cities in all the other states of the United States in which the complainant company maintains offices, were adopted, that company could not possibly pay the aggregate amount of such privilege taxes, but would immediately become insolvent by reason of the fact that the expense of operation, including such privilege or license taxes, would be far in excess of the gross receipts of the complainant company from the whole country at large.

Fifth. The complainant company is a corporation engaged in legitimate business. That it is engaged in interstate commerce by transmitting telegraphic communications among the several states of this Union. That this is a lawful business, and that the said complainant company pays just and lawful taxes upon the assessed value of its property to the state of Alabama, to the county of Mobile, and to the city of Mobile, and that it is in arrears with respect to none of these taxes. That the license tax complained of is in addition to all of the other taxes levied by the state of Alabama, the county of Mobile, and the city of Mobile, and is in this respect unfair, unjust, and unequal and in direct violation of law. Complainant further shows unto your honors that while the said license tax purports to be levied only upon business destined from the Mobile office to points within Alabama, and upon business originating within the state of Alabama and subject to delivery at the Mobile office, that as a matter of fact, in addition to being excessive and confiscatory, it is violative of the guaranteed constitutional right which inures to and in favor of this company to maintain an office in the city of Mobile for the purpose of engaging in the business for which it was chartered, and is violative of the right of the complainant company to carry on interstate commerce unhampered and unimpeded. That the right thus involved is a valuable right, worth to complainant many thousand dollars—worth certainly in excess of $2,100. That, if the defendant municipal corporation is allowed to exact the said excessive license fee, it is destructive, and will be destructive, of the right of this complainant corporation to maintain an office in the city of Mobile for the transaction of the business for which it was chartered, and that, in the face of such license exaction in addition to the other taxes imposed by law, it will be impossible for the complainant company to maintain such an office without actual loss.

Sixth. Complainant further shows unto your honors that by actual

arithmetical calculation taken from the auditor's department, and as a matter of fact the gross receipts derived by the Postal Telegraph-Cable Company from all of the interstate business done from and into the city of Mobile in the year 1908 amounted to $24,446.86, while the expenses properly apportionable to said interstate business so done in the said city of Mobile amounted to in the year 1908 $16,216.35, without taking into consideration any of the superintendence or general office expenses, or any interest on the investments of the company in the said city of Mobile. That the total gross receipts derived by the company from the intrastate business done by it in the city of Mobile in the year 1908 amounted to only $2,247.93, while the expenses properly apportionable to the said intrastate business done in the said city of Mobile by the complainant company in the year 1908 amounted to $1,341.40, without taking into consideration any of the general office expenses or interest charges above referred to. Wherefore the complainant company could not afford, under the facts as just hereinabove set out, to continue to do business in the city of Mobile were it not for the advantages it derives therefrom in connection with the business done by it in other and more populous parts of the United States where its patrons demand connection with the important towns and cities of the rest of the country, and complainant necessarily maintains its office in the city of Mobile, not for the financial income it receives at Mobile, but for the purpose of meeting this demand of its patrons in other cities and states throughout the United States and in connection with the operation of its general interstate telegraphic business. And that in operating this office in the city of Mobile for interstate business it is absolutely necessary that it should likewise receive and transmit all messages offered to it which are intrastate in character and addressed to places at which it has offices in the state of Alabama, for under the law, as a public carrier, it cannot refuse to accept such intrastate business so long as it keeps the Mobile office open and undertakes to maintain it as an office of public service corporation for the conduct of a general interstate telegraphic business.

Seventh. That the said complainant is not engaged in transmitting telegrams from one portion of the city of Mobile to another portion of the said city; nor is it engaged in receiving telegrams sent from one portion to another portion of the said city; but it is engaged exclusively in transmitting telegrams from points in Mobile to points outside of that city, and in receiving telegrams in the city of Mobile from points entirely outside of that city. That the complainant is not an inhabitant of the city of Mobile and does not transact or offer to transact business therein in such a sense as to bring it within the power of the mayor and general council of the said city to assess an occupation tax against this complainant. That the laws of the state of Alabama providing for the collection of taxes for the state and its political subdivisions, including the city of Mobile, is exhaustive of the legal right to tax telegraphic companies, and the city of Mobile has no right or power to collect an additional tax of any kind whatsoever from the complainant company, or to receive or collect any tax

from it except such as it is entitled to receive under its delegated power to tax property located within the city of Mobile; and, therefore, said ordinance seeking to collect an. occupation tax from this complainant is absolutely void.

Eighth. Complainant further shows unto your honors that the said tax is discriminatory and denies to the complainant company the equal protection of the law, and for this reason is void and contrary to the provisions of the Constitution of the United States. That the ordinance imposing said tax, though it purports to levy the same against the intrastate business done by the complainant company in the city of Mobile, is in fact a disguised effort to impose a tax against the entire business of the complainant company done in the city of Mobile, including its interstate business, and is therefore an unlawful interference with, and a tax upon, the interstate business of the company, and void, because contrary to the Constitution and laws of the United States relative thereto. And complainant further shows unto your honors that it is impossible to ascertain the exact extent of the injury to which the complainant will be subjected by this interference with its general business and the interruption to and interference with its interstate business, but that the harm and injury to the complainant will be largely in excess of the sum of $2,000.

Ninth. Complainant further shows that the defendant is intending and threatening to attempt to enforce the provisions of the said ordinance complained about, and is intending and threatening to attempt to collect the said tax, and will do so unless restrained therefrom by the proper orders of this honorable court. That the said defendant is threatening through its police officers and arresting powers to arrest and imprison the local manager of the telegraph office in the city of Mobile for the failure to pay the tax or exaction complained about, and will do so unless restrained and enjoined therefrom by the proper mandates of this honorable court. Complainant further shows unto your honors that the value of the business of the complainant company in the city of Mobile which the defendant threatens and is about to attempt to destroy, taken in connection with and related as the city of Mobile, a large cotton and timber market, is with the other markets of the world, is of very great value, and above the value of the sum of $2,000 exclusive of all interests and costs, and that the harm, injury, and interruption to which the complainant will be subjected by the arrest of its manager and operators, and their repeated arrest in the attempt to coerce the payment of the said license or occupation tax, will be of the value of more than $2,000 exclusive of interest and costs.

Tenth. Complainant further shows that the Postal Telegraph-Cable Company is a solvent corporation, owning large property within the state of Alabama and within the southern district of the state of Alabama, and within the jurisdiction of this honorable court, and that any recovery had against the said complainant company for any tax or claim enforceable or collectible by law can be collected by due process without undue annoyance or delay.

Here follow the prayers for process, and for a temporary writ of injunction restraining defendant from collecting said tax or interfering with the business or employés of complainant, until final decree, and a prayer that, on final hearing, the temporary injunction be made perpetual, thereby forever enjoining and restraining the defendant, its servants or employés, from attempting to collect the said license, occupation, or privilege tax, and from attempting to coerce the payment of the same, or to make any arrests or bring any suits, or otherwise enforce the same.

On Motion for Preliminary Injunction.

1. That the court has jurisdiction. Western Union Telegraph Co. v. City Council of Charleston (C. C.) 56 Fed. 419; Parlin & Orendorff v. Moline Plow Co. (C. C.) 89 Fed. 330, 32 C. C. A. 221; The Adula (D. C.) 89 Fed. 357; Simpson-Crawford Co. v. Borough of Atlantic Highlands (C. C.) 158 Fed. 372; Meyer, Jossen & Co. v. City of Mobile (C. C.) 147 Fed. 843; Humes v. City of Ft. Smith, Ark. (C. C.) 93 Fed. 857.

2. No state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on. Ficklen v. Shelby County Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

3. Telegraph business is interstate commerce, and the telegraph company is engaged in interstate commerce. Leloup v. Port of Mobile, 127 U. S. 641, 8 Sup. Ct. 1383, 32 L. Ed. 311; Ware & Leland v. Mobile County, 209 U. S. 410, 28 Sup. Ct. 526, 52 L. Ed. 855; Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708.

4. "Upon a motion for preliminary injunction, the burden is upon the complainant to satisfy the court that there is at least a reasonable probability of ultimate success upon the question of jurisdiction as well as upon the merits of the controversy." Huntington v. City of New York (C. C.) 118 Fed. 683.

The bill alleges that the complainant's business is interstate commerce, that it is engaged in such business, that the enforcement of the city ordinance complained of in the bill would impose such a burden on complainant as not only to substantially impede and hamper its said business, but that the license tax sought to be collected is unreasonable and confiscatory, and that its exaction would be destructive of the rights of the complainant.

As the case is now presented, and for the purposes of this hearing, the allegations of the bill are to be taken as true, and the preliminary injunction is ordered.

NOTE.—By decree of January 17, 1910, the temporary writ of injunction above referred to was made perpetual, upon the submission of the cause for final decree.

KROSCHEL v. MUNKERS, Chief of Police.

(District Court, D. Oregon. May 2, 1910.)

No. 5,237.

1. CONSTITUTIONAL LAW (§ 251*)—"DUE PROCESS OF LAW."

Law in its regular course of administration through courts of justice is "due process," and, when secured by the law of the state, the constitutional requisition is satisfied. Due process of law is so secured by laws operating on all alike and not subjecting the individual to the powers of government, unrestrained by the principles of private right and distributive justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732; Dec. Dig. § 251.*

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

2. COURTS (§ 282*)—JURISDICTION—FEDERAL QUESTION.

Where the validity of a city ordinance regulating the sale of nonintoxicating beverages depends wholly on state statutes, no federal question can be injected into a prosecution for violating the ordinance unless it be that accused is being held contrary to the inhibition of the fourteenth amendment of the federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Voston & M. C. C. & S. Mining Co., 35 C. C. A. 7.]

3. HABEAS CORPUS (§ 1*)—SCOPE OF "WRIT OF HABEAS CORPUS"—REVISORY REMEDY.

A writ of habeas corpus is available only to determine the question of jurisdiction and power of the custodian to hold petitioner against his will and cannot be utilized as a revisory remedy.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3195-3198; vol. 8, p. 7676.]

4. HABEAS CORPUS (§ 6*)—FEDERAL COURTS—DISCRETION.

The issuance and entertainment of a writ of habeas corpus by a federal court is a matter within the court's discretion to be exercised in sound judgment and in obedience of law that the ends of justice may be adequately subserved.

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

Jurisdiction of federal courts, in habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.]

5. CONSTITUTIONAL LAW (§ 81*)—RESERVED POWERS—POLICE POWER.

The general police power is reserved to the state subject to the limitation that, in the exercise thereof, the state may not trench on the power and prerogatives delegated to the general government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

6. INTOXICATING LIQUORS (§ 10*)—NONINTOXICANTS—REGULATION—POWERS.

Regulation of the sale of nonintoxicants in a city located in the local option county is a matter within the police power of the state acting

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

through the municipality, in which the general government had no concern.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7–12; Dec. Dig. § 10.*]

7. HABEAS CORPUS (§ 45*)—FEDERAL COURTS—DISCRETION.

Where petitioner was convicted of violating an ordinance regulating the sale of nonintoxicants and failed to avail himself of the right of appeal to the circuit court of the state within the time prescribed, he was not entitled to a writ of habeas corpus from a federal court on the ground that he was deprived of his liberty without due process of law; he being entitled to a writ of habeas corpus from the state court and to appeal from the denial thereof to the Supreme Court of the state and, if still unsuccessful, to a review on a writ of error by the Supreme Court.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 45.*]

Habeas corpus by Charles Kroschel against I. A. Munkers, Chief of Police of Albany, Or. Petition dismissed.

J. K. Weatherford and J. R. Wyatt, for plaintiff.
Percy R. Kelly, City Atty. of Albany, for defendant.

WOLVERTON, District Judge. The petitioner, having been accused of the violation of ordinance No. 472 of the city of Albany, Or., which prohibits the selling, bartering, giving away, or otherwise disposing of near-beer, spirituous, vinous, or malt liquors that are not intoxicating, in that he sold a certain quantity of near-beer contrary to such ordinance, was tried and convicted of the offense before the city recorder, and adjudged to pay a fine, with imprisonment until such fine was paid, and, having been taken into custody by the city marshal under commitment for his imprisonment, brings this writ of habeas corpus to secure his release, alleging that he is unlawfully restrained of his liberty.

By the city charter, the city is authorized and empowered to tax, license, regulate, and prohibit the sale of spirituous, vinous, or malt liquors; also to provide for the punishment of any person or persons who shall sell or offer for sale any unwholesome or adulterated provisions; and the charter defines what shall constitute such unwholesome provisions. The authority to pass the ordinance, of which the petitioner is charged with a violation, is referable to these charter provisions, if referable to any.

Since by vote of the people in Linn county, being the county in which Albany is situated, local option has been adopted therein, it is urged that the power of the city to regulate the sale of spirituous, malt, or vinous liquors, whether intoxicating or nonintoxicating, has been superseded by the general law, and hence that the city was without power to pass the ordinance in question, from which it would follow that the petitioner was unlawfully fined and imprisoned.

A similar case was recently decided by this court, and the petitioner discharged. Kuthe v. Farrington, 176 Fed. 579. This, however, without attempting to question the propriety and authority of this court in exercising jurisdiction of the cause.

The contention is, and necessarily must be, in order to give this

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

court jurisdiction, that the petitioner is being deprived of his liberty contrary to the inhibition of the fourteenth amendment to the federal Constitution, which provides that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law. It is said on high authority that:

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. * * * And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." Caldwell v. Texas, 137 U. S. 692, 697, 11 Sup. Ct. 226 (34 L. Ed. 816); Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. Ed. 559.

It is axiomatic now that no state can deprive particular persons or classes of persons of equal and impartial justice under the law. But the direct question presented here is whether the recorder's court had any jurisdiction to try and determine the cause, and this because the city was without power to adopt the ordinance under which the offense with which the petitioner is charged was established. Of course, if no offense has been lawfully created, then it must be conceded that the action of the recorder in adjudging that the petitioner is amenable thereto is in excess of his authority. The recorder's court necessarily passed upon that question in entertaining jurisdiction; hence, logically and strictly speaking, this court is asked to review the action of the recorder's court in that regard. It should be noticed in this relation that the validity of this ordinance depends wholly upon state statutes, and not upon any law or provision of Congress. Hence no federal question can be injected into the case, unless it be that the petitioner is being held contrary to the inhibition of the fourteenth amendment.

The writ of habeas corpus is not in any sense a writ of error; nor may it be utilized as a revisory remedy. It is competent only for determining the question of jurisdiction, and the power of the custodian to hold the petitioner against his will. Hughes, Fed. Proc. 174, 175.

"Being a civil process," says Mr. Justice Jackson, "it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of habeas corpus, this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact, and pronounce them erroneous." In re Frederich, Petitioner, 149 U. S. 70, 75, 13 Sup. Ct. 793, 795 (37 L. Ed. 653).

The issuance and entertainment of the writ is also a matter within the discretion of the federal court. The discretion, however, is to be exercised in sound judgment and in obedience to law, that the ends of justice may be adequately subserved. Mr. Justice Peckham has said that:

The federal courts "ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court, the

federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented." Baker v. Grice, 169 U. S. 284, 290, 18 Sup. Ct. 323, 326 (42 L. Ed. 748).

The principle is very firmly established by the Supreme Court, and it is unnecessary to cite further cases. Upon this principle the federal court properly declined to entertain a petition for a writ of habeas corpus, by a person who had been adjudged guilty by a state court, while his cause was pending on appeal in that jurisdiction; the questions involved arising under the state laws, and depending thereon for their proper application. In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219.

So in another case, where the petitioner had been adjudged guilty in a municipal court, and prior to any appeal through the regular course in the state court, it was adjudged that the federal court ought not to entertain jurisdiction upon habeas corpus. Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639. In this case it was urged that the statute of the state of Minnesota was in conflict with the federal Constitution, and yet the court would not interpose its powers until the petitioner had availed himself of remedies by appeal afforded him under the state procedure.

There is another principle of our dual system of government that has a bearing upon the controversy here. The general police power is reserved to the states, subject, of course, to the limitation that, in the exercise of that power, the state may not trench upon the power and prerogatives delegated to the general government. Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; L'Hote v. New Orleans, 177 U. S. 587, 596, 20 Sup. Ct. 788, 44 L. Ed. 899.

The regulation prescribed by the ordinance under consideration pertains to the police power. Having relation to the vending of nonintoxicating spirituous, malt, and vinous liquors, it is exclusively a subject for state regulation. It is a matter concerning which the general government has never attempted to legislate; nor has it ever in any way assumed any authority or control with reference thereto, so that it remains a subject free for state action and supervision. It is with reference to this police power that the state, through the municipality, has attempted to regulate the sale of these nonintoxicants—a regulation, as I have shown, in which the general government has no concern. If the city has not power through its charter to adopt the regulation, by reason of the power having been taken away or superseded by a general law of the state, that is yet the state's affair, depending upon the interpretation of its laws and the regulation, and involves no federal question. It is only when it is averred that the defendant is being deprived of his liberty, contrary to the intendment of the fourteenth amendment, that a federal question is brought into the case. Of course, if the defendant is being deprived of his liberty arbitrarily, and without authority in the magistrate to condemn him,

he ought to be discharged. But the state tribunals of justice are as well the guardians of our liberties as the federal courts. It is said by Mr. Justice Peckham, in Baker v. Grice, supra, that:

"It is the duty of the state court, as much as it is that of the federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the federal Constitution, to decide that question, and to hold the law void if it violate that instrument."

If such be the duty of the state courts in such a case, it must also be their duty to guard the citizen or individual against unlawful or arbitrary imprisonment, done without appropriate power or authority, or in excess of lawful jurisdiction. Measured alone by the Constitution, laws, and ordinances of the state and its municipalities, the deduction is perfectly natural and reasonable, as the policy and law of the general government is, that the federal courts may not interfere with the regular administration of justice in the state courts, unless in exceptional cases, until the state courts have failed in their duty. When they fail, or the case is such that they cannot give adequate relief, it is time enough for the federal courts to interpose their power to see that the liberty of the individual is maintained.

Now, to the case here: The petitioner has been convicted by a municipal court of a minor offense, growing out of a police regulation. From the judgment of conviction, he had an appeal to the circuit court of the state. Of this he did not avail himself, and the time is now run. But the fact that he now has no appeal in the state court, it having been lost by his own volition or want of diligence, should not strengthen his case for an application to this court for relief in a summary way. He has yet a resort to the state courts if his conviction was through excess of authority in the municipal judge. He may apply there for a writ of habeas corpus, as he has done here, and the courts there are quite as competent to grant him relief as this court, and will be quite as tender and considerate of his liberties as a federal court. If the court to which he applies fails, through error of judgment, to do him justice, he will have an appeal to the highest judicial tribunal in the state; and then, if he is not satisfied with its judgment, he will have his writ of error to the federal Supreme Court. Thus provision is found for the safeguarding of his liberties to the uttermost. His relief will be as speedy there as here. It is in better accord with the policy and authority of our dual system of government that he be required to take that course.

His petition will therefore be dismissed.

In re BAUMHAUER.

(District Court, S. D. Alabama. June 3, 1910.)

1. BANKRUPTCY (§ 228*)—REFEREE'S FINDINGS—CONCLUSIVENESS.
The findings of a referee in bankruptcy on a question of fact will not be reversed unless manifestly wrong.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*

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

2. BANKRUPTCY (§ 340*)—CLAIMS—PRIMA FACIE PROOF.
A proof of claim in bankruptcy is prima facie proof of the allegations therein; but, where the proof is rebutted, the referee should disallow the claim unless further evidence to establish it is produced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

3. EVIDENCE (§ 594*)—UNCONTRADICTED TESTIMONY—CONCLUSIVENESS.
While positive and uncontradicted testimony on a hearing in bankruptcy should not be disregarded arbitrarily, it may be disregarded if it is grossly or inherently improbable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

4. BANKRUPTCY (§ 340*)—CLAIMS—PROOF—SUFFICIENCY.
Evidence in bankruptcy *held* to sustain a referee's finding disallowing a claim for borrowed money.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

In the matter of W. C. Baumhauer, bankrupt. From an order of the referee disallowing J. H. Baumhauer's claim, he appeals. Affirmed.

Fitts & Leigh, for appellant.
R. H. & R. M. Smith, for objecting creditors.

TOULMIN, District Judge. It is the recognized rule of the courts of bankruptcy, that, on review of the decision of a referee based upon his conclusion on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court.

"He sees and hears the witnesses, and his vantage ground is much better than that of a court for determining the credibility of the witnesses and the weight of their testimony." In re Stout (D. C.) 109 Fed. 794.

In the case of Southern Pine Company v. Savannah Trust Company, the Circuit Court of Appeals of the Fifth Circuit said:

"The established rule seems to be that the findings of fact by a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified unless it clearly appears that there was error or mistake." 15 Am. Bankr. Rep. 618, 141 Fed. 802, 73 C. C. A. 60.

"The District Court will not interfere with the action of the referee in bankruptcy as to his findings on facts, unless the same are manifestly erroneous." In re Waxelbaum, 101 Fed. 228. See, also, In re Stout, 6 Am. Bankr. Rep. 505, 109 Fed. 794; In re Lafleche, 6 Am. Bankr. Rep. 483, 109 Fed. 307; In re Covington, 6 Am. Bankr. Rep. 373, 110 Fed. 143; In re James

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

Nassau, 14 Am. Bankr. Rep. 828, 140 Fed. 912; In re Douglas C. Kenyon, 19 Am. Bankr. Rep. 194, 156 Fed. 863.

"A referee's finding of fact that depends upon the truthfulness, not merely the accuracy of oral testimony, should be upheld unless clearly wrong." In re John R. Shriver, 10 Am. Bankr. Rep. 746, 125 Fed. 511; In re Swift, 9 Am. Bankr. Rep. 237, 118 Fed. 348; In re West, 8 Am. Bankr. Rep. 564, 116 Fed. 767.

"The findings of fact of a referee as to the validity of a claim will not be overruled, except upon convincing proof that he was wrong in his conclusions." In re Hatem (D. C.) 20 Am. Bankr. Rep. 470, 161 Fed. 895.

The contention of the claimant is that he, having filed his claim properly verified, made out his case, and that he should have been allowed his entire claim.

It is true that the claimant filed a formal proof of claim against the bankrupt estate, and it is also true that this proof of claim is prima facie evidence that the allegations made therein are correct, and this prima facie evidence must prevail until it shall be properly and successfully attacked.

In Re Castle Braid Company (D. C.) 145 Fed. 228, the court said:

"The allegations of the proof of claim are to be taken as true. If they set forth all the necessary facts to establish the claim, and are not self-contradictory, prima facie, they establish the claim, * * * and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the proofs of claim. The burden of proof is always on the claimant; but, as probative force is given to the allegations of the proof of claim, * * * this must be met, overcome, or at least equalized, by the objecting party." Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584.

If there be proof of facts sufficient to rebut the prima facie proof, the referee should disallow the claim unless the claimant produces further evidence sufficient to establish his claim.

The court in the case of In re Hatem, 161 Fed. 896, said:

"As to the findings of fact, the court would be loath to overrule the decision of a referee who has heard the witnesses testify, looked into their eyes, and observed their deportment on the stand, especially in a matter like this, largely local, and will not do so, except on convincing proof that the referee is wrong in his conclusions. * * * The bankrupt and claimant both testified as to this pretended indebtedness. They produced notes signed by the one and held by the other. * * * The referee did not believe either the bankrupt or claimant, and no evidence has been produced which tends to satisfy this court the referee was wrong in not believing them."

In the case at bar the claimant, though present at the hearing, did not testify; but the bankrupt did testify in behalf of the claimant. The referee had the opportunity to see and hear him and observe his manner while testifying, which is an advantage of great value in cases of this character. This witness' testimony is in some material respects vague and uncertain, if not evasive. He stated that he borrowed $15,000 from the claimant at divers times and in divers amounts from January, 1907, to April, 1908, but that he did not remember the specific dates or months in which he obtained the money, nor did he remember the specific amount he got each time or at any one time, except in one instance when he borrowed $2,500, the date of which he did not remember. He testified that he was a merchant and kept a cashbook, but did not enter the cash obtained on said various loans on

said book, or keep any memorandum of them; that he made a note for each loan when obtained, which was taken up and destroyed when the note for the next succeeding loan was made, the amount of the prior loan or loans being included in the last note made; and that the note for $15,220, now claimed to be due, included all said prior loans. He also stated that said alleged indebtedness is not shown anywhere on his books.

On these facts and circumstances, and other facts and circumstances of probative force shown by the evidence and particularly pointed out and considered by the referee, as appears in his opinion filed in this case, his conclusion was that the claimant had not established his claim as made, and the same was disallowed by the referee as to the full amount claimed.

It is contended that the claimant's formal proof of his claim, and the bankrupt's positive testimony as to the particular fact that the former loaned to the latter the amount of money claimed, being uncontradicted by any one, the claimant is entitled to the full amount of his claim, and that the same should have been allowed; and it may be said that, to justify the referee's finding, he must have disbelieved both the claimant and the bankrupt.

While it is true that the positive testimony of an uncontradicted witness cannot be disregarded by the referee or the court arbitrarily or capriciously, yet there may be such a gross or such an inherent improbability in the statements of the witness in reference to the fact testified to as to discredit him, and to induce the court or referee to disregard his evidence in the absence of any direct conflicting testimony.

In Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501, the Supreme Court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

In Lee Sing Far v. United States, 94 Fed. 838, 35 C. C. A. 331, the Ninth Circuit Court of Appeals said:

"It was for the referee, in the first instance, to determine the credibility of the respective witnesses and the sufficiency of the testimony. The witnesses are brought before him. He had the opportunity of seeing them, and noticing their manner and appearance—their freedom or hesitation in answering questions. These and other circumstances of like character are often as safe a guide as the mere language used by the witness in enabling the court to determine the truth or falsity of the testimony. It is true that a witness is presumed to speak the truth; but this presumption may be overcome and repelled by the manner in which he testifies, by his demeanor on the witness stand, by the character of his testimony, by the circumstances

and surroundings under which he testified, whether his statements are reasonable or unreasonable, the probable or improbable nature of the story he tells, * * * and his interest, if any, in the proceedings; and if from these and other circumstances the court is of opinion that his statements are false, incredible, or unsatisfactory, it has the right to reject them. Of course, this power is not an arbitrary one, and should in all cases be exercised with legal discretion and sound judgment."

I cannot assume that the referee acted arbitrarily in refusing to believe the testimony of any witness, and no evidence produced convinces me that he was wrong in his conclusions in this case.

His findings and order are affirmed.

STUART v. HOLLAND et al.

(Circuit Court, D. Oregon. June 27, 1910.)

No. 1,123.

1. EQUITY (§ 72*)—"LACHES"—ELEMENTS IN GENERAL.

In order that "laches" may bar a suit in equity, it must appear that, beyond the mere lapse of time, it would be inequitable in some matter of substance to permit the claimant to assert his alleged right as against those having enjoyed the same in repose in the meanwhile.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 213; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, pp. 3969–3972; vol. 8, p. 7700.]

2. EQUITY (§ 67*)—LACHES—COMMENCEMENT OF SUIT.

The institution of a suit does not relieve a person from the charge of laches, and, if he fail in the diligent prosecution of his action, the consequences are the same as though he had never taken it.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 67.*]

3. WATERS AND WATER COURSES (§ 177*)—DAMS—INJUNCTION—LACHES—ELEMENTS.

Where a suit to enjoin the maintenance of a dam was begun in 1884, and nothing was done in its prosecution from June, 1885, to May, 1907, during which time there was nothing to prevent its prosecution, though a part of the dam was located on land the title to which was involved in other litigation, and though the patent to the lands overflowed by reason of the existence of the dam did not issue till long after the commencement of the suit, but the value of the land in the meantime had greatly increased and its ownership changed, the suit is barred by laches of complainants.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 262; Dec. Dig. § 177.*]

In Equity. Suit by Wanna Stuart against Josephine Holland and others. Demurrer to amended bill of complaint sustained.

This suit was commenced October 9, 1884, in the circuit court of the state of Oregon for Marion county, under the title of John F. Miller and Wm. P. Miller v. Vallier Wattier, to enjoin the maintenance of a dam across Little Pudding river, in Marion county. The cause was removed to this court at once, whereupon a motion was interposed to remand, resulting in a denial thereof June 17, 1885. From that date nothing further was done until May 27, 1907, when a motion was made for a continuance of the cause in the name of the present litigants. By order of June 22, 1908, the motion was allowed;

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

the complainant having succeeded, by deeds of conveyance, to the right, title, and interest of John F. and William P. Miller in the premises affected and the cause of suit, and the defendants to those of Vallier Wattier, by descent as heirs at law. Thereupon the complainant filed her amended bill of complaint.

The bill shows: That John F. Miller made application to the state in 1872 to purchase certain of the lands described therein as swamp and overflowed lands, part of which lands so applied for were patented to the state September 25, 1890, and a small tract, consisting of lot 3 in section 23, township 6 south, range 2 west, on March 9, 1905. That the board of school land commissioners for the state issued to him a certificate of purchase. That, with a view to reclaiming the lands in pursuance of the laws of the state, William P. Miller became interested with John F. Miller therein, and while they were so interested together this suit was first instituted. That Little Pudding river flows through lot 3, section 7, township 6 south, range 1 west, being a tract of the lands described in the bill of complaint in which complainant is interested. That the dam in question is constructed partially upon this tract, and is maintained at the height of eight feet, which causes the water to flow back upon complainant's land a long distance, and to cover a large area thereof, with other lands belonging to other persons, to complainant's great injury and damage. That defendants are the owners of a small gristmill and a small sawmill, situated upon lands belonging to them adjoining the lands of the complainant, and supposedly the dam is maintained for diverting water for operating said mills. It is further shown that the said dam had been maintained for a long period of time prior to the time of the institution of the suit, and that the lands of complainant, if reclaimed by drainage, are worth $250 per acre. Then it further appears that said lot 3 was for a long time in litigation between William P. Miller and Vallier Wattier which finally resulted favorably to the administrator of the estate of William P. Miller; that at the time litigation was entered upon concerning said lot 3 it had not been patented to the state, and was not so patented until the day and date in the amended complaint set forth and mentioned. As to this allegation there is some mistake, as the amended complaint shows nothing as to when the patent passed from the government as to this particular tract.

To this bill a demurrer has been interposed, based, among other things, upon the ground that the complainant has been guilty of laches precluding her from obtaining the relief prayed for.

J. A. Carson and W. H. Holmes, for complainant.

Williams, Wood & Linthicum and George G. Bingham, for defendants.

WOLVERTON, District Judge (after stating the facts as above). In the view I take of this controversy, it will be unnecessary for me to examine other than the one ground of demurrer, namely, that which relates to laches of the complainant in prosecuting her suit. The cause of suit is the same now as it was when instituted. The titles to some of the lands involved have, since the commencement of the suit, been completed by patents from the general government; yet we must assume that complainant's predecessors had such an interest in the lands as to enable them to maintain the suit if she, as their successor, could maintain it now, barring the objection that she has been guilty of laches. So that the right to maintain the suit was as perfect when commenced as it is now, and has so continued throughout the whole time that it has been pending. At any rate, this is the same suit as it was when instituted, with the exception that new parties have been substituted by revivor for the old.

By recurrence to the facts, it will be seen that the suit lay dormant from June 17, 1885, to May 27, 1907, a period of almost 22 years. The only excuse attempted to be given for the delay is that a dispute was long pending between Vallier Wattier and William P. Miller, the ancestor of the present complainant, touching the right of ownership of lot 3, section 7, township 6 south, range 1 west. This dispute was eventually decided in the Supreme Court of the state in February, 1904, after it had been pending some 10 years. Miller v. Wattier, 44 Or. 347, 75 Pac. 209. I am not advised of the reason for the long delay in bringing that cause to a final determination; but it is not apparent why that suit should have delayed this one. True, the dam complained against is built partially upon this particular tract; but the mere location of the dam is not a vital element in the dispute. It would amount to a trespass, no doubt, for the defendants to enter upon the premises of complainant for maintaining the dam; but the matter of signal importance attending the injunction is that the defendants shall be restrained from overflowing the lands of the complainant. This cause of suit has continuously existed for this long period of time, and the particular location of the dam was not important. If the dam had been located wholly upon the premises of the defendants, or upon those of the plaintiff, or upon the premises of some one else, the result in overflowing the lands of the complainant would have been the same, and the injury and damages the same. So that the dispute and litigation about the ownership of said lot 3 has had nothing to do in real signification in delaying the prosecution of the present cause.

The term "laches" is relative in its significance. It depends largely upon the particular and attendant circumstances and conditions. What would be laches under one train of circumstances would not be so considered under another. While lapse of time is an absolutely essential element of the term, yet generally it must be attended with some hurtful results, which renders it inequitable for the party suffering the delay to assert his alleged rights against those who have enjoyed them in repose, believing themselves secure in such enjoyment.

"Laches in a general sense is the neglect to do what in law should have been done for an unreasonable and unexplained length of time under circumstances permitting diligence. More specifically it is inexcusable delay in asserting a right. Strictly speaking laches implies something more than mere lapse of time; it requires some actual or presumable change of circumstances rendering it inequitable to grant relief." 16 Cyc. 152.

This court has held that "the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly governs the case," is a valid defense, and this as against the general government. United States v. Tichenor (C. C.) 12 Fed. 415, 426, citing Story, Eq. Pl. § 813, and Story, Eq. Jur. § 1520. That was a case where the government had allowed 24 years to pass without asserting its alleged rights. And so also it has been held that, to support the defense of laches, it need not be shown that the defendant has been injured by the delay. Jones v. Perkins (C. C.) 76 Fed. 82.

The rule supported by the stronger authority, however, is thus stated by Mr. Justice Brown, in Galliher v. Cadwell, 145 U. S. 368,

372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738), after remarking that the cases are practically uniform upon the subject:

"They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

And later in the same opinion, after a review of several cases from the United States Supreme Court, it is said:

"They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of 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."

Again, in Townsend v. Vanderwerker, 160 U. S. 171, 186, 16 Sup. Ct. 258, 262 (40 L. Ed. 383), the same distinguished jurist says:

"The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

And yet later, in O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 370 (46 L. Ed. 636), the court says:

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

Thus it would seem that, beyond the mere lapse of time, it should appear that it would be inequitable in some matter of substance to permit the claimant to assert his alleged right as against those having enjoyed the same in repose in the meanwhile. As peculiarly applicable to the present controversy, I quote now language which also has the approval of the Supreme Court:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor

may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." Badger v. Badger, 2 Wall. 87, 94, 17 L. Ed. 836.

Furthermore, the institution of a suit does not relieve a person from the charge of laches, and, if he fail in the diligent prosecution of his action, the consequences are the same as though he had never begun it. Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; Bybee v. Summers, 4 Or. 354, 361.

In the case at bar the bill of complaint shows no fraud or deceit practiced by the defendants, whereby either complainant or her predecessors have been lulled into supposed security, or misled to their injury in any particular. She and her predecessors before her have been at all times free and unhampered to prosecute their suit, and it is entirely by their own neglect that it has not been done. In the meanwhile, after so long a time, the rights and privileges of the defendants have increased in value and importance. This is deducible from the very fact that the complainant is alleging that her lands will be of great value if drained, namely, the value of $250 per acre. This must be largely in excess of their value when this suit was begun in 1884. So that it is manifest that the defendants' status is not the same now as then, and that it would be inequitable, after this long lapse of time, to permit them to be disturbed in their right and privilege. It will be noted that defendants have not only enjoyed their privilege during the pendency of this suit since 1884, but that they so enjoyed it "for a long period" even prior to the institution thereof. This appears from the bill of complaint. Relative rights have surely changed in matter of substance after the lapse of so great a length of time, and the complainant, after such a long and continuous neglect to prosecute, cannot now be permitted to disturb them.

The demurrer will therefore be sustained, and it is so ordered.

NEW JERSEY TERMINAL DOCK & IMPROVEMENT CO. et al. v. ESTATES OF LONG BEACH.

(Circuit Court, E. D. New York. July 6, 1910.)

1. COURTS (§ 357*)—UNITED STATES COURTS—PROCEDURE—FEES OF REFEREE.
The fees of a referee appointed by an order of the United States Circuit Court must be controlled by the allowance of the court, if not agreed on by the parties, and are not affected by the statutory fees prescribed by the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

2. COSTS (§ 148*)—STIPULATIONS—FEES OF REFEREE.
It is against public policy to stipulate that any statutory provision as to the expenses of litigation is to be waived, and to agree, either with or on behalf of the referee, that anything he and the successful party may agree upon shall be collected from the unsuccessful party, without the power of review by any court, even that by whose order reference is had.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 575; Dec. Dig. § 148.*]

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

3. COURTS (§ 357*)—UNITED STATES COURTS—FEES OF REFEREE—STIPULATIONS.
A stipulation that a referee shall receive a reasonable compensation for his services, under practice in the United States courts adopting so far as may be the procedure of the state of New York, where the action was begun is not only within the control of the court, but should be presented to the court for determination, if the parties do not agree what is a reasonable amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

4. REFERENCE (§ 76*)—REFEREE'S FEES—STIPULATIONS.
Under a stipulation for reasonable compensation to a referee, the amount involved and benefit to both parties, as well as the standard of what charge the referee would make to a client, must be taken into account, since the referee is an officer of the court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 110; Dec. Dig. § 76.*]

Action by the New Jersey Terminal Dock & Improvement Company and others against the Estates of Long Beach. Heard on appeal from taxation of costs. Appeal allowed as to item of referee's fees.

Simpson, Thacher & Bartlett, for plaintiffs.
Charles C. Clark, for defendant.

CHATFIELD, District Judge. The plaintiff and defendant consented to the trial of this case before a referee to hear and determine, but with a provision that the report should be confirmed by this court before judgment could be entered. At the beginning of the reference they entered into the following stipulation:

"It is stipulated that the referee shall receive a reasonable compensation for his services, and for the time spent by him in the business of the reference herein, irrespective of any statute, which are hereby waived, which fee shall be paid by the successful party and be taxed as a disbursement against the unsuccessful party herein."

The statutory fees referred to therein are those enumerated in the laws of the state of New York, and with them this court has nothing to do. The fees of a referee appointed by an order of this court must be controlled by the allowance of this court, if not agreed upon by the parties. The plaintiff prevailed and took up the referee's report, which has since been confirmed by this court. Upon taxing costs, it is sought to have the amount allowed by the clerk. Taxation was refused, and an appeal to the court brings up the entire question.

The defendant not only objects to the amount which the plaintiff has paid to the referee, but also questions this court's right to fix the amount which shall be taxed. He insists that the stipulation entered into was against public policy, inasmuch as no referee or no court should be allowed to determine, as a finality, for himself what his decision may be worth in an individual case. With the general proposition thus presented by the defendant this court is in accord. It would seem to be against public policy to stipulate that any statutory provision as to the expenses of litigation is to be waived, and then attempt to agree, either with or on behalf of a referee, that anything that he and the successful party may think obtainable should

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

be forced upon the unsuccessful party, without the power of review by any court, even that by whose order the reference is had.

The situation would be different if the parties beforehand waived the benefits of the statute and agreed upon a flat or fixed rate of payment. The public would not be injured by such a proceeding, unless in the particular case some dangerous precedent might be established. But in the present matter the stipulation was that the referee should receive a reasonable charge; and under the practice in the United States courts, adopting so far as may be the procedure of the state of New York (this action having been begun in the state court and removed to this court), it would seem that the amount which can be taxed against the unsuccessful litigant is not only within the control of this court, but should have been presented to this court for determination, if both parties could not agree what was a reasonable amount as stipulated.

Under the circumstances, the rate at which the referee estimated the value of his services and the time which he devoted to the case do not seem to be unreasonable from his standpoint; but, in allowing compensation for a case of this nature, the amount involved and the benefit to both parties must also be taken into account, for the referee is nevertheless an officer of the court, and bound to be governed in his charges by all the considerations affecting the situation, rather than by the sole standard of what charge he would make to a client. The plaintiff has agreed with the referee in the referee's estimate of what his services are worth; but he can recover from the defendant the amount only which this court feels should be allowed for that purpose in this particular case, and as to the balance the plaintiff will have to meet the expense for itself.

The plaintiff may tax as an item of referee's fees the sum of $1,000, and to that extent the appeal from the action of the clerk will be allowed.

THE COLFAX.

(District Court, E. D. New York. April 25, 1910.)

1. MARITIME LIENS (§ 20*)—SUPPLIES—STATE OF HOME PORT.

No maritime lien is presumed for supplies furnished in New York to a vessel whose home port is in the state, and unless an agreement therefor is shown a lien can only be secured by following the requirements of the state statute.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 27; Dec. Dig. § 20.*]

2. MARITIME LIENS (§ 25*)—STATUTORY LIEN.

A claimant *held* entitled to a lien for services and supplies furnished to a dredge on orders of the master, under Consol. Laws N. Y. 1909, c. 33, § 80.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 25.* Created by state laws, see note to The Electron, 21 C. C. A. 21.]

In admiralty. George L. Penny and Peter Wyckoff urge claims against the scow Colfax. Decree for Wyckoff, and against Penny.

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

Frank C. Barker, for libelants.
Foley, Martin & Nelson and Alexander & Ash, for claimants.

CHATFIELD, District Judge. The libelant Wyckoff has claimed certain items, amounting to $82, for the services of a boat, the Eel, which carried water from the pumping station to the dredge Colfax, while at work within this district; also $2.35 for supplies, $5 for towing, and $267.15 for water. These services were rendered and supplies furnished between the month of December, 1908, and the 13th day of August, 1909. On the 8th day of September, 1909, the vessel was sold in another action by the United States marshal, and the proceeds are now in the registry of the court. On October 27, 1909, Wyckoff filed a specification of lien, according to the laws of the state of New York; his libel in the present action having been begun upon the 7th day of September, 1909, and the libel having been amended to set forth the filing of the lien above referred to.

The libelant Penny claims a lien for certain lumber and other merchandise, of which the last item was delivered May 26, 1909, for which he filed a libel in this court on September 8, 1909, and a lien in the office of the clerk of Suffolk county on November 9, 1909.

Both Penny and Wyckoff have claims which seem to come within the subject-matter of chapter 33, § 80, of the Consolidated Laws of New York, passed February 17, 1909; but in the Penny Case a notice of lien was not properly filed, nor was this action started within 90 days after the furnishing of the last item, or any of the items sought to be secured thereby.

But the provisions of the New York law are expressly limited in application to debts which are not liens by maritime law. It is necessary, therefore (inasmuch as the state law was not complied with in the Penny Case, although both libelants began their actions in admiralty by the service of process before filing the notices of lien under the state statute), to consider whether a maritime lien exists. The Golden Rod, 153 Fed. 171, 82 C. C. A. 345. The services were rendered and the supplies furnished at a place within the state, but apparently outside of the home port of the vessel, which was the port of New York. The Alice Tainter, 14 Blatch. 41, Fed. Cas. No. 195; The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; The Algonquin (D. C.) 88 Fed. 318.

The items in question are not of such a nature that a maritime lien (such as salvage, towage, pilotage, and wages) will be presumed under the admiralty jurisdiction of the United States. The Alligator, 161 Fed. 37, 88 C. C. A. 201. As stated above, the items are apparently of such a sort as are defined in the New York statute, and hence under the practice treating all vessels owned in the state, which includes the home port of the owner, as domestic vessels (The General Smith, 17 U. S. 438, 4 L. Ed. 609), no purely maritime lien could be maintained. As to both boats, therefore, the existence of a lien must be judged by the standards of the state lien law, and the Wyckoff lien must be held valid, while the Penny lien expired and was lost.

Even if measured by purely admiralty standards, and assuming that

the vessel could be deemed to have been in a port other than her home port, or if the New York law should be construed as not covering items of this sort, the result would be the same. The testimony is to the effect that in the case of the libelant Wyckoff credit was given at the time of selling the items to the vessel, upon orders by the master, who was not the owner. But, so far as the Penny claim is concerned, the credit was actually given to the owners of the dredge, and no maritime lien has been proven. The actions in personam previously brought prove nothing by their mere existence, and no part of the claims have been collected thereby.

The libelant Wyckoff may have a decree. The libel of Penny must be dismissed, but without costs.

THE COLERAINE.

THE NELLIE TRACY.

(District Court, E. D. New York. July 27, 1910.)

1. TOWAGE (§ 17*)—TUG AND TOW—MISHAP TO TOW—WARNING.

While the captains of other barges in tow of a tug are not required to perform any service with reference to another barge in the tow to which an accident has happened, they do owe a duty to warn the tug thereof.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 17.*]

2. TOWAGE (§ 12*)—INJURIES TO TOW—NEGLIGENCE—EQUAL FAULT.

Where one of the scows of a tow was swamped owing to the failure of the tug to keep a proper watch of the tow and of the conditions of wind and weather affecting the tow, and the captain of the scow, in the face of danger, did nothing to protect his boat from the inrush of water, and did not attempt to attract the attention of the tugs, both were chargeable with blame for the loss of the scow, so that the damages would be divided.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24–26, 29; Dec. Dig. § 12.*]

In Admiralty. Libel by the New York & New Jersey Transportation Company against the steam tugs Coleraine and Nellie Tracy. Damages divided.

Wray & Callaghan (Albert A. Wray, of counsel), for libelant.
Martin A. Ryan, for claimant.

CHATFIELD, District Judge. This court has already found that the course pursued by the tugs, and the failure on the part of the tug Coleraine to keep proper watch as to its tow, and as to the conditions of wind and weather affecting the tow, were negligent acts, sufficient to hold both tugs responsible for the accident. It might be possible to differentiate between the tugs, or to hold the Coleraine alone responsible; but inasmuch as the Nellie Tracy shared in the failure to keep a lookout, or profit by what lookout she had, and as both tugs are owned by the same company (the tug Nellie Tracy acting under the direction of the Coleraine), it would seem to be reasonable to excuse neither one for their part in the general neglect. On the

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

other hand, the captain of the Virginia E. and the captains of the other barges seem to have had no idea that they were responsible for such acts of prevention or such acts of warning as would be timely to prevent the accident. The captain of the Virginia E. was worried about the safety of his wife and himself, but did not apprehend that his scow would be lost to its owners, or that he should do anything to protect the boat, until the captains of the other boats came to his rescue, and of their own accord began to give signals to the tug. Even the captains of the other boats, who seem to have had more appreciation of the risk, made no serious attempt to signal the tug, but debated the likelihood of disaster resulting from the apparent danger, until a sudden increase of wind caused a prospect of immediate disaster.

While no duty rested upon the other captains to perform any service with reference to the boat Virginia E., nevertheless these captains owed it to the tug, which was doing the towing, to warn it in time of any mishap to the tow; and their evident hesitation in disturbing the tug, and their participation in the idea which the captain of the Virginia E. seems to have had, that he had nothing to do except to wait until arrival at his destination, is more or less instructive in showing the relations existing between the crews of the tugs and the men upon the barges, and indicates that these barge captains should be shown that some responsibility rests upon them. The captain of the Virginia E. might not have been able to put all of the hatch covers across the large cock-pit to his barge, and he might have been entirely unable to interpose any obstruction to the sweep of the waves along the deck; but, if that were the case, he should immediately have attempted to warn the tug. The evidence shows plainly that a long time elapsed, in which he not only did nothing, whether useful or otherwise, to keep the water out of his boat, but also did nothing in the way of attracting the attention of the tugs. Under such circumstances, the tugboats and the barge should be held responsible for the loss.

This case differs from that of The Asbury Park (D. C.) 136 Fed. 269, in which, in the District Court, both the Asbury Park and the coal boat were held jointly responsible, on the ground that the Asbury Park had negligently caused the swells producing injury, while the master of the boat had failed to perform his duty, both in neglecting to call for assistance and in leaving his boat to herself in time of danger; while on appeal ([C. C. A.] 147 Fed. 194) the decree was modified, the court holding that the cause of sinking was not the joint act of the two boats, but that each was a separate transaction, and that the proximate cause was the failure of the master of the boat to take care of or attempt to obtain help for his own boat. Likewise, in the case of The Baltimore, 75 U. S. 377, 19 L. Ed. 463, it was held that, after a collision, the boat in fault for the collision was not also responsible for a failure on the part of those in charge of the injured ship to use reasonable skill and diligence, and that damages should not be recovered for the augmented injuries due to the negligence of the parties themselves.

But in the case at bar the continued progress of the boats under conditions which should have been taken into account by the master

of the tugboat, and the disregard of proper precautions by the master of the barge, were contemporaneous. An extremely severe increase in the wind, or rather a short period of much higher wind than that which had preceded it, proved to be sufficient to swamp the Virginia E., in the condition in which she was. Both the tug captain and the captain of the Virginia E. should have anticipated that a hard blow might occur, in view of what had been going on for half or three-quarters of an hour. The negligence of the towboat might have been overcome by care on the part of the barge's master, and, on the other hand, the negligence on the part of the master of the barge might have been overcome by care on the part of the towboat. And it seems necessary to reach the conclusion that both acts of negligence entered into the loss of the boat in such a way that the entire blame should not be put upon one alone.

The damages will be divided.

ROMONA OÖLITIC STONE CO. v. BOLGER et al.

(Circuit Court, D. Pennsylvania. June 13, 1910.)

No. 844.

1. JOINT-STOCK COMPANIES (§ 15*)—PARTNERSHIP ASSOCIATIONS—LIABILITY OF MEMBERS.

Members of a Pennsylvania partnership association are not individually liable for its debts.

[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 12; Dec. Dig. § 15.*]

2. JUDGMENT (§ 379*)—OPENING—ASSOCIATIONS—SUITS AGAINST MEMBERS.

A judgment against individuals, obtained on the theory that on account of improper formation of a partnership association they were liable as general partners, will be set aside at the instance of members who had no notice of the suit, and who did not authorize the attorney who accepted service and appeared, though no defense to the merits of the claim is set up; they being entitled to show that the company was a partnership association, for whose debts they are not individually liable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 717, 718; Dec. Dig. § 379.*]

3. PARTNERSHIP (§ 204*)—SUITS AGAINST—SERVICE.

Ordinarily, on suit against a partnership, all members must be served to make them individually liable; but service on one member expressly or impliedly authorized to represent the rest binds them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.*]

Action by the Romona Oölitic Stone Company against John J. Bolger and others, partners as John J. Bolger Stone Company, Limited. On rule to open judgment. Rule made absolute, and judgment opened as to petitioners Frank Heavner and others.

Guilliaem Aertsen, Jr., and Francis Rawle, for plaintiff.
J. Morris Yeakle, for petitioners.

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

J. B. McPHERSON, District Judge. The plaintiff sued upon a contract that was apparently made by the John J. Bolger Stone Company, limited, a partnership association under the Pennsylvania statutes. In such an association, if it has been properly formed, the members are not individually liable for the debts. Believing, however, that it had been improperly formed, and therefore that the members were liable as general partners, and that the association was liable as an ordinary firm, the plaintiff brought the present suit, not against the association, but against the individual members, naming them as individuals, and further describing them as "copartners trading as the John J. Bolger Stone Company, Limited." The writ was not served upon any of them, but service was accepted and appearance "for the defendants" was entered by Charles D. McAvoy, an attorney who signed his name on the writ as "attorney for J. Bolger Stone Company." Trial was had, followed by a verdict and judgment for the plaintiff. Within a short time afterwards, three of the defendants obtained this rule to open the judgment as to them; each petition containing the following averments:

"Your petitioner had no knowledge or notice of the issuance of the summons in said suit, or of the filing or the existence of the statement of claim therein, or of the filing or existence of the affidavit of defense referred to, or of the rule to plead, or plea filed in said suit, or of the intermediate or subsequent steps in the pleadings or trial of said suit. Your petitioner had no knowledge or notice that any suit was pending against him, or that he was individually charged, or was about to be individually held responsible for the claim laid in said suit. He had no notice or knowledge of the trial of said suit, or the rendition of said verdict, or the entry of judgment thereon, until May 20, 1910, since which time he has made prompt effort to have the said judgment opened and to be admitted to a defense.

"Your petitioner never authorized, directly or indirectly, Charles D. McAvoy to accept service of the summons or the statement of claim in said suit on behalf of your petitioner, individually or as a general copartner with any or all of the defendants in said suit, or to file an affidavit of defense, or to file a plea, or to appear at trial on behalf of your petitioner as an individual or as a general copartner with any or all of said defendants, and every step taken by said Charles D. McAvoy in said proceedings, so far as it concerns your petitioner, either individually or as a general copartner with said defendants, was without authority from your petitioner."

No defense on the merits was set up to the plaintiff's claim against the limited partnership, but the petitioners assert that they are not individually liable, averring that the association was properly organized, and denying that they, either personally or by agent, had entered into any contract with the plaintiff, or had received any individual benefit therefrom. Depositions were taken, and it was clearly shown that the allegations contained in the paragraphs quoted are true.

Under such circumstances, I regard it as beyond question that the judgment must be opened. Ordinarily, when a partnership is sued, all the members must be served, or they will not be individually liable upon the judgment. The partnership itself may, perhaps, be brought into court by summoning only one of its members; but the individual members can only be bound by a suit of which they have individual notice. This is the general rule; but, of course, if one member has authority to represent the rest for the purposes of the suit—whether such authority be express or implied, general or specific—service

upon him alone may bind the others; but this result follows because he is their agent ad hoc, and his act is therefore binding upon his principals. Here, however, there was no such authority, so far as the three petitioners are concerned; and it hardly seems to be an arguable proposition that they cannot be bound by a judgment rendered in a suit of which they had no notice or knowledge, either actual or constructive. Walsh v. Kirby, 228 Pa. 194, 77 Atl. 452.

That they have no defense on the merits of the contract between the plaintiff and the limited association is not important. They do have a defense to the enforcement of individual liability to satisfy a suit upon that contract, and upon this question they have a right to be heard. They deny that the organization of the association was improper, so as to subject them to liability as general partners, and upon this dispute they have never had an opportunity to present their case. To refuse this application would violate the fundamental rule that no tribunal in an English-speaking country will cast a man in damages unless he has had notice and an opportunity to be heard.

The rule is made absolute, and the judgment is opened as to the petitioners, Frank Heavner, Michael F. Lawler, and Richard Bates, Jr. (or Richard H. Bate, Jr.).

UNION TRUST CO. OF NEW YORK v. FORTY-SECOND ST., M. & ST. N. AVE. RY. CO. et al.

(Circuit Court, S. D. New York. June 16, 1910.)

1. STREET RAILROADS (§ 58*) — MORTGAGES — FORECLOSURE — CHARACTER OF FUNDS.

   The transformation by a receiver in mortgage foreclosure against a street railway company of surplus income fund into cars does not change the fund's character.

   [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

2. STREET RAILROADS (§ 58*)—MORTGAGES—FORECLOSURE—SURPLUS INCOME—APPLICATION.

   In mortgage foreclosure proceedings against a street railway, determination of the rights of all creditors to a fund comprising the surplus income from receivership should be first raised before the special master.

   [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

3. STREET RAILROADS (§ 58*)—MORTGAGES—FORECLOSURE.

   On mortgage foreclosure and sale of a street railway, the purchaser should be required to pay cash to the amount of surplus income from receivership invested in cars sold as part of the road, though the decree permits him to turn over bonds as to the rest of the property, where the value of the bonds is indeterminate and question is raised as to whether the income is covered by the mortgage.

   [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. Foreclosure proceedings by the Union Trust Company of New York against Forty-Second Street, Manhattanville & St. Nich-

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

olas Avenue Railway Company and others. On motion to amend decree of foreclosure and sale. Amended decree directed.

Miller, King, Lane & Trafford, for complainant.

Bowers & Sands, Evarts, Choate & Sherman, and Kellogg & Rose, for defendants.

LACOMBE, Circuit Judge. In the inventory made and filed by the special master, in compliance with the fourth subdivision of the decree of November 30, 1909, there is included in the list of rolling stock, equipments, etc., the following items:

"Seventy-five electric convertible 'pay-as-you-enter' cars, Nos. 1,051 to 1,125, both inclusive, purchased on or about July 9, 1909, pursuant to an order of this court, dated June 8, 1909, at a cost of $350,365.50."

Question is raised as to whether these cars are covered by the mortgage, and complainant prays that the decree be amended so as to adjudicate that they are so covered.

When the receiver took possession of this road, it had no cars of its own, leasing such rolling stock as it required from the Third Avenue road. The receiver in time accumulated a sufficient sum from the operation of the road to buy 75 of these new model cars. It seemed a wise thing so to do, because it would improve the operation of the road while in his hands, and it was reasonable to expect that whoever bought the road, if sold, would need the cars, so that the money invested in them would not be subject to any risk of loss. If he had not bought these cars, the receiver would now have this $350,365.50 on deposit in some bank, or trust company, as surplus income during receivership, to be marshaled and distributed according to the principles of equity. The transformation of the money into cars has in no way changed its character, and for convenience of distribution it should now be retransformed into cash, so that, if not covered by the mortgage, and thus appropriated to the creditors secured by that mortgage, it may be distributed among whatever creditors may be entitled to share in it.

The question whether or not surplus income of receiver is covered by the mortgage is a doubtful one, which should not be decided in any summary manner. Notice of this motion has been given to all persons who have appeared in the proceeding; but this does not include the general body of creditors, who have had no intimation that any adjudication affecting their rights to receiver's surplus income is now in contemplation. The determination of the rights of all persons to that fund should be raised first before the special master, who will be able to provide for giving proper notification to such persons as have filed claims.

It is, of course, manifest that the best way to sell these cars is with the rest of the property as a unitary operating railroad fully equipped. From the proceeds of the sale the amount of the surplus income should be segregated and held as a separate fund until it may be determined to whom it should be distributed. Since the successful bidder is by the terms of the decree allowed to make good his bid by turning over bonds, and the value of such bonds is in-

determinate, the decree should be modified, so as to provide that cash should be paid, instead of bonds, to the amount of the surplus income.

The decree of November 30, 1909, should therefore be amended as follows:

(1) In subdivision 4, before the last paragraph, insert the following:

"The item of personal property described in the inventory as '75 electric convertible "pay-as-you-enter" cars, Nos. 1,051 to 1,125, both inclusive, purchased by the receiver on or about July 9, 1909, pursuant to an order of this court, dated June 8, 1909 at the cost of $350,365.50,' need not be sold as a separate item, but shall be included with the rest of the property. Provision for segregating the amount of receiver's surplus earnings, invested in said cars, and securing the same for future disposition will be found in subdivision 11, infra, in this decree."

(2) In subdivision 11, after the fourth paragraph, insert the following:

"The successful bidder, irrespective of the amount which he may have deposited prior to bidding, shall in making good his bid pay in cash the sum of $350,365.50, being the amount of surplus income of the receiver invested in the 75 electric convertible cars referred to in subdivision 4 of this decree. The special master shall deposit this $350,365.50 as a separate fund to await distribution under further order of this court."

It is also prayed that the decree be amended, so as to provide for an additional inventory. There is no opposition, and the modification seems desirable. The decree should be amended, by inserting in the fourth subdivision, after the first paragraph, the following:

"In addition to the inventory filed on June 28, 1909, in conformity to the original decree, the special master shall prepare and file with the clerk of this court not later than ———, 1910, a supplemental inventory of the legislative and municipal grants to Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company, which said inventory should also give a statement of the streets and avenues in which the railroads of the said railway company are located, and whether such tracks are adapted for the use of electric or horse cars, and a reference to the principal trackage rights, operating agreements, and contracts relating to said roads and tracks, and also a general statement as to the cables and ducts owned by the said railway company."

A further prayer to amend the decree by including in the property to be sold certain claims against the New York City Railway Company and its receivers is denied.

Let an amended decree be prepared and submitted for signature.

UNITED STATES v. NINE BARRELS OF OLIVES.

(District Court, E. D. Pennsylvania. June 30, 1910.)

No. 6.

1. FOOD (§ 24*)—PURE FOOD LAW—ADULTERATION OR MISBRANDING—FORFEITURE—PRELIMINARY EXAMINATION.

Food and Drugs Act June 30, 1906, c. 3915, § 4, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1189), providing for preliminary examination by the Department of Agriculture for alleged adulteration or misbranding of

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

food or drug products, does not apply to a libel for forfeiture authorized by section 10, which provides for a hearing in court in accordance with proceedings in admiralty, so that a preliminary examination before the Department of Agriculture is not a necessary condition precedent to the maintenance of a libel for the condemnation of the alleged objectionable product.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

2. FOOD (§ 24*)—PURE FOOD LAW—POSSESSION—BOND—EFFECT.

Food and Drugs Act June 30, 1906, c. 3915, § 11, 34 Stat. 772 (U. S. Comp. St. Supp. 1909, p. 1194), provides for the examination of articles sought to be imported, suspected of being adulterated or misbranded, by the Department of Agriculture, and declares that, if they are found to be so, entry shall be forbidden, and they shall be destroyed unless exported within three months from the date of notice of refusal of entry, except that, pending examination, the importer shall obtain possession by executing a penal bond conditioned to return the goods to the Secretary of the Treasury when demanded, etc. *Held* that, where proceedings were instituted for the examination and exclusion of certain alleged adulterated or misbranded olives, the importer's execution of a bond for possession under such section did not amount to an official declaration that the olives had been found to comply with the act.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

Libel by the United States for the condemnation of nine barrels of olives, under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]). Sustained.

Jasper Yeates Brinton, for the United States.
Arthur F. Schneider, for claimant.

J. B. McPHERSON, District Judge. The food product under inquiry in this case is black olives imported from Greece. The shipment was seized under the authority of section 10 of the food and drugs act of 1906 (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]). The importer appeared and claimed the goods, and a trial was had before the court without a jury, in which witnesses were examined and other evidence was produced.

The claimant objects to the jurisdiction of the court on the ground that no preliminary hearing was had by the Secretary of Agriculture in accordance with the provisions of section 4. To this it is enough to reply that section 10 of the act, under which the present seizure was made, is independent of section 4. This has already been decided by Judge Morris in United States v. 50 Barrels of Whisky (D. C.) 165 Fed. 966, and by Judge Dayton in United States v. 65 Casks, etc. (D. C.) 170 Fed. 449, and I agree with the result of these decisions. The precise scope of section 4 need not now be determined. It is enough to say for the present that it does not apply to a libel for forfeiture. Under section 10 provision is made for a hearing in court under this well-known process according to the practice of the District Court in admiralty, and a preliminary hearing going over the same ground would be superfluous. Of course, if the act required such a hearing, the court would obey the statute; but in my opinion the procedure under section 10 is complete in itself, and is not a mere continuation of the proceeding referred to in section 4.

Another defense is that the claimant has given the bond required by section 11, and that the acceptance of this bond by the government is equivalent to an official declaration that the olives had been found to comply with the act. I do not so understand the section, which reads as follows:

"The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: Provided, that the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: And provided further, that all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee."

In other words, if an examination is in progress before the Secretary of Agriculture, the importer may take the risk that the result will be what he desires, and may obtain possession of the goods by giving bond to return them in case the result should be adverse. This section does not appear to be so connected with section 10 as to present any obstacle to the remedy by forfeiture.

It only remains to add that, having heard and considered the evidence and the arguments of counsel, I am of opinion, and so find, that the olives in question consist in whole or in part of a decomposed vegetable substance, and should therefore be condemned.

An appropriate judgment may be entered in favor of the United States.

UNITED STATES v. 100 CASES OF TEPEE APPLES et al.

(District Court, W. D. Missouri. October 23, 1908.)

No. 245.

FOOD (§ 15*)—LABELS—"MISBRANDING."

Claimants operated a canning factory in Benton Harbor, Mich., where fruits grown in Michigan, as well as in other states, were canned and prepared for sale. Claimants canned certain "tepee" apples and blackberries grown in Arkansas, sold under a label on which was printed:

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

"Tepee Apples [or Blackberries, as the case might be]. Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan." There was evidence that Michigan apples and blackberries were better than those grown in Arkansas. *Held*, that the labels indicated that the fruit was grown in Michigan, and that claimants were therefore guilty of misbranding, in violation of Food and Drug Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

[Ed. Note.—For other cases, see Food, Dec. Dig. § 15.*]

Action by the United States of America to forfeit 100 Cases of Tepee Apples and 172 Cases of Tepee Blackberries for alleged violation of the food and drug act, because of misbranding. Judgment of forfeiture.

A. S. Van Valkenburgh, U. S. Atty., and L. J. Lyons, Asst. U. S. Atty.

Kelly, Brewster & Buckholz and Thomas E. Lannen, for C. H. Godfrey & Son.

SMITH McPHERSON, District Judge. This case is by information filed by the United States attorney, charging that Ridenour-Baker Grocery Company, of Kansas City, Mo., has in its possession cases of apples and blackberries in original unbroken packages which are misbranded within the meaning of the act of Congress approved June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), entitled "Food and Drugs." The fruits were thereupon seized by the marshal, and notice thereof given. In due time C. H. Godfrey & Son, of Benton Harbor, Mich., appeared and made defense. A jury was waived, and the case tried to the court. The evidence consists of an agreed statement of facts and the deposition of C. H. Godfrey. And these are the facts:

Godfrey & Son pack and can fruits, with their factory at Benton Harbor, Mich., and such has been their business for several years, with their principal office at that place, the fruits grown there, as well as in other states. Their only post office address was there. The apples and berries in suit were grown at and near Springdale, Ark., and by Godfrey & Son there bought and canned, and by them later on sold and shipped to the Ridenour-Baker Company at Kansas City. Each can of apples was labeled with a blue paper about ten inches long and five inches wide, with a picture of a red apple, an Indian tent, or "tepee," with the words "Tepee Apples. Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich." The berry cans had the same label in all respects, except the picture was of a cluster of blackberries and the words "Tepee Blackberries."

The opinion of the Secretary of Agriculture was that such words, to the exclusion of Springdale, Ark., where the fruit was grown and packed, misleads the public. Evidence is offered that Godfrey & Son did not know of such opinion, and that they believed the cans were properly labeled. Such evidence is not admissible and is ruled out. The evidence shows that Michigan and Northern apples are of a better quality and flavor than are Arkansas apples, and that is a matter of common information. As to the berries, the evidence is not

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

so certain, although the deposition of Mr. Godfrey fairly shows that Michigan blackberries, with one variety excepted, are better than those of Arkansas.

Adulteration of goods and false labeling had become so common that it was well-nigh impossible to purchase pure goods, or that which was called for. The same was true as to medicines. Congress undertook to remedy it. The one purpose was to prevent the sale of adulterations. The other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

In this case the label is very attractive to the eye, and of course its only purpose is to sell the fruit. But for that the label would not be on the can. That is what the purchaser at retail looks for, and that is what, more than any other statement or argument, induces the purchase. That the evidence shows that to be misleading, because the words thereon, "Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.," is understood by all adults and children as not only being there packed, but fruits grown in that vicinity. Of course it is idle to insist, as Mr. Godfrey does, that the fruits could not have been raised within the city of Benton Harbor. The term "misbranded," as used in the statute, as defined by the statute, is:

"The package or label of which shall bear any statement designed or device regarding such article * * * which shall be false or misleading in any particular, and to any food which is falsely branded as to the state, territory, or country in which it is manufactured or produced."

Again, the statute recites:

"If it be labeled or branded so as to deceive or mislead the purchaser, it should be considered as misbranded."

There can be no doubt, as it seems to me, that any purchaser from this label would be deceived, in that he would be receiving Arkansas fruits instead of Michigan fruits. Deception is seldom practiced by a literal falsehood, but is usually joined with some truth, so that the entire statement will deceive. And so in this case. Of course the statement is true that Godfrey & Son reside and do business at Benton Harbor; but that one true statement is used in conjunction with the packing of the fruits, and I repeat that I would believe from that, as would all others, that it is Michigan fruit within the cans. And if Godfrey & Son believe, and if it be true, that Arkansas fruits are as good or better than Michigan fruits, let that fact be disclosed by labels and otherwise. This statute is to protect consumers, and not producers. It is a most beneficent and righteous statute, and within the powers of Congress to legislate concerning, and should be en-

forced. It cannot be enforced if it is to be emasculated, as is sought in the present case. The order will be that the fruits and cans under seizure will be sold by the marshal after being properly branded. This will be done, instead of destroying them, as the fruits are not deleterious.

But this order may be avoided under the statute if Godfrey & Son will pay the costs and give bond to properly brand the goods in accordance with this opinion, and sell them in all respects in conformity to law.

PAGE v. MOORE.

(District Court, E. D. Pennsylvania. June 10, 1910.)

No. 1.

1. BANKRUPTCY (§ 186*)—ADMINISTRATION OF ESTATE—PREFERENCES—"PERSON BENEFITED."

Where a mortgage payable to a corporation was assigned as collateral security to the first indorser of notes of the corporation, the first indorser being financially responsible, a president of the corporation as second indorser of the notes, having received no part of the funds derived from the notes, was not a "person benefited" by the assignment within the bankruptcy law (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), so as to render him liable for the amount or value of the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

2. BANKRUPTCY (§ 303*)—ACTION BY TRUSTEE—EVIDENCE.

In an action by a trustee in bankruptcy of a corporation for a reassignment to the corporation of a mortgage payable to it or a money decree for its value on the ground that the original assignment was a preference, evidence *held* insufficient to show that the president of the corporation procured the assignment for the purpose of relieving him of a personal obligation as surety on a bond of the corporation as building contractor.

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

Suit by Howard W. Page, trustee in bankruptcy of Moore & Co., Incorporated, against William G. Moore. Bill dismissed.

Thomas Raeburn White, for complainant.
Henry P. Brown, for respondent.

J. B. McPHERSON, District Judge. This is a suit to avoid a preferential transfer, and it has been brought in equity because the property transferred was a mortgage, and the relief prayed for is in the alternative—either a reassignment of the mortgage, or a money decree for its value. The facts are, briefly, these: Moore & Co., Incorporated, the bankrupt, was engaged in the business of constructing buildings. It was insolvent on January 15, 1908, and the defendant, who was its president, knew its financial condition. On that day the bankrupt assigned a mortgage to Henry D. Moore, the defendant's father, as collateral security to protect his indorsement of the bankrupt's notes for $40,000. These notes were discounted for the bankrupt's benefit. The proceeds went into its treasury, and were afterwards paid out in the

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

usual course of business to laborers and materialmen and in the discharge of current liabilities. Henry D. Moore has paid the notes and still holds them as a liability of the bankrupt; but he is fully protected by the assignment of the mortgage.

The ground upon which it is sought to hold the defendant liable is that he was a "person benefited" by the assignment, and his counsel concedes that this is the only question for decision. The defendant was also an indorser upon the notes referred to; but, as Henry D. Moore was the first indorser, it is manifest that the assignment of the mortgage did not relieve the defendant from any liability upon his indorsement to which he would otherwise have been exposed. If the holder of the notes had called upon him to make his indorsement good, he could have compelled the first indorser, whose financial responsibility is ample and unquestioned, to reimburse him, and therefore the assignment of the mortgage to protect the first indorser did not relieve the defendant. Neither did he benefit directly by the assignment. The proceeds of the notes were not applied to any other obligations of the bankrupt upon which he was liable, and none of the money went into his pocket in any way. The trustee seeks to charge him upon a different ground altogether. I may note in passing that some stress is laid in the complainant's brief upon the averment that the defendant had agreed to indemnify his father against liability upon the latter's indorsement; but I do not think the evidence sufficiently supports the allegation, and I find the disputed fact in favor of the defendant. Laying this matter aside, therefore, it remains to consider the reason that is most insisted upon for holding the defendant to have been a "person benefited" within the meaning of the act (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). The further facts are these:

It appeared that the defendant had been a member of a partnership whose business was taken over by the bankrupt corporation. The partnership and the corporation had each entered into certain building contracts, and had been obliged to give bonds for the faithful execution of these agreements. The surety was an indemnity company, and the defendant had given counter security to protect the company. The amount was large, $120,000. The buildings were still incomplete when the mortgage was assigned. The bankrupt was in financial difficulties and needed money to go on with the contracts, and, if the bankrupt had been obliged to abandon the buildings, the indemnity company would have been compelled to make good whatever damage might thus have been caused to the owners of the buildings, and the defendant would thereupon have been liable over to the surety. In this situation the trustee contends, to state his position in the language of his counsel:

"But in any aspect of the matter respondent was the party to be benefited, for it is not disputed that the whole purpose of raising the $40,000 was to enable the bankrupt to gain further credit, and by this means to complete the buildings then under contract, and which respondent was under a personal liability to complete. Even if respondent's view of the assignment of the mortgage be taken in its entirety—that it was executed and delivered in January to his father, and that he was under no obligation of any kind to reimburse him—yet how can it be doubted that respondent was the real party to

be benefited by the transaction? By causing the bankrupt to assign away its mortgage, it was enabled to raise money sufficient to increase its credit and complete the buildings then under contract, and thereby relieve respondent of a personal obligation amounting to $120,000. The whole transaction was in pursuance of a plan to escape an impending disaster at the expense of innocent third parties, and an essential and necessary part of the scheme was the withholding of this mortgage from record until this could be done. The evidence clearly shows the whole thing was engineered by respondent to gain his own ends."

I am not advised of any decision which carries the doctrine of "benefit" as far as this. Assuming, however, that a trustee might maintain the legal position successfully, he must first of all establish the underlying facts, and in my opinion the evidence in the present case is not sufficient. As I look at the matter, the trustee has not proved that the part taken by the defendant in the assignment of the mortgage to his father had the object described in the foregoing quotation. The defendant knew that the bankrupt was financially embarrassed and needed money to carry on its contracts; but I see no ground to believe that he devised and helped to carry out such a scheme as the trustee supposes. It is much more likely—and I think the evidence so indicates—that he believed the need for money to be the not unusual situation of any business venture, and that if funds could be raised by an adequate loan the contracts could be finished without ultimate loss, and perhaps even at a profit. It seems clear that the present unfortunate condition of affairs is due to the sanguine anticipations of comparatively inexperienced builders, who undertook much more than they could manage, and after suffering some unexpected disasters ended in a court of bankruptcy. As a consequence, losses large in the aggregate have fallen upon a number of persons—among them, upon the defendant himself—but the misfortune of one man cannot be shifted to the shoulders of another unless the latter has been to blame.

A decree may be entered dismissing the bill, with costs.

In re CLEARY.

(District Court, E. D. Pennsylvania. June 25, 1910.)

No. 3,659.

BANKRUPTCY (§ 89*)—PETITION—AMENDMENT—EFFECT.

Where, after answer to a bankruptcy petition, it was amended so as to charge another act of bankruptcy, consisting of a preferential payment to a different creditor than that mentioned in the answer, which the bankrupt admitted, and declared his willingness to submit to adjudication on that ground, the answer would be regarded as raising moot questions only, and the adjudication would be entered on the amendment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 89.*]

In the matter of George Cleary, alleged bankrupt. On motion to strike off the answer, on demurrer to the answer, and on motion for adjudication. Motion for adjudication granted, and motion to strike off answer refused.

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

Thomas Boylan, for petitioning creditor.
Francis J. Maneely, for Consumers' Brewing Co.

J. B. McPHERSON, District Judge. This record presents an unusual situation. On January 24, 1910, Lizzie Donohue presented a petition against the bankrupt, alleging, inter alia, that the number of his creditors was less than 12. The act of bankruptcy averred was a preferential payment to the Consumers' Brewing Company. On February 14th the bankrupt answered, admitting the preference and his insolvency and declaring his willingness to submit to adjudication on that ground. On February 16th the brewing company, describing itself as "an alleged creditor," entered an appearance—but without having received permission to intervene—and on the same day filed the following answer:

"That on or about the 7th day of October, 1907, the said George Cleary made an application to the said Consumers' Brewing Company for a loan of $6,500; the said George Cleary being at that time about to engage in the business of selling liquor at retail in the city of Philadelphia, at No. 3822 Lancaster avenue. That the said application for said loan was granted, and the money advanced to said Cleary. That, subsequently, the said Consumers' Brewing Company, on the 22d day of May, 1908, loaned to the said Cleary the sum of $800, and on May 22, 1909, the sum of $900, making in all the sum of $8,200, upon which was paid on account the sum of $512, leaving a balance for money loaned of $7,688. That on December 11, 1909, the said Cleary was indebted to the said Consumers' Brewing Company in the further sum of $104.05 for merchandise sold and delivered, making the total indebtedness of said Cleary at that time $7,792.05.

"That on or about the said 7th day of October, 1907, when the said Cleary made the application for the above-mentioned loan of $6,500, he was accompanied by one William Donohue, and Cleary stated that he was investing in said liquor business the sum of $2,500 in cash, and that he was not indebted to any person in any sum whatsoever at that time. That the said William Donohue, acting as agent for and on behalf of Lizzie E. Donohue, the petitioner, made the same statement to the Consumers' Brewing Company, upon the faith of which the said loan of $6,500 was granted.

"Respondent further says that in the latter part of November, 1909, the said George Cleary, being still the holder of the aforesaid license to sell liquor at retail at No. 3822 Lancaster avenue in the city of Philadelphia, stated to several of the officers of the said Consumers' Brewing Company, at their office in the Bullitt building in said city, that he desired to sell and transfer the said liquor license to one Harry P. Mosebach for the price or sum of $10,500, which said sum said Cleary stated was more than sufficient to discharge all of his debts and leave him a small surplus. That he asked the said Consumers' Brewing Company to substitute in his place and stead as debtor the said Harry P. Mosebach; there being only the sum of $1,000 cash to be paid on account of the said purchase price of said license. That he further stated that, in addition to the amount due said Consumers' Brewing Company, he owed the firm of Simms & Co., of said city, about $2,400, and that his remaining debts did not exceed $200 or $300, and he made no mention whatever of any indebtedness due to the said Lizzie E. Donohue, the petitioner. That on this occasion the said Cleary was accompanied by the said William Donohue, acting as agent for the said Lizzie E. Donohue, who repeated and corroborated the statements of the said Cleary, and made no mention whatever of the alleged indebtedness of said petitioner. Upon the strength of these representations respondent agreed to accept the said Mosebach as debtor in lieu of the said Cleary and, in addition, advanced to said Mosebach the sum of $207.

"Respondent further says that said liquor license was transferred to said Mosebach on or about the 11th day of December, 1909, and the obligation of the said Mosebach for $8,000 was accepted in lieu of the previous indebtedness

of the said Cleary. That the said Simms & Co. accepted a similar obligation from Mosebach in lieu of their indebtedness against the said Cleary, receiving, however, several hundred dollars of the above-mentioned sum of $1,000 on account of their said claim. That certain creditors of the said Cleary, whom he stated were all remaining, were paid in full, leaving a balance in cash in the hands of said Cleary of upwards of $100. That subsequent to said settlement the said Donohue, acting as agent for the said Lizzie E. Donohue, stated that he had a small claim for money loaned the said Cleary which said claim had been taken care of by him, the said Cleary.

"That at the time said settlement was made the said Cleary and the said William Donohue, acting as agent on behalf of said Lizzie E. Donohue, as aforesaid, were present when the obligations from the said Mosebach were given to respondent and to the said Simms & Co. The said Cleary at that time made no mention whatever of the said indebtedness of the said Lizzie E. Donohue.

"Respondent further says that in making the original loan of $6,500 to said Cleary, and at the time when it agreed to accept the obligations of Mosebach in lieu of those of said Cleary, it had relied upon the statements of the said Cleary and of the said Donohue, agent for the said Lizzie E. Donohue, as above set forth.

"Respondent further says that the acceptance of the obligation from the said Mosebach in lieu of the obligation of the said Cleary was not done with the intent to prefer the said Consumers' Brewing Company, and that the said Cleary was not at the time of making such transfer insolvent.

"Respondent is advised, believes, and suggests to the court that the transaction as above set forth did not constitute an act of bankruptcy.

"Respondent therefore prays your honorable court to dismiss the petition of the said Lizzie E. Donohue."

On February 23d the petition was amended by leave of court in order to charge as an additional act of bankruptcy a preferential payment to Simms & Co. based upon the transaction detailed in the company's answer. On March 5th the bankrupt answered the amendment, admitting the preference to Simms & Co., and again admitting his insolvency and declaring his willingness to be adjudged bankrupt on that ground. No further answer was filed by the company.

Afterwards the petitioning creditor moved to strike off the company's answer for reasons which were substantially repeated in support of the demurrer that was filed at the same time. In effect, they aver that the company is neither a creditor nor a party in interest, and therefore has no standing to intervene; and, further, that if the facts set up in its answer are relevant at all, they can only be heard in defense of a suit by the trustee to set aside the preference. In my opinion it has become unnecessary to decide these questions. Whether the company is still a creditor within the meaning of Act July 1, 1898, c. 541, § 59f, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), is not important. In any event, it only seeks to contest the act of bankruptcy that is charged in the original petition, and a second act is now charged by the amendment to which no defense is interposed. As the amendment states a sufficient ground for adjudication, and the answer of the bankrupt admits the facts, the company's answer raises questions that have become merely academic in this proceeding.

The motion to strike off the company's answer is refused; but the demurrer will stand undecided. The motion to enter an adjudication is granted; but, in order to avoid a possible controversy hereafter concerning the effect of the adjudication on the company's defense, the

clerk is directed to enter the adjudication upon the amendment averring a preference to Simms & Co., and without prejudice to the company's right to defend against a subsequent suit by the trustee to set aside the alleged preference.

IRELAND v. HENKLE, U. S. Marshal.

(Circuit Court, S. D. New York. July 30, 1910.)

1. PUBLIC LANDS (§ 135*)—COAL LANDS—RIGHTS OF ENTRYMEN.

Under Rev. St. §§ 2347-2351 (U. S. Comp. St. 1901, pp. 1440, 1441), authorizing individuals to enter 160 acres of vacant public coal lands, and associations to enter 320 acres, and prohibiting more than one entry by each person or association, one who has perfected an entry can sell or dispose of it as he pleases, and an individual or corporation can purchase as many entries made by others as he or it pleases, regardless of the entryman's intent to sell at the time of entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. § 135.*]

2. CRIMINAL LAW (§ 113*)—ACQUIRING PUBLIC COAL LANDS—PLACE OF OFFENSE.

Persons who had not been in Wyoming until after consummation of an alleged conspiracy to defraud the government by unlawfully obtaining public coal lands, and who had not been in direct or indirect communication with any one there, should not be removed to that state for trial on that charge, since any offense by them was committed elsewhere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 232; Dec. Dig. § 113.*]

Petitions for habeas corpus and certiorari by Rufus J. Ireland, by Patrick T. Wells, by George W. Dally, and by Wilberforce Sully against William Henkle, United States Marshal. Writs sustained, and petitioners discharged.

The four petitioners were indicted in the district of Wyoming, May 21, 1909, for conspiracy, in violation of section 5440, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3676), to defraud the United States by obtaining coal lands from the government in violation of law. Proceedings to remove the petitioners under section 1018 (page 719) were instituted. A hearing was had before a United States commissioner at which the government offered in evidence certified copies of the Wyoming indictment and bench warrant, and rested. Defendants offered testimony, which is quite voluminous. The commissioner held that there was probable cause to suppose that the four petitioners had committed the crime charged in the indictment, and committed them for removal to the district of Wyoming. The cause comes here upon writ of habeas corpus and certiorari. The petitioners are residents of this state.

Hawkins, Delafield & Longfellow, for petitioner.
Henry A. Wise, U. S. Atty., for respondent.

LACOMBE, Circuit Judge (after stating the facts as above). The sections of the United States Revised Statutes regulating entry of coal lands are 2347, 2348, 2349, 2350, 2351 (U. S. Comp. St. 1901, pp. 1440, 1441). They provide that any person above the age of 21 years, who is a citizen, or any association of persons severally qualified, shall have

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

the right to enter any quantity of vacant coal lands of the United States, not exceeding 160 acres to such individual person or 320 acres to such association; also that there shall be only one entry by the same person or association of persons, and no association of persons, any member of which shall have taken the benefit of the sections allowing entry, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.

The indictment charges that petitioners, and certain other persons, did conspire on June 1, 1906, at Lander, in the district of Wyoming, with certain other persons (therein named), to defraud the United States by obtaining for a certain corporation, to be thereafter organized and called the Owl Creek Coal Company, the title to and possession and use of a large quantity of vacant coal lands of the United States in excess of the quantity of such lands which such corporation could lawfully obtain from the United States. It charges that the first overt act performed in pursuance of such conspiracy—then, of course, complete—was performed on June 4, 1906, at Amityville, in the state of New York. It consisted in the execution before a notary public of papers to secure entry. The Owl Creek Company was not then in existence, nor was it when the entries were perfected and paid for on June 22d. It was not incorporated till long afterwards, November 7, 1906.

I fail to find anything in the statute which precludes an entryman who has perfected his entry from selling it or giving it away to whom he pleases, or which precludes any individual or corporation from buying up as many entries actually made by others as he or it pleases. Nor does there seem to be anything in them which makes the present frame of mind of any person making entry of any importance. Why A. and B. and C. and the rest of the alphabet may not enter coal lands, in the hope and expectation that when their entries are made they may be able to find some one who will buy their holdings, consolidate the properties thus acquired, and open a mine to take out the coal, it is difficult to see. Nor is there anything in the statute which forbids any one from promising to buy such individual entries, or the entrymen from relying on such promise. If Congress meant to preclude mining except of independent 320-acre sections, it was easy for it to say so. The corporation not being in existence, the petitioners and the other entrymen could not be held to be merely its agents or dummies, and so within the provision of section 2350 (U. S. Comp. St. 1901, p. 1441).

It is not necessary, however, to decide this application on that ground. It is conceded that none of the petitioners, except Dally, had ever been in the state of Wyoming until after January 1, 1908, and the proof shows that Dally was never there until June 10, 1906, which was after the consummation of the alleged conspiracy, and the first overt act thereunder, which was at Amityville on June 4th. Moreover, it appears that none of the petitioners had ever corresponded, or been in communication, directly or indirectly, with any one in the state of Wyoming until after the period when the crime, if any, was consummated. This disposes of the suggestion made in Price v. Henkel, 216 U. S. 493, 30 Sup. Ct. 257, 54 L. Ed. ——, and cases there

cited. If there was any conspiracy in which these petitioners were engaged, that conspiracy was entered into in New York, and they should not be removed to Wyoming upon this record.

The writs of habeas corpus are sustained, and petitioners discharged, unless the government takes an appeal, in which case proper directions will be made for their appearance.

UNITED STATES v. CHU KING FOON.

(District Court, N. D. New York. July 11, 1910.)

1. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—WITNESSES—CREDIBILITY.

The commissioner in a Chinese deportation proceeding need not believe a Chinese witness, when he sees him and has opportunity to judge of his credibility.

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

2. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain a finding that defendant in a Chinese deportation proceeding was not born in the United States.

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

Appeal from Decision of Commissioner.

From an order of deportation by Commissioner Wellington, Chu King Foon appeals. Affirmed.

Thomas F. Phelan and Lewis E. Griffith, for appellant.

H. E. Owen, Asst. U. S. Atty.

RAY, District Judge. This appeal and the record presents the single question: Was the evidence such that the commissioner ought to have been satisfied that Chu King Foon was born in the United States?

The commissioner has the witnesses before him, and notes their appearance, apparent candor, etc., and is far better able to judge of their truthfulness than any appellate tribunal, not seeing the witnesses, can be. The Supreme Court has decided that in these cases the appellant is entitled to a hearing de novo before the judge, if he desires and demands it. Here the appellant has elected to submit the case on the record made before the commissioner.

Chu Tick, a Chinese person, testified that he knew Jew Hing Lee and Li She, and that they were husband and wife, and lived in San Francisco, Cal., and that the appellant, Chu King Foon, is their son; that the alleged parents were married in 1890, and that he attended the christening feast of defendant, given by the parents; that the father was a tailor at 733 Washington street, and that he saw the defendant in his father's shop substantially every week; that he came east with defendant shortly after the earthquake in 1906; also that he saw defendant frequently in New York for the two months after coming east. He also says he is positive the defendant has always lived in this country.

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

Chu Len, a Chinese person, says he was present at defendant's christening, and knew him about two years, and next saw him about 10 or 12 years thereafter, and that he was then living with his parents, and next saw him in New York. He says defendant is 21 or 22 years old.

Chu King Foon, defendant, was sworn, and says he was born on Washington street, San Francisco, was never out of the United States, and that he came to New York City, and was there 11 or 12 years, and then went to Cohoes and Waterford. He claims he had a certificate of birth given him by his father, but that his store was robbed and this taken from him. He was also asked as to a conversation with Mr. Wiley, a Chinese inspector, and denied the substantial part of his testimony.

It was conceded that Rev. Mr. Armstrong and three women, if sworn, would testify to the good character and truth and veracity of defendant.

Inspector Wiley was not called by the United States, but it was conceded that, if called, he would testify that defendant made certain statements under oath, when questioned, to which attention will be called; that he made the statements through an interpreter, who, if called, would testify that he interpreted correctly. The substance of defendant's statement to Wiley was that he was 31 years old, first came to the United States when 15 years of age, entered at San Francisco, was born in San Francisco, but had forgotten where, and did not remember where he lived for the 15 years he was in that city; that when about 15 he went to China and remained a year, and then returned to the United States and came to New York; also that defendant said his father's name was Chu Ngoon May, but that he was dead, and that his mother's name was Lum She, and that she was and is living in China; also that one Chu Hong Mow, a cousin, knew of his birth, and also Chu Sum, living in New York; also that he had three brothers, two in China and one in the United States, Chu King Fong; also that his father never returned to the United States after taking him to China.

The evidence before the commissioner, given by the witnesses named, was that the alleged father and mother of defendant had no other children. If defendant made this statement to Inspector Wiley, which he reduced to writing, and it is conceded that Wiley and the interpreter would swear he made it, then the evidence of defendant given before the commissioner was undoubtedly untrue, and that of Chu Tick and Chu Len a fabrication, or a case of mistaken identity.

Inconsistent and contradictory statements made out of court, or in court at other times, and under oath, if material, and on substantial points within the knowledge of the witness making them, always tend to discredit the witness. It is, in a way, an impeachment. So the commissioner is not bound to believe a Chinese person in one of these cases, when he sees him and has an opportunity to judge of his truth. The defendant was given a full and a fair hearing. There was no arbitrary action. He was confronted with these statements made to

Inspector Wiley under oath on a former occasion,when he had no interest to falsify, but every interest to tell the truth, if his subsequent testimony before the commissioner was the truth. He denied that he made the statements. This presented a question of fact for the commissioner and for this court.

The commissioner was not satisfied that the defendant was born in the United States, and this court is not. On the other hand, I think he told Wiley the truth, and that Wiley correctly recorded his statements. I cannot discern any motive Wiley had to tell an untruth in the matter. It is not a case of mere discrepancies, but of glaring contradictions, in his statements on vital questions in the case. It is not like United States v. Jhu Why (D. C.) 175 Fed. 630, where the alleged contradictory statements made to the inspector were not very important, and the inspector confessed he might be confused as to the identity of Jhu Why with the one he had in mind as having made the statements. If appellant made the statements to Wiley which it is claimed he did, they are absolutely irreconcilable with the evidence subsequently produced in his behalf, when he and they had strong inducements to manufacture evidence or make untrue statements. Of course, such evidence of contradictory statements is to be carefully scrutinized, and the court should be satisfied they were designedly made.

To reverse the finding of the commissioner in this case would be an arbitrary act, and one in defiance of well-established rules of evidence. If Chinese witnesses, unimpeached, except by their appearance and manner of testifying, are to be believed and their testimony accepted, all Chinese persons desiring to enter the United States will set our exclusion laws at defiance. It is not necessary to comment on this class of testimony. The Supreme Court has held that neither the commissioner nor court is bound to accept it, even when unimpeached by the ordinary methods or contradicted by other witnesses. Here the two witnesses called by defendant were not present at his birth and really could have known but little of him. Their testimony was of a nature impossible for the government to contradict.

I think the commissioner was right, and that the judgment of deportation must be affirmed. So ordered.

SIPP v. COLEMAN.

(Circuit Court, D. New Jersey. June 29, 1910.)

1. LIBEL AND SLANDER (§ 86*)—INNUENDO—SURPLUSAGE.

A declaration for slander, alleging that defendant had stated that plaintiff had been convicted of beating his mother, imputed a criminal offense, indictable as provided by P. L. N. J. 1898, p. 854, §§ 215, 218; and hence an innuendo that the words intended to charge that plaintiff was then and there guilty of a crime, to wit, the crime of assault and battery, was unnecessary and surplusage.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205–208; Dec. Dig. § 86.*]

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

2. LIBEL AND SLANDER (§ 7*)—WORDS SLANDEROUS PER SE.
Words charging complainant with having been convicted of a crime are not slanderous per se, unless the crime charged involved moral turpitude.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17–19; Dec. Dig. § 7.*]

3. LIBEL AND SLANDER (§ 7*)—WORDS SLANDEROUS PER SE—MORAL TURPITUDE.
Alleged slanderous words, charging that plaintiff had been convicted of beating his mother, imputed a crime involving moral turpitude, and were therefore slanderous per se.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 31; Dec. Dig. § 7.*]

At Law. Action by George A. Sipp against Mary Coleman. On demurrer to declaration. Overruled.

Wendell J. Wright, for plaintiff.
McCarter & English, for defendant.

RELLSTAB, District Judge. This is an action for slander. A demurrer is interposed to the first count, which charges the defendant with having said of the plaintiff:

"This man has been convicted of beating his mother (thereby and then and there meaning that the plaintiff has been and was then and there guilty of a crime, to wit, the crime of assault and battery)."

No special damages are alleged, and the question is whether these words are actionable per se.

These words impute a criminal offense, indictable under the laws of the state of New Jersey, and punishable by a fine not exceeding $1,000, or imprisonment with or without hard labor, as the court may direct, for any term not exceeding three years, or both. P. L. N. J. 1898, p. 854, §§ 215, 218. No innuendo was necessary, and the one employed may be treated as surplusage. Curley v. Feeney, 62 N. J. Law, 70, 40 Atl. 678.

There is much confusion in the older cases concerning whether accusing another of an indictable offense is slanderous per se, regardless of the nature of the crime; but it may now be considered settled that only where the crime charged involves moral turpitude may the oral accusation be said to be slanderous per se—that is, actionable without the allegation of special damage. Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; Ludlum v. McCuen, 17 N. J. Law, 12, 17; 25 Cyc. 270; 18 Am. & Eng. Enc. L. 868. Moral turpitude in this connection has been defined to be an act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man. 25 Cyc. 272. Moral standards change with the ages. The changes, however, are upward, and must continue upwards until the standards of the Christ shall be universally accepted.

Conduct which in ancient or even medieval times would be accepted as conventional, and therefore, in a legal sense, moral, would now be denounced as decidedly immoral. What in the old common law would be termed moderate correction of the wife by the husband (1 Black-

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

stone, Com. p. 444) is now execrated as wife-beating, and punished as a despicable crime. Destroying fruit trees of another (Murray v. McAllister, 38 Vt. 167), furnishing watered milk to a creamery (Geary v. Bennett, 53 Wis. 444, 10 N. W. 602), removing landmarks (Young v. Miller, 3 Hill [N. Y.] 21), selling diseased meat (Leitz v. Hohman, 16 Pa. Super. Ct. 276), drunkenness (Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521), and drunkenness on the part of women (Brown v. Nickerson, 5 Gray [Mass.] 1), are some of the offenses said to involve moral turpitude. See 25 Cyc. 272, note 43.

Speaker v. McKenzie, 26 Mo. 255, Birch v. Benton, 26 Mo. 153, and Billings v. Wings, 7 Vt. 439, are relied upon by the demurrant. None of them, however, supports her contention. A reading thereof will show that the accusations therein decided as not actionable per se did not charge crimes in those states; and it was this, and not the lack of moral turpitude of the offense imputed, that led the court to so decide. In Speaker v. McKenzie the statement was that the defendant had whipped his mother. This was decided on the authority of Birch v. Benton, in which the charge was wife-beating; and the court, in stating the reason for reversing the trial court, which held that the words charging assault and battery on the wife were actionable, left no doubt that it considered wife-beating as involving moral turpitude. It said:

"There is no act which is more disgraceful or cowardly, and no offence for which a man ought more promptly to be branded with shame."

Both of these Missouri cases were decided in 1858, and an examination of the laws of that state then in force shows that assault and battery was not an indictable offense, but was to be punished in a summary manner before a justice of the peace. Rev. St. Mo. 1855, p. 977, § 1.

The dicta in Andres v. Koppenheafer, 3 Serg. & R. (Pa.) 255, 8 Am. Dec. 647 (charging making of a libel), and Ludlum v. McCuen, 17 N. J. Law, 12 (charging opening and reading a letter sent by mail), are also cited by demurrant, that charging assault and battery was not actionable. An assault and battery may be of a trivial character, just beyond the line dividing lawful from unlawful force. In such case no moral turpitude would be involved. It may be of such an atrocious character, however, as to involve moral turpitude of a high degree; but giving the cited dicta full effect, as the words "assault and battery" do not necessarily impute the unlawful force to be of the more aggravated character, the mere charging of another with having committed the offense in the words "assault and battery" would not impute moral turpitude.

However, the accusing of another of having beaten his mother charges a graver offense, imputing not mere exercise of force unlawfully, but a wanton disregard or repudiation of filial honor and duty that a son owes to the one who bore and nurtured him. The obligations of the Fifth Commandment are recognized by the secular as well as the ecclesiastical law. The family relation is the basis upon which our entire social superstructure is erected. The dishonoring of the parent by the child injuriously affects the whole social fabric. Very

low, indeed, in the scale of civilization, would a community be that recognized no distinction in morals between an assault and battery by one stranger upon another and one by a son upon his mother. The numerous provocations which cause many fair-minded and good-hearted men to lose their self-control and commit assault and battery upon their fellows would not disturb their equanimity in their dealings with their parents. Respect and love for parents is written into the very law of a normal man's being, and this would prevent him from assaulting them, whatever the provocation. The beating of a mother by her son is therefore abnormal, and so contrary to the accepted and customary rules of civilized society that baseness and depravity of heart in the perpetrator is at once suggested to the mind on hearing that such an offence has been committed. To hold in this state and generation that the beating of one's mother does not involve moral turpitude would itself be a slander of a commonwealth conspicuous for its high regard for and enforcement of filial obligations.

The demurrer is overruled.

THE MONTROSE.

(District Court, E. D. New York. May 27, 1910.)

1. SHIPPING (§ 80*)—INJURY TO PERSON ON VESSEL—CARE REQUIRED.

A vessel is required to exercise reasonable care not to maintain places which are dangerous to persons coming on board with the permission of those in charge, whether on business or for their own pleasure.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 335; Dec. Dig. § 80.*]

2. SHIPPING (§ 80*)—LIABILITY OF VESSEL FOR INJURY TO VISITOR—OPEN HATCHWAY.

A vessel held not liable for an injury to a person who came on board while she was lying at a pier from falling through an open hatchway in a corner of the deckhouse, not used as a passageway and lighted by open doors on either side.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 335; Dec. Dig. § 80.*]

Suit in admiralty by Albert R. Gomez against the Steam Lighter Montrose, formerly the Annie Laurie. Decree for respondent.

Ullo, Ruebsamen & Yuzzolino, for libelant.

John L. Seager, for claimant.

CHATFIELD, District Judge. The libelant fell through an open hatchway in the deck of the lighter Montrose (formerly the Annie Laurie) while stepping or turning backward in the forward starboard corner of the deckhouse, and just within the front entrance or door. This occurred upon the 16th day of September, 1905, at about 10:30 a. m., when the sun was shining brightly, and while the boat was moored nearly head on to a pier upon which she was to unload a partial cargo of wire. The libelant testified that he had gone upon the vessel to inspect this cargo, and that in the course of his move-

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

ments for that purpose he stepped backward and through the open hatchway, which was some 2 feet by 2 feet 4 inches.

The claimant offered testimony to show that the libelant came upon the vessel for the purpose of smoking a cigarette, as smoking was not allowed upon the pier. Whatever may have been the libelant's motive for going upon the vessel, it does not affect his rights. If he was allowed upon the vessel, either in connection with his work or in connection with his personal inclinations while performing the work, the persons in charge of the boat would be responsible for his safety in so far as they might be reasonably expected to use care for his protection. No vessel can maintain a trap by which any person rightfully upon the vessel suffers injury, and the libelant was rightfully upon the vessel, whether he went there to carry out his regular duties, or merely by permission of the men in charge of the vessel, as they say, in order to smoke.

It is urged by the libelant that the mere existence of an open hatch in a part of the deck either used or immediately adjacent to a part used for carrying cargo with no coaming or railing around the hatch to prevent a person from stepping therein was negligence on the part of the vessel under the circumstances. Burrell v. Fleming, 109 Fed. 489, 47 C. C. A. 598, and Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49, citing with approval the Kate Cann (D. C.) 2 Fed. 241. It would seem that an open hatchway in a clear deck, and in a place where it cannot be seen, is not a danger which is ordinarily to be expected, and which persons going upon the vessel must be on their guard against at their peril; but, on the contrary, it would also seem that an open hatchway in a deck not intended for use as a passageway, with light coming in on all sides, and in such a position that no one would be near it except when going there deliberately, does constitute an object which any person, whether he be acquainted with boats or not, should be upon the lookout for, in the same way that he should avoid falling over cargo or any other obstruction that might be upon the deck. The place in question was in a corner only rendered dark by contrast with the sunlight passing through the open doors in the front and sides of the barge. The libelant was bound to use due care in stepping into a place out of the bright sunlight where he could not see the place in which he was standing, and especially, as he turned around and stepped backward without examining his surroundings, it does not seem that under such circumstances an open hatchway should be called a trap, and the vessel made responsible therefor.

The claimant has further denied that the injuries in question resulted from the fall, inasmuch as a number of months passed before any indication of the subsequent trouble developed, and they base their contention upon the testimony of their expert that any such disease could not remain latent for the period that existed in the present case. The claimant has also attempted to show that the physical ailments from which Gomez has been suffering were from an entirely distinct cause, having nothing to do with the accident.

Taking these defenses into consideration, and noting that from

the time of the fall until the following year no local indications of inflammation or wound were noticed by the libelant, and considering that his trouble is in no way the direct consequence of a strain or blow, but at the most would have to be considered as some sort of infection, locating itself or being supplied at the point at which the injury was received, it would seem that the libelant has not sustained the burden of proof sufficiently to satisfy the court that the disabilities resulted from the fall in question. But, coupled with the apparent negligence on his part in failing to examine the part of the deck in which the hatchway existed, it must be held that (whether or not the vessel could be held responsible for maintaining such a hatchway, if the fault shown were entirely that of the vessel) the decision must be for the claimant, and the libel should be dismissed, but without costs.

In re ELLIS.

(District Court, D. Oregon. July 11, 1910.)

1. STATUTES (§ 188*)—CONSTRUCTION—MEANING OF WORDS.
In construing a statute, words and phrases are to be assumed to have been used in their popular sense, if they have not acquired a technical meaning.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.*]

2. ALIENS (§ 61*)—NATURALIZATION—"FREE WHITE PERSONS"—"WHITE."
The term "free white persons," within Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), making the naturalization provisions applicable to such persons, comprehends a Syrian, who is a native of Palestine and a Maronite; the term "white" being intended to be applied in its popular sense, to denote at least the members of the white or Caucasian race.
[Ed. Note.—For other casts, see Aliens, Cent. Dig. § 119; Dec. Dig. § 61.*
For other definitions, see Words and Phrases, vol. 8, pp. 7446, 7447.]

Application by Tom Ellis for admission to citizenship. Application granted.

Robert C. Wright, Dan J. Malarkey, and E. B. Seabrook, for petitioner.

John McCourt, U. S. Atty.

WOLVERTON, District Judge. This is an application on the part of Tom Ellis, a Turkish subject, for admission to citizenship in the United States. The applicant is a Syrian, a native of the province of Palestine, and a Maronite. He lived near Beirut, which city was his port of departure in coming to this country. Ethnologically, he is of Semitic stock, a markedly white type of the race. Brinton's Races and People, pp. 99, 105, 132, 137. See, also, Keane's World's People, pp. 307, 310, 335, 337; Deniker's Races of Man, p. 423. From these references, it is admitted by the United States Attorney that the applicant "is a member of what is known as the white or Caucasian race."

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

"Indeed," he continues, "no contention is made by the naturalization officers of the United States that Syrians do not belong to the white race." Otherwise, the applicant is of good morals, sober and industrious, speaks and writes the English language, has a fair understanding of our institutions and form of government, and is well disposed toward the government, and possesses, without question, all the essential qualifications to entitle him to naturalization, besides being a good and highly respected citizen in the community in which he lives. It may be said, further, that he was reared a Catholic, and is still of that faith.

The essential contention of the government against the admission of the applicant is that the words "free white persons," as used in section 2169 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333), were intended to include only those peoples of the white race who, at the time of the formation of the government, lived in Europe and were inured to European governmental institutions, or upon the American continent, and comprehended such only of the white races who, from tradition, teaching, and environment, would be predisposed toward our form of government, and thus readily assimilate with the people of the United States. There is authority for this view. In re Camille (C. C.) 6 Fed. 256; In re Balsara (C. C.) 171 Fed. 294. And yet there is reason for the view, based upon more recent legislation and the debates in Congress pertaining thereto, that the word "white" was employed to distinguish between the white, the African, and the Mongolian races. In re Saito (C. C.) 62 Fed. 126; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104.

While it may be true that a statute should be interpreted in the light of the conditions prevalent under which it was enacted, yet the words "free white persons" are devoid of ambiguity, and are of plain and simple signification. I know of no technical meaning to be given them in the relation in which they are used in the statute. Applying, therefore, the first and most elementary rule of construction, which is that words and phrases are to be assumed to have been used in their popular sense, if they have not acquired a technical meaning (Endlich, Interpretation of Statutes, § 1), it would seem that the applicant, being a "free white person," is entitled to admission as a citizen. As is said by Sawyer, Circuit Judge, in the case of In re Ah Yup, supra, 5 Sawy. 156, Fed. Cas. No. 104:

"Words in a statute, other than technical terms, should be taken in their ordinary sense. The words 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words, in this country, at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race."

What is conceded by the government, "that the applicant is a member of what is known as the white or Caucasian race," brings the

case at bar exactly within the authority. If it was designed that the statute was to embrace such of the European races only as in some way by their immigration, alliance, or aid contributed to the settlement of this country and the establishment and upbuilding of the United States as a nation among the peoples of the world, it might have been far better expressed than to have used the simple term "white" as designating the races of men entitled to naturalization. Not having been so expressed or particularized, the most reasonable inference would be that the word "white," ethnologically speaking, was intended to be applied in its popular sense to denote at least the members of the white or Caucasian race of people. If there be ambiguity and doubt, it is better to resolve that doubt in favor of the Caucasian possessed of the highest qualities which go to make an excellent citizen, as the applicant appears to be, and withal drawn to and well disposed toward the principles and policies of this government. The courts can do no more than interpret the law. It is for the Congress to point the policy of the government, and if the word "white" in its popular sense is of too broad a signification, as applied to persons deemed suitable to become citizens of the United States, the remedy is easily at hand by an amendment of the law.

I am of the opinion that the applicant should be admitted to citizenship, and such will be the order of the court.

UNITED STATES v. WONG OCK HONG.

(District Court, D. Oregon. May 2, 1910.)

No. 5,234.

1. ALIENS (§ 32*)—DEPORTATION PROCEEDINGS—APPEAL—CERTIFICATION OF JUDGMENT.

Failure of the commissioner in Chinese deportation proceedings to certify the judgment to the District Court on appeal is not a jurisdictional defect; the court being authorized to direct certification and require transmission of the judgment.

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

2. ALIENS (§ 32*)—DEPORTATION PROCEEDINGS—APPEAL—NOTICE.

Where a notice of appeal in Chinese deportation proceedings, though entitled in the District Court, was nevertheless left with the commissioner and transmitted with the papers in the case, the fact that the notice was entitled in the District Court, and not before the commissioner, was not a jurisdictional defect.

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

3. ALIENS (§ 32*)—DEPORTATION PROCEEDINGS—APPEAL—TRIAL DE NOVO.

A Chinaman's appeal from a commissioner's order of deportation is triable de novo before the District Judge, and not on the record made before the commissioner.

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

4. ALIENS (§ 32*)—CHINESE—DEPORTATION—CITIZENSHIP—EVIDENCE.

In Chinese deportation proceedings, evidence *held* to establish defendant's right to remain in the country.

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

Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

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

Deportation proceedings by the United States against Wong Ock Hong. From a judgment directing deportation, defendant appeals. Reversed, and defendant discharged.

Walter H. Evans, Asst. U. S. Atty.
L. H. Tarpley, for defendant.

WOLVERTON, District Judge. This is an appeal from the judgment of the commissioner directing a deportation of the defendant, being a Chinaman, as not entitled to remain in this country. Three questions are presented before coming to the merits of the case:

First. It is urged that this court is without jurisdiction, because the commissioner has not certified his judgment here. That, however, is not a jurisdictional matter, for this court may yet direct a certification of such judgment, and require its transmission here.

The next contention is that this court is without jurisdiction, because the notice of appeal is entitled in this court, and not before the commissioner. From the certificate of the commissioner transmitting the papers in the case to this court, the notice of appeal appears to be among them. It may be inferred, therefore, that, while the notice was entitled in this court, nevertheless it was left with the commissioner, or he would not have transmitted it here among the papers. The commissioner is also the clerk of the District Court. The appeal is intended as a summary procedure, and it might thwart the purposes of the statute if the parties were held to strict technical rules. It seems to me that the notice was sufficient, under the circumstances, although filed in this court, to bring the matter of appeal to the attention of the United States district attorney, and it was, hence, sufficient to confer jurisdiction.

It is next urged that the trial in this court should be had upon the record as made before the commissioner, and not de novo. This question, however, has been put at rest by a recent case in the Supreme Court of the United States, where it is held that:

"The appeal given to a Chinaman from an order of deportation made by a commissioner is a trial de novo before the district judge to which he is entitled before he can be ordered to be deported, and the order cannot be made on a transcript of proceedings before the commissioner." Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

This brings me to a consideration of the merits of the case. It appears from the testimony of the defendant that he was born in South Fork, Cal.; that he resided there with his father until he was 12 years old; that when of that age his father moved to San Francisco, and, being desirous of returning to China, applied for and obtained a certificate for the defendant, entitling him to remain in this country. This certificate, which was given to the defendant, he has held, according to his own testimony, in his possession ever since. The certificate, being numbered 132,997, is presented in court, and bears date May 3, 1894. It also contains a photograph pasted thereon. The defendant further testifies that in November last he came to Portland, and after remaining here a few days went to Seattle. A couple of months later he returned to Portland, where he was arrested, and his right to re-

main in this country questioned. The defendant is corroborated in part in his narrative by the testimony of two Chinamen, who say they knew the father in San Francisco, and of the circumstance of his leaving the son on his departure for China. One of them affirms that he has seen the boy on one or two occasions since. The other one, however, does not remember to have seen him. Both of them recognize the defendant as the boy whom they saw in San Francisco. It was further shown, by other witnesses, that he was seen here in Portland in November, and was then on his way to Seattle, and that he was also seen in Seattle prior to his return to Portland.

The government contends that the defendant is not the same Chinaman as named in the certificate which he produces, and for this contention there is some evidence. It seems that the government inspectors at Point Roberts, Wash., saw there a certificate, presented by a Chinaman, bearing the same number as this one here, and so certified the fact to the inspector at Blaine, Wash. Shortly afterwards a Chinaman passed through Blaine, Wash., with a certificate of the same number, which was checked up at that place. It was shown, further, that the height of that Chinaman was 5 feet 7 inches, while the height of the defendant is 5 feet 4 inches; so that the Chinaman there presenting himself could not have been the same person as the defendant here. Mr. Barbour, who is the government inspector here, upon a careful examination of the appearance of the defendant, is of the opinion that he is not the same person whose photograph is exhibited upon the certificate. His judgment is based almost exclusively upon the type of the ears. Upon the other hand, however, Mr. Connell, who has had some experience in the service, is rather of the opinion that the persons are the same. Such is the case of the government standing against the case presented by the Chinaman.

It is a rule of law that:

"A Chinese person, who is charged with being unlawfully within the United States shall establish, by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his lawful right to remain." United States v. Chin Sing (D. C.) 153 Fed. 590.

Thus is cast upon a Chinese person the burden of proving his right to remain here. In the present case, however, the defendant at least shows a strong prima facie case, when he presents a certificate showing his right to be in this country and testifies that he is the person named in the certificate, with corroboration by other Chinamen as to his identity. Unless this case is overcome by the government, it logically follows that he should not be deported. It is very clear to my mind that the defendant was never at Point Roberts or Blaine, Wash., because the time when a person having a certificate with the same number as this was in Blaine was a couple of months prior to the time when defendant left San Francisco; that being in September, and the defendant leaving San Francisco in November. So that, unless he went from San Francisco up there and returned, he could not well have been in Blaine in September. It is a suspicious circumstance that a certificate of the same number should have passed through the Blaine office; but, if the defendant loaned his certificate for use by another Chinaman,

that would be a different offense from the one here charged, and would not be cause for his deportation.

It is urged that defendant's story is incredible, from the fact that he does not talk English understandingly, as he should if reared in this country. He does speak some English, but would not trust himself to testify without the aid of an interpreter. He can count, and writes his name in fairly good form, but repeats the English alphabet with indifference. He was reared in a country town until the age of 12, but further than this his environment is undisclosed. Ordinarily a Chinese boy would learn to speak the English language fairly well in such a place; but defendant may have had little contact with English-speaking people. While residing in San Francisco, it may be assumed that his association was largely with the Chinese colony, and his contact with the American people limited. It might well happen that a Chinaman living in this country from birth would have learned to speak English indifferently. Aside from this imperfection, the story of Wong Ock Hong is persuasive, and the case of Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501, is not controlling.

I am impressed that the testimony of the defendant, along with the fact that he has the certificate, is sufficiently corroborated, and that he has made the better case. Hence the government must fail in its prosecution.

The judgment will be that the defendant be released.

In re MUSSEY.

(District Court, W. D. Texas, San Antonio Division. June 8, 1910.)

No. 466.

1. HOMESTEAD (§ 23*)—PERSONS ENTITLED—"HEAD OF A FAMILY."

Where a widower occupied property with a family, consisting of three children and his mother-in-law, and after coming of age his son left the place, a daughter was married, but after a time separated from her husband, and returned with three children to live with her father, while the mother-in-law and remaining daughter continued to make their home with him, though one had independent means, and the other earned a livelihood, the widower was the "head of a family," and the place he occupied a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 32; Dec. Dig. § 23.*]

2. HOMESTEAD (§ 1*)—NATURE OF RIGHT CREATED.

The homestead right of a widower, the head of a family, in Texas, is absolute and unconditional, and beyond the reach of creditors.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. HOMESTEAD (§ 23*)—PERSONS ENTITLED—UNMARRIED PERSON.

That the head of a family is unmarried does not affect his homestead right.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 32; Dec. Dig. § 23.*]

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

4. BANKRUPTCY (§ 396*)—REMEDIES OF BANKRUPT—HOMESTEAD EXEMPTION.
Property occupied by a widower, the head of a family, as a home, was properly set aside to him in bankruptcy as a homestead, exempt from forced sale.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

In Bankruptcy.

The only question to be determined is whether the trustee was right in setting apart to the bankrupt the property in controversy as his homestead. The facts are undisputed and they appear in the following findings by the referee:

"Findings of fact upon contest of report of trustee setting apart to the bankrupt as exempt property lot No. 2, in city block No. 125, in the city of San Antonio, Bexar county, Tex., together with all improvements thereon: I find: That the property in controversy was acquired by the bankrupt in the year 1888, at which time the bankrupt was a widower and the head of a family, consisting of himself and three minor children and his mother-in-law. That said property has ever since its acquisition been occupied and used by the bankrupt, together with the members of his family, as a homestead, and that he had no other homestead during that time. That after his children came of age his son left the homestead and is no longer a member of bankrupt's family. That some years prior to this date his daughter Mabel married, but was separated from her husband four years ago, and upon such separation returned to the shelter of her father's home, together with her three minor children, grandchildren of the bankrupt. That said daughter and her children have no other homestead nor income, and are dependent upon and have since been furnished by the bankrupt with means of support and the shelter of a home. That the bankrupt's daughter Laura, although of age, has never ceased her relation as a member of bankrupt's family, but has continued to live with the bankrupt and occupy the property in controversy as her home, and as one of the members of his family, and, although she is earning a livelihood, she is still dependent upon the bankrupt for a home, and he has continued to assist in her support and maintenance. I find, therefore, that Hart Mussey is the head of a family, which consists of himself, his unmarried daughter, his married daughter Mrs. Bates, his three grandchildren, and his mother-in-law, who, although possessed of independent means, has continued to use this property as her home."

In addition to the foregoing facts, it is conceded by counsel representing the respective parties that the bankrupt is insolvent. The referee approved the report of the trustee, setting apart the property to the bankrupt as his homestead, and therefore exempt from the claims of his creditors, and denied the petition of D. Sullivan & Co., the exempting creditors.

Denman, Franklin & McGown, for Sullivan & Co.
Earl D. Scott, for the bankrupt.

MAXEY, District Judge (after stating the facts as above). Under the facts of this case the court is of the opinion that Hart Mussey is the head of a family and that the property in controversy is his homestead. As a homestead it is free from the claims of creditors. Mussey's homestead right is absolute and unconditional, and the decisions of the courts of Texas place it beyond the reach of his creditors. Krueger v. Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663; Bank v. Cruger, 31 Tex. Civ. App. 17, 71 S. W. 785; Wolfe v. Buckley, 52 Tex. 641; Barry v. Hale, 2 Tex. Civ. App. 668, 21 S. W. 983; Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916. See, also, Brau v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Childers v. Henderson, 76 Tex. 664, 13 S. W. 481; Randolph v. White, 135 Fed. 875.

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

It is immaterial whether Mussey acquired the homestead as a single or married man. In either event, in view of the facts found, the result would be the same. See Krueger v. Wolf, supra; Bank v. Cruger, supra; Wolfe v. Buckley, supra; Barry v. Hale, supra.

The trustee was right in setting aside the property to the bankrupt as his homestead and exempt from forced sale, and an order will be accordingly so entered.

In re WERMUTH.

(District Court, N. D. New York. August 5, 1910.)

BANKRUPTCY (§ 407*)—FRAUDULENT CONVEYANCES—CONVEYANCE TO WIFE—SECRET TRUST—DEFEATING DISCHARGE.

Where a bankrupt transferred certain mortgaged realty to his wife in 1894, which conveyance was not concealed in any way, and there was no admission or declaration by either that the bankrupt had or claimed any subsequent interest therein, the fact that he continued to reside with his wife on the property and on other real estate which she purchased, and that he performed services thereon for her, the value of which was not shown to be worth more than his board, was not sufficient to establish a secret trust, which could be made available by the bankrupt's creditors in resistance of an application for a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 742–749; Dec. Dig. § 407.*]

In the matter of Lewis J. Wermuth, bankrupt. On application to confirm report of special master recommending discharge of the bankrupt. Granted.

M. H. Kiley, for bankrupt.

E. S. Moore, for objecting creditor.

RAY, District Judge. The contention of the objecting creditor is that several years ago the bankrupt, Lewis J. Wermuth, conveyed certain real estate which he owned, subject to a mortgage, to his wife without consideration, and later his interest in a legacy given him by the will of Ebenezer Wermuth, by assigning it to one Fuller, who held a bond given by Wermuth secured by a mortgage on such property, and also other claims on the property of the wife, and that such bankrupt retained a secret interest in such real estate and property, and has been guilty of concealing property from his trustee in bankruptcy by not disclosing such secret interest, and of making a false oath, etc., by not disclosing or scheduling same.

Ebenezer Wermuth died in 1899, and the balance of the $2,000 legacy that went to Fuller under the assignment, after paying costs, etc., was about $1,000. The real estate, 25 acres, for which he paid $1,015, and on which was a mortgage of $500, was transferred to the wife in 1894. The interest of the bankrupt in the legacy went to pay a debt on which he was liable. There is no proof that there was any agreement or understanding between the bankrupt and his wife that he should retain or have any interest in such property, or any of it, or that it should ever be reconveyed to him, except the court

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

is asked to infer that such was the fact from the fact that since such transfer Wermuth has continued to live with his wife on this place and other real estate which she purchased, and work and carry same on, not as his own, however, as there is no claim the ownership of the wife has been concealed, or that he or she has claimed or admitted he had any interest therein. I do not think a secret trust or ownership can be inferred from the facts appearing. If Wermuth conveyed to the wife to cheat and defraud creditors, a suit in equity to set aside the transfer would be an appropriate remedy, and, assuming there is no bar to such an action by reason of laches or statute of limitation, the remedy is available to a trustee.

There may be such a holding and management of property, retention of possession, custody, and control, as to show an agreement that a secret interest has been retained by the grantor and that such is the common understanding. But this is not such a case. The bankrupt was not under obligation to leave his wife, and she did not peril her ownership by not turning him out of doors. It was his duty to live with her and aid in her support. There is no proof that the bankrupt did more for the wife than his board, etc., were worth. The burden of showing the retention of an interest in this property, or some of it, was on the objecting creditor, and he has failed to sustain the burden or show facts to substantiate such a claim. I think In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, affirming this court in 122 Fed. 688, is quite pertinent and conclusive here. In the Case of Dauchy, 122 Fed. 688, this court cited and commented on the cases, and I do not see that it is necessary to go over them.

The recommendation of the referee is approved, and a discharge will issue. So ordered.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. May 31, 1910.)

STREET RAILROADS (§ 54*)—FINANCIAL OPERATION—MORTGAGES—FORECLOSURE—SALE.

Where no bids were received by bondholders on a mortgage foreclosure sale of a part of a street railroad system, because the part offered for sale under the first mortgage could not be successfully operated except in connection with the balance of the road, which would be also shortly offered for sale under foreclosure of the second mortgage, the sale of the part secured by the first mortgage would be adjourned to the same date as the sale of the part covered by the second mortgage.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 54.*]

In Equity. Suit by the Morton Trust Company against the Metropolitan Street Railway Company and others to foreclose a mortgage securing bonds. Order passed fixing time of sale.

Bronson Winthrop, for complainant.
J. Parker Kirlin, for defendant.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Dexter, Osborn & Fleming, for receiver of New York City Ry.
Byrne & Cutcheon, for Pennsylvania Steel Co. and another.

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

LACOMBE, Circuit Judge. Upon the recent offer at auction under decree of foreclosure of the first mortgage no bid was made by bondholders, for the expressed reason that the property then offered was but a part of what is known as the "Metropolitan System." The statement filed by them contains the following:

"However important a part it may be, it cannot be operated except in connection with the indispensable portion thereof which is not and cannot now be offered for sale. The latter portion will, in all probability, be made the subject of a decree of foreclosure at an early day and in due course offered for sale. The committee believes that the interests of all concerned and of the public require that a sale of the properties should be had so that they can be purchased practically at the same time. The large amount of new cash to be raised, and the practical conditions to be met, are each of such a character that the property can be utilized only as a 'unitary system.' * * * As soon as the property constituting the unitary system is offered for sale, this committee now intends to bid thereat," etc.

In order to meet the objection above set forth, the sale under foreclosure of second mortgage (the subject of this decree) is set for July 1st at 2 p. m., and the sale under first mortgage will be adjourned to same day at 12 m. This will enable bondholders and others to bid under conditions which will secure the opportunity, at practically the same time and place, for purchasers to acquire the unitary system of the Metropolitan Street Railway as it now exists in the hands of receivers, so that they can take hold of it and operate it without having to purchase anything else, except possibly the stock of the Bridge Operating Company. That stock, however, is apparently not covered by either mortgage. It was bought by receivers. If the purchaser at foreclosure wishes it, he can purchase it from them at a reasonable price.

As to the sale of lot 1, which is the property covered by first mortgage, suggestion was made on settlement of the decree that parties interested might decline to bid at the first mortgage sale, with the expectation of buying it at the second mortgage sale, subject, of course, to the lien of the first mortgage. It is not expected that any such thing will happen, nor could any such device be availed of to take over the property without paying the $10,000,000 which the Court of Appeals required. The power reserved to the court to reject any bid would effectually prevent any such result.

As to lots 13 to 18, inclusive, it is questionable whether they are covered by this mortgage. That question should be first determined, and thereafter such items as are found to be covered can be disposed of at a supplementary sale, where bondholders will have abundant opportunity to buy them in. A mere reference to the description of these items, which consist merely of numerous claims and choses in action against various persons, and a few bonds, indicates that their possession is in no way necessary to the operation of the unitary railway system. There is no reason why the court should delay disposing of that system and securing relief from its further operation, merely because the mortgagee contends that some of these claims are covered by its mortgage. The suggestion made in the brief that such portions of these lots—the property of the Metropolitan Street Railroad Company—as are not subject to the mortgage should nevertheless be

sold now is certainly extraordinary. It is difficult to see on what theory it could be held that bondholders have anything to say about the disposition of property not subject to their mortgage. It may well be that some of these claims of the Metropolitan against other parties should not be sold at all, but that some effort should be made to collect them for the benefit of unsecured creditors.

It is not intended by this reservation to delay the disposition of these questions as to lots 13 to 18. As soon as the present session of the Court of Appeals closes, a day will be named for hearing argument upon them, and, if counsel themselves ask for no delay, decision as to all of the disputed items may reasonably be expected before the summer vacation.

CHARLES E. HIRES CO. v. SIMPKINS.

(Circuit Court, D. Connecticut. July 15, 1910.)

No. 1,329.

1. PLEADING (§ 212*)—DEMURRER—WAIVER.
An answer filed to a complaint waives defendant's right to demur.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 521, 522; Dec. Dig. § 212.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 92*)—UNLAWFUL COMPETITION.
A bill for unlawful competition in the use of complainant's trade-name and good will in the sale of root beer syrup was not demurrable for failure to allege the amount and value of the syrup fraudulently used by defendant, the names of defendant's agents, or of the parties buying the same; nor was the bill not sufficiently specific because it only alleged that defendant's use of the fraudulent syrup occurred on "divers days and at divers places" within the jurisdiction of the court.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 102; Dec. Dig. § 92.*]

In Equity. Bill by the Charles E. Hires Company against Arthur B. Simpkins. On demurrer to bill. Overruled.

Mitchell, Chadwick & Kent, for complainant.
Frederick L. Perry, for defendant.

PLATT, District Judge. The defendant has the right to demur specially to paragraph 4 of the complaint for uncertainty. If he should answer the paragraph without having demurred, he would have waived that right. The question which faces the court is whether or not the complainant has set forth in paragraph 4 such facts as, if found true, would form a basis for a judgment in complainant's favor.

The defendant is charged in the bill with a fraudulent and unfair invasion of complainant's trade-name and good will. He, in the nature of things, must know whether or not he has so trespassed. The facts are not stated with the particularity that good pleading demands, but they seem to be certain enough; surely so in a matter of this kind, when the defendant must know in his heart

of hearts whether there is right and justice in the charges made by complainant. The amount and value of the fraudulently used syrup, and the names of defendant's agents, or of the parties buying, are immaterial matters, not necessary to be alleged. "On divers days and at divers places" is the sticking point, but both time and place are stated to have been within the jurisdiction of the court, and, as I have just said, defendant well knows whether the charges are true, or are made up out of whole cloth.

Let the demurrer be overruled.

In re KOPLIN.

(District Court, E. D. Pennsylvania. July 8, 1910.)

No. 3,648.

BANKRUPTCY (§ 136*)—PROCEDURE—WAIVER OF DEMURRER.

A demurrer to a petition by the trustee to require the bankrupt to turn property over was waived by an answer, both being to the whole petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of Louis W. Koplin, bankrupt. On certificate to review an order of the referee overruling a demurrer to the trustee's petition to require the bankrupt to turn property over. Order affirmed.

Henry N. Wessel, for trustee.
Emanuel Furth, for bankrupt.

HOLLAND, District Judge. The trustee in this case filed a petition on June 10, 1910, in which he alleges that the bankrupt "has property and assets belonging to his estate which he knowingly and fraudulently conceals from your petitioner, being property of the value of $45,973.44, consisting of merchandise, which is fraudulently concealed by the said bankrupt." On this petition, a rule was granted on the bankrupt to show cause why he should not transfer and deliver to the trustee property to the amount claimed, to which petition the bankrupt filed a paper, in the second paragraph of which he demurs to the sufficiency of the petition, and asks that the rule be discharged, and in the third, fourth, and fifth paragraphs he answers, denying the allegations set forth therein. The referee overruled the demurrer, and directed that they proceed with the taking of testimony on the issue joined on the petition and answer.

The bankrupt filed a petition for a certificate, and the question now is whether or not the bankrupt in this proceeding can file both a demurrer and answer. In the Case of Cooper Brothers (D. C.) 159 Fed. 956, 20 Am. Bankr. Rep. 392, upon an involuntary petition in bankruptcy, to the whole of which a demurrer and an answer were filed, it was held that equity rule 37 was intended to cover cases where a demurrer and answer go only to part of the bill and happen to overlap each other, and where both an answer and demurrer are filed

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

to a petition in bankruptcy as a whole, the demurrer will be treated as overruled by the answer.

In the case at bar, both the demurrer and answer go to the whole of the petition, and it is contended by counsel for the bankrupt that the equity rules do not apply to this case, it being in the nature of a criminal proceeding; but, even in that view of the matter, we do not think he is in any better position, because in criminal procedure a defendant is not permitted to file a demurrer after he has pleaded to the indictment. Wharton, in his Criminal Pleading and Practice (8th Ed.) § 407b, says that a demurrer should be promptly made, and is too late after a plea is entered. To the same effect are the cases of Com. v. Ramsey, 1 Brewst. (Pa.) 422; Com. v. Jessup, 63 Pa. 34; Abbott's Trial Brief Criminal Causes, 37.

We have not considered the question of the sufficiency of the trustee's petition to turn over property. Both a demurrer and answer having been filed to the whole petition, the former is waived by the answer.

The order, therefore, made by the referee, refusing to discharge the rule on the bankrupt to deliver property to the trustee, is affirmed.

WORRELL v. WHITNEY et al.

(District Court, E. D. Pennsylvania. July 5, 1910.)

No. 2.

BANKRUPTCY (§ 167*)—PREFERENCES BY PARTNERS—RECOVERY OF CONVEYANCE.

A trustee in bankruptcy may not recover a conveyance of partnership property as a preference, unless it is shown that the partners as individuals were insolvent at the time of the conveyance.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 167.*]

In Equity. Suit by Hibberd B. Worrell, as trustee in bankruptcy, against one Whitney and others. Bill dismissed.

George W. Harkins, Jr., for complainant.
Henry P. Brown, for respondents.

J. B. McPHERSON, District Judge. This is a bill in equity by a trustee in bankruptcy to compel a reconveyance of a house and a second mortgage that are said to have been preferentially conveyed to the defendants within four months of the adjudication. The bankrupts were members of a partnership, and filed a voluntary petition both as a firm and as individuals on May 20, 1907. The conveyance now attacked was of partnership property and was made on March 22d, and it is conceded that the result has been to pay to the defendants a larger proportion of their debt than will be paid to other partnership creditors of the same class. For present purposes the bankrupt's intention to favor the defendants may be assumed, and there is no reason to doubt that the partnership as an entity was insolvent on March 22d. Whether or not the defendants had reason-

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

able cause to believe at that date that the bankrupts were intending to give a preference is a disputed point, upon which opposing opinions might find fairly balanced support in the evidence.

As I view the case, however, it must be decided upon another proposition. As I have just said, the firm considered merely as an entity was insolvent on March 22d, but there is almost no evidence concerning the financial situation of the partners as individuals at that time. It is impossible, therefore, to say that the individual assets of the partners, taken in connection with the assets of the firm, would not have been more than sufficient to pay all the firm debts. The only evidence on the subject of individual insolvency is to be found in the fact that on May 20th, two months later, the petition was filed upon which both members were adjudged bankrupt, both as individuals and as a firm. But this, without more, does not enable me to decide safely that they were insolvent as individuals on March 22d. No effort was made to prove their individual insolvency at that time. One of the bankrupts was not examined at all, and the other was asked no questions concerning his individual condition when the conveyance was made. With proof upon this subject under the trustee's control, he can hardly expect the court to draw uncertain inferences concerning a fact that he might have established with at least reasonable certainty. The necessity for such proof is supported by Re Blair (D. C.) 99 Fed. 76; Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279; Davis v. Stevens (D. C.) 104 Fed. 235; Re Forbes (D. C.) 128 Fed. 137; Re Perley & Hays (D. C.) 138 Fed. 927; and Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960.

The bill is dismissed, with costs, to be paid primarily out of the bankrupt estate.

In re FAMOUS CLOTHING CO.

(District Court, W. D. New York. July 21, 1910.)

No. 3,485.

1. BANKRUPTCY (§ 224*)—PROPERTY IN HANDS OF THIRD PERSON—ORDER TO SHOW CAUSE—JURISDICTION OF REFEREE.

A referee in bankruptcy has power to make an order directing a third person to show cause why property in his hands alleged to belong to the bankrupt should not be delivered to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 224.*]

2. BANKRUPTCY (§ 250*)—PROPERTY IN HANDS OF THIRD PERSON—RECOVERY—JURISDICTION OF BANKRUPTCY COURT.

Jurisdiction of a bankruptcy court to compel the president of a bankrupt corporation to deliver assets alleged to belong to the bankrupt to his trustee is not ousted by the president's alleged bona fide claim to the property in good faith, where there is evidence indicating that such possession is colorable or fictitious.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

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

In the matter of the Famous Clothing Company, bankrupt. On order to show cause why property in the possession of a third person should not be delivered to the bankrupt's trustee. Order allowed.

Fred L. Eaton, for receiver.
Dana L. Jewell, for Joseph Levey.

HAZEL, District Judge. The referee has the power to make the order to show cause herein. The cases uniformly hold that a court of bankruptcy has jurisdiction to make an order requiring the bankrupt or a third person to deliver to the trustee property in his possession which belongs to the bankrupt. In this case the property is withheld or claimed to be withheld by the president of the bankrupt corporation, and, of course, if he is an adverse claimant—that is, a bona fide claimant to the property—or if his claim is made in good faith that no money as claimed came into his possession, then the court is without jurisdiction, and the trustee must institute a plenary action to recover the property. But if Levey has the money, or fraudulently and wrongfully keeps it, he may be compelled summarily to surrender it to the trustee. American Trust Co. of Pittsburgh v. Wallis, 126 Fed. 464, 61 C. C. A. 342; In re New York Car Wheel Works, 132 Fed. 203; In re Friedman (D. C.) 18 Am. Bankr. Rep. 712, 153 Fed. 939. See, also, as bearing upon the nature of the evidence before commitment for contempt, In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558.

The mere denial by the bankrupt that he received the money from the bookkeeper does not take away the jurisdiction of the court. The question is whether the denial is colorable or fictitious. In the judgment of the referee, as I read the certificate, the denial of possession by Levey is false, and therefore the bankruptcy court is not deprived of jurisdiction, and the order to show cause was proper.

So ordered.

GALLAGHER v. WORTH BROS. CO.

(Circuit Court, E. D. Pennsylvania. July 9, 1910.)

No. 890.

MASTER AND SERVANT (§ 233*)—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

An employer is not liable for injury to a machinist, caused by running an overhead crane over his hand while he was descending from the runway, where he placed his hand on the track of the crane and failed to notice the moving of the crane, and where the operator was under the direction of the injured man and another employé, at whose instance the crane was moved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 703, 729; Dec. Dig. § 233.*]

At Law. Action by Thomas Gallagher against the Worth Bros. Company. Plaintiff moves to take off nonsuit. Motion overruled.

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

Goodman & Goodman and C. S. Eastwick, for plaintiff.
H. A. Talbot, for defendant.

HOLLAND, District Judge. In this case the plaintiff and a Mr. Bonner, another machinist, were erecting an I-beam at defendant's mill at Coatesville, and were using an overhead crane on an overhead track for that purpose. The operator of the crane was under the direction of both these men. There were no other employés at work at this time with these three men engaged in this repair work. Both the plaintiff and Bonner gave orders to the craneman when and when not to move the crane. After the I-beam had been raised to an erect position, the plaintiff told Bonner he was going down to the ground floor of the mill, and crossed over to the runway of the crane for that purpose. He did not tell the craneman or Bonner not to move the crane, but in his effort to descend from the runway placed his hand on the track of the crane. In the meantime Bonner had completed his work and ordered the craneman to lower him down to the ground floor, and the latter in order to carry out Bonner's orders, moved the crane, and in doing so ran over the plaintiff's hand.

The plaintiff claimed that the defendant was responsible, because there was no man stationed there to give warning of the moving of the crane; but the court, in entering the nonsuit, took the view that there was no negligence established on the part of the defendant. This was not a case where workmen were engaged near a crane, who, under the circumstances, having their minds upon their work, would not be able to watch the moving of the crane, in which case they should be notified; but it was a case where the plaintiff himself negligently placed his hand upon the track, and then failed to notice the moving of the crane. Even if there had been a man stationed to notify these workmen of the moving of the crane, it is hardly possible to suppose that he would have known that the plaintiff was about to place his hand on the rail.

The court is of the opinion that the nonsuit was properly entered, and the motion to take it off is overruled.

MEMORANDUM DECISIONS

CALIFORNIA NAVIGATION & IMPROVEMENT CO. v. UNION TRANSP. CO. (Circuit Court of Appeals, Ninth Circuit. 1910.) No. 1,769. Appeal from the District Court of the United States for the Northern District of California. A. L. Levinsky and Page, McCutchen & Knight, for appellant. Nathan H. Frank, J. C. Campbell, William H. Metson, and R. W. Campbell, for appellees.

PER CURIAM. On motion of Mr. N. H. Frank, and pursuant to stipulation filed July 5, 1910, ordered decree entered in favor of the appellees in the sum of $25,000, with interest therein from June 25, 1910, at the rate of 6 per cent. per annum. Decree entered accordingly. See, also, 176 Fed. 533.

ENNIS & STOPPANI v. AMERICAN TRUST & SAVINGS BANK. (Circuit Court of Appeals, Seventh Circuit. May 20, 1910.) No. 1,697. On petition to review and revise, in matter of law, proceedings of the District Court of the United States for the Northern District of Illinois. Harrison Musgrave and John H. S. Lea, for petitioner.

PER CURIAM. Petition to review and revise dismissed on motion of petitioner April 19, 1910. See, also, 171 Fed. 755.

THE H. A. BAXTER. (Circuit Court of Appeals, Second Circuit. June 14, 1910.) No. 265. Appeal from the District Court of the United States for the District of Connecticut. This is a limited appeal from a decree of the District Court, District of Connecticut, confirming master's report and adjudging that certain of the libelants recover against the steam tug H. A. Baxter certain sums of money in satisfaction of certain liens for wages, repairs, and supplies. The opinion of the District Judge is found in 172 Fed. 260. De Lagnel Berier, for appellant. Tracy Waller and Charles B. Waller, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We do not think that on the papers before him the District Judge abused his discretion in refusing to open the decree pro confesso. While that decree stands the allegation therein, which was an essential to the relief asked for, that supplies and repairs were furnished to the foreign vessel on the request of her master and owner must be considered to be a proved fact. Even if the question were considered to be open, there is such conflict in the evidence which is before us that we would not feel prepared to disturb the finding of the master and the District Judge, who evidently had testimony before them which is not before us. We see no reason why appellant's claim should have been reduced arbitrarily by striking out all items prior to May 2, 1907, but the claim is not found in the record, and we can make no specific disposition of it. It is thought that this proposition is academic because liens superior to appellant's will practically exhaust the fund. The decree is affirmed, with costs of this appeal to the Baxter against appellant.

ILLINOIS COMMERCIAL MEN'S ASS'N v. McCORMACK. (Circuit Court of Appeals, Seventh Circuit. May 20, 1910.) No. 1,605. In Error to the Circuit Court of the United States for the Northern District of Illinois. James Maher, for appellant. Curtis H. Remy and C. D. O'Brien, for appellee.

PER CURIAM. Judgment affirmed November 5, 1909. See, also, 159 Fed. 114, 86 C. C. A. 304.

JOHNSTONE v. FURNESS, WITHY & CO., Limited, et al. (Circuit Court of Appeals, Second Circuit. July 26, 1910.) No. 269. 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 Furness, Withy & Co., owners of the steamship Dalton Hall, solely in fault for damages to cotton shipped from Montgomery, Ala., to Genoa under through bill of lading. The cotton was damaged through the sinking of a lighter after delivery to the steamer in the port of Savannah. The opinion of the District Judge will be found in 172 Fed. 1016. J. Parker Kirlin and John M. Woolsey, for appellant. Lawrence Kneeland (Kneeland & Harison, of counsel), for libelant. Stewart & Shearer (Charles C. Burlingham, George L. Shearer, and Williamson Pell, of counsel), for Atlantic Coast Line R. R. Co. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The facts are stated in the opinion of Judge Adams and we concur in his findings and conclusions. The merely negative testimony of the ship's officers cannot in our opinion overcome the testimony of the three witnesses (to which he refers) that before 7 o'clock on Monday morning they saw a five-inch stream of water coming out of the discharge pipe. And, accepting the length of the lighter to be 70 feet as stated in the survey and not 60 feet as some of the witnesses estimated, we are not persuaded by the argument that she was so located on the port side of the steamer that it would not be possible for this stream to fall upon her. We find no abuse of discretion in allowing the amendment conforming the pleading to the proof. Decree affirmed, with interest and a single bill of costs of this appeal against appellant.

KORZIB v. NETHERLANDS AMERICAN STEAM NAVIGATION CO. (Circuit Court of Appeals, Second Circuit. July 1, 1910.) No. 310. Appeal from the District Court of the United States for the Southern District of New York. Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for appellant. A. L. Brougham, for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We have no doubt of the respondent's liability in this case to the libelant, a steerage passenger in her seventeenth year on the steamship Nieuw Amsterdam, whose right eye was totally destroyed by the negligence of the stewardess. The commissioner and the District Judge have awarded her the sum of $7,500. The libelant, whose occupation is that of a domestic servant, suffered considerable pain at the time of the accident, June 20, 1907, and at the time of the hearing before the commissioner in November, 1909, still occasionally suffered some physical pain which reduced her ability to do household work, and always suffers mentally because of her disfigurement and the impairment of her matrimonial prospects. While the sum awarded seems to us high, as the commissioner and District Judge concur in it, we feel we ought not to make any reduction. Decree affirmed, with costs.

See, also, 175 Fed. 998.

In re MAAGET. (Circuit Court of Appeals, Second Circuit. June 14, 1910.) No. 233. 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 review an order of the District Court, Southern District of New York, sitting in bankruptcy. Hays, Hershfield & Wolf (Ralph Wolf, of counsel), for petitioner. Marks & Marks (Harry M. Marks, of counsel), for respondent. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. On August 27, 1908, the woolen company sued Maaget in the superior court of Fairfield county, Conn., to recover some $10,000. Attachment was issued under the statutes of that state and duly levied upon his property therein. On August 29th Maaget, with the National Surety Company as surety, discharged the attachment, by giving the usual bond to plaintiff. In order to induce the surety company to execute this bond, one Sack of Bridgeport, Conn., executed his personal bond to that company indemnifying

it against loss. In order to induce Sack to indemnify the surety company, Maaget delivered to him 29 shares of the Maaget Company as security against any loss he might sustain by reason of his indemnity. On September 25, 1908, proceedings in involuntary bankruptcy were instituted against Maaget. On January 19, 1909, the bankrupt moved in the superior court for a stay of proceedings on the ground that he had been adjudicated a bankrupt, and that the claim of the woolen company was one dischargeable in bankruptcy. That court denied the motion on the ground that the plaintiff could enter a modified judgment under which it could pursue its remedies solely against the surety company. Thereupon a motion was made in the bankruptcy court to vacate the attachment and discharge the surety company bond. This motion was denied upon condition that the American Woolen Company execute a bond in the amount of $10,000, conditioned that in the event of its recovery on the surety bond it will pay to the estate of the bankrupt the value of the 29 shares of stock of the Maaget stock, such value to be determined by a summary proceeding. Various propositions have been submitted: That, the bond having taken the place of the attachment, there was nothing to vacate; that the court could not on the mere motion of the bankrupt discharge the contract between the woolen company and the surety company—and others. None of these need be discussed because the petitioner has expressed his willingness to give a bond in the required amount for the payment to the estate of any judgment that may be recovered by the trustee against the woolen company to recover the 29 shares of Maaget Company stock or its proceeds, such action to be begun within a reasonable time to be fixed by the court. We think petitioner should be allowed to try out the propositions it advances, without being summarily foreclosed, and that the security offered will sufficiently protect the estate. The order of the District Court is modified accordingly. See, also, 173 Fed. 232.

MARKS v. FIREMAN'S FUND INS. CO. (Circuit Court of Appeals, Second Circuit. July 1, 1910.) No. 309. Appeal from the District Court of the United States for the Southern District of New York. Lawrence Kneeland and Thomas D. Hewitt (Kneeland & Harison, of counsel), for appellant. Wing, Putnam & Burlingham (Everit Masten, of counsel), for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The decree (175 Fed. 222) is affirmed.

NOYES, Circuit Judge, dissents.

In re RAPHAEL. RAPHAEL et al. v. CHICAGO TITLE & TRUST CO. (Circuit Court of Appeals, Seventh Circuit. May 17, 1910.) No. 1,327. Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Harvey Strickler, for appellant. Julius Moses, for appellee. Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

PER CURIAM. Appellee, as trustee of the bankrupt, sued appellants to recover from them a part of the bankrupt's estate alleged to be in their hands. The cause was referred to a special master, with directions "to hear, take proofs, and report his conclusions and recommendations thereon to the court." The master reported his findings of fact, and recommended a decree against appellants. Of the legal sufficiency of the findings to support the decree there is no doubt. The main questions argued here require for their proper determination a consideration of the evidence. The master was not directed to report the evidence, and he did not return it to the court with his findings. The decree was rendered on June 14, 1906. On July 20, 1906, after the court had overruled appellants' motion for leave to file the master's transcript of the evidence nunc pro tunc as of June 14th, the transcript was filed in the office of the clerk of the trial court. At and prior to the hearing in court no effort was made to have the master directed to report the evidence to the court, and no exceptions were filed in court challenging the sufficiency of the evidence to sustain the master's findings of fact. Manifestly it would be un-

fair to appellee and to the trial court to permit appellants to contend for a reversal on account of matters which the record fails to show were presented to the trial court. The decree is affirmed.

SALMON et al. v. AUSTRO-AMERICAN STAVE & LUMBER CO., Limited. (Circuit Court of Appeals, Second Circuit. May 9, 1910.) In Error to the Circuit Court of the United States for the Eastern District of New York. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The order granting supersedeas should be vacated, without prejudice to defendants applying before the expiration of the December (1909) term to the Circuit Court for opening and re-entry of the judgment or for such other relief as they may be advised.

SANBERN v. WRIGHT & COBB LIGHTERAGE CO. (two cases). (Circuit Court of Appeals, Second Circuit. June 14, 1910.) No. 285. Appeal from the District Court of the United States for the Southern District of New York. Wray & Callaghan and Nelson Keach, for appellant. Kneeland & Harison, for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed on opinion of District Judge (171 Fed. 449), with interest and costs.

In re TOMMY. (Circuit Court of Appeals, Second Circuit. June 14, 1910.) No. 227. Appeal from the District Court of the United States for the Southern District of New York. Appeal from a decree of the District Court, Southern District of New York, fixing the value of petitioner's barge at $3,500 and adjudging that claimant is entitled to recover $3,500 on account of damages sustained from the death of her husband. James J. Macklin and De Lagnel Berier, for appellant. Charles C. Sanders (Herbert C. Smyth and Charles C. Sanders, of counsel), for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. When this cause was here before (The Tommy, 151 Fed. 570, 81 C. C. A. 50), we considered the facts of the accident, the condition of the tongs and the circumstances under which they were furnished; the court below having found that the tongs were defective and that the accident was principally attributable thereto. We reversed the decree which refused to allow a limitation of liability, but did not question the correctness of his other findings, "as he saw and heard the witnesses," remanding the cause with instructions to enter a decree in accordance with our opinion. The District Court has now found the value of the barge to be $3,500, that the damages resulting from the death of Johnson were $7,000, and that it is not necessary to determine whether or not deceased was negligent, because, if he were, the result would be only to divide the damages, while his total recovery under our former decision must be limited to the value of the barge ($3,500). We have examined the record now presented, concur with the conclusions of the District Judge, and see no reason to modify our former decision that the defective condition of the tongs furnished by the master of the barge, who was in that particular an alter ego of the owner, was the principal cause of the accident. Decree affirmed, with interest and costs.

See, also, 168 Fed. 563.

UNITED STATES DECALCOMANIA CO. v. AMERICAN TRUST & SAVINGS BANK. (Circuit Court of Appeals, Seventh Circuit. May 20, 1910.) No. 1,702. Alvin H. Culver, for appellant.

PER CURIAM. Appeal dismissed pursuant to the provisions of section 1, rule 16 (150 Fed. xxix, 79 C. C. A. xxix), April 22, 1910.

WEIL v. PERELES et al. (Circuit Court of Appeals, Seventh Circuit. May 20, 1910.) No. 1,517. Appeal from District Court of the United States for the Eastern District of Wisconsin. H. K. Butterfield and E. J. Henning, for appellant. T. W. Spence, for appellees.

PER CURIAM. Appeal dismissed pursuant to stipulation, April 28, 1910. See, also, 157 Fed. 419.

WESTINGHOUSE AIR BRAKE CO. v. HEIN. (Circuit Court of Appeals, Seventh Circuit. May 20, 1910.) **No. 1,654. Appeal from the Circuit Court of** the United States for the Northern District of Illinois. Charles S. Buell and Charles P. Abbey, for appellant. D. S. Wegg and Walter H. Chamberlin, for appellee.

PER CURIAM. Appeal dismissed March 10, 1910, pursuant to stipulation. See, also, 172 Fed. 524.

BIRMINGHAM, C. & ST. A. R. CO. v. GORDON. (Circuit Court, S. D. New York. May 11, 1910.) Motion to Vacate Summons and Dismiss Suit. Hays, Hershfield & Wolf, for plaintiff. Hornblower, Miller & Potter, for defendant.

NOYES, Circuit Judge. I am not so satisfied that section 1779 of the Code of Civil Procedure of the state of New York, either by itself or in connection with section 1780 of said Code, is in conflict with the provisions of the federal Constitution that I deem it my duty to hold it unconstitutional in deciding this motion. The motion for an order vacating the summons and dismissing the suit is denied.

CHATHAM v. DODGE. (Circuit Court, S. D. New York. June 17, 1910.) On Demurrer to Complaint. James P. Niemann, for plaintiff., Daly, Hoyt & Mason (Charles K. Carpenter, of counsel), for defendant.

HAZEL, District Judge. This action is for breach of contract, and the defendant has filed a demurrer to the complaint on the general ground that the complaint does not state facts sufficient to constitute a cause of action. The specific grounds of demurrer are that the contract alleged in the complaint is void for lack of mutuality, and is indefinite in time and revocable without liability to either party. I have examined into the matter, and think the demurrer should be overruled, with costs. Such an order may be entered and the defendant have leave to interpose answer within 20 days.

FINANCE CO. OF PENNSYLVANIA v. KRESGE. (Circuit Court, E. D. Pennsylvania. May 16, 1910.) No. 752. Action by the Finance Company of Pennsylvania against S. S. Kresge. Verdict for defendant, and plaintiff moves for a new trial. Granted. Stern & Wolf and George H. Earle, Jr., for plaintiff. C. Bradford Fraley, Oscar Wagner, and Charles Biddle, for defendant.

J. B. McPHERSON, District Judge. As I am at present advised, the verdict in this case appears to be for the right party, but the manner in which it was reached is not wholly satisfactory. I submitted a controlling question of fact upon which the weight of the evidence seemed to be with the plaintiff, and (to avoid confusing the jury) I abstained from referring to other questions which the plaintiff claimed to be questions of law that in any event would require a binding instruction in its favor. If the verdict had been for the plaintiff, obviously no decision upon these questions of law would have been necessary. But the jury came in with a verdict for the defendant, and I was therefore obliged to determine whether I would receive it, leaving the plaintiff's questions of law undecided, or whether I would decide the questions provisionally and direct a verdict for the plaintiff. The latter course had this advantage: That these questions of law might upon more deliberate consideration be found to justify the direction. In the hope, therefore, of thus ending the litigation, I concluded to direct a verdict for the plaintiff, but I am now inclined to doubt whether this direction can be sustained. At all

events, it will I think be more satisfactory to have the case tried before another jury, who may perhaps be able to settle the dispute finally, although the unavoidable delay of four or five months is to be regretted. A new trial is granted.

OLD DOMINION COPPER MINING & SMELTING CO. v. LEWISOHN et al. (Circuit Court, S. D. New York. June 17, 1910.) In Equity. On Motion to Amend Bill of Complaint. Louis D. Brandeis and Edward F. McClennen, for complainant. Hoadly, Lauterbach & Johnson, for defendants.

HAZEL, District Judge. This motion first came before Judge Noyes, who in his written memorandum intimated that, if the complainant had presented specific amendments to the different paragraphs of the original bill, he would have passed upon each of the proposed amendments and either allowed or disallowed them. Without endeavoring to pass specifically upon the various proposed amendments, it appears clearly enough that the amendments which the complainant desires to make to the original bill are thoroughly in line with its testimony, while the allegations of the original bill are not as claimed in accord therewith. Under the circumstances presented by the record, I am of the opinion that the proposed amendments should be allowed, and an order to that effect may be entered.

See, also, 176 Fed. 745.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. FARMERS' LOAN & TRUST CO. v. METROPOLITAN ST. RY. CO. et al. GUARANTY TRUST CO. OF NEW YORK v. SAME. (Circuit Court, S. D. New York. June 27, 1910.) Nos. 2–9, 2–33, 2–149, 3–37.

LACOMBE, Circuit Judge. It is quite manifest that the situation with regard to these federal taxes presents questions which should not be summarily disposed of. Indeed, it is possible that some of them can be satisfactorily disposed of only after the United States Supreme Court shall have decided the cases in which reargument has been ordered. The proper course would seem to be for receivers to pay them, thus avoiding all possible penalties, and leaving the ultimate adjustments to be made hereafter. Such payment should be made, however, only under an order to the terms of which, in each case, the lessor company may agree, providing (as was done in the case of the franchise taxes) that the same shall be without prejudice to rights of lessee or bondholders, and that, in the event of its being finally decided that the lessor should pay these excise taxes, it will reimburse the receivers for the money now advanced to pay them. In cases where the lessors will not agree to the entry of such an order, the receivers should not take the responsibility of paying.

See, also, 176 Fed. 471.

THE MATANZAS et al. (District Court, E. D. Pennsylvania. June 8, 1910.) Nos. 15, 44. In Admiralty. Final hearing. Francis C. Adler, John F. Lewis, and J. Frank Staley, for libelant. Howard M. Long, for respondent.

J. B. McPHERSON, District Judge. In each of these cases the libelant, who is a part owner of the bark Matanzas and objected to a contemplated voyage, filed a libel asking that the majority owners be compelled to give security for the safe return of the vessel to the port of Philadelphia. In each case the bond has been entered in a sum fixed by the court, the voyage has been accomplished, and the vessel has been safely returned. While, therefore, the libelant is entitled to a formal decree in his favor, since he was exercising an undoubted right when he asked for security, nothing is now to be provided for except the costs. A decree may therefore be entered in each case in favor of the libelant for costs.

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§ 32. A person of Chinese descent, arrested for being unlawfully in the United States, has the burden of proof to establish his claim that he was born in this country; and a finding against such claim by the commissioners, affirmed by the District Court on additional testimony, will not be set aside by the appellate court, unless clearly against the weight of evidence.—Yee King v. United States (C. C. A.) 368.

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§ 54. In proceedings under the immigration laws, the final determination of the grant of power therein cannot rest with the executive officers under our system of government; but the ultimate decision of such questions must remain with the courts.—Davies v. Manolis (C. C. A.) 818.

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Protection of bankrupt from arrest, see Bankruptcy, § 392.

ART.

Power of art museum to take property by devise, see Corporations, § 436.

ASSAULT AND BATTERY.

Words charging conviction of beating one's mother as slanderous per se, see Libel and Slander, § 7.

II. CRIMINAL RESPONSIBILITY.

Jurisdiction of offenses, see Criminal Law, § 97.

ASSETS.

Collection on insolvency of bank, see Banks and Banking, § 287.

ASSIGNMENTS.

Assignment of claim as discharging sureties, see Principal and Surety, §§ 102, 129.
In bankruptcy, see Bankruptcy, §§ 136–140.

Transfers of particular species of property, rights, or instruments.

See Bills and Notes, § 315.
Indian leases, see Indians, § 16.
Insurance policies, see Insurance, § 222.
Patent, see Patents, § 213.
Rights in public lands, see Public Lands, § 135.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

§ 52. A letter written by the president of a finance company, approved by the bankrupt, to the attorney of certain foreign creditors, *held* an equitable assignment of the bankrupt's interest in certain estates for the benefit of the creditors represented by such attorney.—In re Ballantine (D. C.) 548.

II. OPERATION AND EFFECT.

§ 80. The owner of a debt upon which he had the right to sue a principal or his agent through whom the debt was contracted, the principal being then undisclosed, in assigning the debt may also transfer to the assignee such right of election.—Berry v. Chase (C. C. A.) 426.

§ 89. Where a claim against a corporation was assigned to a prospective purchaser of a part of its assets for collection, to be used in settlement with the corporation, but the sale was never consummated and the claim reassigned to plaintiff, there was no satisfaction thereof.—Denver Engineering Works Co. v. Elkins (C. C.) 922.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 123–348.

IV. ADMINISTRATION OF ASSIGNED ESTATE.

Delivery of property to trustee in bankruptcy, see Bankruptcy, § 293.

VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.

Allowance of expenses from estate of bankrupt, see Bankruptcy, § 471.

ASSOCIATIONS.

See Exchanges; Joint-Stock Companies.
Mutual benefit insurance associations, see Insurance, §§ 817–825.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 205–217, 288.

ATTACHMENT.

See Execution.

II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see Homestead.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial, see Trial, § 110.
Attorneys in fact, see Principal and Agent.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

Powers of attorney to attorney of bankrupt, see Bankruptcy, § 123.

§ 20. There is no statute forbidding a creditor to appoint as his attorney or agent the attorney who has acted as attorney for the bankrupt in preparing his consent to an adjudication.—In re Kaufman (D. C.) 552.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

As items of costs, see Costs, § 172.

ATTORNEYS IN FACT.

See Principal and Agent.

AUDITA QUERELA.

Relief against judgment by motion or other proceedings in same action, see Judgment, § 379.

AUDITORS.

See Reference.

AUTHORITY.

Of agents, see Principal and Agent, § 69.
Of court to open or vacate judgment, see Judgment, § 379.
Of officers and agents of corporations in general, see Corporations, §§ 398–400.
To issue writ of habeas corpus, see Habeas Corpus, §§ 45–113.

AUTOMOBILES.

Care required of automobile driver at railroad crossing, see Railroads, § 328.
Care required of occupant at railroad crossing, see Railroads, § 327.

BACHELORS.

Homestead exemption, see Homestead, §§ 23, 32.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Pledges.
Carriage of goods, see Carriers, § 51; Shipping, §§ 108–132.
Charter party, see Shipping, §§ 49–58.

BANKRUPTCY.

Equitable assignment by bankrupt, see Assignments, § 52.
Right of attorney to represent bankrupt and creditors, see Attorney and Client, § 20.
Weight and sufficiency of evidence in bankruptcy proceedings, see Evidence, § 594.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

§ 14. A court of bankruptcy cannot issue process to be enforced in another territorial jurisdiction, nor make a summary order for delivery of property which can only be there enforced; but such an order can only be obtained by proceedings by the trustee in the court of the district where it must be executed.—Staunton v. Wooden (C. C. A.) 61.

§ 21. In a bankruptcy proceeding against stockholders to recover the stock for the benefit of the estate, certain stockholders by answering to the merits *held* to have waived their right to object to the bankruptcy court's jurisdiction.—In re Mills (D. C.) 409.

(C) Involuntary Proceedings.

§ 58. The giving of security by an insolvent contractor for government work, within four months prior to the filing of a petition in bankruptcy against it, to the surety on its bond to secure a loan of money used to pay the claims of laborers, *held* to be the giving of preference to a creditor which constituted an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).—United Surety Co. v. Iowa Mfg. Co. (C. C. A.) 55.

§ 61. A bankrupt, having admitted its inability to pay its debts and its willingness to be adjudged a bankrupt, *held* subject to the adjudication, though not insolvent.—In re Northampton Portland Cement Co. (D. C.) 726.

§ 72. A corporation *held* to be engaged principally in manufacturing, trading, or mercantile pursuits, and subject to adjudication as a bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).—United Surety Co. v. Iowa Mfg. Co. (C. C. A.) 55.

§ 89. Where, after answer filed to a bankruptcy petition, it was amended, and an additional act of bankruptcy charged which was admitted, the adjudication would be based on the amendment without determining the sufficiency of the answer.—In re Cleary (D. C.) 990.

§ 91. There is no judicial presumption that the corporate name of a corporation denotes the business in which it is "engaged principally," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423).—United States v. Freed (C. C.) 236.

§ 95. Under Bankruptcy Act July 1, 1898, c. 541, §§ 1a (16), 18d, 30 Stat. 544, 551 (U. S. Comp. St. 1901, pp. 3418, 3429), a judge of a court of bankruptcy has no authority to make a general reference to a referee of the issues joined on a petition in involuntary bankruptcy, and should dispose of jurisdictional issues by direct hearing, if possible, as a condition precedent to inquiry upon the other issues raised.—In re Kink (C. C. A.) 694.

§ 97. An alleged bankrupt cannot be subjected to examination on written interrogatories before adjudication at the instance of petitioning creditors.—In re Thompson (D. C.) 874.

§ 100. A federal court's jurisdiction in bankruptcy cannot be collaterally attacked in a prosecution for a crime committed therein.—United States v. Freed (C. C.) 236.

(D) Warrant and Custody of Property.

Payment of receiver's certificates by receiver in bankruptcy, see Receivers, § 129.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) Appointment, Qualification, and Tenure of Trustee.

§ 123. Powers of attorney, executed by creditors to the attorney who had represented the bankrupt, *held* not void for that reason.—In re Kaufman (D. C.) 552.

§ 123. Creditors should not be denied the right to a voice in the selection of a bankrupt's trustee, because they had named as their attorney one who had acted as attorney for the bankrupt.—In re Kaufman (D. C.) 552.

§ 125. A ruling that, because the majority creditors were represented by a disqualified attorney, they were not present for the purpose of voting on the selection of a trustee, but were present for the purpose of determining whether the person voted for by the minority had received a majority vote, was erroneous.—In re Kaufman (D. C.) 552.

§ 127. Where a referee in bankruptcy determined that the majority creditors present at the first meeting were not represented by a qualified attorney, it was error for him to proceed with the appointment of a trustee of his own selection.—In re Kaufman (D. C.) 552.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

Sufficiency of evidence of resulting trust in favor of wife of bankrupt, see Trusts, § 89.

§ 136. Facts *held* insufficient to account for a loss of assets by the bankrupt, and to sustain an order requiring payment of a specified sum as withheld assets to the trustee.—In re Robert Greenberg & Bro. (D. C.) 413.

§ 136. A demurrer to a petition by the trustee to require bankrupt to turn property over was waived by an answer, both being to the whole petition.—In re Koplin (D. C.) 1013.

§ 140. Evidence *held* insufficient to establish the claim of a bankrupt's wife as a creditor of his estate with the right to priority of payment from the proceeds of land to the purchase price of which she claimed to have contributed when it was conveyed to him 29 years prior to the bankruptcy.—Teter v. Viquesney (C. C. A.) 655.

§ 140. A bankrupt's trustee acquires no title to property sold to the bankrupt under a conditional sale until compliance with the condition.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 140. Under a lease of property to a bankrupt, neither the bankrupt nor his trustee or mortgagee are authorized to remove property annexed to the freehold until and unless all the rents in arrears had been paid, whether the property was trade fixtures or not.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

§ 140. Where machinery was sold to a bankrupt under a conditional sale contract, it was not material that the contract was not signed until six months after the goods were delivered, and that the agreement was secret.—In re C. K. Hutchins Co. (D. C.) 864.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 163. The acceptance of a conveyance of property from a banker in payment or as security for a sum converted by him to his own use, with knowledge of his insolvency, *held* an election to treat the conversion as creating an indebtedness and the receipt of a preference thereon which was voidable at suit of the grantor's trustee in bankruptcy.—Atherton v. Green (C. C. A.) 806.

§ 167. Trustee of bankrupt firm *held* not entitled to recover a preference without a showing of individual insolvency of the partners when the preference was given.—Worrell v. Whitney (D. C.) 1014.

§ 175. A sale and lease of the assets of a bankrupt corporation to another company organized to take over its assets, but with intent to hinder, delay, and defraud its general creditors, *held* void in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 67 (e), 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).—In re Medina Quarry Co. (D. C.) 929.

§ 186. A lessee of a bankrupt corporation's assets, under a lease void as against the corporation's creditors, *held* subject in bankruptcy to account only for net profits.—In re Medina Quarry Co. (D. C.) 929.

§ 186. President of corporation *held* not a "person benefited" by the assignment of a mortgage payable to the corporation within the bankruptcy law (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).—Page v. Moore (D. C.) 988.

§ 188. An equitable lien, having been acquired more than four months before the filing of a bankruptcy petition, was not invalidated thereby.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 188. A pledge of a railroad car by the bankrupts *held* not invalid under the Pennsylvania law as to the bankrupt's trustee for failure to deliver the car to the pledgee.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 188. A bankrupt *held* entitled to an equitable lien on the equipment of a work car, to secure advances to the builders who had become bankrupts, regardless of the validity of a pledge thereof.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 191. A landlord has no lien on distrainable property as against the bankrupt tenant's trustee, unless he has levied his distraint before the filing of the petition in bankruptcy.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

§ 191. A lien acquired by a landlord's distress levy within four months prior to the filing of a bankruptcy petition against the tenant is not rendered void or voidable by a subsequent adjudication; such lien not being one secured "by legal proceedings" within Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).—In re Potee Brick Co. of Baltimore City (D. C.) 525.

§ 194. Lien on a bankrupt's assets secured by a creditor's bill *held* a lien acquired by legal proceedings which is avoided by bankruptcy adjudication under Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).—In re Potee Brick Co. of Baltimore City (D. C.) 525.

§ 196. Under Bankr. Act July 1, 1898, c 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), execution for fine for illegal liquor selling *held* to be stayed pending bankruptcy proceedings:—In re Green (D. C.) 870.

§ 206. Where a claim to possession of property of a bankrupt's estate, as against the trustee's right of possession, is based solely on an attachment lien, which is avoided by the adjudication in bankruptcy, the person or officer so in possession is not an adverse claimant, but holds as bailee for the trustee, and must deliver the property on proper demand, and may be required to do so by a summary order of the bankruptcy court.—Staunton v. Wooden (C. C. A.) 61.

§ 209. A petition filed in a court of bankruptcy, praying that petitioner be adjudged a creditor of a bankrupt and entitled to priority of payment from the proceeds of certain lands, cannot be treated as a bill in equity to establish a resulting trust in such lands which would be inconsistent with the relief prayed for.—Teter v. Viquesney (C. C. A.) 655.

(D) Administration of Estate.

§ 224. Where petitions for the reclamation of property from a trustee are presented to a court of bankruptcy, it is the prevailing practice to refer the same to a special master, instead of to the referee in bankruptcy; and such practice should not be changed, except by a general order of the Supreme Court which would be uniform in its operations.—In re Tracy (C. C. A.) 366.

§ 224. A referee in bankruptcy has power to require a third person to show cause why property in his hands alleged to belong to the bankrupt should not be delivered to the trustee.—In re Famous Clothing Co. (D. C.) 1015.

§ 228. Finding of fact by special master will not be set aside, though the judge might have come to a different conclusion from the evidence.—In re Schwartz (D. C.) 767.

§ 228. A referee's report on conflicting evidence will be affirmed, in the absence of a clear showing that it is erroneous.—In re C. K. Hutchins Co. (D. C.) 864.

§ 228. The findings of a referee in bankruptcy on a question of fact will not be reversed unless manifestly wrong.—In re Baumhauer (D. C.) 966.

§ 229. Where contempt proceedings against a bankrupt are not instituted by the referee on his own motion, the bankrupt should be accorded notice and hearing before the referee.—In re Magen (D. C.) 572.

§ 229. A referee in bankruptcy cannot punish the bankrupts for contempt.—In re Magen (D. C.) 572.

§ 229. A referee in bankruptcy may certify contumacious conduct of the bankrupts to the court for its action, without notice to the bankrupts.—In re Magen (D. C.) 572.

§ 241. Facts *held* to justify punishment of bankrupts for contempt in their examination concerning their affairs.—In re Magen (D. C.) 572.

§ 244. Where a creditor desires to take the evidence of a nonresident in support of specifications of objection to a bankrupt's discharge, he may take the witness' deposition under Bankr. Act July 1, 1898, c. 541, § 21b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430).—In re Robinson (D. C.) 724.

§ 250. Facts *held* to require the determination of the ownership of certain corporate stock as between the holders and the bankrupt's trustee in a plenary suit, and not in summary proceedings in bankruptcy.—In re Mills (D. C.) 409.

§ 250. A bankruptcy court is not deprived of jurisdiction to compel the surrender of property in the hands of a third person alleged to belong to the bankrupt, where the evidence warrants the finding that the possessor's claim is colorable or fictitious.—In re Famous Clothing Co. (D. C.) 1015.

§ 258. Where a trustee sells property which is subject to a mortgage of unquestioned validity, and the proceeds are insufficient to satisfy the mortgage, the holder is entitled to the entire sum, without deducting commissions of the trustee and referee, which should be paid from the general estate.—In re Harralson (C. C. A.) 490.

(E) Actions by or Against Trustee.

§ 287. A third person, in possession of goods alleged to belong to the bankrupt, claiming under color of title, *held* entitled to retain possession until dispossessed by a plenary suit.—In re Jackier (D. C.) 720.

§ 288. A summary order, directing a third person to surrender goods alleged to belong to the bankrupt, could not be made, where the goods could not be followed and sufficiently identified to enable the marshal to take possession.—In re Jackier (D. C.) 720.

§ 288. A bankrupt's trustee *held* not entitled to recover in summary proceedings goods alleged to be in respondent's possession belonging to the bankrupt, under the law relating to confusion of goods.—In re Jackier (D. C.) 720.

§ 293. An assignee for the benefit of creditors after an adjudication in bankruptcy against the assignor does not hold the property assigned or its proceeds as an adverse claimant, and, where he voluntarily submits his account to the court of bankruptcy, that court has jurisdiction to make a summary order requiring him to turn over to the trustee such property or funds as remain in his possession.—In re Stewart (C. C. A.) 222.

§ 303. In an action by a trustee in bankruptcy against the bankrupts' accommodation indorser to recover a preference, the burden was on the trustee to prove that the bankrupts intended thereby to prefer defendants, and that defendants knew or had reasonable cause to believe that a preference was intended.—Reber v. Louis Shulman & Bro. (D. C.) 574.

§ 303. In a plenary suit by a bankrupt's trustee to recover goods in the fraudulent pos-

session of a third person, the trustee may recover a verdict for the value of goods, though they cannot be precisely identified.—In re Jackier (D. C.) 720.

§ 303. In action by trustee in bankruptcy evidence *held* insufficient to show that president of bankrupt corporation procured assignment of mortgage to release him from personal obligation as surety on bond of a corporation.—Page v. Moore (D. C.) 988.

§ 304. On petition to require a receiver in bankruptcy to turn chattels over to petitioner under a claimed lien, *held* improper to summarily dispose of an instrument as not giving a lien.—In re Corn (C. C. A.) 841.

(F) Claims Against and Distribution of Estate.

Effect of proof of claim on right of action for deceit, see Fraud, § 35.

§ 310. Mortgage creditors of a bankrupt *held* entitled to prove their claims without surrendering their lien, and if on foreclosure the proceeds of a sale are insufficient, they may share for the balance in the general distribution.—In re Medina Quarry Co. (D. C.) 929.

§ 312. A bondholders' committee of a bankrupt corporation, by conniving at a fraudulent transfer of the corporation's assets, did not deprive itself of the right to share in the bankrupt's assets.—In re Medina Quarry Co. (D. C.) 929.

§ 314. Claim of wife against estate of her husband in bankruptcy *held* not to be allowed. —In re Carpenter (D. C.) 743.

§ 314. Where bondholders of a corporation assigned their bonds to a committee and accepted in exchange stock and bonds of a new corporation, there was no novation precluding allowance as a claim against the bankrupt's estate of the difference between the amount of the bonds used to purchase the bankrupt's assets and their par value.—In re Medina Quarry Co. (D. C.) 929.

§ 318. Claim of landlord for difference between rent agreed to be paid by bankrupt and rent obtained *held* not provable under Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), but provable under section 63a (4).—In re Caloris Mfg. Co. (D. C.) 722.

§ 318. Claim of vendor for balance of purchase price of land, less the value of the land, *held* not to be allowed.—In re Davis (D. C.) 871.

§ 323. Where a bankrupt's creditor held life insurance policies having no surrender value as collateral security, and the creditor and the trustee could not agree as to their value, the creditor was entitled to have the value fixed by litigation before the referee, under Bankr. Law July 1, 1898, c. 541, §§ 57, 58, 30 Stat. 560, 561 (U. S. Comp. St. 1901, pp. 3443, 3444), and to dividends on the balance of the debt.—In re Davison (D. C.) 750.

§ 323. Where a bank held certain policies on the bankrupt's life as security, and their value was deducted from the bank's claim for the distribution of dividends, the bank was not required to surrender the policies to the trustee.—In re Davison (D. C.) 750.

§ 325. In accounting between bankrupt and his wife, bankrupt *held* entitled to credit for value of property at time of transfer to her, and not at time of accounting.—In re Carpenter (D. C.) 743.

§ 336. A claim against a bankrupt's estate, alleged to be improperly verified under general order 21 (89 Fed. ix, 32 C. C. A. xxii), *held* subject to amendment.—In re Medina Quarry Co. (D. C.) 929.

§ 340. In hearing before referee in bankruptcy as to claim of bankrupt's wife, her testimony *held* competent.—In re Carpenter (D. C.) 743.

§ 340. Evidence in bankruptcy *held* to sustain a referee's finding disallowing a claim for borrowed money.—In re Baumhauer (D. C.) 966.

§ 340. Rule respecting proof of claims in bankruptcy stated.—In re Baumhauer (D. C.) 966.

§ 346. In the distribution of the estate of a bankrupt, the actual and necessary cost of preserving the estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction, is entitled to priority of payment over taxes due the state.—State of New Jersey v. Lovell (C. C. A.) 321.

§ 348. Certain claims *held* not "wages due the workmen," within the meaning of section 64b (4) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]).—United Surety Co. v. Iowa Mfg. Co. (C. C. A.) 55.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 391. A suit *held* not subject to stay on bankruptcy of defendant, under Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426).—In re Clipper Mfg. Co. (C. C. A.) 843.

§ 392. A bankrupt, arrested on a civil process while in the state to testify before the referee, in violation of an order of protection given him, will be discharged by the court of bankruptcy on writ of habeas corpus, regardless of whether or not the claim on which he was arrested is one dischargeable in bankruptcy.—United States v. Flynn (D. C.) 316.

§ 396. Under Code Pub. Gen. Laws Md. 1904, art. 23, § 134, a bankrupt can claim as exempt only such cemetery lots as are held by him solely for purposes of sepulture.—Burdette v. Jackson (C. C. A.) 229.

§ 396. Property occupied by a widower, the head of a family, as a home, was properly set aside to him in bankruptcy as a homestead, exempt from forced sale.—In re Mussey (D. C.) 1007.

§ 404. Where a bankrupt failed to obtain a discharge, although his petition was dismissed for want of prosecution, and not on the merits, he is not entitled to a discharge in a second bankruptcy proceeding from the debts provable in the first.—Pollet v. Cosel (C. C. A.) 488.

§ 405. The phrase "party in interest," as used in the rule that objections to discharge in bankruptcy may be made by any "party in interest," construed.—Talcott v. Friend (C. C. A.) 676.

§ 407. Where, after a bankruptcy adjudication against a firm, one of the partners became a voluntary bankrupt, it was not a valid objection to the latter's discharge that another partner obtained goods for the firm by false representations in which the petitioning partner did not participate.—Frank v. Michigan Paper Co. (C. C. A.) 776.

§ 407. A disposition of his property by a bankrupt with intent to keep it from his creditors is with intent to hinder, delay, or defraud them, and will bar his right to a discharge.—In re Nelson (D. C.) 320.

§ 407. Where a bankrupt conveyed certain real estate to his wife in 1894, the fact that he continued to live thereon with her and to perform services for her with reference thereto *held* not to raise a secret trust, available to the bankrupt's creditors in resistance of a discharge.—In re Wermuth (D. C.) 1009.

§ 408. Conveyance by bankrupt to near relative without consideration, and failure to disclose it in schedule, if shown to be an innocent transaction, *held* no obstacle to the bankrupt's discharge.—In re McCann (D. C.) 575.

§ 413. An application to examine the resident of another state in support of creditors' objections to the bankrupt's discharge under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), should be made to the federal District Court of the district of the witness' residence.—In re Robinton (D. C.) 724.

§ 413. Objections to discharge of bankrupt because of failure to keep books *held* insufficient, but amendable.—In re Bradin (D. C.) 768.

§ 413. Objections to discharge of bankrupt charging fraudulent transfer *held* sufficient.—In re Bradin (D. C.) 768.

§ 414. Bankrupt, conveying property to near relative without consideration, and failing to disclose it, in schedules, *held* prima facie guilty of concealing assets.—In re McCann (D. C.) 575.

§ 415. Where finding of special referee rejecting explanation as to transfer of property and omission from schedules is supported by evidence, discharge *held* to be refused.—In re McCann (D. C.) 575.

§ 415. On proceedings for the discharge of bankrupts, the question whether an explanation offered by them of a transfer to a near relative without consideration and the omission of the property from the schedules is credible is a question of fact.—In re McCann (D. C.) 575.

§ 423. Under bankr. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428) § 17, as amended by Act Cong. Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310), false representation by a partner by means of which the firm acquired property will be imputed to the partners, so that their discharge in bankruptcy will not relieve them from such debt.—Frank v. Michigan Paper Co. (C. C. A.) 776.

§ 426. Neither the action of a creditor in opposing a bankrupt's discharge on the ground that he obtained credit on a materially false statement nor a finding by the court thereon, that the bankrupt had not been guilty of any act which barred his right to a discharge under Bankr. Act July 1, 1898, c. 541, § 14b(3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), is a bar to a subsequent action by the objecting creditor against the bankrupt for deceit based on the same false statement.—Talcott v. Friend (C. C. A.) 676.

§ 426. Under Bankr. Act July 1, 1898, c. 541, § 17a(2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310), a discharge in bankruptcy is not a bar to an action for deceit although based on a materially false statement in writing which might have been ground for refusing a discharge under section 14b(3).—Talcott v. Friend (C. C. A.) 676.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

§ 446. In a proceeding to revise under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the Circuit Court of Appeals is limited to a review in matter of law and cannot determine questions of fact involved in the finding or order sought to be reviewed, where there is any evidence to support such finding or order.—In re Stewart (C. C. A.) 222.

(B) Appeal.

§ 463. Where the appeal record did not contain all the evidence, a motion to add additional matter would be granted, with the reservation of the right to determine which party should ultimately bear the cost thereof.—Herman Keck Mfg. Co. v. Lorsch (C. C. A.) 485.

§ 463. The sending of account books to the Circuit Court of Appeal is not within the rule authorizing the sending up of exhibits which cannot be transcribed, in the absence of proof of a showing that transcription or representation by photographic copies could not be had.—Herman Keck Mfg. Co. v. Lorsch (C. C. A.) 485.

§ 467. The action of a District Court in refusing to allow a broker a commission for making a sale of a bankrupt's property, in the absence of any contract therefor, affirmed.—Gold v. South Side Trust Co. (C. C. A.) 210.

§ 467. A ruling, concurred in by both referee and district judge in an administrative matter in bankruptcy, which is discretionary, will not be reversed by the appellate court, unless unmistakably wrong.—Gold v. South Side Trust Co. (C. C. A.) 210.

VII. COSTS AND FEES.

§ 471. An assignee for the benefit of creditors on an accounting after his assignor has been adjudicated a bankrupt is not entitled to an allowance from the funds in his hands for expenses incurred in resisting the adjudication. —In re Stewart (C. C. A.) 222.

§ 474. On a bankrupt's appeal from an involuntary adjudication, he was not entitled to an order requiring his receiver to pay the cost of printing the record out of the funds of the estate in his hands.—Herman Keck Mfg. Co. v. Lorsch (C. C. A.) 485.

§ 484. An assignee for the benefit of creditors who retained possession of the estate after the filing of a petition in bankruptcy against the assignor, and until final adjudication, may not improperly be treated as a quasi receiver and allowed compensation for such services and disbursements as benefited the state.—In re Stewart (C. C. A.) 222.

VIII. OFFENSES AGAINST BANKRUPT LAWS.

Negativing statutory exceptions in indictment, see Indictment and Information, § 111.

§ 492. A bankrupt corporation may be guilty of concealing assets, and the president may be indicted for that offense, if he participated therein.—United States v. Freed (C. C.) 236.

§ 494. An indictment for an offense committed in the course of bankruptcy proceedings against a corporation *held* not objectionable for failure to allege that the corporation was principally engaged in one of the occupations specified in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423).—United States v. Freed (C. C.) 236.

BANKS AND BANKING.

I. CONTROL AND REGULATION IN GENERAL.

Bank depositor's guaranty law as denial of equal protection of the laws, see Constitutional Law, § 240.

§ 4. The bank depositors' guaranty act of Kansas (Laws 1909, c. 61) is not unconstitutional, because its effect may be to increase competition with national banks, and thus impair their efficiency as instrumentalities of the national government.—Dolley v. Abilene Nat. Bank of Abilene, Kan. (C. C. A.) 461.

III. FUNCTIONS AND DEALINGS.

(D) Collections.

Bona fide purchaser, see Bills and Notes, § 330.

IV. NATIONAL BANKS.

Bank depositor's guaranty law as denial of equal protection of the laws, see Constitutional Law, § 240.

§ 260. Guaranty of a purchaser of certain stock from a national bank against loss by reason of executing his note to the bank for the price *held* ultra vires.—Barron v. McKinnon (C. C.) 759.

§ 287. A shareholder's agent of a national bank, appointed under Act June 30, 1876, c. 156, § 3, 19 Stat. 63 (U. S. Comp. St. 1901, p. 3510), could be sued by an alleged creditor of the bank on a guaranty collateral to a contract for the sale of certain stock owned by it.—Barron v. McKinnon (C. C.) 759.

BAR.

Of action by laches or staleness of demand, see Equity, §§ 67–86.
Of prosecution by limitation, see Criminal Law, § 150.

BARROOMS.

See Intoxicating Liquors.

BELIEF.

Preliminary information on information and belief, see Criminal Law, § 211.

BENEFICIAL ASSOCIATIONS.

Benefit and relief funds for servants, acceptance as affecting master's liability for injuries to servant, see Master and Servant, § 100.
Mutual benefit insurance association, see Insurance, §§ 817–825.

BENEFICIARIES.

Of trust, see Trusts.

BENEFITS.

Acceptance ground of estoppel to appeal, see Appeal and Error, § 162.
Benefit and relief funds for servants, acceptance as affecting master's liability for injuries to servant, see Master and Servant, § 100.

BENEFIT SOCIETIES.

See Insurance, §§ 817–825.

BEQUESTS.

See Wills.
To charities, see Charities.

BIAS.

Of witness, ground for impeachment, see Witnesses, § 372.

BILL IN EQUITY.

See Equity, § 150.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, § 51.

BILL OF RIGHTS.

See Constitutional Law.

BILLS AND NOTES.

As collateral security, see Pledges, § 58.
Receivers' certificates, see Receivers, § 129.

I. REQUISITES AND VALIDITY.

(F) Validity.

§ 107. A corporation contracting to "make and deliver" a patented log-loading machine and taking notes therefor which did not state that they were given for a patented machine as required by Kirby's Dig. Ark. §§ 513–516, *held* not a "merchant or dealer" within the provision of such statute excepting from such requirement notes taken on sales of patented articles by merchants or dealers in the usual course of business.—Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co. (C. C. A.) 710.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 144. A note is not negotiable merely because it contains no conditions precedent, performance of which must be alleged in suing on it.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

§ 164. Essential of a negotiable note stated.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

§ 164. A note containing special stipulations and payable on a contingency is not negotiable.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(C) Assignment or Sale.

§ 315. A note containing special stipulations and payable on a contingency is subject in the hands of an assignee to any defense available against the payee.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

§ 315. When payment of a note is expressly made subject to equities growing out of, and defenses based on, an existing or contemporaneous agreement, one taking the note holds it subject to such equities and defenses.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

§ 315. A note in the hands of a transferee *held* subject to the maker's defenses.—Klots Throwing Co. v. Manufacturers' Commercial Co. (C. C. A.) 813.

(D) Bona Fide Purchasers.

§ 330. A bank, to which a check had been sent under an unrestricted indorsement of the payee, *held* entitled to assume that its indorser had authority to transfer title, and hence was entitled to recover from the drawer, who stopped payment, on account of the insolvency of the bank to which the check was first indorsed.—United States Nat. Bank v. Amalgamated Sugar Co. (C. C.) 718.

§ 358. Under sections 25, 27, 29, art. 2, of the Missouri and Pennsylvania negotiable instruments acts (Laws Mo. 1905, p. 247 [Ann. St. 1906, §§ 463—25, 463—27, 463—29]; Act Pa. May 16, 1901 [P. L. 199]), accommodation indorsers *held* liable on a note transferred before maturity to a creditor as additional collateral security for a pre-existing debt.—Trust Co. of St. Louis County v. Markee (C. C.) 764.

§ 379. Under sections 25, 27, and 29, art. 2, of the Missouri and Pennsylvania negotiable instruments acts (Laws Mo. 1905, p. 247 [Ann. St. 1906, §§ 463—25, 463—27, 463—29]; Act Pa. May 16, 1901 [P. L. 199]), accommodation indorsers *held* liable on a note transferred before maturity to a creditor as additional collateral security for a pre-existing debt.—Trust Co. of St. Louis County v. Markee (C. C.) 764.

VIII. ACTIONS.

Against accommodation indorsers of notes pledged as collateral, see Pledges, § 58.

BLEACHED FLOUR.

See Food, § 22.

BOARDS.

Of trade, see Exchanges.

BOATS.

See Collision.

BONA FIDE PURCHASERS.

Of bills or notes, see Bills and Notes, § 330.

BONDS.

Effect of importer's bond for possession of articles of food in subsequent proceedings for condemnation as adulterated or misbranded, see Food, § 24.
Interest as damages, see Damages, § 68.
Sureties on bonds, see Principal and Surety.

II. CONSTRUCTION AND OPERATION.

§ 62. A bond given by a contractor, conditioned for the faithful performance of the contract, although in terms an absolute obligation to pay a certain sum on default by the principal, is modified by the accompanying conditions, and

on breach of the contract by the principal the obligee can recover thereon only the damages proved.—American Surety Co. of New York v. Fidelity Trust Co. (C. C. A.) 699.

BOOKS.

Of bankrupt, transmission to appellate court in bankruptcy proceedings, see Bankruptcy, § 463.

BOROUGHS.

See Municipal Corporations.

BRAKEMAN.

Liability of employer for injuries, see Master and Servant, §§ 125, 217, 286, 288.

BRANDS.

On articles of food, see Food, §§ 14, 15, 24.

BREACH.

Of contract in general, see Contracts, §§ 280–303.

BRIDGES.

Assumption of risk of injuries from overhead bridge by railroad brakeman, see Master and Servant, § 217.
Liability for injuries to railroad brakeman from overhead bridge, see Master and Servant, §§ 286, 288, 289.

BROKERS.

Rights and liabilities as members of exchange, see Exchanges.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

Joint accounting by commission company and agent, see Account, § 10.

IV. COMPENSATION AND LIEN.

§ 65. Grantees in a deed canceled for fraud and directed to account for proceeds of a portion of the property sold by them are not entitled to an allowance for services in making such sales.—Snow v. Hazlewood (C. C. A.) 182.

BUCKET SHOPS.

Jurisdiction of prosecution for conspiring to violate bucket shop law, see Criminal Law, § 97.
Removal of accused to other districts for trial in prosecution for conspiracy, to violate bucket shop laws, see Criminal Law, § 242.

BUILDING CONTRACTS.

In general, see Contracts, § 240.

BUILDINGS.

Fixtures, see Fixtures.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

Sentence on conviction on different counts, see Criminal Law, § 984.

BUSINESS.

Regulation of conduct of business as regulation of commerce, see Commerce, § 58.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.

CARELESSNESS.

See Negligence.

CARGO.

Of vessel, carriage in general, see Shipping, §§ 108–132.

CARRIERS.

As employers, see Master and Servant.
Construction, regulation, and operation of railroad in general, see Railroads.
Construction, regulation, and operation of street railroads in general, see Street Railroads.
Construction, regulation, and operation of telegraph and telephone lines, see Telegraphs and Telephones.
Delivery to carrier as transfer of title to goods sold, see Sales, § 201.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Regulation of, as regulation of commerce, see Commerce, § 33.

(B) Interstate and International Transportation.

Regulation by state as interference with interstate commerce, see Commerce, § 33.

§ 24. Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), being acts to regulate commerce, do not apply to street railway companies engaged in the transportation of passengers between cities in different states.—Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission (C. C.) 243.

§ 30. A tariff rate between two points on different railroads, filed and published by one company and concurred in by the other, which does not designate any particular route, must be held as a matter of law to apply to the natural and direct route over the lines of the two companies between the designated points, and to

constitute the lawful rate over such route.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

§ 38. An indictment of a shipper for receiving concessions from a carrier by which its property was transported in interstate commerce for less than the published rate in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), considered and *held* sufficient.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

§ 38. Evidence considered and *held* sufficient to support a finding that there was a concert of action among the connecting carriers transporting an interstate shipment of merchandise in respect to the charges and the through movement of the traffic, the entire carriage having been made under a "blind" bill of lading issued by the initial carrier, which did not name its own nor a through rate.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

§ 38. Evidence *held* sufficient to support a verdict finding that defendant knowingly accepted concessions as a shipper from the lawful rates established by railroad companies in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138).—Standard Oil Co. of New York v. United States (C. C. A.) 614.

II. CARRIAGE OF GOODS.

Matters peculiar to carriage by vessel, see Shipping, §§ 108–132.
Regulation, as regulation of commerce, see Commerce, § 33.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

For carriage by vessels, see Shipping, § 108.

§ 51. "Blind billing" defined.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

(F) Loss of or Injury to Goods.

By vessel, see Shipping, §§ 121–132.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

Conclusiveness in federal court of judgment in state court, see Judgment, § 828.
Splitting causes of action, see Action, § 53.

§ 306. Where the C. Railroad Company operated rolling stock belonging to the A. Company, at a mileage rental, the equipment being subject to the orders of the C. Company while on its tracks, the two companies were in privity as to a passenger injured thereon.—Jenkins v. Atlantic Coast Line R. Co. (C. C.) 535.

§ 315. Under the rules of pleading in Virginia, which govern the federal courts by virtue of the conformity statute (Rev. St. 914 [U. S. Comp. St. 1901, p. 684]), a declaration alleging that while plaintiff was a passenger on a street car he was injured by the negligent running of another car against him is not supported by evidence that the other car was standing still while the one upon which he was a passenger was moving.—Norfolk & A. Terminal Co. v. Rotolo (C. C. A.) 639.

CARS.

In general, see Carriers; Railroads.
Injuries to employés through defect in or negligent management of cars, see Master and Servant, § 125.

CAUSE OF ACTION.

See Action.

CEMETERIES.

Burial lots as exempt property of bankrupt, see Bankruptcy, § 396.

CERTAINTY.

Of contract as affecting right to specific performance, see Specific Performance, § 28.

CERTIFICATE.

Accompanying demurrer in equity, see Equity, § 228.
Receivers' certificates, see Receivers, § 129.

CERTIFICATION.

Of judgment on appeal in Chinese deportation proceedings, see Aliens, § 32.

CERTIORARI.

II. PROCEEDINGS AND DETERMINATION.

§ 47. A writ of certiorari issued to a subordinate court operates as a supersedeas from the time of its service or of formal notice of its issuance, suspending the power of the court to which it is issued to take further action in the case until it is finally disposed of by the reviewing court.—Waskey v. Hammer (C. C. A.) 273.

CESTUI QUE TRUST.

See Trusts.

CHAMBER OF COMMERCE.

See Exchanges.

CHANCERY.

See Equity.

CHANNELS.

Collision in channels, see Collision, §§ 91–102.

CHARACTER.

Of applicant for citizenship, see Aliens, § 62.
Of parties as determining jurisdiction of federal courts, see Courts, §§ 307–318.
Of witness, see Witnesses, §§ 346–372.

CHARGE.

By carrier, see Carriers, §§ 30–38.
Criminal accusation, see Indictment and Information.
Instructions to jury, see Criminal Law, § 824; Trial, §§ 259–268.

CHARITIES.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 2. An agreement or other instrument creating a charitable trust is to be construed and its validity determined by the law of the state where made and to be executed.—Girard Trust Co. v. Russell (C. C. A.) 446.

§ 14. A gift in trust for the payment of the debt of a state, if not defeated by illegal provisions, is a good charitable gift.—Girard Trust Co. v. Russell (C. C. A.) 446.

CHARTER PARTIES.

See Shipping, §§ 49–58.

CHATTEL MORTGAGES.

See Pledges.
Right to distrain against property of bankrupt tenant levied on under judgment in favor of tenant's mortgagee, see Landlord and Tenant, § 269.

CHATTELS.

Annexation to real property, see Fixtures.
Pledge, see Pledges.
Sale, see Sales.

CHECKS.

In general, see Bills and Notes.

CHINESE.

Exclusion or expulsion, see Aliens, § 32.

CHURCHES.

See Religious Societies.

CIRCUIT COURTS.

See Courts, § 414.

CIRCUIT COURTS OF APPEALS.

See Courts, § 405.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens; Indians.
Admission of aliens to citizenship, see Aliens, §§ 61–68.
Citizenship as ground of jurisdiction of United States courts, see Courts, §§ 307–318.
Equal protection of laws, see Constitutional Law, §§ 211–245.

§ 10. A passport issued to a Chinese person by the Secretary of State is not evidence of the citizenship of such person in the United States.—Edsell v. D. Charlie Mark (C. C. A.) 292.

CIVIL ACTION.

See Action.

CIVIL RIGHTS.

Denial of equal protection of laws, see Constitutional Law, §§ 211–245.
Deprivation of life, liberty, or property without due process of law, see Constitutional Law, §§ 251–303.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 310–348.
Against estate of decedent, see Executors and Administrators, § 225.
Headright claims and settlements and contracts under colonization laws, see Public Lands, § 172.
Of privilege from answering question, see Witness, § 307.
To property affecting jurisdiction of federal courts, see Courts, § 269.

CLIENTS.

See Attorney and Client.

CLOUD ON TITLE.

See Quieting Title.

COAL HOLES.

In sidewalks, liability for injury to traveler, see Municipal Corporations, § 821.

COLLATERAL ATTACK.

On appointment of administrator or executor, see Executors and Administrators, § 29.
On judgment, see Judgment, §§ 475–497.
On jurisdiction of bankruptcy court, see Bankruptcy, § 100.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

Principal and Surety.

COLLECTION.

Of assets of bankrupt's estate, see Bankruptcy, § 250.
Of taxes, see Taxation, § 608.

COLLISION.

VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

§ 75. A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch and other measures calculated to make its position known.—The Bailey Gatzert (C. C. A.) 44.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

§ 91. While the narrow channel rule (Act June 7, 1897, c. 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring vessels to keep to the right in narrow channels, does not apply to upper New York Bay, considered as a single body of water, it does apply to each of the well-recognized deep-water channels which run in a generally parallel direction through the bay, including Main Ship Channel. —The La Bretagne (C. C. A.) 286.

§ 95. A tug and tows, which overtook and passed a schooner in Hampton Roads while she was on the starboard tack and moving away from the tow, *held* to have been "finally past and clear" within the meaning of article 24, of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), so that when the schooner came about on the port tack, heading toward the tow, she became the overtaking vessel, and bound by such article to keep out of the way, while the tug and tows were required by article 21 to keep their course and speed.—The Mary E. Morse (D. C.) 945.

§ 95. Tows of the length of 4,000 feet or more, when navigating frequented waters, are held to an extremely strict observance of the rules for preventing collisions.—The Mary E. Morse (D. C.) 945.

§ 95. A collision in Hampton Roads in the daytime between a barge in tow and an overtaking schooner *held* due solely to the fault of the towing tug, for violation of article 21, of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring her to keep her course and speed.—The Mary E. Morse (D. C.) 945.

§ 99. A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch, and other measures calculated to make its position known.—The Bailey Gatzert (C. C. A.) 44.

§ 100. Whether or not an efficient lookout was maintained on a dredge at work in a channel during a dense fog *held* immaterial in a suit for collision with the dredge by a moving steamer, where the fog bell on the dredge was being rung at intervals of less than a minute, and could be heard many times the distance at which an approaching vessel could be seen.—The Bailey Gatzert (C. C. A.) 44.

§ 100. A steamer passing down the Willamette river from Portland in a dense fog at a speed of 15 miles an hour *held* not going at the moderate speed required by article 16 of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]).—The Bailey Gatzert (C. C. A.) 44.

§ 100. A decree affirmed holding a steamer passing down the Willamette river from Portland in a dense fog at a speed of about 15 miles an hour solely in fault for a collision with a stationary dredge which was working in the channel, on the ground of excessive speed.—The Bailey Gatzert (C. C. A.) 44.

§ 102. The fact that a vessel at the time of a collision with another was on the wrong side of the channel in violation of the rules, *held* not to constitute a contributory fault.—The La Bretagne (C. C. A.) 286.

COLOR OF TITLE.

To property of bankrupt, see Bankruptcy, § 287.

COLUMBIA, DISTRICT OF.

See District of Columbia.

COMBINATIONS.

See Conspiracy; Monopolies, §§ 17–21.
As constituting patentable inventions, see Patents, § 26.

COMITY.

Between courts, see Courts, §§ 489–500.

COMMERCE.

Application of interstate commerce laws to street railroads, see Carriers, § 24.
Carriage of goods and passengers, see Carriers; Shipping.
Combination in retraint of interstate commerce, see Monopolies, §§ 17–21.
Construction and operation of regulations in respect to interstate or international transportation, see Carriers, §§ 24–38.
Pleading employment in interstate commerce, see Master and Servant, § 256.

II. SUBJECTS OF REGULATION.

§ 28. Telegraph business is interstate commerce, and the telegraph company is engaged in interstate commerce.—Postal Telegraph-Cable Co. v. City of Mobile (C. C.) 955.

§ 33. Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as a general rule a "common arrangement" between carriers is established by

proof of a shipment under a through bill of lading and a continuous interstate carriage thereunder, coupled with proof of concerted action among the connecting carriers with regard to the payment of the charges and the receipt and movement of the traffic.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

§ 33. A bill of lading which acknowledges the receipt of merchandise consigned to a point in another state, names the route and railroads over which the shipment is to be made, contains an agreement by the initial carrier to deliver to the next connecting carrier, and provides that as to each carrier upon the route the service is to be rendered in accordance with the conditions stated therein, is a through bill of lading, having reference to the usual method in use by connecting carriers.—Standard Oil Co. of New York v. United States (C. C. A.) 614.

§ 33. The pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) *held* not a police regulation, but a proper act for the regulation of interstate commerce.—Shawnee Milling Co. v. Temple (C. C.) 517.

III. MEANS AND METHODS OF REGULATION.

Jurisdiction of federal court to restrain enforcement of tax on commerce, see Courts, § 289.

§ 58. Under Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), a railroad company engaged in interstate commerce *held* liable for an injury to an employé while engaged in such commerce resulting from the negligence of a fellow servant engaged in interstate commerce, and the act is not unconstitutional as not within the power of Congress to regulate interstate commerce.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 58. Congress has authority, under its constitutional power to regulate interstate commerce, to prescribe rules of liability as between an interstate carrier and its employés in such interstate commerce in cases of injury to the employés while actually engaged in such commerce.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 58. A sectionhand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in interstate commerce within the meaning of Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), and within the protection of such act.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 58. Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), conceding it to be otherwise within the constitutional power of Congress to regulate interstate commerce, is not invalid because it results in establishing rules and measures of liability in cases to which it applies different from those which exist under the state laws arising from the relation of master and servant.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 72. State *held* to have no power to levy taxes on interstate commerce either by duties on transportation or on receipts derived from transportation or on occupation or business of carrying it on.—Postal Telegraph-Cable Co. v. City of Mobile (C. C.) 955.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONS.

Of broker, see Brokers, § 65.

COMMON CARRIERS.

See Carriers.

COMMON KNOWLEDGE.

Judicial notice of matters of common knowledge, see Evidence, § 7.

COMMON NUISANCE.

See Nuisance, § 84.

COMPANIES.

See Corporations; Joint-Stock Companies; Partnership.

COMPENSATION.

Compensatory damages, see Damages, § 68.

Of particular classes of officers or other persons.
Brokers, see Brokers, § 65.
Referees, see Reference, § 76.
Shipowners for charter of vessel, see Shipping, § 49.
Trustees, see Trusts, § 315.

COMPENSATORY DAMAGES.

See Damages.

COMPETITION.

Combinations to lessen or stifle free competition in trade, see Monopolies, §§ 17–21.
Unfair competition, see Trade-Marks and Trade-Names, §§ 91, 92.

COMPLAINT.

In civil actions, see Equity, § 150; Pleading.
In criminal prosecution, preliminary complaint, see Criminal Law, § 211.
In criminal prosecutions, see Indictment and Information.

COMPUTATION.

Of period of limitation of civil actions, see Limitation of Actions, §§ 60–130.

CONCLUSIVENESS.

Of allegations or admissions on party pleading, see Pleading, § 36.
Of judgment, see Judgment, §§ 678–690, 822.
Of verdicts and findings, see Appeal and Error, § 1011.

CONCURRENT JURISDICTION.

Of courts in general, see Courts, §§ 489–500.

CONDEMNATION.

Of adulterated or misbranded articles of food, see Food, § 24.
Taking property for public use, see Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 469–474.

CONDITIONS.

In contracts and conveyances.

See Bills and Notes, §§ 144, 164.
Sale, see Sales, §§ 469–474.
Statement in memorandum required by statute of frauds, see Frauds, Statute of.

Precedent to actions or other proceedings.

For condemnation of adulterated or misbranded articles of food, see Food, § 24.

CONDUCT.

Of witness as ground of impeachment, see Witnesses, §§ 346–372.

CONFEDERACY.

See Conspiracy.

CONFIDENTIAL RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.

CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.

CONFLICT OF LAWS.

Contracts and conveyances.

Contract for sale, see Sales, § 55.
Contracts for transmission and delivery of telegrams, see Telegraphs and Telephones, § 27.
Contract of pledge, see Pledges, § 2.

Liabilities for torts.

Liability for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 27.

Remedies and jurisdiction and procedure.

Actions by or against foreign corporations after dissolution, see Corporations, § 691.
Conflicting jurisdiction of courts, see Courts, §§ 489–500.

CONFORMITY.

Of United States courts to state practice, see Courts, §§ 334–357.

CONGRESS.

Creation of Indian reservations, see Indians, § 12.

CONJUGAL RIGHTS.

See Husband and Wife.

CONSIDERATION.

Sufficiency to entitle party to specific performance of contract, see Specific Performance, § 49.

CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general, see Criminal Law, § 423.
Combinations to monopolize trade, see Monopolies, §§ 17–21.
Conspiracy to commit contempt of court as contempt, see Contempt, § 2.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 33. Under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), relating to conspiracy against the United States, when the object of the conspiracy is effected, there can be no further overt act.—Lonabaugh v. United States (C. C. A.) 476.

(B) Prosecution and Punishment.

Declarations by conspirators as evidence, see Criminal Law, § 423.
Evidence of other offenses, see Criminal Law, § 371.
Jurisdiction of offense, see Criminal Law, § 97.
Limitation of prosecution, see Criminal Law, § 150.
Removal of accused to other district for trial, see Criminal Law, § 242.
Venue, see Criminal Law, § 113.

§ 43. There is not a fatal variance between indictment and proof in a prosecution for conspiracy under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), because the indictment charges that defendants conspired with each other and with others to the grand jurors unknown, while the evidence shows that the name of another conspirator was in fact known, where the indictment fully sets out his connection with the conspiracy, and designates him by name so as to clearly advise defendants of the charge against them.—Jones v. United States (C. C. A.) 584.

§ 43. An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States of public lands, *held* sufficient.—Mays v. United States (C. C. A.) 610.

§ 45. Evidence considered in a prosecution for conspiracy, and *held* to have a sufficient tendency to show the connection of other defendants with the conspiracy to render letters written by them, charged in the indictment as overt acts, admissible in evidence against the defendants on trial.—Jones v. United States (C. C. A.) 584.

§ 45. An indictment for conspiracy to defraud the United States of public lands by fraudulently obtaining the title to worthless state lands, securing the establishment of a forest reserve including such lands, and then exchanging the same for public lands of the United States under the law authorizing such exchange, is not bad because it does not describe the state lands to be so acquired further than to state the counties in which they are situated where they had not been obtained and no further description was possible.—Mays v. United States (C. C. A.) 610.

§ 47. In a prosecution under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy to defraud the United States, the government is not required to prove that all overt acts alleged were committed, nor that all the defendants named in the indictment were engaged in the conspiracy.—Jones v. United States (C. C. A.) 584.

CONSTITUTIONAL LAW.

Constitutionality of bank depositor's guaranty act, see Banks and Banking, § 4.
Federal employers' liability act as delegation of judicial power of United States to state courts, see Courts, § 42.
Jurisdiction of federal courts in cases arising under Constitution of United States, see Courts, § 282.
Restraining enforcement of unconstitutional statute, see Injunction, § 85.

Provisions relating to particular subjects.

Enactment and validity of statutes, see Statutes, § 64.
Subjects and titles of statutes, see Statutes, § 118.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

Operation of statute unconstitutional in part, see Statutes, § 64.

§ 43. A party, having invoked the jurisdiction of the court under a statute permitting notice by publication, *held* not in a position to question the judgment on the ground that the statute conferring such jurisdiction was unconstitutional.—Skinner v. Franklin County (C. C.) 862.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

§ 70. Whether or not Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is effective to carry out the purpose intended, and thus promote interstate commerce, is a legislative and not a judicial question which cannot affect the constitutional power of Congress to enact it.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

IV. POLICE POWER IN GENERAL.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

§ 81. The general police power belongs to the states subject to the limitation that the state must not trench on the prerogatives delegated to the general government.—Kroschel v. Munkers (D. C.) 961.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

Jurisdiction of federal court to restrain enforcement of ordinance impairing obligation of contract, see Courts, § 282.

X. EQUAL PROTECTION OF LAWS.

§ 211. The provision of the fourteenth constitutional amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws" does not render state legislation properly confined within its appropriate sphere invalid because it does not extend to and embrace objects beyond the state's jurisdiction.—Dolley v. Abilene Nat. Bank of Abilene, Kan. (C. C. A.) 461.

§ 240. The bank depositors' guaranty act of Kansas (Laws 1909, c. 61) is not unconstitutional as denying to national banks within the state the equal protection of the laws.—Dolley v. Abilene Nat. Bank of Abilene, Kan. (C. C. A.) 461.

§ 245. Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is not unconstitutional as denying the equal protection of the laws to the carriers affected thereby.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

XI. DUE PROCESS OF LAW.

Deprivation of liberty without due process of law as ground for habeas corpus, see Habeas Corpus, § 45.

§ 251. "Due process of law" defined.—Kroschel v. Munkers (D. C.) 961.

§ 283. Laws N. Y. 1867, c. 393, *held* not to authorize taxation without due process of law, so that a controversy thereunder would present a federal question.—Risley v. City of Utica (C. C.) 875.

CONSTRUCTION.

Of contracts, instruments, or judicial acts or proceedings.

See Bonds, § 62; Sales, §§ 55, 469–474; Statutes, §§ 174–241; Wills, § 501.
Assignments, see Assignments, §§ 80–89.
Bills of lading, see Carriers, § 51.

Charter parties, see Shipping, §§ 49–58.
Constitutional provisions, see Constitutional Law, § 43.
Contracts, see Contracts, § 171.
Letters patent, see Patents, § 157.
Patents for public lands, see Public Lands, § 114.
Pleadings, see Pleading, § 35.

CONTEMPORANEOUS AGREEMENTS.

Rights of assignee of note subject to equities growing out of contemporaneous agreement, see Bills and Notes, § 315.

CONTEMPT.

In bankruptcy proceedings, see Bankruptcy, §§ 229, 241.
Infringement of patent in violation of injunction, see Patents, § 326.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 2. A conspiracy to commit a contempt of court is not in itself a punishable contempt.—Doniphan v. Lehman (C. C.) 173.

§ 13. The taking of a deposition in pursuance of a conspiracy to impose upon a federal court in another state, and the filing and publishing of such deposition, *held* not a contempt of the court under Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), where it has not been used or offered in evidence.—Doniphan v. Lehman (C. C.) 173.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.
As claims provable against bankrupt's estate, see Bankruptcy, § 318.
Assignment, see Assignments.
In restraint of trade, see Monopolies, §§ 17–21.
Specific performance, see Specific Performance.

Contracts of particular classes of persons.

See Banks and Banking, § 260; Corporations, § 478; Husband and Wife, §§ 43–49¾; Master and Servant, § 100; Receivers, § 129.
Insurance companies, see Insurance.
Officers and agents of corporations in general, see Corporations, §§ 398–400.
Shipowners, see Shipping, § 108.

Contracts relating to particular subjects.

See Fixtures, § 27; Insurance; Shipping, §§ 49–58.
Compensation of broker, see Brokers, § 65.
Transportation of goods, see Shipping, § 108.

Particular classes of express contracts.

See Bills and Notes; Bonds; Partnership; Sales.
Affreightment, see Shipping, § 108.
Agency, see Principal and Agent.
Bills of lading, see Carriers, § 51.
Charter parties, see Shipping, §§ 49–58.
Insurance policies, see Insurance.
Leases, see Landlord and Tenant.
Limiting liability of master for injury to servant, see Master and Servant, § 100.
Maritime contracts, see Shipping, §§ 49–58, 108.
Receivers' certificates, see Receivers, § 129.
Suretyship, see Principal and Surety.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

Necessity of mutuality in order to enforce specific performance, see Specific Performance, § 32.

(D) Consideration.

Sufficiency to entitle party to specific performance, see Specific Performance, § 49.

(E) Validity of Assent.

To bill or note, see Bills and Notes, § 107.

II. CONSTRUCTION AND OPERATION.

Particular classes of contracts.

See Bonds, § 62; Sales, §§ 55, 469–474.
Assignments, see Assignments, §§ 80–89.
Bills of lading, see Carriers, § 51.
Charter parties, see Shipping, §§ 49–58.

(A) General Rules of Construction.

Rights of assignee of note subject to equities growing out of contemporaneous agreement, see Bills and Notes, § 315.

§ 171. A contract for the construction of a statue, which provided for partial payments to be made when successive steps of the work were completed, and bonds to be given covering each payment, construed, and *held* not divisible, but entire, a breach of which by the failure to complete the statue after certain payments had been made entitled the employer to recover on the bonds the amount of such payments as damages.—American Surety Co. of New York v. Fidelity Trust Co. (C. C. A.) 699.

III. MODIFICATION AND MERGER.

§ 240. Facts *held* insufficient to show an individual liability of defendant to plaintiff on a contract to furnish labor and materials for the construction of a building pursuant to an agreement with a construction company.—Wark v. Moore (C. C.) 873.

V. PERFORMANCE OR BREACH.

Contract for sale of mineral rights, see Mines and Minerals, § 54.
Enforcement of specific performance, see Specific Performance.
Measure of damages for breach, see Damages, § 120.

§ 280. A contract by the vendor of a site for a manufacturing plant to furnish spur tracks connecting such plant with certain railroad lines construed.—South Memphis Land Co. v. McLean Hardwood Lumber Co. (C. C. A.) 417.

§ 303. The granting of a temporary injunction restraining a railroad company from crossing the track of another road *held* not to constitute such vis major as to relieve a third person from liability for failure to perform a contract to furnish side track connections to a manufacturing plant.—South Memphis Land Co. v. McLean Hardwood Lumber Co. (C. C. A.) 417.

VI. ACTIONS FOR BREACH.

Damages, measure, see Damages, § 120.

§ 352. Evidence, in an action to recover on a contract for services rendered, *held* to require the submission of the case to the jury.—Hill v. Kennedy (C. C. A.) 282.

CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see Courts, §§ 328, 329.

CONVERSION.

Of chattels into realty, see Fixtures.

CONVEYANCES.

As preference by debtor, see Bankruptcy, §§ 163–186.

Conveyances by or to particular classes of persons.

See Corporations, §§ 434–436; Indians, § 15.
Insolvent debtors, see Bankruptcy, §§ 163–186.

Conveyances of particular species of, or estates or interests in, property.

See Mines and Minerals, §§ 54–55.
Personal property in general, see Sales.
Public lands, see Public Lands, § 172.
Rights in public lands, see Public Lands, § 135.

Particular classes of conveyances.

See Assignments.

CORPORATIONS.

Liability for contempt for infringement of patent in violation of injunction, see Patents, § 326.
Penalty for falsely marking articles as patented, see Patents, § 224.
Privilege of corporate officer from giving testimony tending to convict corporation of offense, see Witnesses, § 297.
Unincorporated associations, see Joint-Stock Companies.

Particular classes of corporations.

See Carriers; Exchanges; Municipal Corporations; Railroads; Religious Societies.
Banks, see Banks and Banking.
Electric companies, see Electricity, § 4.
Insurance companies, see Insurance.
Mutual benefit insurance associations, see Insurance, §§ 817–825.
Street railroad companies, see Street Railroads.
Telegraph or telephone companies, see Telegraphs and Telephones.
Water companies, see Waters and Water Courses, § 200.

II. CORPORATE EXISTENCE AND FRANCHISE.

Of electric companies, see Electricity, § 4.

V. MEMBERS AND STOCKHOLDERS.

Members of joint-stock companies, see Joint-Stock Companies.

(C) Suing or Defending on Behalf of Corporation.

Duplicity in pleading, see Equity, § 166.

§ 211. A stockholder's bill *held* within equity rule 94, so that a plea unaccompanied by an answer denying the fraud alleged in the bill was fatally defective.—Sims v. United Wireless Telegraph Co. (C. C.) 540.

(D) Liability for Corporate Debts and Acts.

§ 244. Under Const. Minn. art. 10, § 3, and under Rev. Laws Minn. 1905, §§ 2863, 2864, a transferee of corporate stock *held* not chargeable with double liability.—Hamilton v. Loeb (C. C.) 728.

§ 259. A court of equity *held* without jurisdiction of a suit by the receiver of an insolvent corporation against numerous stockholders to collect an assessment made on the stock.—Fidelity Trust & Safe Deposit Co. v. Archer (C. C. A.) 32.

VI. OFFICERS AND AGENTS.

Joint accounting by commission company and agent, see Account, § 10.
Privilege of corporate officer as witness, see Witnesses, § 297.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 317. The president of a mutual life insurance company *held* liable to the company for funds fraudulently misappropriated.—Moulton v. Field (C. C. A.) 673.

§ 317. A contract between a mutual insurance company and its general manager by which he was to receive for a term of years a percentage on the business done was one for personal services which he could not transfer to another, and on his becoming incapacitated the value of the unexpired term, if any, belonged to the company, and the action of the officers and directors in permitting him to sell and transfer it to another for a large sum received for his own use was a violation of their duty of good faith toward the company and a betrayal of their trust.—Moulton v. Field (C. C. A.) 673.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 370. The scope of a corporation's business is limited by its charter.—Stephens v. Gall (D. C.) 938.

§ 379. A corporation chartered to buy and sell grain, etc., for its customers, cannot form a partnership relation with another.—Stephens v. Gall (D. C.) 938.

(B) Representation of Corporation by Officers and Agents.

§ 398. Stockholders of a corporation cannot contract on its behalf with third persons.—Denver Engineering Works Co. v. Elkins (C. C.) 922.

§ 400. A corporation's agent has no implied authority to bind a corporation by contracts not within its charter powers.—Stephens v. Gall (D. C.) 938.

(C) Property and Conveyances.

Of religious societies, see Religious Societies, § 18.

§ 434. Without statutory authority, a Massachusetts corporation may acquire title to real estate.—Hubbard v. Worcester Art Museum (C. C.) 406.

§ 436. Under St. Mass. 1856, c. 215, § 4, and St. Mass. 1874, c. 375, § 7, an art museum incorporated under Massachusetts laws has authority to take and hold real property by devise.—Hubbard v. Worcester Art Museum (C. C.) 406.

(D) Contracts and Indebtedness.

Discharge of sureties, see Principal and Surety, §§ 102, 129.

§ 478. A corporation's mortgage *held* to cover after-acquired real and personal property and profits, and stone quarried by a subsequent corporation under a lease fraudulent as to creditors.—In re Medina Quarry Co. (D. C.) 929.

(E) Torts.

Particular classes of corporations or associations.

See Carriers, §§ 306–315; Railroads, §§ 327–350, 401.

(F) Civil Actions.

District in which action in federal court must be brought, see Courts, § 274.

By or against particular classes of corporations or associations.

See Carriers, § 315; Railroads, §§ 194, 350, 401.

(G) Crimes and Criminal Prosecutions.

Of carriers, see Carriers, § 38.

VIII. INSOLVENCY AND RECEIVERS.

Bankruptcy proceedings, see Bankruptcy, § 72.

IX. REINCORPORATION AND REORGANIZATION.

Lease by bankrupt corporation to new corporation as fraudulent transfer, see Bankruptcy, § 186.

Rights and liabilities of fraudulent lessee of bankrupt corporation, see Bankruptcy, § 186.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 615. A suit to wind up the affairs of an insolvent corporation of New Jersey under section 65 of the corporation act of that state (P. L. 1896, p. 298), as such act has been construed by the Supreme Court of the state, may be brought by a simple contract creditor, and, even if such objection would lie to a suit brought in a federal court of equity, it is open only to the corporation and cannot be raised by an intervening stockholder.—McGraw v. Mott (C. C. A.) 646.

§ 630. A New Jersey corporation, whose charter has been annulled by proclamation of the Governor for nonpayment of taxes, may thereafter sue or be sued in its corporate name in relation to any matter necessary or proper to the orderly settlement of its affairs, by virtue of Corporation Act N. J. (P. L. 1896, p. 295) §§ 53–55.—Harris-Woodbury Lumber Co. v. Coffin (C. C.) 257.

XII. FOREIGN CORPORATIONS.

Ancillary receivership in federal court, see Courts, § 264.

District in which suit must be brought in federal court, see Courts, §§ 274, 276.

§ 671. Appointment of a receiver by a state court, for a foreign corporation, does not affect the corporation's acts in other states, not pertaining to the property in the state where the receiver is appointed—Sims v. United Wireless Telegraph Co. (C. C.) 540.

§ 671. Appointment of a receiver of a foreign corporation in New Jersey *held* not to preclude a minority stockholder from maintaining suit to prevent the fraudulent exercise of the corporation's franchises, the foreclosure of a chattel mortgage and the enforcement of a judgment.—Sims v. United Wireless Telegraph Co. (C. C.) 540.

§ 691. The powers of a corporation, although doing business in a state other than that of its creation, are governed by the law of its domicile, and its power to sue or be sued after its formal dissolution is determined by such law, and not by that of the state in which the suit is brought.—Harris-Woodbury Lumber Co. v. Coffin (C. C.) 257.

CORRUPTION.

In general, see Fraud.

CO-SERVANTS.

See Master and Servant, §§ 179–198.

COSTS.

Fees of referees appointed by federal court, see Courts, § 357.
In bankruptcy proceedings, see Bankruptcy, §§ 471–484.

V. AMOUNT, RATE, AND ITEMS.

§ 148. Stipulation waiving statutory provisions as to expenses of litigation and authorizing referee's fees without power of review by a court *held* against public policy.—New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C.) 973.

§ 172. On a bill for an accounting for the benefit of creditors, no fee should be allowed defendants' counsel, where they were engaged solely in defending their individual clients from personal liability.—American Ice Co. v. Pocono Spring Water Ice Co. (C. C.) 868.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Proceedings in forma pauperis, see Courts, § 405.

COUNSEL.

See Attorney and Client.

COUNTIES.

See Municipal Corporations.
County in which to sue, see Venue.

COURTS.

See Judgment.
Constitutional exercise of judicial powers in general, see Constitutional Law, § 70.
Contempt of court, see Contempt.
Effect in state courts of judgments of courts of other states, see Judgment, §§ 822–828.
Effect in United States courts of judgments of state courts, see Judgment, § 828.
Extraterritorial jurisdiction of bankruptcy courts, see Bankruptcy, § 14.
Province of court and jury, see Trial, § 177.
Removal of action from state court to United States court, see Removal of Causes.

Jurisdiction of proceedings affecting particular classes of persons.

Bankrupts, see Bankruptcy, § 293.
Trustees in bankruptcy, see Bankruptcy, § 293.

Jurisdiction of proceedings relating to particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 293.

Jurisdiction of particular actions or proceedings.

See Habeas Corpus, §§ 45–113.
Bankruptcy proceedings, see Bankruptcy, § 14.

Special jurisdictions and particular classes of courts.

See Admiralty.
Bankruptcy courts, see Bankruptcy, § 14.
Referees in bankruptcy, see Bankruptcy, § 224.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 42. Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), does not attempt to delegate judicial power of the United States to state courts, in violation of article 3 of the Constitution, but creates substantive rights not solely cognizable in the federal courts, but which may be availed of in any court of competent jurisdiction, state or federal.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

(D) Rules of Decision, Adjudications, Opinions, and Records.

Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, § 1097.

§ 96. A United States District Court is bound by the decisions of the Circuit Court of Appeals in the same circuit.—In re Thompson (D. C.) 874.

VII. UNITED STATES COURTS.

Effect in United States courts of judgments of state courts, see Judgment, § 828.
Jurisdiction of habeas corpus proceedings, see Habeas Corpus, § 45.
Jurisdiction of offenses, see Criminal Law, § 97.

(A) Jurisdiction and Powers in General.

§ 263. Jurisdiction of the United States Circuit Court stated, where suit is brought involving both state and federal questions.—Risley v. City of Utica (C. C.) 875.

§ 264. Where a federal court of equity in New Jersey has appointed a receiver for a corporation under section 65 of the New Jersey corporation act (P. L. 1896, p. 298), it is in accordance with the federal practice to authorize a suit in another district in which the corporation has property for the appointment of an ancillary receiver, and, while a stockholder may be permitted to intervene and defend in such suit, he cannot therein question the jurisdiction of the court in the principal suit.—McGraw v. Mott (C. C. A.) 646.

§ 269. Section 8 of the federal judiciary act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), authorizing certain local actions to be brought in the district where the property is situated, does not extend to all suits of a local nature nor to all local actions in rem, but is definitely limited to suits brought to enforce the rights specified and cannot be extended by construction.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 269. Section 8 of the federal judiciary act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), construed.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 269. An action to abate or restrain a nuisance is of a local nature and can only be maintained in a court having the proper territorial jurisdiction, and the venue of such action is in the district where the nuisance itself is located.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 269. When the requisite diversity of citizenship between the parties exists to give a federal court jurisdiction, a suit to establish a lien or claim on property within the provisions of section 8 of the judiciary act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), may be maintained in the district where the property is situated, although neither the plaintiff nor defendant is a resident of such district.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 269. Act Cong. March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), *held* inapplicable to local actions, and hence did not preclude the bringing of ejectment in a federal court in the district where the land lay, because neither plaintiff nor defendant were residents of that district—Elk Garden Co. v. T. W. Thayer Co. (C. C.) 556.

§ 269. A foreign corporation *held* "found" within the district, within Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), where process was served on an agent of the corporation appointed under a state law to receive service of process.—Elk Garden Co. v. T. W. Thayer Co. (C. C.) 556.

§ 274. An action by a citizen of Pennsylvania may be properly brought against a foreign corporation doing business in Pennsylvania in the federal district of plaintiff's residence.—Hagstoz v. Mutual Life Ins. Co. of New York (C. C.) 569.

§ 276. Objection to the jurisdiction of a federal court on the ground that neither plaintiff nor defendant is a resident of the district *held* waived by defendant by entering a general appearance.—Howland Pulp & Paper Co. v. Alfreds (C. C. A.) 482.

§ 276. Registry by a foreign corporation of appointment of a resident agent in Pennsylvania did not waive its privilege, under Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 507) to be free from suit in that state, except by a citizen thereof.—Hagstoz v. Mutual Life Ins. Co. of New York (C. C.) 569.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

Federal question as ground for removal from state to federal court, see Removal of Causes, § 19.

§ 282. An action to protect a settler's rights with reference to unsurveyed public land under Act Cong. May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), *held* not to involve the construction of the Constitution of the United States so as to sustain federal jurisdiction on that ground.—Earnhart v. Switzler (C. C. A.) 832.

§ 282. Persons who had paid taxes to pay for water furnished the city under a contract providing for excessive compensation *held* not entitled to seek equitable relief in a federal court.—Risley v. City of Utica (C. C.) 875.

§ 282. Where a municipal ordinance, legislative in character, impaired the obligation of a prior contract made by the city, a suit to enjoin its enforcement involves a question arising under the United States Constitution, of which the federal courts have jurisdiction; the requisite amount being involved.—Nelson v. City of Murfreesboro (C. C.) 905.

§ 282. Where the validity of an ordinance depends on state statutes, no federal question can be injected into a prosecution for violating the ordinance, unless it be that petitioner is held contrary to the fourteenth amendment of the federal Constitution.—Kroschel v. Munkers (D. C.) 961.

§ 285. An action to protect a settler's rights with reference to unsurveyed public land under Act Cong. May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), *held* not to involve the construction of the laws of the United States so as to sustain federal jurisdiction on that ground.—Earnhart v. Switzler (C. C. A.) 832.

§ 289. The United States Circuit Court *held* to have jurisdiction of action by a telegraph company engaged in interstate commerce to restrain enforcement of tax against it.—Postal Telegraph-Cable Co. v. City of Mobile (C. C.) 955.

§ 299. Federal jurisdiction, on the ground that the case involves a controversy under the Constitution and laws of the United States, does not appear unless plaintiff's statement of his own claim shows that the determination of the case actually involves the construction of the Constitution or some law or treaty of the United States—Earnhart v. Switzler (C. C. A.) 832.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

§ 307. A suit brought by a citizen of one state against a citizen of another state and an alien, as defendants, involving the requisite jurisdictional amount is within the jurisdiction of a Circuit Court of the United States.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 318. The dismissal without prejudice of a suit in a federal court as to one of several defendants who might be sued severally or jointly, because the court is without jurisdiction as to him, does not deprive it of jurisdiction over the other defendants properly before it.—Ladew v. Tennessee Copper Co. (C. C.) 245.

(D) Jurisdiction Dependent on Amount or Value in Controversy.

§ 328. The amount involved in a suit is not measured by the actual recovery, but by the amount claimed, provided it is claimed in

good faith, and is not merely a colorable claim to give the court jurisdiction.—Risley v. City of Utica (C. C.) 875.

§ 328. Several taxpayers cannot unite in one suit, each having a separate demand, to recover back municipal taxes paid by them so as to confer jurisdiction on the Circuit Court of the United States by aggregating their demands to make the amount in controversy within the cognizance of such court.—Risley v. City of Utica (C. C.) 875.

§ 329. Under Va. Code 1904, §§ 2750, 2751, a declaration in ejectment failing to charge that the value of the land sued for was more than $2,000, *held* demurrable.—Elk Garden Co. v. T. W. Thayer Co. (C. C.) 556.

(E) Procedure, and Adoption of Practice of State Courts.

§ 334. On a writ of error in an action at law, the Circuit Court is governed on questions of practice by rules prevailing in the courts of the state in which the case was tried.—Day v. Atlantic Coast Line R. Co. (C. C. A.) 26.

§ 344. The word "suit" as used in Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), *held* to include an action at law as well as a proceeding in equity.—Elk Garden Co. v. T. W. Thayer Co. (C. C.) 556.

§ 347. The question of jurisdiction of a federal court may be raised by demurrer.—Hagstoz v. Mutual Life Ins. Co. of New York (C. C.) 569.

§ 352. In a federal court, a written stipulation waiving a jury in accordance with Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), is not necessary to the submission to the court of issues of law on what is virtually an agreed statement of facts.—Talcott v. Friend (C. C. A.) 676.

§ 357. The fees of a referee appointed by an order of the United States Circuit Court must be controlled by the allowance of the court, if not agreed on by the parties, and are not affected by the statutory fees prescribed by the state.—New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C.) 973.

§ 357. Stipulation as to referee's fees in United States court *held* to place the matter within the control of the court.—New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C.) 973.

(F) State Laws as Rules of Decision.

Effect in United States courts of judgments of state courts, see Judgment, § 828.

§ 359. In determining the title of real estate, the federal courts are governed by the law of the state as to transfers and alienation, and the effect of decrees and judgments of the state courts and as to the construction of its statutes are controlled by the decisions of its highest court.—Seefeld v. Duffer (C. C. A.) 214.

§ 365. Upon the question of the measure of damages in an action in a federal court for breach of a covenant of quiet enjoyment in a lease, the court is governed by the decisions of the highest court of the state where the property is situated, so far as they determine the question.—Thorley v. Pabst Brewing Co. (C. C. A.) 338.

§ 365. The measure of damages for evicting a lessee under a lease of lands in Pennsylvania, applied in a suit in the United States Circuit Court, should be the rule adopted by the Supreme Court of that state.—American Ice Co. v. Pocono Spring Water Ice Co. (C. C.) 868.

§ 367. A federal court, although required to exercise an independent judgment as to the construction of a deed in the case in which the question is presented, will incline strongly to adopt the construction placed on a similar deed by the highest court of the state, where, under the ruling of the state courts, such construction becomes a rule of property.—Kuhn v. Fairmont Coal Co. (C. C. A.) 191.

§ 367. Under Rev. St. U. S. § 721 (U. S. Comp. St. 1901, p. 588), the Ohio rule that an unfiled chattel mortgage is invalid as to all creditors, in proceedings to settle an insolvent's estate through a receiver, will be applied in the federal courts sitting in that state, as against the holder of an unfiled conditional sale contract.—Hamilton v. David C. Beggs Co. (D. C.) 949.

§ 371. Section 65 of the corporation act of New Jersey (P. L. 1896, p. 298), which authorizes a suit by any creditor or stockholder to wind up the affairs of a corporation which has become insolvent or suspended its ordinary business for want of funds to carry on the same, creates a right which may be enforced in a federal court of equity having jurisdiction of the parties.—McGraw v. Mott (C. C. A.) 646.

§ 371. A federal court must decide a point for itself, when it has not been passed upon by the courts of the state under which it rises.—Hamilton v. Loeb (C. C.) 728.

§ 372. Under the rule of the federal courts there can be no recovery of damages from a telegraph company for mental anguish caused by failure to deliver a message or by delay in delivery, where that is the only ground of damage, and in the absence of statutory provisions the question is one of general law, upon which state decisions are not controlling in the federal courts.—Western Union Telegraph Co. v. Burris (C. C. A.) 92.

§ 372. Whether the doctrine res ipsa loquitur applies to an action for injuries to a servant is a question of general law, concerning which the federal courts are governed by their own decisions.—Patton v. Illinois Cent. R. Co. (C. C.) 530.

§ 374. The rule that equitable defenses cannot prevail against the legal title in the federal courts is not affected by the statutes of the state or the procedure of its courts.—Seefeld v. Duffer (C. C. A.) 214.

(H) Circuit Courts of Appeals.

§ 405. An appeal cannot be taken to the Circuit Court of Appeals in forma pauperis.—Herman Keck Mfg. Co. v. Lorsch (C. C. A.) 485.

(I) Circuit Courts.

§ 414. Where the Circuit Court may maintain jurisdiction, if at all, under Act Cong. March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508) it is the court's duty under section 5, if it appears plainly on complainant's own showing that the amount in controversy is insufficient, to dismiss the suit.—Risley v. City of Utica (C. C.) 875.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

Removal of action from state court to United States court, see Removal of Causes.

(B) State Courts and United States Courts.

Authority of United States courts to discharge on habeas corpus persons in custody of state authorities, see Habeas Corpus, § 45.

§ 489. While a federal court cannot interfere with property in the hands of an administrator, which is in the custody of the state probate court, it may adjudge the rights of parties before it in such property, and such adjudication will be binding on the administrator, and may be enforced against him personally.—Order of St. Benedict of New Jersey v. Steinhauser (C. C.) 137.

§ 500. Appointment of a receiver for a corporation by a state court does not preclude the prosecution of the pending suit to judgment.—Sims v. United Wireless Telegraph Co. (C. C.) 540.

COVENANTS.

IV. ACTIONS FOR BREACH.

Following decisions of state court as to measure of damages in federal courts, see Courts, § 365.

COVERTURE.

See Husband and Wife.

CRANES.

Liability of master for injuries to servant, contributory negligence, see Master and Servant, § 233.

CREDIBILITY.

Of witness, see Witnesses, §§ 346–372.

CREDITORS.

See Bankruptcy; Execution; Homestead. Of decedent, see Executors and Administrators, § 225.

CREDITORS' SUIT.

Effect of bankruptcy on lien acquired by creditor's bill, see Bankruptcy, § 194.

CREW.

Of vessel, see Seamen.

CRIMES.

See Criminal Law.

CRIMINAL LAW.

Collateral attack on jurisdiction of bankruptcy court, see Bankruptcy, § 100.
Habeas corpus to review proceedings, see Habeas Corpus.
Indictment, information, or complaint, see Indictment and Information.
Privilege of witness as to answer tending to subject him to criminal prosecution, see Witnesses, § 297.
Subjects and titles of acts relating to crimes and criminal prosecutions and punishments, see Statutes, § 118.
Words imputing crime as constituting libel or slander, see Libel and Slander, § 7.

Offenses by particular classes of persons.

See Carriers, § 38.

Particular offenses.

See Conspiracy, §§ 33–47; Contempt; Perjury.
Discrimination and overcharge by carrier, see Carriers, § 38.
Violations of bankrupt laws, see Bankruptcy, §§ 492–494.
Violations of bankrupt laws, ground for refusal of discharge of bankrupt, see Bankruptcy, § 408.
Violations of interstate commerce regulations, see Carriers, § 38.
Violations of regulations relating to articles of food or drink, see Food, § 22.

IV. JURISDICTION.

§ 97. Waters inclosed in whole or in part by a breakwater or other artificial structure to afford a protected anchorage, as well as those so inclosed by natural land, constitute a "haven" within the meaning of Rev. St. §§ 5346, 5361, 5362 (U. S. Comp. St. 1901, pp. 3630, 3640), making certain acts offenses against the United States when committed on the high seas or in any "haven, * * * within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state."—Ex parte O'Hare (C. C. A.) 662.

§ 97. The waters inclosed between the shore and the government breakwaters in Lake Erie at the port of Buffalo, without as well as within the line designated on the government chart as "Buffalo Harbor Line," constitute a "haven," and not "high seas," within the meaning of

Rev. St. § 5346 (U. S. Comp. St. 1901 p. 3630), and an assault with a dangerous weapon committed on a vessel belonging to the United States or citizens thereof anchored in such waters is within the state, and not the federal, jurisdiction.—Ex parte O'Hare (C. C. A.) 662.

§ 97. A steam vessel which has been towed from her winter berth on one of the Great Lakes to an anchorage to be fitted out for the season, but which has not signed a crew nor had a fire built under her boilers, is not "on a voyage," so that jurisdiction of an offense committed thereon is given to the courts of the United States by Act Sept. 4, 1890, c. 874, 26 Stat. 424 (U. S. Comp. St. 1901, p. 3627).—Ex parte O'Hare (C. C. A.) 662.

§ 97. Persons accused of conspiring to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) in the District of Columbia *held* properly tried there, if they participate in overt acts there, though the unlawful agreement was made elsewhere.—United States v. Campbell (D. C.) 762.

V. VENUE.

(A) Place of Bringing Prosecution.

§ 113. Persons *held* not removable to another federal district for trial for an alleged conspiracy to defraud the government by unlawfully obtaining public coal lands.—Ireland v. Henkle (C. C.) 993.

VI. LIMITATION OF PROSECUTIONS.

§ 150. In a prosecution under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy, where there are successive overt acts, the period of limitations must be computed from the last of them.—Lonabaugh v. United States (C. C. A.) 476.

§ 150. Where an alleged conspiracy to defraud the United States contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime, and a prosecution is not barred until three years after the last overt act averred in the indictment.—Jones v. United States (C. C. A.) 584.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 211. Under Const. U. S. Amend. 4, a warrant cannot be issued on an information filed by the district attorney based on his information and belief unsupported by proof establishing probable cause.—United States v. Baumert (D. C.) 735.

§ 211. Rev. St. § 1022 (U. S. Comp. St. 1901, p. 720), and Const. Amend. 4, do not require the oaths and affirmations of supporting witnesses to an information to be taken in open court or before the judge directing the issuance of the warrant.—United States v. Baumert (D. C.) 735.

§ 211. An information for violation of the pure food laws *held* not sufficiently proved to justify the issuance of process.—United States v. Baumert (D. C.) 735.

§ 242. A conspiracy to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) *held* to be an offense against the United States, within Rev. St. §§ 1014, 5440 (U. S. Comp. St. 1901, pp. 716, 3676).—United States v. Campbell (D. C.) 762.

§ 242. Rule as to effect of indictment on motion to remove one to the jurisdiction where he has been indicted stated.—United States v. Campbell (D. C.) 762.

§ 242. Probable cause for a finding that persons accused of conspiracy to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) in the District of Columbia participated in the overt acts committed there warranted their removal.—United States v. Campbell (D. C.) 762.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 284. Where a plea in abatement in a criminal case was submitted to the court and overruled, being determined as a question of law, it was not error when it subsequently appeared that a question of fact was involved to submit such question to a jury.—Jones v. United States (C. C. A.) 584.

§ 301. The refusal to permit the defendant in a criminal case to withdraw a plea to file a motion to quash after the statute of limitations had run *held* within the discretion of the court.—Waller v. United States (C. C. A.) 810.

X. EVIDENCE.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 346–372.

Examination of witnesses, see Witnesses, §§ 297–307.

In prosecution for accepting concessions from carrier, see Carriers, § 38.

In prosecution for conspiracy, see Conspiracy, §§ 45–47.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 351. Evidence *held* properly admitted in a criminal case tending to show that on a former trial defendant feigned insanity before the court and jury.—Waller v. United States (C. C. A.) 810.

§ 368. Declarations made by one conspirator while the conspiracy was in progress, and relating to its object, although not in furtherance thereof, are admissible as part of the res gestæ against each conspirator.—Jones v. United States (C. C. A.) 584.

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

Effect of importer's bond for possession in proceedings for condemnation of adulterated or misbranded articles of food, see Food, § 24.

DAMAGES.

Damages for particular injuries.

See Death, § 85.
Breach of contract for sale of mineral rights, see Mines and Minerals, § 54.
Breach of contract of sale, see Sales, § 384.
Eviction of lessee, see Landlord and Tenant, § 180.
Misrepresentations in charter party, see Shipping, § 58.
Negligent delay in transmission of telegram, see Telegraphs and Telephones, § 56.
Violation of anti-trust laws, see Monopolies, § 28.

II. NOMINAL DAMAGES.

For breach of covenant for quiet enjoyment, see Landlord and Tenant, § 130.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

In actions for causing death, see Death, § 85.

(C) Interest, Costs, and Expenses of Litigation.

§ 68. A holder of bonds calling for 8 per cent. interest, conditional on presentment at a certain time and place, failing this, *held* entitled to 5 per cent. as damages, and not to 8 per cent. under the contract.—Skinner v. Franklin County (C. C.) 862.

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

Entire or severable contract, see Contracts, § 171.

§ 120. The measure of damages considered for breach of a contract to furnish track connections between a lumber plant and railroad lines.—South Memphis Land Co. v. McLean Hardwood Lumber Co. (C. C. A.) 417.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132. An award of $4,500 made to a stevedore, 48 years old, for an injury which entirely disabled him for life, caused great suffering, and was probably of a progressive character.—Baker v. Hamburg-American Packet Co. (D. C.) 271.

DAMS.

In nonnavigable waters, see Waters and Water Courses, § 179.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(E) Damages, Forfeiture, or Fine.

§ 85. Where a seaman was killed by the negligence of the shipowners, his administratrix, under Code Civ. Proc. N. Y. § 1902, *held* entitled to recover full indemnity for damages sustained by his death.—Cornell Steamboat Co. v. Fallon (C. C. A.) 293.

DEBTOR AND CREDITOR.

See Bankruptcy; Executions; Homestead.

DECEDENTS.

Estates, see Executors and Administrators; Wills.

DECEIT.

See Fraud.

DECEPTION.

See Fraud.

DECLARATION.

In pleading, see Pleading.

DECLARATIONS.

As evidence, see Criminal Law, § 423.

DECREE.

In equity, see Equity, § 422.
Judgments in general, see Judgment.

DEEDS.

By or to Indians, see Indians, § 15.
By or to insolvent debtors, see Bankruptcy, §§ 163–186.
Of mineral lands, see Mines and Minerals, § 55.
Preferences by debtor, see Bankruptcy, §§ 163–186.

III. CONSTRUCTION AND OPERATION.

Following decisions of state courts, see Courts, § 367.

(D) Exceptions and Reservations.

Reservations of minerals and mineral rights, see Mines and Minerals, § 55.

DEFAMATION.

See Libel and Slander.

DEFAULT.

In performance of contracts in general, see Contracts, §§ 280–303.

DEFRAUD.

See Fraud.

DELAY.

As barring right of election to sue principal or agent, see Principal and Agent, § 145.
In transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27–56.
Laches, see Equity, §§ 67–86.

DELEGATION.

Of power to control traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

DELIVERY.

Of goods sold, see Sales, § 201.
Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27–56.

DEMISE.

See Landlord and Tenant.

DEMURRAGE.

See Shipping, §§ 173–183.

DEMURRER.

See Equity, § 228; Pleading, § 212.
Raising question of jurisdiction of federal court, see Courts, § 347.

DENIALS.

In pleading, see Pleading, § 127.

DEPORTATION.

Of Chinese, see Aliens, § 32.
Of immigrants excluded, see Aliens, § 54.

DEPOSITARIES.

Deposits incident to particular occupations, see Banks and Banking.

DEPOSITIONS.

See Witnesses.
In proceedings after adjudication in bankruptcy, see Bankruptcy, § 244.
Taking and filing deposition as contempt of court, see Contempt, § 13.

DERRICK.

Liability of master for injuries to servant, see Master and Servant, §§ 217, 238.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Wills.
Judgment against heir as conclusive against coheirs, see Judgment, § 690.

I. NATURE AND COURSE IN GENERAL.

Effect of contract between religious society and member, see Religious Societies, § 18.

DESCRIPTION.

Of devisees or legatees in will, see Wills, § 501.
Of land in memorandum of contract of sale, see Frauds, Statute of, § 110.

DE SON TORT.

Trustees de son tort, see Trusts, § 170.

DESTRUCTION.

Of property unlawfully in Indian country, see Indians, § 32.

DEVISES.

See Wills.

DILIGENCE.

Affecting right to equitable relief in general, see Equity, §§ 67–86.

DIRECTING VERDICT.

See Trial, § 177.

DISABILITIES.

Of aliens, see Aliens, § 1.
Of Indians, see Indians.

DISBURSEMENTS.

Costs in general, see Costs.

DISCHARGE.

Of bankrupts, see Bankruptcy, §§ 404–426.
Of sureties in general, see Principal and Surety, §§ 102–129.

DISCRETION OF COURT.

Grant of habeas corpus, see Habeas Corpus, § 6.
Review of discretion in civil actions, see Appeal and Error, § 983.
Withdrawal of plea in criminal prosecution, see Criminal Law, § 301.

DISCRIMINATION.

Denial of equal protection of laws, see Constitutional Law, §§ 211–245.

DISMISSAL AND NONSUIT.

As affecting limitation of actions, see Limitation of Actions, § 130.
Effect of dismissal of suit in federal court as to one defendant as affecting jurisdiction as to others, see Courts, § 318.
For want of jurisdiction of federal circuit court, see Courts, § 414.

II. INVOLUNTARY.

New action after limitations on dismissal of former action against wrong parties, see Limitation of Actions, § 130.

§ 55. Want of jurisdiction of a federal court, apparent on the face of a bill, may be taken advantage of by a motion to dismiss.—Ladew v. Tennessee Copper Co. (C. C.) 245.

DISPATCH.

See Telegraphs and Telephones.

DISPUTE.

Amount in dispute as affecting jurisdiction of courts, see Courts, §§ 328, 329.

DISSOLUTION.

Effect of dissolution of corporation, see Corporations, § 691.
Of corporation or association, see Corporations, §§ 615–630.
Of municipal corporation, see Municipal Corporations, § 51.

DISTRESS.

For rent, see Landlord and Tenant, § 269

DISTRIBUTION.

Of estate of bankrupt, see Bankruptcy, §§ 310–348.
Of proceeds of execution sale, see Execution, § 324.

DISTRICT AND PROSECUTING ATTORNEYS.

Preliminary information on information and belief of district attorney, see Criminal Law, § 211.

DISTRICT OF COLUMBIA.

§ 3. Congress may enact laws applying exclusively to the District of Columbia.—United States v. Campbell (D. C.) 762.

DISTRICTS.

Judicial districts in which suits in federal courts must be brought, see Courts, §§ 269–276.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see Courts, §§ 307–318.

DIVISIBLE CONTRACTS.

See Contracts, § 171.

DOMICILE.

Of parties to action as determining jurisdiction of courts, see Courts, §§ 307–318.

DOUBLE LIABILITY.

Of stockholders, see Corporations, § 244.

DOUBLE PLEADING.

In equity, see Equity, § 166.

DRAFTS.

See Bills and Notes.

DRAINS.

Specific performance of contract for construction, see Specific Performance, § 74.

DRAMSHOPS.

See Intoxicating Liquors.

DREDGES.

Liability for injuries from collision, see Collision, §§ 75, 99, 100.
Liability for injuries to seamen, see Seamen, § 29

DUE COURSE OF TRADE.

Transfer of negotiable instruments, see Bills and Notes, § 330.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 251–303.

DUPLICITY.

In pleading, see Equity, § 166.

DUTIES.

Excise duties, see Internal Revenue.

EASEMENTS.

Streets, see Municipal Corporations, §§ 680–682.

I. CREATION, EXISTENCE, AND TERMINATION.

Transfer on sale of property of railroad company, see Railroads, § 194.

ECCLESIASTICAL CORPORATIONS.

See Religious Societies.

EJECTMENT.

Venue of action, see Venue, § 5.

I. RIGHT OF ACTION AND DEFENSES.

§ 17. Conceding that a deed given as a mere security for an existing debt is not effective to transfer the legal title or right of possession of the mortgaged property from the grantor to the grantee, nevertheless the voluntary surrender of actual possession to the grantee as further security is lawful, and may be effective to create a legal right of possession sufficient to bar a right of recovery in an action of ejectment by the mortgagor against the mortgagee.—Sheridan v. Southern Pac. Co. (C. C. A.) 81.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

District in which suit must be brought in federal court, see Courts, § 269.

III. PLEADING AND EVIDENCE.

§ 76. A so-called amended complaint in ejectment *held* not to constitute a supplemental complaint, under Carter's Code Civ. Proc. Alaska, § 98.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

§ 84. An amended complaint in ejectment *held* not to entitle plaintiff, under Carter's Code Civ. Proc. Alaska, § 98, to recover on or prove a title acquired after the commencement of the action.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

§ 84. In ejectment, the plaintiff must recover, if at all, on his title as it existed at the time of the commencement of the action, and evidence of any after-acquired title is inadmissible, unless the foundation therefor has been laid by a supplemental complaint, under the authority of a statute which permits the filing thereof in actions at law.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

§ 95. Evidence considered, and *held* insufficient to establish a legal title to real estate in plaintiff which entitled him to recover in ejectment.—Sheridan v. Southern Pac. Co. (C. C. A.) 81.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 116. In ejectment, where both parties allege title and the evidence sustains that of defendant, it is not error for the court to render an affirmative judgment in his favor, adjudging him to be the owner of the property and entitled to possession.—Sheridan v. Southern Pac. Co. (C. C. A.) 81.

ELECTION.

Between causes of action, counts, or defenses, see Pleading, § 369.

ELECTION OF REMEDIES.

Election of right to sue principal or agent, see Principal and Agent, § 145.

ELECTIONS.

Of trustees in bankruptcy, see Bankruptcy, §§ 123–125.

ELECTRICITY.

Electric railroads, see Street Railroads.

Power of city to grant exclusive franchise, see Municipal Corporations, § 682.

Power of city to grant perpetual right to use of street, see Municipal Corporations, §§ 680, 681.

Telegraph and telephone lines, see Telegraphs and Telephones.

§ 4. An ordinance granting a franchise to an electric light company construed, and in the absence of any provision fixing the term, *held* to be for the life of the corporation; the use of the streets thereafter by its successor being at the will of the city only.—Omaha Electric Light & Power Co. v. City of Omaha (C. C. A.) 455.

§ 16. The foreman in charge of the poles and wires of an electric light company was acting in the course of his duty in attempting to remove a broken telephone wire, which was allowed by the telephone company to hang against a light pole, interfering with its use; and the telephone company is liable for its negligence in permitting the broken wire to remain in such position as to become dangerously charged with electricity by contact with a light wire, causing the death of such foreman when he took hold of it.—New England Telephone & Telegraph Co. v. Moore (C. C. A.) 364.

ELIGIBILITY.

Of applicants for naturalization, see Aliens, § 62.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 5. The United States has constitutional authority to organize and maintain an irrigation project which will associate with itself other owners of arid lands for the purpose of reclaiming and improving the same, and in that behalf may exercise the right of eminent domain to acquire lands necessary for such project.—Burley v. United States (C. C. A.) 1.

§ 29. Under Irrigation Act June 17, 1902, c. 1093, §§ 1–5, 32 Stat. 388, 389 (U. S. Comp. St. Supp. 1909, pp. 596–599), an irrigation project is not invalidated by the fact that it is proposed to irrigate privately owned lands as well as a large tract owned by the government.—Burley v. United States (C. C. A.) 1.

EMPLOYER'S LIABILITY ACTS.

See Master and Servant, § 116.
Federal act as delegation of judicial power of United States to state courts, see Courts, § 42.
Partial invalidity, see Statutes, § 64.
Regulation of interstate commerce, see Commerce, § 58.

EMPLOYÉS.

See Master and Servant.

ENCROACHMENT.

By judiciary on Legislature, see Constitutional Law, § 70.

ENTIRE CONTRACTS.

See Contracts, § 171.

ENTRY, WRIT OF.

Actions for recovery of possession of real property, and damages for detention thereof, see Ejectment

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 211–245.

EQUITABLE ASSIGNMENTS.

In general, see Assignments, § 52.

EQUITABLE DEFENSES.

Procedure in federal courts, see Courts, § 374.

EQUITABLE ESTATES.

See Trusts.

EQUITABLE LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, § 188.

EQUITY.

Equitable assignment, see Assignments, § 52.
Equitable defenses, effect of state laws in federal courts, see Courts, § 374.
Equitable estates, see Trusts.
Equitable liens, effect of proceedings in bankruptcy, see Bankruptcy, § 188.
Equities and defenses against assignee of bill or note, see Bills and Notes, § 315.

Particular subjects of equitable jurisdiction and equitable remedies.

See Account; Injunction; Quieting Title; Receivers; Specific Performance; Trusts.
Infringement of patents, see Patents, §§ 301–326.

II. LACHES AND STALE DEMANDS.

Affecting right to injunction against maintenance of dam, see Waters and Water Courses, § 177.

§ 67. The institution of a suit does not relieve a person from the charge of laches, and, if he fail in the diligent prosecution of his action, the consequences are the same as though he had never begun it.—Stuart v. Holland (C. C.) 969.

§ 72. That laches may bar suit in equity, it must appear inequitable to permit claimant to assert his alleged right.—Stuart v. Holland (C. C.) 969.

§ 86. Laches cannot be imputed to one in possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title so long as there is no attempt to assert such title, and he has no reason to anticipate such an attempt.—Seefeld v. Duffer (C. C. A.) 214.

III. PARTIES AND PROCESS.

Intervention in suit for infringement of trademark, see Trade-Marks and Trade-Names, § 91.

IV. PLEADING.

(A) Original Bill.

Multifariousness of bill for infringement of patent, see Patents, § 310.

§ 150. A bill filed by the United States to cancel a large number of separate conveyances made by individual Indian allottees to the several defendants as invalid, because made in violation of a statute imposing restrictions upon the alienation of the land by the Indians, is not multifarious.—United States v. Allen (C. C. A.) 13.

(B) Plea, Answer, and Disclaimer.

Suits by stockholders on behalf of corporation, see Corporations, § 211.

§ 163. A plea setting up a prior adjudication of the same matters between the same parties is a good plea in equity.—Moredock v. Moredock (C. C.) 163.

§ 166. Double or separate pleas are not allowable without special leave of court.—Sims v. United Wireless Telegraph Co. (C. C.) 540.

§ 166. A plea to a stockholder's bill *held* bad for duplicity.—Sims v. United Wireless Telegraph Co. (C. C.) 540.

(D) Replication.

§ 213. Where no reply is filed to a plea, but the case is set down for argument under equity rule 33, the plea is taken as admitted.—W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C.) 544.

(E) Demurrer, Exceptions, and Motions.

§ 228. Under the express terms of Equity Rule 31, a demurrer to a bill is insufficient when not accompanied by a certificate that it is

well founded in law and by an affidavit that it is not interposed for delay.—Stephens v. Gall (D. C.) 938.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Reference in action at law, see Reference.
Review of questions of fact, see Appeal and Error, § 1017.

X. DECREE AND ENFORCEMENT THEREOF.

§ 422. Where a case is set down for hearing on bill and plea under equity rule 33, and the plea sufficiently meets all the claims of the bill, defendants are entitled to a final decree.—W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C.) 544.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of homestead, see Homestead, § 32.

ESTATES.

See Homestead.
Bankrupts' estates, see Bankruptcy.
Decedents' estates, see Executors and Administrators; Wills.
Estates for years, see Landlord and Tenant.
Restrictions on creation of perpetuities, see Perpetuities.

ESTOPPEL.

I. BY RECORD.

By judgment, see Judgment, §§ 678–690.

III. EQUITABLE ESTOPPEL.

Of particular classes of persons, or persons in particular relations.

Patentees, see Patents, § 168.

To assert or deny particular facts, rights, claims, or liabilities.

Claims against bankrupts' estates, see Bankruptcy, § 312.
Constitutionality of statute, see Constitutional Law, § 43.
Discharge of surety, see Principal and Surety, § 129.
Limitation of claims of patent, see Patents, § 168.

To maintain or oppose particular remedies or defenses.

Appeal or other proceeding for review, see Appeal and Error, § 162.

EVICTION.

Of tenant, see Landlord and Tenant, § 180.

EVIDENCE.

See Witnesses.
Conspiracy to take and the deposition as contempt of court, see Contempt, § 13.
Depositions of nonresident in bankruptcy proceedings, see Bankruptcy, § 244.
False swearing, see Perjury.
Objections to evidence on ground of insufficiency of pleadings, see Pleading, § 428.
Passport as evidence of citizenship, see Citizens, § 10.
Presentation of evidence by counsel in civil action, see Trial, § 110.

As to particular facts or issues.

Claims against bankrupt's estate, see Bankruptcy, § 336.
Concealing assets by bankrupt, see Bankruptcy, § 414.
Corporate name as denoting business, see Bankruptcy, § 91.
Creation, existence, and validity of trust, see Trusts, §§ 44–89.
Gift by wife to husband, see Husband and Wife, § 49¾.
Misrepresentations in charter party, see Shipping, § 58.
Negligence of master causing injury to servant, see Master and Servant, § 270.
Patentable novelty, see Patents, § 45.
Preference by bankrupt, see Bankruptcy, § 303.

In actions by or against particular classes of persons.

See Master and Servant, §§ 265–270; Principal and Agent, § 190.
Bankrupt, see Bankruptcy, § 340.
Insurance companies, see Insurance, §§ 817–825.
Shipowner, see Shipping, § 58.
Trustees in bankruptcy, see Bankruptcy, § 303.

In particular civil actions or proceedings.

See Ejectment, § 95; Quieting Title, § 44.
Chinese deportation proceedings, see Aliens, § 32.
For discharge of bankrupt, see Bankruptcy, § 414.
For injuries to cargo, see Shipping, § 132.
For injuries to servants, see Master and Servant, §§ 265–270.
For violation of anti-trust laws, see Monopolies, § 28.
On claim against bankrupt, see Bankruptcy, § 340.
On insurance policies, see Insurance, §§ 817–825.
To enforce maritime lien, see Maritime Liens, § 65.
To forfeit property for violation of revenue laws, see Internal Revenue, § 46.
To recover assets of estate of bankrupt, see Bankruptcy, § 303.
To recover penalty for falsely marking articles as patented, see Patents, § 224.
To recover property of bankrupt, see Bankruptcy, § 303.
To restrain receiving or using quotations of board of trade, see Exchanges, § 14.

In criminal prosecutions.

See Conspiracy, §§ 45–47; Criminal Law, §§ 351–423.

For accepting concessions from carrier, see Carriers, § 38.

Review and procedure thereon in appellate courts.

Harmless error in rulings on, see Criminal Law, § 1169.

Review of rulings as dependent on presentation of objection in lower court, see Criminal Law, § 1036.

Review of sufficiency of evidence, see Appeal and Error, § 209.

I. JUDICIAL NOTICE.

§ 7. Judicial notice will be taken that sound wheat, properly and timely harvested, put through the sweat in the stack, well ground and bolted, makes nutritious, wholesome, and white flour.—Shawnee Milling Co. v. Temple (C. C.) 517.

II. PRESUMPTIONS.

As to particular facts or issues.

Corporate name as denoting business, see Bankruptcy, § 91.

Gift by wife to husband, see Husband and Wife, § 49¾.

Prejudice from error in trial court, see Appeal and Error, § 1031.

In particular civil actions or proceedings.

For injuries to servants, see Master and Servant, § 265.

III. BURDEN OF PROOF

In particular civil actions or proceedings.

See Quieting Title, § 44.

For deportation of Chinese, see Aliens, § 32.

For injuries to cargo, see Shipping, § 132.

For injuries to servants, see Master and Servant, § 265.

On insurance policies, see Insurance, § 817.

On motion for preliminary injunction, see Injunction, § 152.

To forfeit property for violation of revenue laws, see Internal Revenue, § 46.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

In criminal prosecutions, see Criminal Law, §§ 351–368.

(B) Res Gestæ.

In criminal prosecutions, see Criminal Law, § 368.

§ 123. A statement, made by the master of a vessel some time after the injury of a stevedore, tending to show that he had previous knowledge of the insecure condition of a trim board, which fell and caused the injury, was not a part of the res gestæ, but a narrative of a past transaction, and inadmissible to bind the owner of the vessel, in an action against him for the injury.—Cyborowski v. Kinsman Transit Co. (C. C. A.) 440.

(C) Similar Facts and Transactions.

Evidence of similar injuries in action for injuries to servant, see Master and Servant, § 270.

Other offenses, see Criminal Law, § 368.

XIV. WEIGHT AND SUFFICIENCY.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 346–372.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 209.

As to particular facts or issues.

Creation, existence, and validity of trust, see Trusts, §§ 44, 89.

Gift by wife to husband, see Husband and Wife, § 49¾.

Misrepresentations in charter party, see Shipping, § 58.

Preference by bankrupt, see Bankruptcy, § 303.

In particular civil actions or proceedings.

See Ejectment, § 95.

Chinese deportation proceedings, see Aliens, § 32.

For breach of contract with broker, see Principal and Agent, § 190.

On claim against bankrupt, see Bankruptcy, § 340.

To recover assets of estate of bankrupt, see Bankruptcy, § 303.

To restrain receiving or using quotations of board of trade, see Exchanges, § 14.

§ 594. While positive and uncontradicted testimony on a hearing in bankruptcy should not be disregarded arbitrarily, it may be disregarded if it is grossly or inherently improbable.—In re Baumhauer (D. C.) 966.

EXAMINATION.

Of bankrupt or others in bankruptcy proceedings, see Bankruptcy, § 241.

Of debtor as to insolvency, see Bankruptcy, § 97.

Of nonresident in support of objection to discharge of bankrupt, see Bankruptcy, § 413.

Of witnesses, see Witnesses, §§ 297–307.

Preliminary examination by Agricultural Department as condition precedent to libel for condemnation of adulterated or misbranded articles of food, see Food, § 24.

EXCEPTIONS.

In statutes, allegations in indictment or information, see Indictment and Information, § 111.

Necessity and sufficiency for purpose of review in civil cases, see Appeal and Error, § 272.

Risks and causes of loss excepted in insurance policy, see Insurance, § 415.

EXCESSIVE DAMAGES.

See Damages, § 132.

EXCHANGES.

§ 14. In a suit for an injunction to restrain use of market quotations, evidence *held* insufficient to show that defendant P. received or used such quotations, either individually or as a party interested in defendant commission company.—Board of Trade of City of Chicago v. Price (C. C.) 399.

EXCISE.

Duties, see Internal Revenue.
Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCLUSION.

Of Chinese, see Aliens, § 32.

EXCLUSIVE PRIVILEGES.

Power of municipality to grant, see Municipal Corporations, § 682.

EXCUSE.

For nonperformance or defects in performance of contracts in general, see Contracts, § 303.

EXECUTION.

Exemptions, see Homestead.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

Stay of execution against bankrupt, see Bankruptcy, § 196.

VII. SALE.

(E) Proceeds.

§ 324. Where a levy is made on distrainable goods, the landlord by notice to the sheriff is entitled to receive out of the proceeds of the goods not exceeding one year's rent in arrear.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

EXECUTORS AND ADMINISTRATORS.

See Wills.
Testamentary trustees, see Trusts.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 29. If an order appointing an administrator is so written as to leave it doubtful in what estate the appointment is made, other parts of the probate record may be referred to for the purpose of removing the doubt, and where it appears that the administrator qualified and acted in a particular estate and made final report and settlement, under the law of Texas his authority cannot be questioned collaterally to invalidate a sale made by him.—Seefeld v. Duffer (C. C. A.) 214.

§ 29. A surrogate having jurisdiction, under Code Civ. Proc. N. Y. § 2476, to grant letters of administration to plaintiff, such appointment *held* not subject to collateral attack because of a failure to require bonds.—Cornell Steamboat Co. v. Fallon (C. C. A.) 293.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

§ 225. The claim of a third person that he is the owner of property in the hands of an administrator is not a claim that is within the jurisdiction of the probate courts of Minnesota, and is not affected by Rev. Laws Minn. 1905, § 3730, requiring claims against estates to be presented to the probate court for allowance within the time fixed by order of such court, nor is it within section 3733 limiting the time within which actions may be brought against an executor or administrator on provable claims.—Order of St. Benedict of New Jersey v. Steinhauser (C. C.) 137.

X. ACTIONS.

Surplusage in pleading, see Pleading, § 35.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 524. Where an administrator, suing as such in the state of his appointment, recovers judgment, the original cause of action in favor of his intestate is merged therein, and the judgment constitutes a new cause of action in favor of himself personally, on which he may sue in his own name in any state where the debtor is found.—Moore v. Kraft (C. C. A.) 685.

EXECUTORY CONTRACTS.

In general, see Contracts.

EXEMPTIONS.

See Homestead.
Of bankrupt, see Bankruptcy, § 396.

EXHIBITS.

Transmission to appellate court in bankruptcy proceedings, see Bankruptcy, § 463.

EX PARTE PROCEEDINGS.

Habeas corpus, see Habeas Corpus.

EXPLOSIVES.

Liability of master for injuries to servant, see Master and Servant, § 286.

EXPRESS TRUSTS.

See Trusts, § 44.

EXPROPRIATION.

See Eminent Domain.

EXPULSION.

Of Chinese, see Aliens, § 32.

EXTENSION.

Of time for presentation of claims against estate of decedent, see Executors and Administrators. § 225.

FABRICATED EVIDENCE.

Admissibility of testimony of feigned insanity on former trial, see Criminal Law, § 351.
Cross-examination of accused as to feigned insanity on former trial, see Witnesses, § 346.

FACT.

Judicial notice of facts, see Evidence, § 7.

FACTORS.

See Brokers.

FALSE REPRESENTATIONS.

See Fraud.
Effect of discharge in bankruptcy, see Bankruptcy, § 423.

FALSE SWEARING.

See Perjury.

FAMILY.

See Husband and Wife.
Homestead, see Homestead.

FAULT.

See Negligence.
As cause of collision, see Collision.

FEDERAL COURTS.

See Courts, §§ 263–414, 489–500.
Decisions of, as authority in other federal courts, see Courts, § 96.
Removal of causes to federal courts from state courts, see Removal of Causes.

FEDERAL QUESTIONS.

Grounds for jurisdiction, see Courts, §§ 282–299.

FEES.

In bankruptcy proceedings, see Bankruptcy, § 484.
Of assignee for benefit of creditors after bankruptcy, see Bankruptcy, § 484.
Of attorneys, as items of costs, see Costs, § 172.

FEIGNING INSANITY.

Admissibility of testimony of feigned insanity on former trial, see Criminal Law, § 351.
Cross-examination of accused as to feigned insanity on former trial, see Witnesses, § 346.

FELLOW SERVANTS.

See Master and Servant, §§ 179–198.

FEME COVERT.

See Husband and Wife.

FIDEI COMMISSUM.

See Trusts.

FIDUCIARY RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.
Between corporations and their officers or agents, see Corporations, § 317.

FIERI FACIAS.

See Execution.

FILING.

Contract of conditional sale, see Sales, § 474.

FINDINGS.

Review in appellate court, see Appeal and Error, §§ 1011, 1017.

FIRE INSURANCE.

See Insurance.

FISCAL MANAGEMENT.

Of municipal corporations, see Municipal Corporations, §§ 956–977.

FIXTURES.

Removal of improvements by tenant, see Landlord and Tenant, § 157.

§ 27. A provision in a lease that improvements erected on the premises should not be removed until rent was paid controlled the tenant's right of removal of articles annexed to the freehold otherwise removable as trade fixtures.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

FLIGHT.

Of accused as evidence of guilt, see Criminal Law, § 351.

FLOUR.

See Food, § 22.
Judicial notice of quality of grain, see Evidence, § 7.

FOG.

Collision during fog, see Collision, § 100.

FOOD.

Information for violation of pure food law, see Criminal Law, § 211.
Interstate commerce regulations, see Commerce, § 33.

§ 5. The use of a thin coating of pure silver on candy to make it conspicuous, not deleterious or detrimental to health, *held* not a violation of the adulterated candy subdivision of Pure Food and Drug Act June 30, 1906, c. 3915, § 7, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1190).—French Silver Dragée Co. v. United States (C. C. A.) 824.

§ 12. The federal pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), prohibiting shipment of adulterated or misbranded goods, *held* to apply to a warehouseman shipping such goods from one state to another.—United States v. Buffalo Cold Storage Co. (D. C.) 865.

§ 14. "Salad oil" prima facie means olive oil, and, in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton-seed oil shipped in interstate commerce constitutes a misbranding in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188).—Brina v. United States (C. C. A.) 373.

§ 15. Claimants, canning Arkansas apples and blackberries, and selling them under a label indicating that they were grown in Michigan, *held* guilty of misbranding, in violation of Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).—United States v. 100 Cases of Tepee Apples (D. C.) 985.

§ 22. Whether bleached flour is flour so treated that inferiority is concealed, or contains added poisonous ingredients which may render it injurious to health, in violation of National Pure Food Law June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), *held* a question for the jury.—Shawnee Milling Co. v. Temple (C. C.) 517.

§ 24. A preliminary examination by the Department of Agriculture of an alleged adulterated or misbranded food product, under Food and Drugs Act June 30, 1906, c. 3915, § 4, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1189), *held* not a condition precedent to a libel in rem to condemn the product, under section 10.—United States v. Nine Barrels of Olives (D. C.) 983.

§ 24. Importer's execution of a bond for possession of imports suspected of violating Food and Drugs Act June 30, 1906, c. 3915, § 11, 34 Stat. 772 (U. S. Comp. St. Supp. 1909, p. 1194), *held* not equivalent to an official declaration that the imports complied with the act.—United States v. Nine Barrels of Olives (D. C.) 983.

FOOD AND DRUGS ACT.

See Food, §§ 14, 15, 34.
Interstate commerce regulations, see Commerce, § 33.

FORECLOSURE.

Of street railroad mortgage, see Street Railroads, §§ 54, 58.

FOREIGN ADMINISTRATION.

See Executors and Administrators, § 524.

FOREIGN CORPORATIONS.

See Corporations, §§ 671–691.

FOREIGNERS.

See Aliens.

FOREIGN JUDGMENTS.

See Judgment, §§ 822–828.

FOREMAN.

Liability of master for injuries to servant from acts or omissions of foreman, see Master and Servant, § 189.

FORFEITURES.

For violations of internal revenue laws, see Internal Revenue, § 46.

FORMA PAUPERIS.

Appeal to circuit court of appeals, see Courts, § 405.

FORMER ADJUDICATION.

Operation and effect in general, see Judgment, §§ 678–690.
Plea in equity, see Equity, § 163.

FORMS OF ACTION.

See Action, § 27; Ejectment.

FOURTEENTH AMENDMENT.

See Constitutional Law, §§ 211–245, 251–303.

FRANCHISES.

Corporate franchises in general, see Electricity, § 4.
Grants by municipal corporations, right to use street for purposes other than highway, see Municipal Corporations, §§ 680–682.

FRATERNAL ASSOCIATIONS.

See Insurance, §§ 817–825.

FRAUD.

Conspiracy to defraud, see Conspiracy, § 33.
Discharge of bankrupt, effect on debts created by fraud, see Bankruptcy, §§ 423, 426.

By particular classes of persons, or persons in particular relations.

See Brokers, § 65.
Bankrupt, see Bankruptcy, § 423.
Corporate officers and agents as against corporation or shareholders, see Corporations, § 317.

Particular remedies.

Refusal of discharge in bankruptcy, see Bankruptcy, § 407.

II. ACTIONS.

(A) Rights of Action and Defenses.

§ 35. An action for deceit is not based on a rescission of the contract, but implies an affirmance and the proving of a claim in bankruptcy for the price of goods sold and delivered on a contract, and the receiving of dividends thereon is not a bar to a subsequent action by the creditor for deceit based on fraudulent representations inducing the sale.—Talcott v. Friend (C. C. A.) 676.

FRAUDS, STATUTE OF.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 110. A contract relating to mineral rights in land *held* to contain a sufficient description of the lands to meet the requirement of the statute of frauds of Arkansas (Kirby's Dig. Ark. 1904, § 3654.—Eisleben v. Brooks (C. C. A.) 86.

FRAUDULENT CONVEYANCES.

By debtor prior to bankruptcy proceedings, see Bankruptcy, § 175.

I. TRANSFERS AND TRANSACTIONS INVALID.

(G) Reservations and Trusts for Grantor.

Grounds for refusal of discharge of bankrupt, see Bankruptcy, § 407.

FREIGHT.

Carriage of goods, see Carriers, § 51; Shipping, §§ 108–132.
Provisions in charter party, see Shipping, § 49.

FUNDS.

Of religious societies, see Religious Societies, § 18.
Public funds, see Municipal Corporations, §§ 956–977.

GAMING.

III. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

Locality of offense, see Criminal Law, § 97.

GIFTS.

Between husband and wife, see Husband and Wife, §§ 43–49¾.
Charitable gifts, see Charities.

GOOD FAITH.

Of purchaser of bill or note, see Bills and Notes, § 330.

GOODS.

Sale, see Sales.

GRAND JURY.

See Indictment and Information.

GRANTS.

Of minerals and mining rights, see Mines and Minerals, § 55.
Of public lands, see Public Lands.
Of right to use streets for purposes other than highway, see Municipal Corporations, §§ 680–682.

GUARANTY.

See Principal and Surety.
Bank depositor's guaranty law as denial of equal protection of law, see Constitutional Law, § 240.
Constitutionality of bank depositor's guaranty act as increasing competition with national banks, see Banks and Banking, § 4.
Power of national bank, see Banks and Banking, § 260.

HABEAS CORPUS.

For discharge of alien in deportation proceedings, see Aliens, § 32.

I. NATURE AND GROUNDS OF REMEDY.

§ 1. A writ of habeas corpus is only available to determine jurisdictional questions and cannot be utilized as a revisory remedy.—Kroschel v. Munkers (D. C.) 961.

§ 6. Issuance of habeas corpus by a federal court is a matter to be determined in the exercise of a sound judicial discretion.—Kroschel v. Munkers (D. C.) 961.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 45. In a criminal prosecution in a state court, where the statute creating the offense is not repugnant to the federal Constitution, and the court has jurisdiction, its determination

with respect to the sufficiency of the charge is controlling in the federal courts on an application by the accused for a writ of habeas corpus after conviction.—Erickson v. Hodges (C. C. A.) 177.

§ 45. The determination by the highest court of a state that the offense charged in an indictment is one punishable under the laws of the state is conclusive in a subsequent proceeding by the accused in a federal court for release on a writ of habeas corpus.—Erickson v. Hodges (C. C. A.) 177.

§ 45. Where petitioner was convicted of violating a city ordinance and permitted the time to appeal to expire, his remedy was by habeas corpus in the state courts and not by an application for such a writ in the first instance to the federal courts.—Kroschel v. Munkers (D. C.) 961.

§ 62. Under Rev. St. § 755 (U. S. Comp. St. 1901, p. 593), which provides that on an application to a federal court for a writ of habeas corpus the court or judge shall forthwith award a writ, "unless it appears from the petition itself that the party is not entitled thereto," where it appears from the petition that the case is not one which would justify the exercise of federal authority, it may be dismissed, and the court is not required to either award a writ or issue an order to the respondent to show cause. —Erickson v. Hodges (C. C. A.) 177.

§ 113. On appeal in a habeas corpus case for the discharge of a Chinese person held for deportation, the findings of the lower court are not conclusive, and all questions of fact on the evidence are open to consideration by the appellate court; but such findings should not be set aside unless the evidence in the record is such as to convince the court that they are erroneous.—Wong Heung v. Elliott (C. C. A.) 110.

HARMLESS ERROR.

In civil actions, see Appeal and Error, § 1031.
In criminal prosecutions, see Criminal Law, §§ 1167–1169.

HAVEN.

Jurisdiction of offenses committed in haven, see Criminal Law, § 97.

HEADRIGHT.

Claims and settlements and contracts under colonization laws, see Public Lands, § 172.

HEALTH.

Regulation of manufacture, sale, and use of articles of food or drink, see Food.

II. REGULATIONS AND OFFENSES.

Regulation of manufacture, sale, and use of articles of food or drink, see Food.

HEARING.

In involuntary bankruptcy proceedings, see Bankruptcy, §§ 95–97.
On motion or application for discharge of bankrupt, see Bankruptcy, § 415.
On motion or application for injunction, see Injunction, § 152.

HIGH SEAS.

Jurisdiction of offenses, see Criminal Law, § 97.

HIGHWAYS.

Crossing by railroads, see Railroads, §§ 327–350.
Streets in cities, see Municipal Corporations, §§ 680–682.

V. REGULATION AND USE FOR TRAVEL.

(C) Injuries from Defects or Obstructions.

Accidents at railroad crossings, see Railroads, §§ 327–350.
In streets, see Municipal Corporations, § 821.

HIRING.

Of premises, see Landlord and Tenant.

HISTORY.

Of statute as aid to construction, see Statutes, § 217.

HOLES.

Coal holes in sidewalks, liability of city for injuries to traveler, see Municipal Corporations, § 821.

HOMESTEAD.

Homestead as exempt property of bankrupt, see Bankruptcy, § 396.

I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

§ 1. The homestead right of a widower, the head of a family, in Texas, is absolute and unconditional, and beyond the reach of creditors. —In re Mussey (D. C.) 1007.

(B) Persons Entitled.

§ 23. A bachelor, who is not the head of a family, is not entitled to a homestead exemption under the laws of North Dakota.—In re Malloy (D. C.) 942.

§ 23. A widower *held* the head of a family, and the property occupied by him a homestead. —In re Mussey (D. C.) 1007.

§ 23. That the head of a family is unmarried does not affect his homestead right.—In re Mussey (D. C.) 1007.

(C) Acquisition and Establishment.

§ 32. Property acquired by a bachelor before marriage may be exempt as his homestead, if he resides thereon as the head of a family within a reasonable time thereafter.—In re Malloy (D. C.) 942.

§ 32. A bankrupt, never having resided on certain farm land as a homestead, *held* not entitled to claim the same as exempt in bankruptcy.—In re Malloy (D. C.) 942.

HOMICIDE.

Civil liability for causing death, see Death, § 85.

VII. EVIDENCE.

(B) Admissibility in General.

Res gestæ, see Criminal Law, § 368.

HOSTILE WITNESS.

Impeachment for interest or bias, see Witnesses, § 372.

HUSBAND AND WIFE.

Claim of wife against estate of husband in bankruptcy, see Bankruptcy, § 314.
Contribution by wife of purchase of property by bankrupt husband, see Bankruptcy, § 140.
Right of alien wife or alien husband to naturalization, see Aliens, § 61.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 43. To constitute relation of debtor and creditor between husband and wife where she receipted for money which he retained, there must be some evidence of a contract.—In re Carpenter (D. C.) 743.

§ 49¾. Where wife receipted to husband for a sum of money, and he retained it, gift *held* not presumed.—In re Carpenter (D. C.) 743.

§ 49¾. Evidence *held* insufficient to show that the parties intended a gift of wife's money to husband when she receipted for the money, though he retained it in his possession.—In re Carpenter (D. C.) 743.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 113. Under Constitution and laws of South Carolina, real and personal property of married woman held by her at marriage or accruing by inheritance or otherwise *held* to become her separate property with power to dispose of as if she were unmarried.—In re Carpenter (D. C.) 743.

HYPOTHECATION.

See Pledges.
Of vessels, see Maritime Liens.

IDENTIFICATION.

Of act amended in amending act, see Statutes, § 138.
Of property of bankrupt, see Bankruptcy, § 288.

IDENTITY.

Of invention affecting question of infringement of patent, see Patents, § 237.
Of persons as affecting conclusiveness of former judgment, see Judgment, §§ 678–690.

IMITATION.

Of articles of food, see Food.

IMMIGRATION.

See Aliens, § 54.

IMPAIRING OBLIGATION OF CONTRACT.

Jurisdiction of federal court to restrain enforcement of ordinance impairing obligation of contract, see Courts, § 282.

IMPEACHMENT.

Of witness, see Witnesses, §§ 346–372.

IMPLIED TRUSTS.

See Trusts, § 89.

IMPRISONMENT.

Release on habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Rights of trustee in bankruptcy of lessee as to improvements, see Bankruptcy, § 140.

INCAPACITY.

In general, see Indians.

INCRIMINATION.

Compelling witness to criminate himself, see Witnesses, § 297.

INDEBTEDNESS.

Of corporations in general, see Corporations, § 478.

INDEMNITY.

See Principal and Surety.
To sureties, see Principal and Surety, § 129.

INDIANS.

Multifariousness in bill to cancel conveyances, see Equity, § 150.

§ 12. In an act creation a commission to select lands to form an Indian reservation when the selection is "approved by Congress," the term "Congress" means the lawmaking branch of the government, and the approval of both Houses is necessary to create a valid reservation.—United States v. Crook (D. C.) 391.

§ 12. The provision of the treaty made with the Sioux Indians April 29, 1868, that "the country north of the North Platte river and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory," did not include in such unceded territory any land within the state of Nebraska.—United States v. Crook (D. C.) 391.

§ 15. The United States by virtue of its peculiar relation to the Indians, and to prevent the defeat of its policy with respect to the Five Civilized Tribes, may maintain suits in its own name to enforce the restrictions imposed on the alienation of lands although retaining neither a legal nor an equitable estate in such lands.—United States v. Allen (C. C. A.) 13.

§ 15. Act May 27, 1908, c. 199, § 6, 35 Stat. 314, by implication confers authority on the United States to maintain suits to set aside conveyances of lands made by Indian allottees in violation of the restrictions imposed on their alienation.—United States v. Allen (C. C. A.) 13.

§ 15. To a suit brought by the United States under the authority conferred by Act May 27, 1908, c. 199, § 6, 35 Stat. 314, to set aside a deed, lease, or contract made by an Indian allottee in violation of the statutory restrictions on alienation, the allottee is not an indispensable party.—United States v. Allen (C. C. A.) 13.

§ 16. The approval by the Secretary of the Interior of an assignment of a lease of lands of a Cherokee Indian allottee, made without the consent of the lessor, in direct violation of its terms, did not validate such assignment.—Midland Oil Co. v. Turner (C. C. A.) 74; Seep v. Spade (C. C. A.) 77.

§ 16. Trespassers, who drilled oil wells on lands of an Indian allottee, *held* to have acquired no rights by the subsequent assignment to them of a lease executed by the allottee, but which provided that it should not be assignable without her consent, and the court *held* to have properly enjoined their further operation of the wells and canceled the lease, where the lessee made no claim thereunder.—Midland Oil Co. v. Turner (C. C. A.) 74; Seep v. Spade (C. C. A.) 77.

§ 31. The grant of citizenship to the Indians in Indian Territory by Act Feb. 8, 1887, c. 119, 24 Stat. 388, as amended by Act March 3, 1901, c. 868, 31 Stat. 1447, was intended for their protection and was not a renunciation by the United States of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights.—United States v. Allen (C. C. A.) 13.

§ 31. It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen.—United States v. Allen (C. C. A.) 13.

§ 32. Under Rev. St. §§ 2147, 2150, 2151, the Military Department has no authority to hold a person apprehended for being unlawfully in the Indian country indefinitely as a prisoner, nor to destroy property found unlawfully therein.—United States v. Crook (D. C.) 391.

INDICTMENT AND INFORMATION.

Preliminary complaint, see Criminal Law, § 211.

Review of questions as dependent on prejudicial nature of error, see Criminal Law, § 1167.

Against particular classes of persons.

Bankrupt, see Bankruptcy, § 494.

For particular offenses.

See Conspiracy, § 43; Perjury, § 26.

For accepting concessions from carrier, see Carriers, § 38.

Violations of bankruptcy laws, see Bankruptcy, § 494.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

§ 3. Prosecutions for offenses not punishable by imprisonment in a penitentiary or state's prison may be instituted by information supported by oaths or affirmations and showing probable cause.—United States v. Baumert (D. C.) 735.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 9. An indictment may be found and presented by a grand juror without a preliminary formal complaint or prior arrest.—United States v. Baumert (D. C.) 735.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 36. Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), *held* inapplicable to prosecutions by information.—United States v. Baumert (D. C.) 735.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 111. An indictment for an offense committed in the course of bankruptcy proceedings against a corporation *held* not objectionable for failure to negative the exceptions in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423).—United States v. Freed (C. C.) 236.

IX. ISSUES, PROOF, AND VARIANCE.

See Conspiracy, § 43.

INDIVISIBLE CONTRACTS.

See Contracts, § 171.

IN FORMA PAUPERIS.

Proceedings on appeal or writ of error, see Courts, § 405.

INFORMATION.

Criminal accusation, see Indictment and Information.
Preliminary information on information and belief, see Criminal Law, § 211.

INFRINGEMENT.

Of patent, see Patents, §§ 237–326, 328.
Of trade-mark or trade-name, see Trade-Marks and Trade-Names, §§ 91, 92.

INJUNCTION.

Incidental to particular remedies or proceedings.

For infringement of patent, see Patents, § 301.

Relief against particular acts or proceedings.

See Nuisance, § 84.
Enforcement of taxes, see Taxation, § 608
Infringement of patent, see Patents, § 301.
Maintenance of dam, see Waters and Water Courses, § 177.
Receiving or using quotations of board of trade, see Exchanges, § 14.
Trespasses on Indian Lands, see Indians, § 16.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

§ 26. The holder of the legal title to land *held* not entitled to maintain an action of trespass to try title against the holder of the equitable title who with his grantors had claimed ownership, and exercised control over the land for more than 50 years.—Seefeld v. Duffer (C. C. A.) 214.

(E) Public Officers and Boards and Municipalities.

Jurisdiction of federal court to restrain enforcement of ordinance impairing obligation of contract, see Courts, § 282.

§ 85. A bill to restrain the enforcement of a criminal or penal statute lies only when the statute is invalid and an attempt to enforce it will invade property rights or create a multiplicity of suits.—Shawnee Milling Co. v. Temple (C. C.) 517.

§ 85. Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), prohibits the filing of a bill in equity to enjoin the enforcement of a valid statute by civil proceedings.—Shawnee Milling Co. v. Temple (C. C.) 517.

(G) Personal Rights and Duties.

Liability of owner of patent for giving notice to infringers and threatening suit, see Libel and Slander, § 132.

III. ACTIONS FOR INJUNCTIONS.

Sufficiency of evidence in suit to restrain receiving or using quotations of board of trade, see Exchanges, § 14.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

In suit for infringement of patent, see Patents, § 301.

(A) Grounds and Proceedings to Procure.

§ 144. Upon a motion for preliminary injunction, allegations of the bill are to be taken as true.—Postal Telegraph-Cable Co. v. City of Mobile (C. C.) 955.

§ 152. Upon a motion for preliminary injunction, burden *held* to be on complainant to show that there is probability of ultimate success on question of jurisdiction and merits of controversy.—Postal Telegraph-Cable Co. v. City of Mobile (C. C.) 955.

VII. VIOLATION AND PUNISHMENT.

Injunction against infringement of patent, see Patents, § 326.
Liability of corporation for infringement of patent in violation of injunction against corporate officers, see Patents, § 326.

INJURIES.

In general, see Damages; Negligence.

INNOCENT PURCHASERS.

Of bills or notes, see Bills and Notes, § 330

INNUENDO.

Averment in complaint for libel and slander, see Libel and Slander, § 86.

INSANE PERSONS.

VIII. CRIMES.

Cross-examination of accused as to feigned insanity on former trial, see Witnesses, § 346.

INSOLVENCY.

See Bankruptcy.
Of street railroad company, see Street Railroads, § 58.

INSPECTION.

Of tools, machinery, appliances, and places for work for protection of servant, see Master and Servant, § 124.

INSTRUCTIONS.

By court to jury, see Criminal Law, § 824; Trial, §§ 259, 268.

INSTRUMENTS.

Requisites and sufficiency of writing to satisfy statute of frauds, see Frauds, Statute of, § 110.

Particular classes of written instruments.

See Bills and Notes; Bonds; Indictment and Information; Insurance; Wills.

Charter parties, see Shipping, §§ 49–58.

Contracts in general, construction and operation, see Contracts, § 171.

Patents for public lands, see Public Lands, § 114.

Receivers' certificates, see Receivers, § 129.

INSURABLE INTEREST.

See Insurance, § 115.

INSURANCE.

Construction of shipping contract as to insurance, see Shipping, § 108.

Covenants in lease to insure, see Landlord and Tenant, § 156.

Security to creditors of bankrupt, see Bankruptcy, § 323.

II. INSURANCE COMPANIES.

(B) Mutual Companies.

Fraud of officers as against corporation or shareholders, see Corporations, § 317.

IV. INSURABLE INTEREST.

§ 115. The chartered owner of a steamship, which subchartered it for a voyage for a lump sum, one half to be paid in advance and the other half by the bill of lading freight, has an insurable interest in such freight.—Tweedie Trading Co. v. Western Assur. Co. of Toronto (C. C. A.) 103.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 138. Certificates insuring freight, issued under running policies, are not invalid because the policies are upon cargo; but the policies, for the purpose of such certificates, must be read with the substitution of freight for goods and merchandise.—Tweedie Trading Co. v. Western Assur. Co. of Toronto (C. C. A.) 103.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 222. Where a bank took an assignment of certain insurance policies, to secure a loan to the insured, the bank was entitled to convert the policies into money at its election and credit the value thereof on the debt.—In re Davison (D. C.) 750.

XII. RISKS AND CAUSES OF LOSS.

(A) Marine Insurance.

§ 415. Under a charter of a vessel to carry a cargo of live stock, the fodder to be provided by the charterer, the fodder was an appurtenance of the cargo, and not of the vessel, and the fact that it was not of proper kind, by reason of which there was an excessive mortality among the animals on the voyage, did not render the ship unseaworthy for the voyage, nor affect the right of the owner to recover on policies insuring the freight, including the risk of mortality.—Tweedie Trading Co. v. Western Assur. Co. of Toronto (C. C. A.) 103.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(A) Marine Insurance.

§ 479. A contract by a shipowner in a bill of lading for insurance of the property covered thereby while on board construed as to contribution.—Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co. (D. C.) 133.

§ 489. Under the sue and labor clause of marine policies insuring freight on a cargo of live stock, where, because of the refusal of the cattlemen shipped to work, the ship was compelled to deviate from her voyage to procure others, the insurers are liable in the first instance for the expenses incurred in such deviation, being subrogated to the right of the insured to recover contribution in general average.—Tweedie Trading Co. v. Western Assur. Co. of Toronto (C. C. A.) 103.

XX. MUTUAL BENEFIT INSURANCE.

(F) Actions for Benefits.

§ 817. An accident policy construed, and the burden *held* to rest on the beneficiary, suing to recover for the death of insured following his fall on a sidewalk by which he was injured, to establish not only that the injury was accidental and was the proximate cause of death, but that it was the sole cause independently of any pre-existing disease or bodily infirmity as a contributory cause.—Illinois Commercial Men's Ass'n v. Parks (C. C. A.) 794.

§ 825. In an action on an accident policy to recover for the death of the insured, the questions whether an injury to insured was accidental or resulted from a diseased condition and whether, if accidental, it was the cause of death "independently of all other causes," *held*, under the evidence, questions for the jury.—Illinois Commercial Men's Ass'n v. Parks (C. C. A.) 794.

INTENT.

Construction of statutes, see Statutes, § 185.

INTEREST.

Element of damages in general, see Damages, § 68.

JOINT PATENTEES.

See Patents, § 92.

JOINT-STOCK COMPANIES.

Vacation of judgment against association, see Judgment, § 379.

§ 15. Where a private association of persons having negotiable shares which were transferred from time to time purchased property as a partnership, on a cancellation of the deed to such property for fraud and the direction of an accounting to the grantor for the proceeds of portions of the property sold, all members of the association at the times of such sales are liable as partners.—Snow v. Hazlewood (C. C. A.) 182.

§ 15. Members of a Pennsylvania partnership association are not individually liable for its debts.—Romona Oölitic Stone Co. v. Bolger (C. C.) 979.

JOINT TORT-FEASORS.

Liabilities for injuries to passengers, see Carriers, § 306.

JUDGES.

See Courts.

Judicial powers and functions in general, and delegation thereof, see Constitutional Law, § 70.

JUDGMENT.

Decisions of courts in general, see Courts, § 96.
Practice in equity, see Equity, § 422.
Release by discharge in bankruptcy, see Bankruptcy, § 423.

In particular civil actions or proceedings.

See Bankruptcy, § 100; Ejectment, § 116.
To enforce pledge, see Pledges, § 58.

In criminal prosecutions.

See Criminal Law, § 984.

Review.

See Appeal and Error; Certiorari; Criminal Law, §§ 1035–1186.
Decision in appellate court directing judgment in lower court, see Appeal and Error, § 1176.
Judgment on appeal or writ of error, see Appeal and Error, §§ 1176–1218; Criminal Law, § 1186.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 251. A judgment *held* erroneous as based on matters outside the issues made by the pleadings.—Kelley v. Benton (C. C. A.) 466.

IX. OPENING OR VACATING.

§ 379. A judgment against individuals, obtained on the theory that, on account of improper formation of a partnership association, they were liable as general partners, *held* properly set aside.—Romona Oölitic Stone Co. v. Bolger (C. C.) 979.

XI. COLLATERAL ATTACK.

On appointment of administrator or executor, see Executors and Administrators, § 29.

(A) Judgments Impeachable Collaterally.

§ 475. Where a probate court, having jurisdiction, has determined that administration upon the estate of a decedent was proper, and has issued letters of administration and administered upon the property, no other court not exercising appellate jurisdiction can correct its errors of judgment.—Seefeld v. Duffer (C. C. A.) 214.

(B) Grounds.

§ 497. Where the record of a court of general jurisdiction in probate matters shows that the necessary steps were taken to invoke such jurisdiction in a given case, or when the record is silent on the subject, the decrees of the court are conclusive when collaterally called in question.—Seefeld v. Duffer (C. C. A.) 214.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Appointment of executor or administrator, see Executors and Administrators, § 29.
Former decision in same case as law of the case, see Appeal and Error, § 1097.

(B) Persons Concluded.

§ 678. Estoppel by judgment obtains not only between parties, but also as to their privies.—W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C.) 544.

§ 690. Where a bequest was made by a testator in trust for the benefit of a son and "his family" which consisted of his children, a judgment against him in a proceeding brought by him against the trustee for an accounting *held* not conclusive against his children.—Moredock v. Moredock (C. C.) 163.

XV. LIEN.

Effect of bankruptcy, see Bankruptcy, § 196.

XVII. FOREIGN JUDGMENTS.

§ 822. Where the principal administrator of an estate was sued personally in another state, by an administrator there appointed for the same intestate, as a debtor of the estate, and appeared and defended, a judgment there rendered against him is conclusive as to all defenses he made or could have made therein, and such matters cannot be again litigated in an action against him on the judgment in the state of his residence.—Moore v. Kraft (C. C. A.) 685.

§ 828. Where one railroad operated trains belonging to another over its tracks at a specified rental, a judgment in favor of the former in an action for injuries to a passenger *held* res adjudicata against the passenger's right to sue the latter for damages arising out of the same

accident.—Jenkins v. Atlantic Coast Line R. Co. (C. C.) 535.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

Payment ground of estoppel to appeal, see Appeal and Error, § 162.

XXI. ACTIONS ON JUDGMENTS.

Right of action by foreign administrator, see Executors and Administrators, § 524.

(B) Foreign Judgments.

Surplusage in pleading, see Pleading, § 35.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

Plea in equity, see Equity, § 163.

JUDICIAL DISCRETION.

Grant of habeas corpus, see Habeas Corpus, § 6.
Review of discretion in civil actions, see Appeal and Error, § 983.
Withdrawal of plea in criminal prosecution, see Criminal Law, § 301.

JUDICIAL LEGISLATION.

Encroachment by courts on legislative functions, see Constitutional Law, § 70.

JUDICIAL NOTICE.

In civil actions, see Evidence, § 7.

JUDICIAL POWER.

See Constitutional Law, § 70.

JUDICIAL PROCESS.

In general, see Process.

JUDICIAL SALES.

Exemption of real property, see Homestead.
Of property of bankrupts, see Bankruptcy, § 258.
On execution, see Execution, § 324.

JURISDICTION.

Extraterritorial jurisdiction of bankruptcy courts, see Bankruptcy, § 14.
Of courts in general, see Courts.
Of federal courts of cases arising under laws relating to public lands, see Courts, § 285.
Removal of actions from state court to United States court, see Removal of Causes.
Want of, as ground for dismissal, see Dismissal and Nonsuit, § 55.
Want of jurisdiction ground for collateral attack on judgment, see Judgment, § 497.

Jurisdiction of particular actions or proceedings.

See Habeas Corpus, §§ 45–113.
Against administrator in federal court, see Courts, § 489.
Bankruptcy proceedings, see Bankruptcy, § 14.
By or against trustees in bankruptcy, see Bankruptcy, § 293.
Criminal prosecutions, see Criminal Law, § 97.

Jurisdiction of particular classes of persons.

Federal courts of administrators, see Courts, § 489.
Trustees in bankruptcy, see Bankruptcy, § 293.

Jurisdiction of particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 293.
Property in possession of receiver, see Courts, § 500.

Special jurisdictions and jurisdictions of particular classes of courts.

Admiralty jurisdiction, see Maritime Liens, § 65.
Appellate jurisdiction, see Courts, § 405.
Bankruptcy courts, see Bankruptcy, § 14.
Federal courts in general, see Courts, §§ 263–414.
Referees in bankruptcy, see Bankruptcy, § 224.
United States Circuit Courts of Appeals, see Courts, § 405.

JURY.

Custody, conduct, and deliberations, see Trial, § 317.
Instructions, see Criminal Law, § 824; Trial, §§ 259–268.
Questions for jury in civil actions, see Trial, § 177.
Taking case or question from jury at trial, see Trial, § 177.

II. RIGHT TO TRIAL BY JURY.

Waiver of jury in federal court, see Courts, § 352.

KNOWLEDGE.

Of defect or danger as affecting assumption of risk by servant, see Master and Servant, § 217.
Of defect or danger in machinery and appliances as affecting liability of master for injuries to servant, see Master and Servant, § 125.

LABELS.

On articles of food, see Food, § 15.

LABOR.

See Master and Servant; Seamen.

LACHES.

Affecting particular rights, remedies, or proceedings.

In equity, see Equity, §§ 67–86.
Injunction against maintenance of dams, see Waters and Water Courses, § 177.

Naturalization proceedings, see Aliens, § 68.
To recover taxes paid, see Municipal Corporations, § 977.

LADDERS.

Liability of master for injuries to servant through defect in ladders, see Master and Servant, § 125.

LADING.

Bill of, see Carriers, § 51.

LANDLORD AND TENANT.

Fraudulent transfer of lease by bankrupt, see Bankruptcy, §§ 175, 186.
Lease of Indian lands, see Indians, § 16.
Rights of trustee in bankruptcy to remove improvements made by lessee, see Bankruptcy, § 140.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

Approval of assignment of Indian leases, see Indians, § 16.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 130. The general rule in New York, established by decision, is that for breach of a covenant for quiet enjoyment in a lease the lessee can recover only nominal damages, with nothing for the value of his lease or for improvements; and the fact that the lessor made the lease with knowledge that he was without full authority to do so does not create an exception to the rule, unless the lessee was without such knowledge and was misled.—Thorley v. Pabst Brewing Co. (C. C. A.) 338.

(D) Repairs, Insurance, and Improvements.

§ 156. Provisions of a lease for 99 years with respect to rebuilding in case of fire and the use of the proceeds of insurance construed.—Pike v. Cincinnati Realty Co. (C. C. A.) 97.

§ 157. Termination of lease by forfeiture or expiration of the term *held* not necessarily to terminate the bankrupt's right to remove fixtures after payment of rent in arrears.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

(F) Eviction.

§ 180. A lessee's measure of damage for eviction stated.—American Ice Co. v. Pocono Spring Water Ice Co. (C. C.) 868.

§ 180. Items recoverable by a lessee wrongfully evicted stated.—American Ice Co. v. Pocono Spring Water Ice Co. (C. C.) 868.

VIII. RENT AND ADVANCES.

Claim against bankrupt, see Bankruptcy, § 318.
Right to proceeds of execution against tenant, see Execution, § 324.

(B) Actions.

Effect of bankruptcy of lessee, see Bankruptcy, § 191.

(C) Lien.

§ 248. An agreement that chattels on the premises shall be at the disposal of the landlord as security for rent is not valid as against creditors of the lessee before entering.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

(D) Distress.

§ 269. A landlord could not distrain against property of the bankrupt tenant levied on under a judgment in favor of the tenant's chattel mortgagee.—In re Potee Brick Co. of Baltimore City (D. C.) 525.

LANDS.

Indian lands, see Indians, §§ 12–16.
Public lands, see Public Lands.

LANGUAGE.

Of statute, see Statutes, § 188.

LARCENY.

II. PROSECUTION AND PUNISHMENT.

(D) Sentence and Punishment.

Sentence on conviction on different counts, see Criminal Law, § 984.

LAW.

Due process of law, see Constitutional Law, §§ 251–303.
Instructions as to matters of law, see Trial, § 238.
Maritime law, see Maritime Liens; Seamen; Shipping; Towage.
Statutory law, see Statutes.

LAW OF THE CASE.

Former decision on appeal, see Appeal and Error, § 1097

LAWYERS.

See Attorney and Client.

LAY DAYS.

See Shipping, § 181.

LEASE.

See Landlord and Tenant.
Fraudulent transfers by bankrupt, see Bankruptcy, §§ 175, 186.
Of Indian lands, see Indians, § 16.

LEGACIES.

See Wills.

LEGAL NOTICE.

See Process.

LEGISLATION.

In general, see Statutes.

LEGISLATIVE POWER.

Control of acts, rights, and liabilities of municipal corporations, see Municipal Corporations, § 78.

LETTERS PATENT.

For inventions, see Patents.
For public lands, see Public Lands, § 114.

LEX LOCI.

Contracts and conveyances.

See Sales, § 55.
Contract of pledge, see Pledges, § 2.
Contracts for transmission and delivery of telegrams, see Telegraphs and Telephones, § 27.

Liabilities for torts.

Liability for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 27.

Remedies, and jurisdiction and procedure.

Actions by or against foreign corporations after dissolution, see Corporations, § 691.
Conflicting jurisdiction of courts, see Courts, §§ 489–500.

LIBEL.

For condemnation of adulterated or misbranded articles of food, see Food, § 24.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 7. Words imputing a crime are not slanderous per se, unless they involve moral turpitude.—Sipp v. Coleman (C. C.) 997.

§ 7. Words charging that plaintiff was guilty of beating his mother *held* to charge an offense involving moral turpitude, slanderous per se.—Sipp v. Coleman (C. C.) 997.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 86. A declaration for slander, that defendant stated that plaintiff had been convicted of beating his mother, *held* to state an offense under P. L. N. J. 1898, p. 854, §§ 215, 218, so that an innuendo was surplusage.—Sipp v. Coleman (C. C.) 997.

V. SLANDER OF PROPERTY OR TITLE.

§ 132. The owner of a patent may lawfully notify infringers, or persons believed to be such, of his claims, and warn them that suit will be brought to protect his legal rights, where he acts in good faith.—Virtue v. Creamery Package Mfg. Co. (C. C. A.) 115.

LICENSES.

II. IN RESPECT OF REAL PROPERTY.

Grants by municipalities of rights to use street for purposes other than highway, see Municipal Corporations, §§ 680–682.
Transfer on sale of property of railroad, see Railroads, § 194.

LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 188–209.

Particular classes of liens.

See Maritime Liens; Pledges.
Maritime liens, see Shipping, § 87.
Of landlord for rent, see Landlord and Tenant, § 248.

LIFE INSURANCE.

See Insurance.

LIGHTS.

See Electricity.
On vessels, see Collision, § 75.
Power of city to grant perpetual lighting franchise, see Municipal Corporations, §§ 680, 681.

LIMITATION.

Of claims of patents, see Patents, §§ 168–178.

LIMITATION OF ACTIONS.

Laches, see Equity, §§ 67–86.
Of criminal prosecutions, see Criminal Law, § 150.
Time for presentation of claims against estate of decedent, see Executors and Administrators, § 225.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 60. Where an agent was permitted to retain and use for certain purposes property belonging to his principal, which authority had not been withdrawn at the time of his death, limitation did not begin to run until that time against an action to recover the property unexpended.—Order of St. Benedict of New Jersey v. Steinhauser (C. C.) 137.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 102. Claim of wife against the estate of her husband in bankruptcy for a sum of money held by him in trust *held* not barred by limitations.—In re Carpenter (D. C.) 743.

(H) Commencement of Action or Other Proceeding.

§ 130. Under Code Va. 1904, § 2934, a plaintiff who, through a misapprehension of the facts or otherwise, without fraud, brings his action against the wrong defendant, and judgment is rendered against him solely on that ground, may bring a new action within one year, although an action would otherwise be barred.—Norfolk & A. Terminal Co. v. Rotolo (C. C. A.) 639.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 182. The provision of Act Cong. Feb. 24, 1905, c. 788, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), prohibiting suit on a federal contractor's bond within six months after completion of the contract and settlement with the contractor, *held* a limitation which must be formally pleaded in order to be availed of.—United States v. Stitzer (C. C.) 567.

LIMITATION OF LIABILITY.

Of master for injuries to servant, see Master and Servant, § 100.
Of shipowner, see Shipping, § 209.

LIQUIDATION.

In general, see Bankruptcy.

LIQUOR SELLING.

See Intoxicating Liquors.

LOANS.

Insurance policies as securities, see Insurance, § 222.

LOCAL ACTIONS.

See Courts, § 269; Venue, § 5.

LOOKOUTS.

Necessity of keeping, see Collision, § 99.

LOSS.

Causes of loss within insurance policy, see Insurance, § 415.

MACHINERY.

Annexation to real property, see Fixtures.
Dangerous machinery, liability of master for injuries to servant, see Master and Servant, §§ 101–125, 233–238.
Patents for machines, infringement, see Patents, § 237.

MANDATE.

To lower court on decision on appeal or other proceeding for review, see Appeal and Error, § 1194.

MANUFACTURES.

Manufacturing companies as subject to bankruptcy law, see Bankruptcy, § 72.
Patents for, infringement, see Patents, § 237.

MARINE INSURANCE.

See Insurance, §§ 115, 138.
Construction of shipping contract, see Shipping, § 108.
Extent of loss and liability of insurer on policy, see Insurance, §§ 479–489.
Risks and causes of loss within policy, see Insurance, § 415.

MARITAL RIGHTS.

See Husband and Wife.

MARITIME CONTRACTS.

Charter parties, see Shipping, §§ 49–58.
For carriage of goods, see Shipping, § 108.

MARITIME LAW.

See Admiralty; Collision; Maritime Liens; Seamen; Shipping; Towage.

MARITIME LIENS.

Enforcement by suit in rem, see Shipping, § 87.

NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(B) Under Statutory Provisions.

§ 20. No maritime lien is presumed for supplies furnished in New York to a vessel whose home port is in the state, and unless an agreement therefor is shown a lien can only be secured by following the requirements of the state statute.—The Colfax (D. C.) 975.

§ 24. The presumption that attends the making of repairs or furnishing of supplies to a vessel in a foreign port will not arise to support a lien for repairs in her home port, given only by the local law; but proof of an understanding, express or implied, that they were furnished on the credit of the vessel, is essential.—The F. A. Kilburn (C. C. A.) 107.

§ 25. A claimant *held* entitled to a lien for services and supplies furnished to a dredge on orders of the master, under Consol. Laws N. Y. 1909, c. 33, § 80.—The Colfax (D. C.) 975.

II. CREATION, OPERATION, AND EFFECT.

§ 29. The engineer of a steamer *held* to have ostensible authority by reason of a previous course of dealing to represent the owner in

ordering repairs from a libelant, which entitled libelant to a lien therefor under a local statute.—The F. A. Kilburn (C. C. A.) 107.

III. ENFORCEMENT.

(A) In Admiralty.

§ 65. Evidence considered, and *held* insufficient to sustain the burden of proof resting on a libelant to show by a clear preponderance of the evidence that repairs made on claimant's barge, for which the suit was brought, were ordered by claimant's agent.—The Hugh Doherty (C. C. A.) 696.

MARITIME TORTS.

Delay in delivery of or loss of or injury to goods shipped, see Shipping, §§ 121–132.
Liabilities of vessels and owners in general, see Shipping, §§ 80–87.
Limitation of vessel owner's liability, see Shipping, § 209.
Loss of or injury to tow, see Towage, § 12.

MARK.

See Trade-Marks and Trade-Names.
Penalties for falsely marking articles as patented, see Patents, § 224.

MARRIAGE.

See Husband and Wife.
Fraudulent marriage to evade judgment of deportation, see Aliens, § 32.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Seamen.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

As preferred claim in bankruptcy, see Bankruptcy, § 348.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Federal employers' liability act as delegation of judicial power of United States to state courts, see Courts, § 42.
Interstate commerce regulations, see Commerce, § 58.
Partial invalidity of employers' liability act, see Statutes, § 64.
Statutory actions for death, see Death, § 85.

(A) Nature and Extent in General.

Partial invalidity of statute prohibiting limitation of liability, see Statutes, § 64.

§ 97. If a master provides structures which guard against all accidents which can reasonably be foreseen, he has done his duty in that respect to his employés.—New York, N. H. & H. R. Co. v. Dailey (C. C. A.) 289.

§ 100. A railroad relief department contract merely providing for an election by the employé between benefits and a suit for damages *held* not in violation of Const. Va. § 162 (Code 1904, p. cclix).—Day v. Atlantic Coast Line R. Co. (C. C. A.) 26.

§ 100. A railroad relief department contract *held* not invalid as contrary to public policy.—Day v. Atlantic Coast Line R. Co. (C. C. A.) 26.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102. The master's duty to the servant requires the exercise of reasonable care and skill in furnishing safe machinery and appliances.—Northern Pac. Ry. Co. v. Altimus (C. C. A.) 275.

§ 113. A railroad company *held* not liable for an injury to an engine hostler at a roundhouse, who attempted to get off an engine when it was being kicked into the roundhouse and struck against the post between the stalls.—New York, N. H. & H. R. Co. v. Dailey (C. C. A.) 289.

§ 113. The maintaining by a railroad company of an overhead bridge so low that it will strike a brakeman when standing or walking on the top of passing freight cars in the course of his duty, unless reasonably unavoidable, is negligence per se.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

§ 116. A staging built by a shipbuilding company around a vessel under construction necessary for the carpenters and caulkers to work upon is "ways, works or machinery," within the meaning of the Massachusetts employer's liability act (Rev. Laws, c. 106, § 71), for the defective construction of which causing an injury to an employé the company may be *held* liable.—Richard T. Green Co. v. Young (C. C. A.) 493.

§ 124. The master's duty to the servant requires him to keep machinery and appliances in a safe condition, and includes the duty of making inspection and tests at proper intervals.—Northern Pac. Ry. Co. v. Altimus (C. C. A.) 275.

§ 124. The rule stated with respect to the master's duty to inspect machinery and appliances purchased for use where employés are required to work.—Petroleum Iron Works Co. v. Boyle (C. C. A.) 433.

§ 124. An "external examination," such as a purchaser of a machine or appliance which is to be used in the place where his employés are to work is required to make, is not necessarily limited to the outer surface as distinguished from the inner surface of a valve actually exposed or readily exposable to view in the process of installation.—Petroleum Iron Works Co. v. Boyle (C. C. A.) 433.

§ 125. In an action for injuries to a servant by the breaking of a ladder rung on the side of a car, actionable negligence *held* not shown.—Patton v. Illinois Cent. R. Co. (C. C.) 530.

(E) Fellow Servants.

§ 179. A state constitutional provision abolishing the fellow-servant rule as to railroad employés *held* not in conflict with the federal Constitution or its amendments.—Day v. Atlantic Coast Line R. Co. (C. C. A.) 26.

§ 180. St. Wis. 1898, § 1816, subd. 2, as amended by Laws 1903, c. 448, § 1, which abolishes the fellow servant doctrine in case of injury to railroad employés in the line of duty, is limited to railroads operating as common carriers, and has no application to the case of an injury to one of the crew of an engine employed solely in hauling slag cars from a blast furnace to the dumping ground, through the negligence of a fellow servant, although they were employed by a railroad company, which furnished them and the engine to the steel company.—Knitter v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 494.

§ 189. A railroad section foreman and the members of the crew working under him, are fellow servants, within the rule of the federal courts.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 198. A railroad company *held* not liable for an injury to an engine hostler; the only negligence shown being that of a fellow servant.—New York, N. H. & H. R. Co. v. Dailey (C. C. A.) 289.

(F) Risks Assumed by Servant.

§ 205. The servant has the right to assume that the master has exercised due care and diligence to provide suitable appliances, and does not assume the risk from the master's negligence in performing such duty.—Northern Pac Ry. Co. v. Altimus (C. C. A.) 275.

§ 217. An engineer operating a derrick injured by the breaking of a part through its alleged defective construction and the improper manner of its support *held* to have assumed the risk, and not entitled to recover from his employer.—Stewart v. Brune (C. C. A.) 350.

§ 217. To charge a railroad brakeman with assumption of the risk of injury from a low overhead bridge by which he was struck and killed, it must be shown that he had either actual or constructive notice not only of the existence of the bridge, but of the fact that it was so low as to be dangerous, and also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

(G) Contributory Negligence of Servant.

§ 233. An employer *held* not liable for injury to a machinist, caused by running an overhead crane over his hand.—Gallagher v. Worth Bros. Co. (C. C.) 1016.

§ 238. An engineer operating a derrick injured by the breaking of a part through its alleged defective construction and the improper manner of its support *held* to have been responsible for the accident.—Stewart v. Brune (C. C. A.) 350.

(H) Actions.

Application of the doctrine res ipsa loquitur in federal courts, see Courts, § 372.

Removal of causes under federal employer's liability act, see Removal of Causes, §§ 19, 49.

§ 256. The declaration in an action by a railroad employé against the company for a personal injury *held* not to state a case under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]).—Walton v. Southern Ry. Co. (C. C.) 175.

§ 265. The doctrine res ipsa loquitur *held* not applicable to an action for injuries to a brakeman by the breaking of a ladder rung on the side of a freight car.—Patton v. Illinois Cent. R. Co. (C. C.) 530.

§ 267. In an action by an employé to recover for an injury received while tending a machine in defendant's paper mill, the admission of evidence that defendant's superintendent refused to allow plaintiff to go into the mill after the injury to examine the machinery *held* not error, where it was offered to explain why plaintiff could not more specifically describe the circumstances and occurrence of the injury.—Howland Pulp & Paper Co. v. Alfreds (C. C. A.) 482.

§ 270. Evidence *held* admissible in an action by a servant for a personal injury to show negligence of the master in furnishing defective and dangerous appliances and in giving improper instructions to the servant as to their use.—Federal Lead Co. v. Lohr (C. C. A.) 692.

§ 286. The question of the negligence of a master in failing to inspect a valve when it was installed, and which by reason of a structural defect exploded, killing an employé, *held* properly submitted to the jury in an action for the death of the servant.—Petroleum Iron Works Co. v. Doyle (C. C. A.) 433.

§ 286. In an action against a railroad company to recover for the death of a brakeman killed by striking a bridge in the night while on top of a train, the question of the negligence of defendant in maintaining the bridge with less clearance than the standard and usual amount, *held* under the evidence, a question for the jury.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

§ 286. In an action to recover for the death of a brakeman killed by striking a low bridge the question whether there were "telltales" up at the time, *held*, under the evidence, a question for the jury.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

§ 288. The question of assumption of risk *held* properly submitted to the jury in an action by a servant to recover for a personal injury.—Northern Pac. Ry. Co. v. Altimus (C. C. A.) 275.

§ 288. Where a railroad company maintaining an overhead bridge so low that it will strike a brakeman when standing or walking on the top of passing freight cars in the course

of his duty, the company cannot charge its brakemen with assumption of the risk as matter of law by publishing rules giving them notice generally that bridges will not clear a man on top of high cars and to look out and guard themselves accordingly.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

§ 288. The posting of a notice on a bulletin board by a railroad company that the "telltales" were down at a certain overhead bridge cannot charge a brakeman with assumption of the risk therefrom as a matter of law in the absence of evidence that he had actual notice or knowledge.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

§ 289. The question of contributory negligence *held* properly submitted to the jury in an action by a servant to recover for a personal injury.—Northern Pac. Ry. Co. v. Altimus (C. C. A.) 275.

§ 289. The following by an inexperienced workman of the master's instructions, as to the manner of doing his work, by reason of which he was injured, *held* not so obviously dangerous as to charge him with contributory negligence as matter of law.—Federal Lead Co. v. Lohr (C. C. A.) 692.

§ 289. A brakeman on a freight train who was struck and killed by a low bridge at which there were no telltales while proceeding along the tops of the cars in the night during a storm *held* not chargeable with contributory negligence as matter of law.—West v. Chicago, B. & Q. Ry. Co. (C. C. A.) 801.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Liability of vessel for injuries to employés of stevedores caused by negligence of mate, see Shipping, § 84.

(A) Acts or Omissions of Servant.

§ 300. The ground upon which a master in any case is held liable for a negligent act of his servant is not because the servant in his negligent conduct represents the master, but upon the distinct ground that he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured.—Philadelphia & R. Coal & Iron Co. v. Barrie (C. C. A.) 50.

§ 301. A coal dealer, which hired a team and driver by the hour from another dealer to deliver coal from its yards, *held* the master of such driver while so working, and liable for an injury to a third person caused by his negligence.—Philadelphia & R. Coal & Iron Co. v. Barrie (C. C. A.) 50.

MASTERS IN CHANCERY.

Special master in proceedings for reclamation of property from trustee in bankruptcy, see Bankruptcy, § 224.

MEASURE OF DAMAGES.

See Damages, § 120.

For eviction of tenant, see Landlord and Tenant, § 180.

MECHANICS' LIENS.

Liens for construction and repair of vessels, see Maritime Liens.

MEETINGS.

Of creditors of bankrupt, see Bankruptcy, §§ 123–125.

MEMBERS.

Of corporations in general, see Corporations, §§ 211–259.
Of exchanges, see Exchanges.
Of firms, see Partnership.
Of joint-stock companies, see Joint-Stock Companies.
Of religious societies, see Religious Societies.
Of unlawful combinations, rights, and liabilities, see Monopolies, § 21.

MERCANTILE COMPANIES.

As subject to bankruptcy law, see Bankruptcy, § 72.

MESSAGES.

Transmission and delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27–56.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

§ 51. Where oil wells, drilled by defendants as trespassers on the land of complainant, pending a suit to recover possession, were operated by a receiver, who used defendant's tools and machinery, and the oil produced was awarded to complainants, but defendants were allowed to keep the proceeds of that produced by them, less the royalty, and to remove their tools and machinery, they were entitled to fair rental for their use by the receiver, and were not chargeable with any part of his compensation for operating the wells.—Midland Oil Co. v. Turner (C. C. A.) 74; Seep v. Spade (C. C. A.) 77.

(B) Conveyances in General.

§ 54. In an action for breach of a contract to form a corporation, one-half of whose stock was to be issued to plaintiffs, and which was to purchase the mineral rights in certain lands at a stated price, the value of the stock to be issued to plaintiffs cannot be considered as an element of damages, in the absence of any evidence as to the value of the mineral rights.—Eisleben v. Brooks (C. C. A.) 86.

§ 54. The measure of damages for breach of a contract to purchase mineral rights in lands considered.—Eisleben v. Brooks (C. C. A.) 86.

§ 55. A deed conveying all the coal under a tract of land, with the right to mine and remove the same, construed, and *held* not by implication to reserve the right to have sufficient coal left in place to support the surface in its original condition.—Kuhn v. Fairmont Coal Co. (C. C. A.) 191.

(C) Leases, Licenses, and Contracts.

Lease of Indian lands, see Indians, § 16.

MISBRANDING.

Articles of food, see Food, §§ 14, 15, 24.

MISCONDUCT.

See Contempt.

MISDELIVERY.

Of telegraph message, see Telegraphs and Telephones, §§ 27–56.

MISJOINDER.

Multifariousness in bill in equity, see Equity, § 150.

MISREPRESENTATION.

See Fraud.

MISTAKE.

Affecting right to specific performance, see Specific Performance, § 52.

MODIFICATION.

Of contract, see Contracts, § 240.

MONEY LENT.

Bill or note given for loan of money, see Bills and Notes.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 17. A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), as in restraint of interstate trade and commerce; its effect on such commerce, if any, being indirect and incidental.—Virtue v. Creamery Package Mfg. Co. (C. C. A.) 115.

§ 21. That the owner of a patent is a party to an illegal combination in restraint of trade does not deprive him of the right to sue for infringement of his patent.—Virtue v. Creamery Package Mfg. Co. (C. C. A.) 115.

§ 28. Evidence *held* insufficient to establish a combination or conspiracy in restraint of interstate trade or commerce between two defendants, each of whom brought a suit against plaintiff for infringement of a different patent, which would sustain an action by plaintiff for treble damages under Sherman Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202).—Virtue v. Creamery Package Mfg. Co. (C. C. A.) 115.

MORAL TURPITUDE.

Words imputing crime involving moral turpitude as slanderous per se, see Libel and Slander, § 7.

MORTGAGES.

By or to corporations, see Corporations, § 478.
Proof of claims by mortgage creditors of bankrupt, see Bankruptcy, § 310.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

Ejectment to recover possession by mortgagor, see Ejectment, § 17.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

Mortgage by corporation of after-acquired property, see Corporations, § 478.

IV. RIGHTS AND LIABILITIES OF PARTIES.

Ejectment by mortgagor, see Ejectment, § 17.

X. FORECLOSURE BY ACTION.

Of street railroad mortgage, see Street Railroads, §§ 54, 58.

(J) Sale.

Foreclosure of street railroad mortgage, see Street Railroads, §§ 54, 58.

MOTIONS.

For direction of verdict, see Trial, § 177.
For injunction, see Injunction, §§ 144–152.

MOTOR VEHICLES.

Care required of automobile driver at railroad crossing, see Railroads, § 328.
Care required of occupant of automobile at railroad crossing, see Railroads, § 327.

MULTIFARIOUSNESS.

In bill in equity, see Equity, § 150.

MUNICIPAL CORPORATIONS.

See District of Columbia.

Street railroads, see Street Railroads.
Water supply, see Waters and Water Courses, § 200.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 51. Where a municipal corporation has been organized, it does not become dissolved by a failure to elect officers, or by the neglect of the officers elected to perform their corporate functions.—United States Bank v. City of Kendall (C. C.) 914.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

Delegation to municipalities of power to control traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 78. Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power, except so far as expressly delegated or indispensably necessary to the exercise of some other power which has been expressly delegated. —Omaha Electric Light & Power Co. v. City of Omaha (C. C. A.) 455.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

Jurisdiction of federal court to restrain enforcement of ordinance impairing obligation of contract, see Courts, § 282.

VII. CONTRACTS IN GENERAL.

For supplying water to municipality, see Waters and Water Courses, § 200.
Specific performance of contract for water supplies, see Specific Performance, § 32.

IX. PUBLIC IMPROVEMENTS.

(D) Damages.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

X. POLICE POWER AND REGULATIONS.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§§ 680, 681. A legislative grant of power to a city generally to "provide for lighting the streets" and to "care for and control the streets" is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business; that being a servitude not embraced within the ordinary control over streets usually given to municipalities.—Omaha Electric Light & Power Co. v. City of Omaha (C. C. A.) 455.

§ 682. Murfreesboro City Charter (Laws Tenn. 1903, c. 120) § 8, and section 12 as amended by Laws 1905, c. 41, § 1, *held* not to give the city council power to grant an exclusive franchise for furnishing electricity for inhabitants for light, heat, and power.—Nelson v. City of Murfreesboro (C. C.) 905.

§ 682. Power of a municipal corporation to grant exclusive privileges in streets, stated.—Nelson v. City of Murfreesboro (C. C.) 905.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 821. A plaintiff, who was injured by stepping into an open coal hole in a sidewalk on a public street at a time when it was quite dark, cannot be held chargeable with contributory negligence as matter of law.—Philadelphia & R. Coal & Iron Co. v. Barrie (C. C. A.) 50.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(D) Taxes and Other Revenue, and Application Thereof.

Joinder of claims for purpose of jurisdiction of federal court to recover taxes paid, see Courts, § 328.
Jurisdiction of federal court to restrain tax on interstate commerce, see Courts, § 289.

§ 956. The power to tax is inherent in a municipal corporation duly created, whether expressly granted or not.—Risley v. City of Utica (C. C.) 875.

§ 961. Laws N. Y. 1867, c. 393, *held* a valid exercise of the Legislature's power to confer authority upon a municipal corporation.—Risley v. City of Utica (C. C.) 875.

§ 977. Laches in seeking and enforcing a remedy would bar recovery of taxes paid for compensation under a contract between a city and water company, from about 1900, where suit was not brought for nearly 10 years.—Risley v. City of Utica (C. C.) 875.

MUSEUMS.

Power of art museum to acquire property by devise, see Corporations, § 436.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 817–825.

MUTUALITY.

Of obligation of contract sought to be specifically enforced, see Specific Performance, § 32.

NAMES.

See Trade-Marks and Trade-Names.
Of devisees and legatees in will, see Wills, § 501.

NATIONAL BANKS.

See Banks and Banking, §§ 260–287.

NATURALIZATION.

See Aliens, §§ 61–68.

NAVIGABLE WATERS.

See Shipping.
Collision between vessels, see Collision.
Jurisdiction of offenses committed in haven, see Criminal Law, § 97.
Nonnavigable waters, see Waters and Water Courses.

NAVIGATION.

See Collision; Maritime Liens; Shipping; Towage.
Administration of maritime law, see Admiralty.
Marine insurance, see Insurance, §§ 415–489.

NEGLIGENCE.

Causing death, see Death, § 85.

By particular classes of persons.

See Carriers, §§ 306–315; Municipal Corporations, § 821; Railroads, §§ 327–350, 401.
Electric light or power companies, see Electricity, § 16.
Employers, see Master and Servant, §§ 97–289.
Employés, liability for injuries to third persons, see Master and Servant, §§ 300–301.
Fellow servants, see Master and Servant, §§ 179–198.
Shipowners, see Shipping, §§ 80–87, 121–132.
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 27–56.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 327–350, 401; Telegraphs and Telephones, §§ 27–56.
Streets and highways, see Municipal Corporations, § 821.
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101–125.
Vessels, see Collision; Shipping, §§ 80–87, 121–132; Towage, § 12.

Injuries to particular species of property.

Goods shipped, see Shipping, §§ 121–132.
Vessels, see Collision; Towage, § 12.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 1. Degree of actionable negligence stated. —The General De Sonis (D. C.) 123.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

Electricity, see Electricity, § 16.

(C) Condition and Use of Land, Buildings, and Other Structures.

Streets and highways, see Municipal Corporations, § 821.
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101–125.
Vessels, see Collision.

III. CONTRIBUTORY NEGLIGENCE.

Contributory negligence of servant injured, see Master and Servant, § 289.
Of person injured by operation of railroad, see Railroads, §§ 327–350.
Of servants, see Master and Servant, §§ 233–238.
Of tow, see Towage, § 12.

IV. ACTIONS.

Damages, inadequate and excessive, see Damages, § 132.

(B) Evidence.

Acts and statements accompanying or connected with transaction as constituting part of res gestæ, see Evidence, § 123.
Evidence of similar injuries in action for injuries to servant, see Master and Servant, § 270.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Bonds.

NEW PARTIES.

See Parties, §§ 40–51.

NEWSPAPERS.

Publication of libelous articles, see Libel and Slander.

NEW TRIAL.

Opening or vacating judgment, see Judgment, § 379.

II. GROUNDS.

(A) Errors and Irregularities in General.

§ 14. A passenger, in an action for injuries, having claimed damages by reason of a collision, *held* not entitled to a new trial to establish a cause of action on the theory that his injury was the result of fright.—Lube v. Philadelphia Rapid Transit Co. (C. C.) 867.

NONRESIDENCE.

Affecting right of removal, see Removal of Causes, § 12.
Examination of nonresident in support of objection to charge of bankrupt, see Bankruptcy, § 413.

NONSUIT.

Involuntary nonsuit before trial, see Dismissal and Nonsuit, § 55.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

See Process.
Judicial notice, see Evidence, § 7.
Of appeal or writ of error in Chinese deportation proceedings, see Aliens, § 32.
Of contempt proceedings against bankrupt, see Bankruptcy, § 229.

NOVATION.

Modification of contracts in general, see Contracts, § 240.

NOVELTY.

Patentable novelty, see Patents, §§ 40–45.

NUISANCE.

II. PUBLIC NUISANCES.

(C) Abatement and Injunction.

§ 84. In a suit to abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations, whose effect mingles and combines in contributing to the injury to the plaintiff's property, may properly be joined as defendants although each transacts his own business separately and independently from the others.—Ladew v. Tennessee Copper Co. (C. C.) 245.

OATH.

False swearing, see Perjury.

OBJECTIONS.

In judicial proceedings.

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 192–209.
Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, §§ 1035, 1036.
To claims against bankrupt's estate, see Bankruptcy, § 340.
To discharge of bankrupt, see Bankruptcy, § 413.

OBLIGATION OF CONTRACTS.

Laws impairing, jurisdiction of federal court to restrain enforcement, see Courts, § 282.

OBSTRUCTIONS.

Of streets, see Municipal Corporations, § 821.

OCCUPATION.

Of homestead, see Homestead, § 32.

OFFENSES.

See Criminal Law.

OFFICERS.

Particular classes of officers.

See Receivers.
Attorneys, see Attorney and Client.
Corporate officers in general, see Corporations, § 317.
Referees, see Reference, § 76.
Referees in bankruptcy, see Bankruptcy, §§ 224–229.
Trustees, see Trusts.
Trustees in bankruptcy, see Bankruptcy, §§ 123–348.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of trustees in bankruptcy, see Bankruptcy, §§ 123–127.

OIL.

Leases of Indian lands, see Indians, § 16.
Misbranding, see Food, § 14.
Oil lands, recovery from trespasser, see Mines and Minerals, § 51.

OPENING.

Judgment, see Judgment, § 379.

OPINIONS.

Duty to give instructions copied from judicial opinion, see Trial, § 238.

ORAL AGREEMENTS.

See Frauds, Statute of.

ORDERS.

For payment of money, see Bills and Notes.
For protection of bankrupt from arrest, see Bankruptcy, § 392.
Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1035–1186.

ORES.

See Mines and Minerals.

ORGANIC LAW.

See Constitutional Law.

ORIGINAL BILL.

See Equity, § 150.

OUSTER.

Of tenant, see Landlord and Tenant, § 180.

OWNERSHIP.

Of patents, see Patents, § 213.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.

PARENT AND CHILD.

Words charging conviction of beating one's mother as slanderous per se, see Libel and Slander, § 7.

PAROL AGREEMENTS.

See Frauds, Statute of.

PARTIAL INVALIDITY.

Of statute, effect, see Statutes, § 64.

PARTIES.

Change in parties to obligation secured, see Principal and Surety, § 102.
Character, ground of jurisdiction, see Courts, §§ 307–318.
New action after limitations on dismissal of former action against wrong party, see Limitation of Actions, § 130.
Rights and liabilities as to costs, see Costs.

In particular actions or proceedings.

For infringement of trade-mark, see Trade-Marks and Trade-Names, § 91.
For negligent delay in transmission of telegram, see Telegraphs and Telephones, § 56.
To restrain nuisance, see Nuisance, § 84.
To set aside conveyance of Indian lands, see Indians, § 15.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Persons concluded by judgment in general, see Judgment, §§ 678–690.

II. DEFENDANTS.

(B) Joinder.

In suit to restrain nuisance, see Nuisance, § 84.
Separable controversies against joint defendants permitting removal to federal court by part of defendants, see Removal of Causes, § 49.

III. NEW PARTIES AND CHANGE OF PARTIES.

Intervention in suit for infringement of trade-mark, see Trade-Marks and Trade-Names, § 91.

§ 40. In a suit for unfair competition in trade, consisting in part of the use by defendant of bottles for its produce alleged to be similar in design to complainant's and calculated to deceive purchasers, the fact that the bottles used by defendant are of a patented design does not give the manufacturer and patentee any legal or equitable interest in the suit which entitles him to intervene.—Moxie Nerve Food Co. of New England v. Modox Co. (C. C.) 415.

§ 51. It is not the mere convenience of the parties before the court that renders absent parties indispensable, but the protection of the rights of those absent parties.—United States v. Allen (C. C. A.) 13.

PARTNERSHIP.

See Joint-Stock Companies.
Discharge of partner in bankruptcy, as affecting liability for fraud of co-partner, see Bankruptcy, § 423.
Grounds for refusal of discharge of partner in bankruptcy, see Bankruptcy, § 407.
Power of corporation to form partnership, see Corporations, § 379.
Preferences of partnership creditors by bankrupt, see Bankruptcy, § 167.

I. THE RELATION.

(C) Evidence.

Admissions in pleading, see Pleading, § 127.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

Admissions in pleadings, see Pleading, § 127.
Election between defenses, see Pleading, § 369.

§ 204. Rule as to necessity of serving all members of a partnership in a suit against it stated.—Romona Oölitic Stone Co. v. Bolger (C. C.) 979.

PASSENGERS.

See Carriers, §§ 306–315.

PASSPORTS.

As evidence of citizenship, see Citizens, § 10.

PATENTS.

For public lands, see Public Lands, § 114.
Right of owner to warn infringers and threaten suit, see Libel and Slander, § 132.
Validity of notes for patent rights, see Bills and Notes, § 107.

II. PATENTABILITY.

(A) Invention.

§ 16. The mere carrying forward of an original conception, patented, involving only change of form, proportion, or degree or the substitution of equivalents doing the same thing as did the original invention by substantially the same means with better effects, is not such invention as will sustain a patent.—Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co. (C. C. A.) 511.

§ 16. A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better

results, is not such invention as will sustain a patent.—Neureuther v. Mineral Point Zinc Co. (C. C. A.) 850.

§ 26. There is no invention in bringing old elements into new combinations where each performs the same service as it did in the earlier art.—Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co. (C. C. A.) 511.

§ 27. The Bossert patent, No. 571,297, for an electric wall box, *held* to involve invention and to be valid.—Bossert Electric Const. Co. v. Pratt Chuck Co. (C. C. A.) 385.

(B) Novelty.

§ 40. Claims of a patent for means for, or mechanism adapted to, a certain result, and like functional claims, are not objectionable if limited to the invention shown by the specification and drawings.—Weed Chain Tire Grip Co. v. Excelsior Supply Co. (C. C.) 232.

§ 45. That a chemical compound is not a new article of manufacture in a patentable sense is not conclusively shown by the fact of a prior known compound having the same formula.—Kuehmsted v. Farbenfabriken of Elberfeld Co. (C. C. A.) 701.

(E) Prior Public Use or Sale.

§ 75. The commercial use of a combination for four years, after which a new element was added and a patent applied for, was an abandonment of the invention as embodied in the original combination.—Star Mfg. Co. v. Crescent Forge & Shovel Co. (C. C. A.) 856.

III. PERSONS ENTITLED TO PATENTS.

§ 92. The fact that one of two joint patentees of a combination was the first to perceive the crude form of the elements and the possibility of their adaptation and composition to accomplish a useful result is not sufficient to overcome the presumption of joint invention arising from the granting of the patent.—Vrooman v. Penhollow (C. C. A.) 296.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

§ 157. Patents granted under the laws of the United States pursuant to Const. art. 1, § 8, are grants made in consideration of discoveries which "promote the progress of science and useful arts," and are to be construed liberally so as to effect their real intent.—Bossert Electric Const. Co. v. Pratt Chuck Co. (C. C. A.) 385.

(B) Limitation of Claims.

§ 168. It is of the essence of the rule whereby an inventor is estopped from claiming to the full of his invention as disclosed by his specification and claims in consequence of his concessions to meet the requirements of the Patent Office, and so obtain his patent, that the requirements which were conceded by him should concern the matter upon which the estoppel is raised.—Vrooman v. Penhollow (C. C. A.) 296.

§ 168. Where an applicant for a patent acquiesces in the rejection of claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have surrendered and disclaimed what he thus conceded, and is bound by the limitations so imposed, and it is immaterial whether the office was right or wrong in rejecting the original claims.—Campbell v. American Shipbuilding Co. (C. C. A.) 498.

§ 172. Whether an invention be a pioneer, or being of small importance, is ranked at the foot of the line, the rule is that it shall be judged on its own merits; that is to say, according to the advance it has made in novelty and utility beyond the former act.—Vrooman v. Penhollow (C. C. A.) 296.

§ 178. Where a claim of a patent contains a description of only one form of a thing which would perform the same office in other forms, the court will apply the general rule that the description covers all equivalent forms, and the form described will be treated only as the one preferred.—Vrooman v. Penhollow (C. C. A.) 296.

§ 178. The statutory requirement that an applicant for a patent shall explain the best mode in which he has contemplated applying the principle of his invention (Rev. St. § 4888 [U. S. Comp. St. 1901, p. 3383]), does not preclude him from claiming any other mode which embodies his principle.—Vrooman v. Penhollow (C. C. A.) 296.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights of Patentees in General.

Liability of owner for giving notice to infringers and threatening suit, see Libel and Slander, § 132.

(C) Licenses and Contracts.

§ 213. A corporation which took from another corporation, afterward dissolved, all of its property, contracts, and good will, by a bill of sale which warranted title, and without assuming any of the liabilities of the grantor, was not the legal successor of such grantor and did not succeed to its rights under a contract granting it a license under a patent which by its terms was not assignable without the consent of the patentee.—Niagara Fire Extinguisher Co. v. Hibbard (C. C. A.) 844.

§ 213. A finding that a patentee had not given his consent to the transfer of a license from the licensee to another corporation and was not estopped to deny the validity of such transfer *held* sustained by the evidence.—Niagara Fire Extinguisher Co. v. Hibbard (C. C. A.) 844.

XI. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

§ 224. To authorize the recovery of the penalty imposed by Rev. St. § 4901 (U. S. Comp. St. 1901, p. 3388), for falsely marking articles as patented for the purpose of deceiving the

public, such purpose must be proved, and where the article is sufficiently like that described in a patent to permit of an honest belief that it is within the patent, although it is not, the question of the intent of defendant in marking it as covered by the patent is one for the jury.—London v. Everett H. Dunbar Corporation (C. C. A.) 506.

§ 224 A corporation is a "person," within the meaning of Rev St. § 4901 (U. S. Comp. St. 1901, p. 3388), which imposes a penalty on "every person" who marks an unpatented article with any word importing that the same is patented for the purpose of deceiving the public, and may be convicted of such offense.—London v. Everett H. Dunbar Corporation (C. C. A.) 506.

§ 224. In an action under Rev. St. § 4901 (U. S. Comp. St. 1901, p. 3388), for falsely marking articles as patented, in order to recover more than a single penalty, the proof must go further than to show the marking of a number of articles, and must be sufficiently specific as to time and place and circumstances to show a number of distinct offenses, although it need not show the specific date of each.—London v. Everett H. Dunbar Corporation (C. C. A.) 506.

XII. INFRINGEMENT.

Combination in restraint of trade as defense to suit for infringement, see Monopolies, § 21.
Liability of owner for giving notice to infringers and threatening suit, see Libel and Slander, § 132.

(A) What Constitutes Infringement.

§ 237. The Vrooman patent, No. 676,549, for a vegetable topping machine, construed, and *held* infringed by a machine in which the cutting bar is of equal diameter to the cylinder or exceeds it.—Vrooman v. Penhollow (C. C. A.) 296.

§ 237. The Vrooman & Vrooman patent, No. 580,742, for an onion topping machine, construed, and *held* infringed by a construction in which the onions come in contact with one of the rollers.—Vrooman v. Penhollow (C. C. A.) 296.

(C) Suits in Equity.

§ 301. A preliminary injunction will not be granted to restrain alleged infringement of an unadjudicated patent of recent date, where the defenses involve issues of fact, and where complainant cannot in any event be subjected to more than a small amount of damages before the case can be heard on the merits.—Meyers v. Skinner (C. C.) 860.

§ 310. A bill for the infringement of two patents is not multifarious, where one patent is merely for an improvement in one element of the combination of the other and both are infringed by the same machine.—Vrooman v. Penhollow (C. C. A.) 296.

§ 311. A defense of noninfringement pleaded in the answer in an infringement suit is not waived by a further defense of license, but raises an issue of fact under which complainant has the burden of proof, and defendant is not estopped by pleading the license from contesting such issue.—Niagara Fire Extinguisher Co. v. Hibbard (C. C. A.) 844.

§ 318. Where infringement is only as to an improved feature of a machine, profits can be recovered only which arose from the patented feature.—Brown v. Lanyon Zinc Co. (C. C. A.) 309.

§ 318. In ascertaining the profits on accounting for an infringement, the true standard of comparison is that appliance which was open to the defendant, and, next to the plaintiff's invention, could have been most advantageously used.—Brown v. Lanyon Zinc Co. (C. C. A.) 309.

§ 326. A corporation organized by a defendant, who has been enjoined from infringement of a patent, for the sole purpose of escaping the consequences of the injunction, and of which such defendant is an officer, is bound by the injunction, and may be punished for contempt for its violation, although not formally made a party to the suit.—Bernard v. Frank (C. C. A.) 516.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

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1,575. Improvements in calcining and smelting ores, cited..... 850

1886.

13,850. Signature-gathering machine, cited 374

UNITED STATES.

ORIGINAL.

100,234. Lid of a powder box, cited..... 385
135,598. Paper-feeding machine, cited..... 374
160,834. Oyster can, cited..... 385
221,412. Construction of barges, boats, etc., cited 498
340,204. Mold for casting teeth for diamond saws, cited..... 860
382,088. Mold for casting saw teeth, cited.. 860
387,986. Mold for casting teeth for diamond saws, cited..... 860
412,618. Punching wads, cited..... 385
424,508. Double-hulled vessel, cited..... 498
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476,028. Safety attachment for railway trolleys, cited..... 708
490,105. Combined churn and butter-worker, cited..... 115
532,013. Ore roasting furnace, cited..... 309
539,571. Combined churn and butter-worker, cited..... 115
548,074. Trolley controller, claim 4 held void 708
560,667. Incandescent lamp socket, cited.. 511
564,443. Outlet box, cited..... 385

564,527. Conduit outlet box for electric wires, cited 385
565,541. Socket for incandescent lamps, cited 511
565,720. Combined churn and butter-worker, cited 115
567,303. Stop mechanism for printing presses, cited 374
568,919. Socket for incandescent electric lamps, cited 511
571,297. Electric wall boxes, held valid, and claim 5 held infringed 385
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585,100. Combined churn and butter-worker, cited 115
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588,635. Signature-gathering machine, cited 374
590,984. Stop motion mechanism, cited 374
600,168. Combined churn and butter-worker, cited 115
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761,496. Signature-gathering machine, claim 1 held valid and infringed, claim 19 held invalid, other claims held not infringed 374
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PAUPERS.

Proceedings in forma pauperis on appeal or writ of error, see Courts, § 405.

PAYMENT.

Of price of goods sold conditionally, see Sales, § 469.
Part payment of claim against bankrupt, see Bankruptcy, § 325.

V. RECOVERY OF PAYMENTS.

Payment of receiver's certificates, see Receivers, § 129.

PENALTIES.

Construction and operation of penal statutes in general, see Statutes, § 241.
For falsely marking articles as patented, see Patents, § 224.

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See Trial, § 177.

PERFORMANCE.

Of contract in general, see Contracts, §§ 280–303.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

§ 26. It is sufficient that an indictment for perjury allege that defendant's testimony was false, and that he believed it to be false, without alleging the actual facts.—United States v. Freed (C. C.) 236.

PERPETUAL FRANCHISE.

Power of city to grant perpetual right to use of street, see Municipal Corporations, §§ 680, 681.

PERPETUITIES.

§ 8. A gift of money in trust, to be accumulated in a specified manner until the fund should equal the then debt of a state, and then be paid over to the state for the purpose of discharging such debt, *held* void, as in violation of the rule against remoteness.—Girard Trust Co. v. Russell (C. C. A.) 446.

§ 8. A liberal rule of construction is applied to trusts for public charitable purpose, and they will be sustained where private trusts would be held invalid as in violation of the rule against perpetuities.—Girard Trust Co. v. Russell (C. C. A.) 446.

§ 8. Where a gift to charity is absolute, and the gift and the constitution of the trust for charity are contemporaneous and immediate, the fund may then perhaps be accumulated, subject to reasonable control by a court of equity; but where the accumulation is a condition precedent to the vesting of the gift in charity, and the period of accumulation transgresses the rule against remoteness, the gift is void ab initio.—Girard Trust Co. v. Russell (C. C. A.) 446.

PERSONAL INJURIES.

Causing death, see Death, § 85.
Imposition of liability for, as denial of equal protection of laws, see Constitutional Law, § 245.

Particular causes or means of injury.

See Electricity, § 16.
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Acts or omissions of municipality in general, see Municipal Corporations, § 821.
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Defects or obstructions in streets, see Municipal Corporations, § 821.
Navigation of vessels, see Shipping, §§ 80–87.
Negligence in general, see Negligence.
Operation of railroads, see Railroads, §§ 327–350, 401.

Particular classes of persons injured.

See Seamen, § 29.
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Remedies.

See Damages.
Evidence admissible as part of res gestæ, see Evidence, § 123.
Separable controversies as ground for removal to federal court, see Removal of Causes, § 49.

PERSONAL PROPERTY.

Annexation to real property, see Fixtures.
Pledge, see Pledges.
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PERSONAL REPRESENTATIVES.

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For conveyance of water, see Waters and Water Courses, § 200.

PLACE.

Criminal jurisdiction as dependent on locality of offense, see Criminal Law, § 97.
For work, duties and liabilities of master as to servants, see Master and Servant, §§ 101–125.
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PLATFORMS.

Liability of master for injuries to servant from defects in platform, see Master and Servant, § 116.

PLEA.

In civil actions, see Pleading, §§ 92–127.
In criminal prosecutions, see Criminal Law, §§ 284–301.

PLEADING.

Conformity of judgment to pleadings, see Judgment, § 251.
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Practice in equity, see Equity, §§ 150–228.

Allegations as to particular facts, acts, or transactions.

Amount or value in controversy, see Courts, § 329.
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Jurisdictional facts, see Courts, § 329.
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In actions by or against particular classes of persons.

See Carriers, § 315; Master and Servant, §§ 256–289.
Stockholders suing or defending on behalf of corporation, see Corporations, § 211.

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See Ejectment, §§ 76–95.
For infringement of patent, see Patents, §§ 310, 311.
For injuries to passengers, see Carriers, § 315.
For injuries to servants, see Master and Servant, §§ 256–289.
For libel or slander, see Libel and Slander, § 86.
For price or value of goods sold, see Sales, § 355.
For unlawful competition in use of trade-name, see Trade-Marks and Trade-Names, § 92.
Pleas in criminal prosecutions, see Criminal Law, §§ 284–301.
Preliminary complaint in criminal prosecutions, see Criminal Law, § 211.
Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 192.
To enforce liens against property of bankrupt, see Bankruptcy, § 209.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 35. Where an administrator, suing as such in the state of his appointment, recovers judgment, and he sues in his own name thereon in another state, where the debtor is found, the addition of his title as administrator in the declaration *held* surplusage.—Moore v. Kraft (C. C. A.) 685.

§ 36. Where defendants, sued as partners, filed a special plea denying the partnership and also a plea of set-off consisting of an account stated to be due to defendants as partners, such statement is not conclusive and does not estop defendants from offering evidence in support of the special plea.—Heisen v. Churchill (C. C. A.) 828.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

In equity, see Equity, § 150.

In particular actions or proceedings.

For injuries to servants, see Master and Servant, §§ 256–289.
For libel or slander, see Libel and Slander, § 86.
For unlawful competition in use of trade-name, see Trade-Marks and Trade-Names, § 92.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In equity, see Equity, §§ 163–166.
Pleading statute of limitations as defense, see Limitation of Actions, § 182.

(A) Defenses in General.

Duplicity in pleading in equity, see Equity, § 166.

§ 92. In an action against partners, a plea denying the partnership and of set-off *held* not inconsistent.—Heisen v. Churchill (C. C. A.) 828.

(C) Traverses or Denials and Admissions.

§ 127. Where defendants, sued as partners, filed a special plea denying the partnership and also a plea of set-off consisting of an account stated to be due to defendants as partners, such statement may be used as an admission of the partnership.—Heisen v. Churchill (C. C. A.) 828.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

In equity, see Equity, § 213.

V. DEMURRER OR EXCEPTION.

For want of jurisdiction of federal court, see Courts, § 347.
In equity, see Equity, § 228.

§ 212. An answer filed to a complaint waives defendant's right to demur.—Charles E. Hires Co. v. Simpkins (C. C.) 1012.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Amendment of bankruptcy petition, see Bankruptcy, § 89.
In ejectment, see Ejectment, § 76.

§ 274. Supplemental complaint defined.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

§ 274. The rule of practice under statutes allowing the filing of supplemental complaints in actions at law is similar to that of the chancery courts in reference to supplemental bills, and the supplemental complaint differs from an amended complaint, in that it does not take the place of the original pleading, but stands with it, and adds to it some fact which has occurred since the beginning of the action, which fact must be set forth therein.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

XI. MOTIONS.

§ 369. Where pleas filed are inconsistent, the defendant and not the plaintiff has the right to elect which shall stand.—Heisen v. Churchill (C. C. A.) 828.

XII. ISSUES, PROOF, AND VARIANCE.

Conformity of judgment to issues raised by pleading, see Judgment, § 251.

In particular actions or proceedings.

See Ejectment, §§ 76–85.
For infringement of patent, see Patents, § 311.
For injuries to passengers, see Carriers, § 315.
For price or value of goods sold, see Sales, § 355.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 192.

§ 428. Failure to demur to an amended complaint in ejectment *held* not to waive right to object to introduction of evidence.—Bush v. Pioneer Mining Co. (C. C. A.) 78.

PLEDGES.

Effect of proceedings in bankruptcy, see Bankruptcy, § 188.
To creditors of bankrupt, see Bankruptcy, § 323.
Transfer of insurance as collateral security, see Insurance, § 222.

§ 2. A contract of pledge made in Pennsylvania must be construed according to the law of that state.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 58. Judgment *held* properly awarded against accommodation indorsers for the full amount of a note deposited with the holder as collateral security, though there have been payments on the original note.—Trust Co. of St. Louis County v. Markee (C. C.) 764.

POLICE POWER.

Of state, see Constitutional Law, § 81.
Particular subjects of regulation, see Intoxicating Liquors, § 10.

POLICY.

Of insurance, see Insurance.

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Combinations in violation of anti-trust acts, see Monopolies, §§ 17–21.

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Of demised premises, see Landlord and Tenant, § 130.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.
Of real property, remedies for recovery, see Ejectment.
Remedies for recovery of possession of property of bankrupt, see Bankruptcy, § 287.
Right of possession, element of right of action, see Ejectment, § 17.

POWERS.

Of attorney, see Principal and Agent.
Of attorney to represent creditors of bankrupt, see Bankruptcy, § 123.

PRACTICE.

In particular civil actions or proceedings.

See Bankruptcy; Certiorari, § 47; Ejectment, §§ 76–95, 116; Execution; Habeas Corpus, §§ 45–113; Injunction, §§ 144–152; Quieting Title, § 44.
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By or against firms or partners, see Partnership, § 204.
By or against foreign corporations, see Corporations, § 671.
By or against principals or agents, see Principal and Agent, § 190.
By or against trustees in bankruptcy, see Bankruptcy, §§ 287–304.
For breach of contract, see Contracts, § 352.
For breach of contract of sale, see Sales, § 384.
For causing death, see Death, § 85.
For damages by combinations or monopolies, see Monopolies, § 28.
For fraud, see Fraud, § 35.
For infringement of patent, see Patents, §§ 301–326.
For infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, §§ 91, 92.
For injuries at railroad crossings, see Railroads, § 350.
For injuries by or to artificial ponds, reservoirs, channels, and dams, see Waters and Water Courses, § 179.
For injuries from defects or obstructions in streets, see Municipal Corporations, § 821.
For injuries to passengers, see Carriers, § 315.
For injuries to persons on or near railroad tracks, see Railroads, § 401.
For injuries to servants, see Master and Servant, §§ 256–289.
For libel or slander, see Libel and Slander, § 86.
For purchase money on sale of goods, see Sales, § 355.
For unfair competition in trade, see Trade-Marks and Trade-Names, §§ 91, 92.
Suing or defending on behalf of corporation, see Corporations, § 211.
To abate or enjoin nuisance in general, see Nuisance, § 84.
To enforce dissolution of corporation, see Corporations, § 615.
To enforce liability of stockholders, see Corporations, § 259.
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To establish and enforce rights or liens against estate of bankrupt, see Bankruptcy, § 209.

Particular proceedings in actions.

See Appearance; Costs; Dismissal and Nonsuit; Evidence; Execution; Judgment; Limitation of Actions; New Trial; Parties; Pleading; Process; Reference; Removal of Causes; Trial; Venue.
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Ground for reversal in civil actions, see Appeal and Error, § 1031.
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PRELIMINARY INJUNCTION.

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PREROGATIVE WRITS.

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PRESENTATION.

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PREVENTIVE RELIEF.

See Injunction.

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Of goods sold, see Sales, § 355.

PRINCIPAL AND AGENT.

See Master and Servant.

Powers of attorney to represent creditors of bankrupt, see Bankruptcy, § 123.

Shareholder's agent of national bank, see Banks and Banking, § 287.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Brokers.

Corporate agents, see Corporations, §§ 317, 398–400.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Corporate officers and agents, see Corporations, § 317.

Limitation of actions to recover property from agent, see Limitation of Actions, § 60.

(A) Execution of Agency.

§ 69. Acts of an agent tending to violate his fiduciary duty are not only invalid as to the principal, but are against public policy.—Stephens v. Gall (D. C.) 938.

§ 69. An agent *held* not entitled to profits of a contract made for his principal.—Stephens v. Gall (D. C.) 938.

(B) Compensation and Lien of Agent.

Brokers, see Brokers, § 65.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Creation of lien on vessel, see Maritime Liens, § 29.

Liability of master for injuries to third persons by acts or omissions of servants or independent contractors, see Master and Servant, §§ 300–301.

(A) Powers of Agent.

Authority of agents of corporations in general, see Corporations, §§ 398–400.

(B) Undisclosed Agency.

§ 145. An assignment of a claim against an agent with express authority to sue any undisclosed principal does not amount to an election to look to either the principal or agent to the exclusion of the other.—Berry v. Chase (C. C. A.) 426.

§ 145. Where a plaintiff had the right of election between suing an agent and a principal, originally undisclosed, a delay of a few months after knowledge of the principal before bringing suit against him *held* not so unreasonable as to bar the right of election where it did not appear that defendant was prejudiced by such delay.—Berry v. Chase (C. C. A.) 426.

(F) Actions.

Assignment of right of action, see Assignments, § 80.

§ 190. A firm of brokers *held* justified in carrying out the orders of agents, of whom defendant was the undisclosed principal, by buying stock on the New York Stock Exchange to cover a short sale after defendant had failed to comply with a demand for more margins.—Berry v. Chase (C. C. A.) 426.

PRINCIPAL AND SURETY.

See Bonds.

Preference to sureties by bankrupt, see Bankruptcy, § 58.

III. DISCHARGE OF SURETY.

§ 102. Assignment of a secured claim against a corporation to a prospective purchaser of certain of its assets *held* not to discharge the sureties.—Denver Engineering Works Co. v. Elkins (C. C.) 922.

§ 129. Sureties for a corporation *held* to have been indemnified, and could not therefore claim that they were discharged from liability by plaintiff's assignment of the debt against the corporation and the latter's agreement to accept it in part payment of certain of its assets.—Denver Engineering Works Co. v. Elkins (C. C.) 922.

PRIOR ADJUDICATION.

Operation and effect in general, see Judgment, §§ 678–690.

PRIORITIES.

Of claims against bankrupt's estate, see Bankruptcy, §§ 346–348.
Of liens for rent, see Landlord and Tenant, § 248.

PRIVILEGE.

Grants of privileges by municipal corporations, right to use street for purpose other than highway, see Municipal Corporations, §§ 680–682.
Of witness as to testimony, see Witnesses, §§ 297–307.

PRIVITY.

Among carriers, see Carriers, § 306.
With party to action, conclusiveness of adjudication, see Judgment, §§ 678–690.

PROBATE COURTS.

Collateral attack on judgment, see Judgment, § 475.

PROCEDURE.

See cross-references under Practice.

PROCEEDS.

Of sale under execution, see Execution, § 324.

PROCESS.

In actions against firms or partners, see Partnership, § 204.
Adoption by federal court of practice of state courts, see Courts, § 344.

Particular forms of writs or other process.

See Certiorari; Execution; Habeas Corpus.

II. SERVICE.

(C) Publication or Other Notice.

Estoppel to question constitutionality of statute authorizing service by publication, see Constitutional Law, § 43.

(E) Return and Proof of Service.

§ 141. Where summons against a city was returned served on the person designated as the mayor, he had no capacity to attack the service on the ground that he was not mayor, and that the city had passed out of existence.—United States Bank v. City of Kendall (C. C.) 914.

PROFITS.

Accounting as to profits by infringer of patents, see Patents, § 318.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.
Prohibitory injunction, see Injunction.

PROMISE.

See Contracts.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Criminal Law, §§ 351–423; Evidence; Witnesses.
Of service of process, see Process, § 141.

PROPERTY.

Constitutional guaranty of right of property, see Constitutional Law, §§ 251–303.
In Indian country, authority of military department, see Indians, § 32.

Of particular classes of persons.

See Corporations, §§ 434–436; Indians, §§ 12–16; Religious Societies, § 18.
Bankrupt, see Bankruptcy, § 396.
Married woman's separate property, see Husband and Wife, § 113.
Married women, see Husband and Wife, § 113.
Trustee in bankruptcy, see Bankruptcy, § 140.

Particular species of property.

See Fixtures; Mines and Minerals; Patents, § 213; Waters and Water Courses.

Remedies involving or affecting property.

See Ejectment; Execution; Quieting Title; Specific Performance.
Bankruptcy proceedings, see Bankruptcy.
Conveyances, contracts, and other transactions between husband and wife, see Husband and Wife, §§ 43–49¾.
Distress for rent, see Landlord and Tenant, § 269.
Enforcement of liens against property of bankrupt, see Bankruptcy, § 209.
Enforcement of maritime liens, see Maritime Liens, § 65.

Transfers and other matters affecting title.

See Assignments; Pledges.
Conveyances of mines and mineral lands, see Mines and Minerals, §§ 54–55.
Sale, see Sales.
Taking for public use, see Eminent Domain.

Offenses against or involving property.

See Nuisance.
Slander of property, see Libel and Slander, § 132.

PROTECTION.

Equal protection of the laws, see Constitutional Law, §§ 211–245.

PROVINCE OF COURT AND JURY.

See Trial, § 177.

PROVISIONAL REMEDIES.

See Injunction; Receivers.
Review of decisions, see Appeal and Error, § 870.

PROVISIONS.

See Food.

PROVISOS.

In statutes, allegations in indictment or information, see Indictment and Information, § 111.

PUBLIC CORPORATIONS.

See Municipal Corporations.

PUBLIC DEBT.

See Municipal Corporations, §§ 956–977.

PUBLIC DOMAIN.

See Public Lands.

PUBLIC FUNDS.

See Municipal Corporations, §§ 956–977.

PUBLIC GRANTS.

See Public Lands.

PUBLIC LANDS.

Indian lands, see Indians, §§ 12–16.
Jurisdiction of federal courts of cases arising under laws relating to public lands, see Courts, § 285.

I. GOVERNMENT OWNERSHIP.

Conspiracy to defraud United States, see Conspiracy, §§ 43, 45.
Declarations by conspirators to defraud United States, see Criminal Law, § 423.
Evidence of other offenses in prosecution for conspiracy to defraud United States, see Criminal Law, § 371.
Venue of prosecution for conspiracy, see Criminal Law, § 113.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(D) Reservations to United States.

Exercise of power of eminent domain for irrigation projects, see Eminent Domain, §§ 5, 29.

(J) Patents.

§ 114. Under public land laws of the United States, a patent becomes effective when it is executed and recorded with the recorder of the General Land Office at Washington, and no other act will be necessary to pass title.—Lonabaugh v. United States (C. C. A.) 476.

(L) Relief of Bona Fide Settlers and Claimants.

Jurisdiction of federal courts, see Courts, § 282.

(M) Conveyances, Contracts, and Exemptions.

§ 135. Effect of Rev. St. §§ 2347–2351 (U. S. Comp. St. 1901, pp. 1440, 1441), regulating entry of coal lands, stated as to transfer or sale of the entries.—Ireland v. Henkle (C. C.) 993.

III. DISPOSAL OF LANDS OF THE STATES.

§ 172. Where a headright certificate issued by the Board of Land Commissioners of Texas was sold and transferred by the administrator of the holder under an order of court, was located by the purchaser and a patent issued in accordance with the usual practice to "the heirs" of the decedent, their heirs and assigns, the purchaser acquired only the equitable title to the land, the legal title passing to the heirs of the deceased.—Seefeld v. Duffer (C. C. A.) 214.

PUBLIC LAWS.

See Statutes.

PUBLIC NUISANCE.

See Nuisance, § 84.

PUBLIC REVENUE.

See Internal Revenue; Taxation.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations; Railroads; Street Railroads.
Electric light and heating companies, see Electricity.
Grant of rights in streets, see Municipal Corporations, §§ 680–682.
Interstate commerce laws, see Commerce.
Steamboat companies, see Shipping.
Telegraph and telephone companies, see Telegraphs and Telephones.
Water companies, see Waters and Water Courses, § 200.

PUBLIC USE.

Of invention affecting right to patent, see Patents, § 75.
Taking property for public use in general, see Eminent Domain.
What constitutes public use for which property may be taken under power of eminent domain, see Eminent Domain, § 29.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 200.

PUBLIC WAYS.

See Municipal Corporations, §§ 680–682, 821.

PURCHASERS.

See Sales.

PURE FOOD LAWS.

See Food.
Interstate commerce regulations, see Commerce, § 33.
Preliminary information, see Criminal Law, § 211.

QUALIFICATIONS.

Of applicants for naturalization, see Aliens, § 62.

QUESTIONS OF LAW AND FACT.

In civil actions, see Trial, § 177.

QUIA TIMET.

See Quieting Title.

QUIETING TITLE.

II. PROCEEDINGS AND RELIEF.

§ 44. In suits in equity to quiet title or remove a cloud, the burden is upon the complainant to show that he is the lawful owner of the premises involved in the controversy.—Harris-Woodbury Lumber Co. v. Coffin (C. C.) 257.

QUOTATIONS.

Of board of trade, see Exchanges, § 14.

RAILROADS.

See Street Railroads.
As employers, see Master and Servant.
Breach of contracts to provide railroad connections, see Contracts, § 280.
Carriage of goods and passengers, see Carriers.
Regulations for protection of employés in interstate commerce, see Commerce, § 58.
Relief department for employés, effect of receipt of benefits on liability of railroad for injury to employé, see Master and Servant, § 100.

I. CONTROL AND REGULATION IN GENERAL.

Control and regulation of common carriers, see Carriers, §§ 24–38.
Regulation of, as regulation of commerce, see Commerce, §§ 33, 58.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(B) Foreclosure of Liens and Mortgages.

§ 194. Under Code Ga. 1895, § 3069, one on whose land a railroad company has constructed spur tracks under a parol license cannot assert a right to the exclusive use of such tracks for individual purposes as against a purchaser of the road and tracks under a judicial decree, which without notice has made extensive repairs and improvements on such tracks to fit them for its general use.—Pacific Improvement Co. v. Chattanooga Southern R. Co. (C. C.) 238.

X. OPERATION.

Carriage of passengers, see Carriers, §§ 306–315.
Fellow servants in operation of railroad, see Master and Servant, § 180.
Injuries to employés, see Master and Servant, §§ 97–289.

(C) Companies and Persons Liable for Injuries.

Injuries to passengers, see Carriers, § 306.

(F) Accidents at Crossings.

§ 327. A person riding by invitation in an automobile on the seat with the owner and driver when the car was struck by a train on a railroad crossing *held* chargeable with contributory negligence.—Brommer v. Pennsylvania R. Co. (C. C. A.) 577.

§ 327. A woman riding on the rear seat of an automobile when it was struck by a train on a railroad crossing *held* on the evidence not chargeable with contributory negligence as matter of law.—Brommer v. Pennsylvania R. Co. (C. C. A.) 577.

§ 328. Failure of plaintiff to look and listen before going on a railroad track, where he was struck and injured by an approaching engine, *held* contributory negligence, precluding a recovery.—Boston & M. R. R. v. McGrath (C. C. A.) 323.

§ 328. The duty of an automobile driver approaching a grade railroad crossing where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty.—Brommer v. Pennsylvania R. Co. (C. C. A.) 577.

§ 328. The driver of an automobile injured by the striking of his car by a train on a railroad crossing *held* chargeable with contributory negligence in failing to stop, look, and listen when he reached a point 30 or 40 feet from the crossing where he could for the first time see along the track.—Brommer v. Pennsylvania R. Co. (C. C. A.) 577.

§ 330. The fact that there was a flagman at a grade crossing of a railroad, and that he gave no warning of an approaching train to those approaching the crossing in an automobile, did not relieve such persons of the duty to themselves exercise care before driving on the crossing by stopping to look and listen when they reached a point from which they could first see along the track.—Brommer v. Pennsylvania R. Co. (C. C. A.) 577.

§ 350. In an action to recover for injury to a person struck by a train while driving over a railroad crossing, the questions of defendant's negligence and plaintiff's contributory negligence both *held* properly submitted to the jury.—Erie R. Co. v. Hanna (C. C. A.) 669.

§ 350. A person killed by a train while driving over a grade crossing *held*, on the evidence, not chargeable with contributory negligence as matter of law.—Baltimore & O. R. Co. v. Coppock (C. C. A.) 682.

(G) Injuries to Persons on or near Tracks.

§ 401. In an action under Shannon's Code Tenn. §§ 1574–1576, to recover for an injury to plaintiff caused by his being struck by a railroad train, an instruction, stating the rule as to when a person is "beyond striking distance," considered and approved.—Southern Ry. Co. v. Sutton (C. C. A.) 471.

RATE.

Of demurrage, see Shipping, § 183.
Transportation rates, see Carriers, §§ 30–38.

REAL ACTIONS.

See Ejectment.

REAL ESTATE AGENTS.

See Brokers.

REAL PROPERTY.

Annexation of chattels to real property, see Fixtures.
Remedies involving or affecting, see Ejectment.
Venue of actions, see Venue, § 5.

RECALL.

Of mandate, see Appeal and Error, § 1218.

RECEIVERS.

Effect of appointment of receiver of foreign corporation, see Corporations, § 671.
Jurisdiction of state courts of property in possession of receiver of federal court, see Courts, § 500.
Of street railroad companies, see Street Railroads, § 58.
Operation of oil wells, see Mines and Minerals, § 51.

III. TITLE TO AND POSSESSION OF PROPERTY.

State laws as rules of decision in federal courts, see Courts, § 367.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(C) Receiver's Certificates.

§ 129. A receiver's certificate *held* not an absolute promise to pay, but a promise to pay only from a fund in court in process of administration, depending on whether the fund is sufficient to pay all claims of equal priority, the determination of which was solely within the jurisdiction of the court holding the fund.—In re C. M. Burkhalter & Co. (D. C.) 403.

§ 129. Where a creditor was held not bound to return an improper payment, unless the amount of the payment exceeded the amount the creditor was entitled to receive out of the fund in the hands of a bankrupt's receiver, such question could be determined on an accounting before a master, based on a rule to show cause.—In re C. M. Burkhalter & Co. (D. C.) 403.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

Appointment of ancillary receiver in federal court, see Courts, § 264.

RECLAMATION.

Of property from trustee in bankruptcy, see Bankruptcy, § 224.

RECORDS.

Of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 45.
Transmission of original records of bankrupt to appellate court in bankruptcy proceedings, see Bankruptcy, § 463.

REFERENCE.

In bankruptcy proceedings, see Bankruptcy, §§ 95–97.

II. REFEREES AND PROCEEDINGS.

Fees of referees appointed by federal court, see Courts, § 357.
In bankruptcy, see Bankruptcy, §§ 224–229.

§ 76. In determining fees of referee in the United States court under stipulation, amount involved and benefit to both parties, as well as standard of what charge the referee would make to a client, *held* required to be taken into account.—New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C.) 973.

III. REPORT AND FINDINGS.

Review of questions of fact, see Appeal and Error, § 1017.

REGISTRATION.

Of trade-marks or trade-names, see Trade-Marks and Trade-Names, § 45.

REGULATIONS.

Of business as denial of equal protection of the laws, see Constitutional Law, § 240.

REHEARING.

See New Trial.

RELEASE.

From liability as surety, see Principal and Surety, §§ 102–129.
From liability of master for future injuries to servant, see Master and Servant, § 100.

RELEVANCY.

Of evidence, see Criminal Law, §§ 351–368.

RELIEF ASSOCIATION OR DEPARTMENT.

For employés, effect on liability of employer for injuries to employé, see Master and Servant, § 100.

RELIGIOUS SOCIETIES.

§ 18. The contract between the Order of St. Benedict of New Jersey, a charitable corporation, and its members, by which the latter take the vow of poverty, and agree to convey all property acquired by them to the order, *held* not contrary to public policy and valid, and to make the order the owner of property earned by a member and held by him at his death, to the exclusion of his heirs.—Order of St. Benedict of New Jersey v. Steinhauser (C. C.) 137.

REMAND.

Of cause by appellate court, see Appeal and Error, § 1194.

REMEDIES.

See Action.

REMITTITUR.

Of cause by appellate court, see Appeal and Error, § 1194.

REMOTENESS.

Of limitations in deed, will, or declaration of trust, see Perpetuities.

REMOVAL.

Of accused to other county or district for trial, see Criminal Law, § 242.
Of fixtures, see Fixtures, § 27.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

§ 10. The jurisdiction of a federal court in a cause removed from a state court must rest on that of the state court from which the removal was made.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

§ 12. Where neither of the parties to a suit is a resident of the district, the consent of both is necessary to confer jurisdiction on a federal court, and the cause is not removable over the plaintiff's objection, whether the ground of removal is diversity of citizenship, or because the suit is based on a law of the United States.—Bottoms v. St. Louis & S. F. R. Co. (C. C.) 318.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. An action by an employé against a railroad company to recover for a personal injury, where both parties were engaged in interstate commerce at the time of the injury, is governed by the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), which supersedes all other law, and is controlling on the question of the jurisdiction of a federal court and the right of removal.—Bottoms v. St. Louis & S. F. R. Co. (C. C.) 318.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(B) Separable Controversies.

§ 49. In an action against a nonresident master and resident superintendent for injuries to a servant, facts *held* insufficient to establish a joint cause of action; but they showed a separable controversy between plaintiff and the nonresident, removable to the federal court.—Marach v. Columbia Box Co. (C. C.) 412.

REMOVAL OF CLOUD.

See Quieting Title.

RENDITION.

Of judgment, see Judgment, § 251.

RENT.

See Landlord and Tenant, §§ 248–269.

REPAIRS.

Lien for repair of vessel, see Maritime Liens, § 29.

REPLICATION.

In pleading, see Equity, § 213.

REPLY.

In pleading, see Equity, § 213.

REPRESENTATION.

By partner as ground for refusal of discharge in bankruptcy of other partner, see Bankruptcy, § 407.
Of corporation by officers and agents, see Corporations, §§ 398–400.

REPRESENTATIONS.

False representations, see Fraud.

REPRESENTATIVES.

Personal representatives, see Executors and Administrators.

REPUTATION.

Of witness, see Witnesses, §§ 346–372.

REQUESTS.

For instructions, see Criminal Law, § 824; Trial, §§ 259–268.

RESERVATIONS.

Indian reservations, see Indians, § 12.
Of minerals and mining rights, see Mines and Minerals, § 55.

RES GESTÆ.

In civil actions, see Evidence, § 123.
In criminal prosecutions, see Criminal Law, § 368.

RES IPSA LOQUITUR.

Application of doctrine in federal courts, see Courts, § 372.

RES JUDICATA.

See Judgment, §§ 678–690.
Former decision as law of the case, see Appeal and Error, § 1097.

RESPONDEAT SUPERIOR.

See Master and Servant, §§ 300–301.

RESTRAINT OF TRADE.

Trusts and other combinations, see Monopolies, §§ 17–21.

RESTRICTIONS.

On creation of perpetuities, see Perpetuities.

RESULTING TRUSTS.

See Trusts, § 89.

RETURN.

Of process in general, see Process, § 141.

REVENUE.

See Internal Revenue; Taxation.

REVERSAL.

Of judgment or order in civil actions, see Appeal and Error, § 1176.
Of judgment or order in criminal prosecutions, see Criminal Law, § 1186.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1035–1186; Habeas Corpus.
Of referee's proceedings in bankruptcy by judge, see Bankruptcy, § 228.

REVISION.

Of bankruptcy proceedings, see Bankruptcy, § 446.

RISKS.

Assumed by servant, see Master and Servant, §§ 205–217, 288.
Within insurance policy, see Insurance, § 415.

ROADS.

See Street Railroads.
In cities, see Municipal Corporations, §§ 680–682.

SAILORS.

See Seamen.

SALAD OIL.

Misbranding, see Food, § 14.

SALES.

As preferences by debtor, see Bankruptcy, §§ 163–186.
Combinations to control, see Monopolies, § 17.
Prior public sale of invention as affecting patentability, see Patents, § 75.
Proof of claim against estate of bankrupt purchaser as affecting right of action for deceit, see Fraud, § 35.

Sales by or to particular classes of persons.

Insolvent debtors, see Bankruptcy, §§ 163–186.
Trustees in bankruptcy, see Bankruptcy, § 258.

Sales of particular species of, or estates or interests in, property.

See Bills and Notes, § 315; Intoxicating Liquors.
Minerals, see Mines and Minerals, §§ 54–55.

Sales on judicial or other proceedings.

See Bankruptcy, § 258; Execution, § 324.

II. CONSTRUCTION OF CONTRACT.

§ 55. A contract for the sale of goods is to be construed according to the law of the place

where delivery is to be made or the contract is to be performed.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 55. Where goods were to be delivered f. o. b. cars at Detroit, Mich., and were consigned to the buyer, the law of Michigan governed the contract.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 82. Unless time is stipulated for in a contract of sale, the sale is for cash.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 201. In general, in the absence of a stipulation, title vests in the buyer on delivery of the goods to the carrier for transportation.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

Conformity of judgment to pleading, see Judgment, § 251.

§ 355. An allegation in a complaint that plaintiff sold and delivered goods to defendants *held* supported by the evidence.—McIntosh v. McKany & Carmichael Mercantile Co. (C. C. A.) 65.

(F) Actions for Damages.

§ 384. On breach of a purchaser's contract to purchase a part of the assets of a corporation, he is liable, not for the price, but for the difference between the value of the property and the contract price.—Denver Engineering Works Co. v. Elkins (C. C.) 922.

IX. CONDITIONAL SALES.

State laws as rules of decision in Federal courts, see Courts, § 367.
Title of trustee in bankruptcy to property delivered to bankrupt under contract of conditional sale, see Bankruptcy, § 140.

§ 469. Contract of sale construed, and *held* to make payment of the price a condition precedent to the passing of title.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 472. Where title to a car sold under a conditional sale never passed to the buyer, the buyer's transferee acquired no rights therein superior to the seller.—In re Pittsburgh Industrial Iron Works (D. C.) 151.

§ 474. Under Rev. St. Ohio 1908, § 4155–2, construed in connection with section 4150, an unfiled conditional sale contract *held* void as against all creditors of the buyer represented by a receiver appointed by a federal court.—Hamilton v. David C. Beggs Co. (C. C.) 949.

SALOONS.

See Intoxicating Liquors.

SCAFFOLDS.

Liability of master for injuries to servant from defects in scaffolds, see Master and Servant, § 116.

SCHEDULE.

Of tariff rates, see Carriers, §, 30.

SEAMEN.

§ 29. An injured seaman *held* only entitled to recover his wages and the expenses of maintenance and cure to the end of the voyage, or as long as he is entitled to wages, independent of negligence.—Cornell Steamboat Co. v. Fallon (C. C. A.) 293.

§ 29. The owners of a dredge, while being towed to the Isthmus of Panama, *held* not required to make it as seaworthy as they would an ordinary ship.—State of Maryland v. Ellicott (D. C.) 127.

SEAS.

Jurisdiction of offenses committed in havens, see Criminal Law, § 97.

SECRETARY OF THE INTERIOR.

Approval of assignment of Indian leases, see Indians, § 16.

SECURITY.

See Bonds; Principal and Surety.
Collateral security in general, see Pledges.

SENTENCE.

See Criminal Law, § 984.

SEPARABLE CONTROVERSIES.

Removal from state court, see Removal of Causes, § 49.

SEPARATE ESTATE.

Of married woman, see Husband and Wife, § 113.

SEPARATE PLEAS.

In equity, see Equity, § 166.

SERVANTS.

See Master and Servant.

SERVICE.

Of process, see Process, § 141.

SERVICES.

See Master and Servant.

SETTING ASIDE.

Judgment, see Judgment, § 379.
Verdict, see New Trial.

SEVERABLE CONTRACTS.

Entire or severable contracts, see Contracts, § 171.

SHIPPING.

See Admiralty; Collision; Maritime Liens; Seamen; Towage.
Insurable interest in steamship, see Insurance, § 115.
Jurisdiction of offenses on vessels, see Criminal Law, § 97.
Marine insurance, see Insurance, §§ 415, 479–489.

III. CHARTERS.

§ 49. A shipowner's lien on cargo given by the charter party is not preserved against the indorsee of a bill of lading, except so far as those terms of the charter party are expressly incorporated into it.—Dewar v. Mowinckel (C. C. A.) 355.

§ 58. Evidence considered, and *held* insufficient to entitle a charterer to recover damages for alleged misrepresentations in the charter party as to the speed of the vessel.—The Hurstdale (C. C. A.) 371.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

Statements by master of vessel as res gestæ, see Evidence, § 123.

§ 80. A vessel is required to exercise reasonable care not to maintain places which are dangerous to persons coming on board with the permission of those in charge, whether on business or for their own pleasure.—The Montrose (D. C.) 1000.

§ 80. A vessel *held* not liable for an injury to a person who came on board while she was lying at a pier from falling through an open hatchway in a corner of the deckhouse, not used as a passageway and lighted by open doors on either side.—The Montrose (D. C.) 1000.

§ 81. In an action against the owner of a steam tug for injuries to the master of a barge by being caught in a stern line, the tug *held* guilty of negligence, authorizing a recovery.—The Dauntless (C. C. A.) 346.

§ 84. The allegations and proof in an action against a shipowner for the death of a stevedore *held* insufficient to show any negligence which rendered the defendant liable.—Cyborowski v. Kinsman Transit Co. (C. C. A.) 440.

§ 84. A stevedore's employé, who was injured on a vessel through the mutual negligence of himself and a mate, who volunteered to assist in replacing a hatch cover, *held* entitled to recover half damages from the vessel.—The General De Sonis (D. C.) 123.

§ 84. The second mate of a vessel, in volunteering to assist the employés of a stevedore in replacing a hatch cover, which was the duty of the stevedore's men, was not acting as a representative of the ship's owner or master, having authority to fasten responsibility on them under the rule of respondeat superior, and they cannot be held liable for an injury to one of the men through the mate's negligence.—The General De Sonis (D. C.) 123.

§ 84. A ship *held* liable for an injury to a stevedore, caused by the defective condition of a hatch cover.—Baker v. Hamburg-American Packet Co. (D. C.) 271.

§ 87. By the maritime law a ship in commission and her officers and crew are unified, so far that for maritime torts, whether the ship is the instrument by which an injury is inflicted, or the injury is the consequence of a negligent or mischievous act of her captain or any member of her crew, a maritime lien attaches to the ship, which entitles the injured to recover compensation by a suit in rem.—The General De Sonis (D. C.) 123.

VII. CARRIAGE OF GOODS.

§ 108. Where a shipowner contracted in the bill of lading to insure the property covered thereby in accordance with the terms of policies then held by it, insuring it against liability to cargo owners, its liability thereunder was measured by that of its own insurers.—Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co. (D. C.) 133.

§ 108. A contract by a shipowner with a shipper construed.—Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co. (D. C.) 133.

§ 121. A warranty of seaworthiness in a charter party is absolute and not conditional, and includes a warranty of proper stowage for the voyage.—The Medea (C. C. A.) 781.

§ 132. Where goods were received by a vessel in good condition, but delivered in a damaged condition to avoid liability therefor the vessel has the burden of proof to show that the injury was due to some cause within the exceptions of the bill of lading although the libel may allege a particular ground of negligence.—The Medea (C. C. A.) 781.

§ 132. The fact alone that damage to cargo was caused by sea water, without any evidence as to how the water entered the ship, is not sufficient to relieve the vessel from liability on the ground that the damage resulted from sea perils within an exception in the bill of lading, nor is sufficient to show in addition that the ship encountered stormy weather on the voyage which was no worse than should have been anticipated.—The Medea (C. C. A.) 781.

§ 132. Evidence considered in a suit against a vessel for damage to cargo and *held* to establish the allegation of libelant that she was unseaworthy by reason of improper stowage.—The Medea (C. C. A.) 781.

IX. DEMURRAGE.

§ 173. The cesser clause in a charter party will not relieve the charterer from liability for freight or demurrage where the lien given is not commensurate with such liability.—Dewar v. Mowinckel (C. C. A.) 355.

§ 181. A deliberate contract, made by the parties in a charter party, giving the charterer the right to designate the place of discharge, and providing that lay days shall commence when the vessel is ready to discharge, cannot be varied or relaxed on the ground that its enforcement subjects the vessel to an unreasonable delay.—Anderson v. J. J. Moore & Co. (C. C. A.) 68.

§ 181. A charterer *held* not liable for demurrage, under the charter party, because of delay of the ship in waiting her turn to discharge at the wharf, to which she was assigned by the consignee, as permitted by the charter party.—Anderson v. J. J. Moore & Co. (C. C. A.) 68.

§ 181. Where the consignee of a ship's cargo is given the right by the charter party to designate the place of discharge at the port of delivery, either at a safe wharf or alongside, it is his duty to exercise such right within a reasonable time after notice of the arrival of the vessel at the port, and his failure to do so is a waiver of the right.—Dewar v. Mowinckel (C. C. A.) 355.

§ 183. A rate of demurrage agreed upon in a charter party for a certain number of demurrage days will be adopted by the court as the measure of damages for further detention of the ship in the absence of other evidence, but it is open to either party to show that it is not the true measure.—Dewar v. Mowinckel (C. C. A.) 355.

XI. LIMITATION OF OWNER'S LIABILITY.

§ 209. Rev. St. § 4283 et seq. (U. S. Comp. St. 1901, p. 2943), and Supreme Court Admiralty Rules 54 to 57, limiting a vessel owner's liability, construed, and *held* not to require admiralty to act in stated circumstances.—Delaware River Ferry Co. v. Amos (D. C.) 756.

SHIPWRECKS.

See Collision.

Marine insurance, see Insurance, §§ 415, 479–489.

SIDEWALKS.

Injuries from defects or obstructions, see Municipal Corporations, § 821.

SIGNALS.

From vessels, see Collision, § 75.

SLANDER.

See Libel and Slander.

SOLICITORS.

See Attorney and Client.

SPECIAL MASTERS.

In proceedings for reclamation of property from trustee in bankruptcy, see Bankruptcy, § 224.

SPECIAL PROCEEDINGS.

See Certiorari; Habeas Corpus.

Deportation of Chinese, see Aliens, § 32.

Detention and return of immigrants excluded, see Aliens, § 54.

Limitation of liability of shipowner, see Shipping, § 209.

Naturalization, see Aliens, § 68.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 16. A court *held* not justified in denying specific performance of a contract to convey all the phosphate rock under certain land on the ground of hardship because of alleged inadequacy of price.—Heyward v. Bradley (C. C. A.) 325.

II. CONTRACTS ENFORCEABLE.

§ 28. A contract for the conveyance of the phosphate rock under certain land a right of way over other land, and a washer site on a river *held* not so vague and uncertain as not to be capable of specific enforcement.—Heyward v. Bradley (C. C. A.) 325.

§ 32. The contract between a city and a water company *held* not specifically enforceable by either party.—Risley v. City of Utica (C. C.) 875.

§ 49. A contract for the sale of the phosphate rock underlying certain land *held* not so unconscionable nor based on such a grossly inadequate consideration as would justify the refusal of specific performance.—Heyward v. Bradley (C. C. A.) 325.

§ 52. In a suit to compel specific performance of a contract to convey the phosphate rock underlying certain land an alleged mistake, in that it was defendant's intention to sell only that portion of the rock that underlay about 100 acres of the land which had been already partially mined, *held* no defense.—Heyward v. Bradley (C. C. A.) 325.

§ 74. A court of equity will not decree specific performance of a contract for the construction of a public drainage ditch, at suit of the contractor, where the work requires special skill and the contract contemplates supervision by the drainage district.—La Hogue Drainage Dist. No. 1 of Iroquois County, Ill., v. Watts (C. C. A.) 690.

SPIRITUOUS LIQUORS.

Regulation of manufacture and sale, see Intoxicating Liquors.

SPLITTING CAUSES OF ACTION.

See Action, § 53.

SPUR TRACKS.

Rights of purchaser of railroad property, see Railroads, § 194.

STAGING.

Liability of master for injuries to servant from defects in staging, see Master and Servant, § 116.

STALE DEMANDS.

Laches in general, see Equity, §§ 67–86.

STARE DECISIS.

See Courts, § 96.

STATE BANKS.

See Banks and Banking, § 4.

STATEMENT.

By accused or other persons as part of res gestæ, see Criminal Law, § 368.
By parties or other persons as part of res gestæ, see Evidence, § 123.
Declarations, see Criminal Law, § 423.

STATES.

Courts, see Courts.

II. GOVERNMENT AND OFFICERS.

Control by Legislature, of acts, rights, and liabilities, of municipal corporations, see Municipal Corporations, § 78.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Disposal of public lands, see Public Lands, § 172.
Gift for payment of debt of state, see Charities, § 14.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.
Charging statutory offenses, see Indictment and Information, § 111.
Constitutionality in general, see Constitutional Law.
Enforcement in federal court of rights under state statutes, see Courts, § 371.
Jurisdiction of federal courts in cases arising under laws of United States, see Courts, §§ 285–289.
Laws denying due process of law, see Constitutional Law, §§ 251–283.
Laws denying the equal protection of the law, see Constitutional Law, §§ 211–245.
Restraining enforcement, see Injunction, § 85.
Statute of frauds, see Frauds, Statute of.
Statute of limitations, see Limitation of Actions.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

Concurrence of both branches of congress in creation of Indian reservations, see Indians, § 12.
Restraining enforcement of invalid statute, see Injunction, § 85.

§ 64. The provision of Employer's Liability Act April 22, 1908, c. 149, § 5, 35 Stat. 66 (U. S. Comp. St. Supp. 1909, p. 1173), making void any contract, rule, regulation, or device, the intent of which shall be to exempt any carrier from liability under the act, is clearly separable from the other provisions of the act which are not involved in the question of its constitutionality.—Zikos v. Oregon R. & Nav. Co. (C. C.) 893.

III. SUBJECTS AND TITLES OF ACTS.

§ 118. Laws Wash. 1891, c. 28, § 1 (Ballinger's Ann. Codes & St. Wash. § 6774 [Pierce's Code, § 1545]), amending section 782 of the territorial Code of 1881, is not in violation of article 2, § 27, of the state Constitution.—Erickson v. Hodges (C. C. A.) 177.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 138. Laws Wash. 1891, c. 28, § 1 (Ballinger's Ann. Codes & St. Wash. § 6774 [Pierce's Code, § 1545]), amending section 782 of the territorial Code of 1881, is not in violation of article 2, § 27 of the state Constitution.—Erickson v. Hodges (C. C. A.) 177.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

Allegations in indictment or information as to provisos and exceptions, see Indictment and Information, § 111.

§§ 174, 175. The construction and interpretation of statutes cannot extend to amendment or legislation nor can considerations of apparent hardship justify a strained construction of the law as written.—Ladew v. Tennessee Copper Co. (C. C.) 245.

§ 185. That which is implied is as much a part of a statute as that which is expressed.—United States v. Allen (C. C. A.) 13.

§ 188. In construing a statute, words and phrases are to be assumed to have been used in their popular sense, if they have not acquired a technical meaning.—In re Ellis (D. C.) 1002.

§ 217. The effect of a statute actually passed by Congress cannot be narrowed by reference to a bill which was never voted on, but was merely proposed in committee.—United States v. Allen (C. C. A.) 13.

(B) Particular Classes of Statutes.

§ 241. Although penal laws and statutes in derogation of the common law are to be strictly construed and not extended beyond their plain meaning, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.—Southern Ry. Co. v. Sutton (C. C. A.) 471.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

STATUTES AT LARGE.

ALASKA.

CODE OF CIVIL PROCEDURE.

ARKANSAS.

KIRBY'S DIGEST.

LAWS.

GEORGIA.

CIVIL CODE 1895.

KANSAS.

LAWS.

STEVEDORES.

Injuries to, see Shipping, § 84.
Excessive damages for injuries to, see Damages, § 132.

STIFLING.

Competition, see Monopolies.

STIPULATIONS.

Affecting fees of referees in federal court, see Courts, § 357.
As to compensation of referee, see Reference, § 76.
Stipulations waiving statutory provisions as to costs, see Costs, § 148.

STOCK EXCHANGES.

See Exchanges.

STOCKHOLDERS.

Of corporations in general, see Corporations, §§ 211–259.
Of joint-stock companies, see Joint-Stock Companies.

STREET RAILROADS.

As subject of interstate commerce regulations, see Carriers, § 24.
Carriage of passengers, see Carriers, § 315.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 54. Where bondholders, secured by a mortgage on a part of a street railroad system, refused to bid on such part separated from the balance covered by a second mortgage, also about to be foreclosed, the sale would be adjourned to the same date set for the sale of the balance of the road.—Morton Trust Co. v. Metropolitan St. Ry. Co. (C. C.) 1010.

§ 55. Where the decree of sale in consolidated suits against the lessees of an extensive street railway system creates a consolidated fund, to be distributed among all parties interested in accordance with their respective rights and priorities as thereafter determined by the court, all claims against any part of the fund will be left for consideration together in a single proceeding.—Pennsylvania Steel Co. v. New York City Ry. Co. (C. C.) 242.

§ 58. A petition for instructions to the receivers for an extensive street railway system by the lessor of one of the constituent lines, not filed until a few weeks prior to the date of the advertised sale of the property, considered and denied.—Pennsylvania Steel Co. v. New York City Ry. Co. (C. C.) 240.

§ 58. The transformation by a receiver in mortgage foreclosure against a street railway company of surplus income funds into cars does not change the fund's character.—Union Trust Co. of New York v. Forty-Second St., M. & St. N. Ave. Ry. Co. (C. C.) 981.

§ 58. In mortgage foreclosure proceedings against a street railway, determination of the rights of all creditors to a fund comprising the surplus income from receivership should be first raised before the special master.—Union Trust Co. of New York v. Forty-Second St., M. & St. N. Ave. Ry. Co. (C. C.) 981.

§ 58. On mortgage foreclosure and sale of a street railroad, the purchaser *held* properly required to pay cash to the amount of surplus income from receivership invested in cars sold as part of the road.—Union Trust Co. of New York v. Forty-Second St., M. & St. N. Ave. Ry. Co. (C. C.) 981.

II. REGULATION AND OPERATION.

Injuries to passengers, see Carriers, § 315.

STREETS.

Crossing by railroads, accidents, at crossings, see Railroads, §§ 327–350.
Injuries from defects or obstructions, see Municipal Corporations, § 821.
Use and regulation in general, see Municipal Corporations, §§ 680–682.

SUBSTITUTES.

For articles of food, see Food.

SUIT.

See Action; Equity.

SUMMARY PROCEEDINGS.

By or against trustees in bankruptcy, see Bankruptcy, § 288.
For collection of assets of estate of bankrupt, see Bankruptcy, §§ 206, 250, 293.

SUMMONS.

See Process.

SUPERINTENDENTS.

Liability of master for injuries to servant from acts or omissions of persons engaged in superintendence, see Master and Servant, § 189.

SUPERSEDEAS.

Certiorari as supersedeas, see Certiorari, § 47.

SUPPLEMENTAL PLEADING.

See Pleading, § 274.

SURETYSHIP.

See Principal and Surety.

SURPLUSAGE.

In pleading, see Pleading, § 35.

SURRENDER.

Of lien by mortgage creditors of bankrupt, see Bankruptcy, § 310.
Summary proceedings to compel surrender of property to estate of bankrupt, see Bankruptcy, § 288.

SUSPENSION.

Of running of statute of limitations, see Limitation of Actions, §§ 102–130.

SWEARING.

False swearing, see Perjury.

SYRIANS.

Right to naturalization, see Aliens, § 61.

TAXATION.

See Internal Revenue.
Municipal taxes, see Municipal Corporations, §§ 956–977.
Of property employed in interstate commerce, see Commerce, § 72.
Priority of claims for taxes against bankrupt's estate, see Bankruptcy, § 346.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

Deprivation of property without due process of law, see Constitutional Law, § 283.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(C) Remedies for Wrongful Enforcement.

§ 608. Unless a complainant can invoke some recognized ground of equity jurisdiction, the mere illegality or irregularity of a tax complained of gives no right to injunctive relief against its collection.—Singer Sewing Mach. Co. of New Jersey v. Benedict (C. C. A.) 628.

§ 608. Where a state statute requires notice to a property owner of the raising of his assessment, the failure to give such notice renders the action of the taxing officers in levying a tax on the increase without jurisdiction and void, and it is subject to collateral attack whenever any claim of right is asserted under it, which excludes the jurisdiction of a court of equity to enjoin collection of the tax on the ground that there is no adequate remedy at law.—Singer Sewing Mach. Co. of New Jersey v. Benedict (C. C. A.) 628.

§ 608. A bill *held* not to allege facts which gave a federal court of equity jurisdiction to enjoin the collection of a tax.—Singer Sewing Mach. Co. of New Jersey v. Benedict (C. C. A.) 628.

TEAMS.

Liability of employer for negligence of driver, see Master and Servant, § 301.

TELEGRAPHS AND TELEPHONES.

Telegraph business as interstate commerce, see Commerce, § 28.

II. REGULATION AND OPERATION.

Jurisdiction of federal court to restrain tax on telegraph business as interstate commerce, see Courts, § 289.
Nature of action for failure to transmit telegram as in contract or tort, see Action, § 27.
State laws as rules of decision in federal courts as to damages, see Courts, § 372.

§ 27. Act Ark. March 7, 1903 (Acts 1903, p. 124), authorizing recovery of damages from a telegraph company for mental suffering for negligence in receiving or transmitting or delivering a message, does not give a right of recovery on that ground alone, where the negligence occurred in another state, where it is not authorized.—Western Union Telegraph Co. v. Burris (C. C. A.) 92.

§ 56. By the weight of authority in this country a person to whom a telegram is sent, where it is intended for his benefit or information, has a right of action against the company for negligent delay in its transmission or delivery.—Western Union Telegraph Co. v. Burris (C. C. A.) 92.

TESTAMENT.

See Wills.

TESTIMONY.

See Evidence; Witnesses.

TIME.

Computation of period of limitation, see Limitation of Actions, §§ 60–130.
For exceptions at trial to reserve ground of review, see Appeal and Error, § 272.
For payment for goods sold, see Sales, § 82.
For presentation of claims against estate of decedent, see Executors and Administrators, § 225.
Of accrual of right of action within statute of limitations, see Limitation of Actions, § 60.

TITLE.

Of trustee in bankruptcy to property of bankrupt, see Bankruptcy, §§ 136–140.
Removal of cloud, see Quieting Title.
Slander of title, see Libel and Slander, § 132.

Particular matters affecting title.

Sale of personal property in general, see Sales.

Particular species of property or rights.

See Bills and Notes, § 330; Patents, § 213.
Personal property in general, see Sales, § 201.

Titles of particular acts or proceedings.

See Statutes, § 118.

TORTS.

Liabilities of particular classes of persons.

See Carriers, §§ 306–315; Municipal Corporations, § 821; Railroads, §§ 327–350, 401.
Electric light or power companies, see Electricity, § 16.
Employers, for injuries to employés, see Master and Servant, §§ 97–289.
Employers, for injuries to third persons, see Master and Servant, §§ 300, 301.
Shipowners, see Shipping, §§ 80–87, 121–132.
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 27–56.

Liabilities respecting particular species of property or instrumentalities.

See Electricity, § 16; Railroads, §§ 327–350, 401; Telegraphs and Telephones, §§ 27–56.
Streets and highways, see Municipal Corporations, § 821.
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101–125.
Vessels, see Shipping, §§ 80–87; Towage, § 12.

Particular torts.

See Fraud; Libel and Slander; Nuisance.
Causing death, see Death, § 85.
Injuries by servants, see Master and Servant, §§ 300, 301.
Injuries from defects or obstructions in streets, see Municipal Corporations, § 821.
Injuries from negligence, see Negligence.
Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 27–56.
Injuries from operation of railroads, see Railroads, §§ 327–350, 401.
Injuries incident to production or use of electricity, see Electricity, § 16.
Injuries to passengers, see Carriers, §§ 306–315.
Injuries to servants, see Master and Servant, §§ 97–289.
Loss of or injury to goods by carrier, see Shipping, §§ 121–132.
Loss of or injury to tow, see Towage, § 12.
Maritime torts, see Collision; Shipping, §§ 80–87, 209; Towage, § 12.

Remedies for torts.

See Damages.
Action for distinguished from action on contract, see Action, § 27.
Separable controversies as ground for removal to federal court, see Removal of Causes, § 49.

TOWAGE.

Fault of towing vessel causing collision, see Collision, § 95.

§ 12. Both the captain in charge of a scow and the tug by which it was being towed *held* chargeable with the loss of the scow, requiring a division of damages.—The Coleraine (D. C.) 977.

§ 17. Where an accident happens to one of the boats of a tow, the captains of other boats in the tow owe a duty to the tug to warn the captain of the tug.—The Coleraine (D. C.) 977.

TOWNS.

See Municipal Corporations.

TRADE.

Boards of trade, see Exchanges.
Combinations in restraint of trade, see Monopolies, §§ 17–21.
Regulation of trade as denial of equal protection of laws, see Constitutional Law, § 240.

TRADE-MARKS AND TRADE-NAMES.

III. REGISTRATION, REGULATION, AND OFFENSES.

§ 45. Conclusiveness of a judgment finding that complainants were not the rightful owners of trade-marks *held* not affected as between the parties and their privies by the complainant's subsequent registration of the trade-mark under Act Cong. Feb. 20, 1905, c. 592, § 16, 33 Stat. 728 (U. S. Comp. St. Supp. 1909, p. 1283).—W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C.) 544.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(C) Actions.

Intervention, see Parties, § 40.

§ 91. In a suit for infringement of a trade-mark, facts *held* insufficient to entitle petitioner to intervene.—W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C.) 544.

§ 92. A bill for unlawful competition in the fraudulent use of complainants' trade-name in the sale of syrup *held* not defective for failure to name defendant's agents, the parties buying the fraudulent syrup, the amount and value used, and in stating that it was so used "on divers days and at divers places" within the jurisdiction of the court.—Charles E. Hires Co. v. Simpkins (C. C.) 1012.

TRADING COMPANIES.

As subject to bankruptcy law, see Bankruptcy, § 72.

TRAINS.

See Carriers; Railroads.

TRANSFERS.

See Assignments; Sales.
As preferences by debtor, see Bankruptcy, §§ 163–186.
By insolvent debtor, see Bankruptcy, §§ 163–186.
Of bills and notes, see Bills and Notes, § 315.
Of insurance policies, see Insurance, § 222.
Of rights in public lands, see Public Lands, § 135.

Of title as between parties to sale, see Sales, § 201.

TRANSMISSION.

Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27–56.

TRANSPORTATION.

Of goods, see Carriers, §§ 24–38, 51; Shipping, §§ 108–132.
Of goods regulation of commerce, see Commerce, § 33.
Of passengers, see Carriers, §§ 306–315.

TRAVELERS.

On streets, injuries from defects or obstructions, see Municipal Corporations, § 821.

TRAVERSE.

In pleading in general, see Pleading, § 127.

TRESPASS.

Injuries to trespassers, see Railroads, § 401.

TRESPASS TO TRY TITLE.

See Ejectment.
Restraining prosecution of action, see Injunction, § 26.

TRIAL.

Trial de novo on appeal in Chinese deportation proceedings, see Aliens, § 32.
Witnesses, see Witnesses.

Proceedings incident to trials.

See New Trial; Reference.
Entry of judgment after trial of issues, see Judgment, § 251.
Examination of witnesses, see Witnesses, §§ 297–307.
Place of trial, see Venue.
Waiver of jury, see Courts, § 352.

Trial of actions by or against particular classes of persons.

See Master and Servant, §§ 286–297; Railroads, §§ 350–401.
Insurance companies, see Insurance, § 825.
Receiver in bankruptcy, see Bankruptcy, § 304.

Trial of particular civil actions or proceedings.

See Bankruptcy, §§ 95–97.
For injuries at railroad crossings, see Railroads, § 350.
For injuries from defects or obstructions in streets, see Municipal Corporations, § 821.
For injuries to persons on or near railroad tracks, see Railroads, § 401.
On insurance policies, see Insurance, § 825.
To require receiver in bankruptcy to turn over property, see Bankruptcy, § 304.

Trial of criminal prosecutions.

See Criminal Law, § 824.

IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 297–307.

(C) Objections, Motions to Strike Out, and Exceptions.

Objections to evidence on ground of insufficiency of pleading, see Pleading, § 428.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 110. In an action by an employé to recover for a personal injury, it was prejudicial error to permit plaintiff's counsel on the examination of a juror to ask questions the evident purpose and effect of which were to convey to the jury a strong intimation that defendant was insured against such liabilities, and that the insurance company was the real party in interest as defendant, contrary to what appeared from the record.—Stewart v. Brune (C. C. A.) 350.

VI. TAKING CASE OR QUESTION FROM JURY.

Review of rulings as dependent on presentation of question in lower court, see Appeal and Error, § 209.

(A) Questions of Law or of Fact in General.

As to particular facts, issues, or subjects.

Assumption of risk by servant injured, see Master and Servant, § 288.
Negligence of master causing injury to servant, see Master and Servant, § 286.
Contributory negligence of servants, see Master and Servant, § 289.

In particular civil actions or proceedings.

For breach of contract, see Contracts, § 352.
For injuries at railroad crossings, see Railroads, § 350.
For injuries from defects or obstructions in street, see Municipal Corporations, § 821.
For injuries to servants, see Master and Servant, §§ 286–297.
On insurance policies, see Insurance, § 825.

(D) Direction of Verdict.

§ 177. Effect of requests for peremptory instructions by both parties stated.—Charlotte Nat. Bank of Charlotte, N. C., v. Southern Ry. Co. (C. C. A.) 769.

VII. INSTRUCTIONS TO JURY.

In actions for injuries to persons on or near railroad tracks, see Railroads, § 401.
In criminal prosecutions, see Criminal Law, § 824.

(C) Form, Requisites, and Sufficiency.

§ 238. The fact that language found in a requested instruction was copied from the opinion of a court, the correctness of which is not questioned, does not necessarily render it error to refuse the request.—Howland Pulp & Paper Co. v. Alfreds (C. C. A.) 482.

(E) Requests or Prayers.

In criminal prosecutions, see Criminal Law, § 824.

§ 259. An oral request to charge, made as the jury were about to retire, *held* properly refused. —Keystone Bank v. Safety Banking & Trust Co. (C. C.) 727.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 317. An exception to the retirement of the jury before plaintiff in error had an opportunity to except to the charge must be sustained.—Mann v. Dempster (C. C. A.) 837.

IX. VERDICT.

Setting aside verdict, see New Trial.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Review in appellate court as dependent on prejudicial nature of error, see Appeal and Error, § 1031.
Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, §§ 179–272.

TRIAL DE NOVO.

In appeal in Chinese deportation proceedings, see Aliens, § 32.

TRIBUNALS.

See Courts.

TRUSTEES.

See Trusts.

TRUSTEES DE SON TORT.

See Trusts, § 170.

TRUSTS.

Charitable trusts, see Charities.
Combinations to monopolize trade, see Monopolies, §§ 17–21.
Existence of trust as affecting limitation of actions, see Limitation of Actions, § 102.
Particular fiduciary relations, see Brokers; Executors and Administrators; Principal and Agent.

I. CREATION, EXISTENCE, AND VALIDITY.

Restrictions on creation of perpetuities, see Perpetuities.

(A) Express Trusts.

§ 44. Evidence *held* to show that money retained by a husband after his wife gave him a receipt therefor was held by him as a trustee, and that he is liable to account therefor.—In re Carpenter (D. C.) 743.

(B) Resulting Trusts.

§ 89. The uncorroborated testimony of a bankrupt and his wife is insufficient to establish a resulting trust in favor of the wife in lands which were conveyed to the husband nearly 30 years prior to the bankruptcy, and have been held by him without objection since that time. —Teter v. Viquesney (C. C. A.) 655.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

Trustees in bankruptcy, see Bankruptcy, §§ 123–127.

§ 170. Grantees in a deed canceled for fraud and directed to account for proceeds of a portion of the property sold by them are charged as trustees de son tort.—Snow v. Hazelwood (C. C. A.) 182.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 315. The practice of compensating a trustee out of a fund for his services in the care of it has no application to a case where he is simply subserving the interest of one party in a contest for possession of the fund.—Pike v. Cincinnati Realty Co. (C. C. A.) 97.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

Computation of period of limitation as affected by existence of trust in general, see Limitation of Actions, § 102.

TUGS.

See Towage.

ULTRA VIRES.

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