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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

OCTOBER—DECEMBER, 1910

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JUDGES

OF THE

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[1] Died October 15, 1910.

CASES REPORTED

See End of Index for Tables of Federal Cases in Other Reports.

CASES

ARGUED AND DETERMINED

IN THE

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

RICHARDSON v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 22, 1910.)

1. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFICERS—FALSE ENTRIES—OFFENSES.

The making of false entries in the books of a national bank is equally an offense, whether it is done by the bank officer charged, or whether he procures it to be done through the medium of others.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958–967; Dec. Dig. § 256.*]

2. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES—INDICTMENT—NAMES OF PERSONS MAKING ENTRIES.

Where an indictment against a national bank cashier for making false entries, specified with great particularity and at length the entries, the falsification of which was charged, and these entries were fully described, the indictment was not defective for indefiniteness, because it did not specify the names of the clerks or employés by whose hand the entries were in fact made.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965–976; Dec. Dig. § 257.*]

3. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—BANK OFFICERS—OFFENSES—INDICTMENT.

Where a national bank cashier was indicted for making false entries, and also for indirectly participating in the making thereof, in that he caused and procured them to be made, proof of either of such charges was sufficient after verdict to sustain a conviction, even though the other was not proved.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

4. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSE—PROCUREMENT—EFFECT.

Where an act is done by the procurement of a person, it is his act in effect, even where it is a crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–81; Dec. Dig. § 59.*]

5. CRIMINAL LAW (§ 59*)—PRINCIPAL—PRESENCE.

In order that a principal shall be answerable for a felony he must have been actually or constructively present where another equally guilty committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–81; Dec. Dig. § 59.*]

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

6. CRIMINAL LAW (§ 59*)—MISDEMEANORS—PRINCIPALS.
Where an offense is a misdemeanor all participants are principals.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–81; Dec. Dig. § 59.*]

7. BANKS AND BANKING (§ 256*)—PRINCIPALS AND AIDERS AND ABETTERS—NATIONAL BANKS—OFFICERS.
Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), makes it a misdemeanor for any officer, director, cashier, or agent of a national bank to make any false entries in any book, report, or statement of the association with intent to injure or defraud the association, or to deceive any agent appointed to examine the affairs thereof, and then declares that every person who with like intent aids or abets any officer, clerk, or agent in any violation of the section shall be also guilty of a misdemeanor. *Held* that, where a violation of the statute is committed by an officer and an outsider, the one must be prosecuted as a principal, and the other as an aider and abettor, but that the provision as to aiding and abetting does not apply to those who, as national bank officers, with fraudulent intent, make or cause to be made false entries in the books and reports of the bank, as such they are principals, whether they bring about the falsification through the medium of others, innocent or guilty, or do it themselves; the aiding and abetting applying only to those not connected with the bank, who counsel, or incite those who are.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 965; Dec. Dig. § 256.*]

8. CRIMINAL LAW (§ 1059*)—EXCEPTIONS—SUFFICIENCY.
A general exception taken to the refusal to direct a verdict is insufficient to entitle accused to complain of a variance on appeal.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

9. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—BANK OFFICERS—DEFENSES—FALSE ENTRIES—INTENT.
The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965–976; Dec. Dig. § 257.*]

10. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFICERS—INTENT TO DEFRAUD.
Where false entries were made by the officers of a national bank to overcome complaints by the comptroller in order that the bank examiners and the comptroller might be deceived and misled thereby, proof of such false entries was sufficient to sustain a finding that they were made with intent to injure and defraud the bank, and this though they represented the condition of the bank to be more favorable than it was.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965–976; Dec. Dig. § 257.*]

11. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—ASSUMPTION OF DISPUTED FACTS.
Where, in a prosecution of a national bank officer for false entries, the government denied that the clerks who made the false entries under the directions of the defendant were in any sense accomplices, requests to charge assuming that they were accomplices were properly refused.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754–1764, 1771; Dec. Dig. § 761.*]

12. CRIMINAL LAW (§ 510*)—CONVICTION—ACCOMPLICES—TESTIFYING.
There is nothing which forbids the conviction of a defendant at common law or in the federal courts on the uncorroborated testimony of an accomplice.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. § 510.*]

13. CRIMINAL LAW (§§ 763, 764*)—ACCOMPLICES—CORROBORATION—INSTRUCTION.

Since, in a prosecution in a federal court corroboration of an accomplice is not indispensable, an instruction that the credibility of such a witness is weakened by the absence of corroboration, and that the jury ought to acquit where there is no corroboration of an accomplice's testimony, encroaches on the prerogatives of the jury who have the right to rely on such evidence if they are satisfied therewith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748; Dec. Dig. §§ 763, 764.*]

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

One Richardson, as cashier of the Cosmopolitan National Bank of Pittsburg, Pa., was convicted of making false entries in the books of the bank, and in the reports of its financial condition, and he brings error. Affirmed.

Ben. C. Tunison and James A. Wakefield, for plaintiff in error.

R. M. Gibson, Asst. U. S. Atty.

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

ARCHBALD, District Judge. The defendant, as cashier of the Cosmopolitan National Bank of Pittsburg, Pa., was convicted of making false entries in the books of the bank and in the reports of its financial condition, made to the Comptroller of the Currency, with intent to injure and defraud the bank and to deceive the directors and the agents appointed by the comptroller to examine it. The entries falsified were set out in the indictment, and the defendant was to that extent advised of the exact charge which was made against him; but it is now contended that in several respects the indictment is not sufficient; that it varies from the evidence; that the defendant should not have been charged as a principal, but as an aider and abettor, the entries having been made by the hands of others; and that a conviction should not have been allowed, as it was, on the evidence of accomplices, without cautioning the jury as to the weight to be given to their testimony.

The indictment is based on Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

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

The defendant being charged with having caused the false entries in question to have been made by others, it is contended that the names of the parties by whom they were made should have been given, and that without this, even after verdict, the indictment is not sufficient. In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, the defendant was charged with unlawfully causing or procuring a still and boiler to be used for the purpose of distilling liquor in a building where vinegar was being manufactured, contrary to the provisions of the statute in such case made and provided; and it was held that the defendant himself not being charged with using the still and boiler, but only with causing or procuring them to be used by others, the names of the persons by whom it was done should have been given, it being neither impracticable nor unreasonably difficult to do so, and it not being stated that the names of such parties were to the grand jury unknown. This was approved in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, where it was held that an indictment for making and passing counterfeit securities of the United States, in omitting to state that the defendant at the time of the uttering knew them to be counterfeit, failed to state a crime within the provisions of the law. It is not enough as is there said and as was said in the Simmons Case, to set forth the offense in the words of the statute, "unless these words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." So in Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725, where the defendant was charged with having impersonated and voted in the name of another at an election held for the choice of a representative in Congress, it was held that, in order to make out an offense under the statute, it was necessary to charge that the defendant in fact voted for such representative, and not simply that he voted at an election where a representative was voted for by others, his vote having been possibly confined to state officers. These decisions are cited and relied on by the defendant, as showing the particularity of averment, which is required in criminal matters even under the modern practice; and especially the Simmons Case, as expressly ruling that when an offense is committed through the instrumentality of others, the names of those by whom it was committed must be given. These decisions are highly technical, and seem to carry the law to the verge, but must nevertheless be respected if they are found to apply. As possibly qualifying them, however, in the recent case of Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, on an indictment against a United States Senator for practicing before a federal department, in violation of the statute, it was held that the defendant was not entitled to a disclosure in the indictment of all the particular means so employed. The question in every such case is whether, taking the indictment as it stands, the defendant is sufficiently advised of the charge which is made, so as to enable him to prepare his defense and to plead the judgment as a bar to a subsequent prosecution. N. Y. Cent. R. R. v. U. S., 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613; Standard Oil Co. v. U. S. (C. C. A.) 179 Fed. 614. Properly considered, neither of the cases relied on by the defendant goes further than this or proceeds upon a different

ground. It is not decided, for example, in the Simmons Case, that in every instance where an offense is charged to have been committed through the agency of another, the person by whom it was done must be named. The naming of the person in that case was deemed requisite; that is all. The offense there was most meagerly charged, the bare words of the statute defining it being used. And it may very well have been considered necessary, in consequence, in order to identify the act relied on for a conviction, to require that the name of the person by whom it was claimed to have been done should be given. In the present instance, however, nothing of the kind can be said. With great particularity, and at considerable length, the entries, the falsification of which is charged, are described, their position by book, report, column, and line in each case having been given. The exact part taken by the defendant in the falsification was unimportant, save only as he was shown to be involved or responsible for it, as he undoubtedly was. It was equally an offense, whether he did it himself or procured it to be done through the medium of others, and with the particulars indicated, it was not necessary, where done by another, to charge by just whom it was so done. The entry falsified and the purpose of it were the important things, as to which the fullest information was given. The ordinary course of business, with which the defendant was familiar would disclose the rest. It was not, as in the Simmons Case, where the use of the boiler and still constituted a single unrelated act, in no way connected with the business carried on at the place and with which the defendant had possibly nothing to do. It is to be noted, also, in the present instance, that the defendant is charged in the indictment with making the false entries, as well as causing and procuring them to be made, a direct, as well as an indirect participation, being thus averred, the one of which would be good after verdict and sufficient to sustain a conviction, even if the other was not. Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. But without resting the case upon that, we are not persuaded that under the circumstances the indictment was not sufficiently specific, so as to meet all the requirements of the law as it stood; and the conviction based on it is not therefore to be disturbed.

There is nothing in the contention that the defendant should have been charged as aiding and abetting, and not as a principal, the entries having been made by others who were guilty participants in the crime. No doubt the entries and items falsified were the work of others, but they were clerks, acting under the direction of the defendant, who was thus legally as well as morally bound. They may or may not have acted with knowledge, so as to be guilty themselves. But the case does not turn upon that point. Where an act is done by the procurement of a person it is his act in effect, even where it is made a crime. It is true that, in case of a felony, in order to be answerable as principal, the person must have been actually or constructively present where another, equally guilty, commits the deed. But the offense here is a misdemeanor, in which all parties are principals, and there is no occasion therefore to refine over the distinction between aiders and abettors, or principals in the first or second degree.

It is contended, however, that, by the terms of the statute, aiding

and abetting is a distinct offense, and covers every case where the falsification is not the direct act of the defendant, but is done by his procurement, and must be so specifically laid. The act, as it is said, not only denounces bank officers who, with fraudulent intent, do the falsification, but every person who, with like intent aids and abets them therein, and, having in terms provided for the punishment of that which without it would have been punishable as the act of an accessory at common law, it was the evident intention to make the aiding and abetting a substantive offense, preserving the distinction which prevails in the case of a felony; this being confirmed by the title of the amendatory act, by which the provision is first brought into the law (Act April 6, 1869, c. 11, 16 Stat. 7) where it is the declared purpose of the amendment to extend to accessories the penalties of the original act. This argument, however, fails to note the limitation of the original, which was confined in terms to officers, clerks, and agents of national banks, the manifest purpose of the amendment being to enlarge its scope, and not to revive refined distinctions with regard to principals and accessories which have been outgrown. The added provision made every person who aided or abetted in the offense liable to the same extent as the officer, clerk, or agent who committed it, and thus brought in new parties who would not otherwise be held. The law recognized that the actual falsification would be done by those who were immediately engaged with the affairs of the bank, and had the charge and custody of its books, and these the original act reached—those by whose hands the false entries were made, as well as those who directed it to be done. But not those who, having no relation to the bank, were not within its terms; and it was to these, when aiding and abetting those who were, that the amendment was intended to apply. An officer, clerk, or agent is thus to be indicted as a principal offender, whatever his participation in the offense, the same since the amendment, as it was before. As was said of a cashier, indicted under the act in Peters v. United States, 94 Fed. 127, 36 C. C. A. 105:

"He is as guilty if he directed false entries to be made by the clerk or bookkeeper as if made the entries in person."

And Morse v. United States, 174 Fed. 539, 98 C. C. A. 321, is to the same effect. The distinction made in the statute is well pointed out in Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109, where it is said:

"The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons co-operating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offense, there must of course be a principal, and it follows that, without the concurring act of an officer or agent of a bank, third persons cannot commit a violation of the provisions of section 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider, the one must be prosecuted as the principal, and the other as the aider and abettor."

This in our judgment is all that there is to this part of the act. It has nothing to do with those, who, as national bank officers with fraudulent intent, make or cause to be made false entries in the books and reports of the bank. As such they are principals, whether they

bring about the falsification through the medium of others, innocent or guilty, or do it themselves. The aiding and abetting applies to those not connected with the bank, who instigate, counsel, or incite those who are.

But it is said that a different construction is put upon the act in Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704. In that case Cochran as president and Sayre as assistant cashier were indicted under this section for making a false entry in a report to the Comptroller of the Currency, Sayre being charged in the indictment with making the entry, and Cochran with aiding and abetting him therein. The introduction in evidence of the report to the Comptroller was objected to at the trial, because neither of the defendants could be convicted under the indictment as principals, but only as accessories, the report not having been made out by them, but by some one else; with regard to which it was said:

"The second objection that the defendants could not be convicted as principals in making the report, but only as accessories would probably be true, if they were charged with making such reports"—

the conclusion being reached that:

"As it is admitted that Sayre actually made the entries in and filled out the report in question, he was properly charged as principal; and it was for the jury to say whether Cochran, the president, so far aided and abetted him in making such entries as to make him liable as an accessory."

But the expression of opinion, which was so qualifiedly advanced, while addressed to the objections made at the trial, was nothing but a dictum, there being enough in the case without regard to it to sustain the conviction, and the case going off on another point. It is to be noted, also, that there was no discussion of the subject, nor any suggestion of the considerations which led to the views expressed. It was nothing but a passing observation, thrown off in argument, upon which it was not necessary to dwell, the case being effectively disposed of otherwise, even assuming it to be correct. All that is ventured to be said is that the objection that the defendant could not be convicted as a principal in making the report was probably true, an inconsequential statement, by which it is not expected that any one would be bound. We feel justified, therefore, in adhering to the conclusion, which, after a careful consideration of the subject, we have been constrained to reach.

It is further said, however, that there was a variance as to the purpose with which the falsification of the reports to the Comptroller was made, which was to deceive that officer, and not to injure the bank or to deceive the directors or the agents appointed to examine it as charged. There was no exception taken at the trial, which entitles the defendant to raise this question, except the general one to the refusal of the court to direct a verdict, which is not enough. But, without stopping over that, there is no merit in the point. The contention is that the false entries, being consequent upon and induced by the complaints of the Comptroller, and for the purpose of meeting and overcoming them, must have been intended to deceive him, and could not have been for anything else. The intent, no doubt, is of the essence of the offense, and must be proved as laid. United States v.

Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; McKnight v. United States, 111 Fed. 735, 49 C. C. A. 594; Marrin v. United States, 167 Fed. 951, 93 C. C. A. 351; United States v. Corbett, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. ——. But even if the falsification of the entries, following upon the complaints of the Comptroller, may have been induced thereby, warranting the inference that the Comptroller was to be deceived, that is not the only conclusion that could be drawn, and still less can it be urged, as it is, that there was no evidence on the subject of intent, in the face of the contention that it was all one way. So far as concerns both the falsification of the entries in the books and in the reports, the misleading and deceiving of the examiners appointed by the Comptroller may just as well have been in the mind of the defendant as the deception of the Comptroller himself. As is well known, the Comptroller does not in person, except possibly in rare cases, make an examination into the condition of national banks, whatever opinion he may have been led to form, based upon reports sent in. This duty devolves on the examiners, whom he appoints for the purpose, and it is by falsifying the books and making them speak differently from what they should that these examiners are able to be deceived. The same deceptive purpose in the falsification of the reports called for by the Comptroller may not be so clear. But it is not so foreign or remote as by no possibility to be involved. In United States v. Corbett, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. ——, it was argued to the contrary of what it is here, that the Comptroller was not an agent appointed to examine into the condition of such banks within the meaning of the act, and could not therefore be charged as intended to be deceived by false reports, the examiners appointed by him being the parties to whom this applied. The two contentions complement each other, and dispose of this part of the act if sustained. But the fact is that neither of them is sound. The bank examiners, equally with the Comptroller, are agents appointed to examine the affairs of national banks, not only within the meaning, but within the express terms, of the law, and equally with the Comptroller consult and rely in the examinations which they are required to make on the reports sent in by the association, and are as much likely, if these reports are falsified, to be deceived and misled thereby. This the law recognizes and provides against, making it an offense to falsify any such reports with intent to deceive them, which as a directly contemplated possibility the defendant may well be presumed to have designed.

The same is true as to the intent to injure and defraud the association. It is said that inasmuch as the reports which are falsified represented the condition of the bank to be more favorable than it was, an intent to injure it cannot be implied. The same contention was made in the Corbett Case, just cited, and is conclusively disposed of by what is there said. The purpose of such reports being to enable the Comptroller and the examiners acting under him the better to supervise, and, if necessary, to correct the administration by its officers of the bank's affairs, it is most obvious, that a misrepresentation, the effect of which is to mislead and deceive either of them, could hardly fail to operate to the injury of the bank. And those therefore who

change and falsify the entries in such reports in the way charged, having committed themselves to this possible result, must be regarded as having intended that it should come about. The intent to injure and defraud the bank in the present instance, was thus rightly charged, and it was for the jury to say whether it had been made out, as to which they had the right to judge by the nature of the items falsified, their relation to the condition and conduct of the bank's affairs, and the circumstances under which the falsification was done. This question was submitted to the jury with sufficiently adequate instructions, and having been found against the defendant, that is the end of the matter here.

It is finally urged that the jury were allowed to convict on the uncorroborated testimony of accomplices, without being warned as to the caution with which such testimony is to be received. It is denied by the government that the clerks who made the false entries under the direction of the defendant were in any sense accomplices; and the requests in which it is assumed that they were could not therefore have been affirmed. But in those where this mistake is avoided, the court was asked to charge that if these witnesses were accomplices their testimony was not to be regarded unless corroborated by unimpeachable testimony in some material point. This went far beyond the accepted rule, and was properly refused. There is nothing which forbids the conviction of a defendant, at common law or in a federal court, on the uncorroborated testimony of an accomplice, as is there assumed. 12 Cyc. 453; United States v. Giuliani (D. C.) 147 Fed. 594. No doubt there is a well-established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source. But this is as far as the matter goes. See Holmgren v. U. S., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. ——. And corroboration not being indispensable, an instruction that the credibility of a witness is weakened by its absence, and that the jury ought to acquit where there is none, encroaches on the prerogatives of the jury who have a right to rely on such evidence if they are satisfied with it (12 Cyc. 600); and the court may therefore, without error, refuse to charge that they ought not. Commonwealth v. Bosworth, 6 Gray (Mass.) 479. The requests here were much more than cautionary. They went the full length of declaring that the testimony of the witnesses, if accomplices, without being corroborated by other unimpeachable testimony in some material part was not to be believed. To have given these instructions would have been a clear mistake. The court may not have said all in this direction that it might. But it did say that the evidence was to be carefully scrutinized, which called the attention of the jury to their duty in this regard, and it was not bound to say more.

The judgment is affirmed.

DAVIS v. LOUISVILLE TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 1,863.

1. EVIDENCE (§ 244*)—RECORDS OF COMMERCIAL AGENCY—REPORT MADE BY PERSON SINCE DECEASED.

A report as to the assets and business of a corporation and the statements of its president made to Dun & Co. by their authorized representative in the regular course of his duty, and placed on file to be furnished to any subscriber inquiring in the due course of the business of the company as a commercial agency, after the death of the representative who made it, is admissible as prima facie evidence that the statements therein purporting to have been made by the president of the corporation were so made by him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

2. FRAUD (§ 21*)—CORPORATIONS (§ 80*)—FRAUDULENT REPRESENTATIONS—PERSON ENTITLED TO RELY ON REPRESENTATIONS—STATEMENTS MADE TO MERCANTILE AGENCY.

Claimant, who was negotiating with the president of the bankrupt corporation for the purchase of treasury stock of the corporation, solicited a friend from whom he expected to borrow a portion of the money to pay for the stock to obtain information in regard to the corporation. The friend secured from Dun & Co., a copy from their records of a report made by their representative for their use generally from statements given him by the president, showing the capital paid up, the property and business of the corporation, and that it had no indebtedness, and, in reliance on such report, claimant purchased and paid for the stock at its par value. The statements contained in such report were materially false. *Held*, that the report must be considered as addressed to any person to whom it should be furnished by the mercantile agency in the regular course of its business, or to whom it might rightfully be communicated either as a basis for credit or for investment in the stock of the corporation, which it was endeavoring to sell at the time the report was made; that the statements therein constituted false and fraudulent representations, which entitled claimant to rescind the contract of purchase, unless barred by laches or acquiescence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 9, 10, 23; Dec. Dig. § 21;* Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

3. CONTRACTS (§ 270*)—RESCISSION—LACHES—APPLICATION OF DOCTRINE.

The defense of laches to defeat the right to rescind a contract for fraud will not be entertained unless it is made to appear that it would be inequitable to deny it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

4. CONTRACTS (§ 270*)—RESCISSION FOR FRAUD—LACHES.

A claimant who was induced by fraudulent representations to purchase stock in a corporation, and who sought to rescind prior to the bankruptcy of the corporation, *held* not barred by laches, and entitled to prove his claim in bankruptcy for the purchase price of the stock.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 270.*]

5. BANKRUPTCY (§ 345*)—PROCEEDINGS ON OBJECTIONS TO CLAIM—ISSUES.

A court of bankruptcy in adjudicating upon the claim of a creditor is without authority to adjudge such claim priority over the claims of certain other creditors on grounds which would ordinarily be the basis for an action of deceit, where, although such other creditors appeared, no

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

such issues were formulated and presented against them either severally or jointly.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

Appeal from the District Court of the United States for the Western District of Kentucky.

In the matter of the Howe Manufacturing Company, bankrupt. On appeal from order disallowing claim of Hueling Davis. Reversed.

This is an appeal from an order entered in the court below April 9, 1908, rejecting a claim of Davis, appellant, against the Howe Manufacturing Company, bankrupt, for $5,000 and interest. The company was adjudicated a bankrupt December 22, 1906, and the Louisville Trust Company, one of the appellees, was thereafter appointed trustee. The claim grows out of a purchase by Davis of 50 shares of the par value of $100 each of the capital stock of the bankrupt. In his original and amended proofs of claim Davis alleges that he subscribed for the stock and paid its par value in cash to the company in reliance upon the truth of certain representations made by the company through its president and vice president, who were also directors; that these representations were false and fraudulent and made for the purpose of inducing him to purchase the stock; that upon discovery of the fraud he repudiated and rescinded the contract, tendered to the company the certificates representing the stock, and demanded payment of the price with interest, which was refused.

The alleged false representations consist of two classes. The first class is said to be comprised in a report made by Ben Howe as president of the company to R. G. Dun & Co., a mercantile agency, then maintaining an office in Louisville. The other class is claimed to have been made principally, if not wholly, by T. L. Jefferson as vice president and director of the company through a letter written to a Mr. Chess and through statements made by Jefferson both to Chess and Davis. A copy of the report to Dun & Co., as well as the letter written by Jefferson to Chess, were placed in the hands of Davis before he purchased. These representations related to the financial condition of the bankrupt company and also of another company bearing the same name, the assets and good will of which had been purchased and taken over by the new company. It is not necessary to set out more than the substance of the statements said to have been made, or the evidence offered in support and denial of the contentions made by the respective parties.

In addition to what will be found in the opinion, it is sufficient to state that the present controversy began with negotiations had in July, 1903, between Davis and Howe, whereby Davis was to take stock and Howe was to give him employment in the company, and that Davis thereupon borrowed of Chess $2,500 and of Llewellyn Smith the same sum, giving to them his notes and using the money in buying the stock. Davis was given employment in the company and continued therein in several capacities for a period of nearly three years, and received from the company compensation of about $3,000, when, at the close of April, 1906, he claims to have made discoveries which caused him to quit the employ of the company. He testified that he suspected financial difficulty in the affairs of the company in March of that year through knowledge he obtained of a proposed contract—called a "four-cornered agreement"—to which the company, a "syndicate," the Western National Bank, and Jefferson were to be parties, designed in some way to aid Jefferson if not the company itself. This resulted in an investigation and the discovery claimed to have been made by Davis upon which he bases his contention that he was entitled to rescind. He insists further that his right extends not only to proving a general claim for $5,000, but also to priority over certain of the creditors, if not all of them, in the assets of the bankrupt. The particular creditors against whom the claim of priority is made are Jefferson, the Western National Bank of Louisville, and Ben Howe, both individually and as assignee of certain claims of creditors of the bankrupt. The claims of Davis in both the respects last mentioned were allowed by the

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

referee, but the orders in that behalf were reversed and set aside by the court below.

Helm Bruce and Percy Booth, for appellant.
Johnson & Hieatt, for appellee Louisville Trust Co.
Henry Burnett, for appellee Jefferson.
Bernard Flexner, for appellee Western Nat. Bank.
Henry Burnett and Bernard Flexner, for appellee Howe.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The initial test of the validity of the claim of Davis is involved in important questions of admissibility of evidence. It is contended in the first place that no competent witness was produced to testify that any report of the financial condition of the company was ever made to the mercantile agency; and, in the next place, that the instrument exhibited as such a report could not if received in evidence be considered as addressed to Davis or as having been intended to influence him or any one else in the purchase of treasury stock of the bankrupt company. The court below regarded the report as inadmissible, and so declined to consider it. This is made the subject of the first assignment of error.

The paper was received in evidence by the referee. It was admittedly a copy of what purported to be a report made by J. H. Saunders as city reporter of Dun & Co. at Louisville. It was shown that he had occupied that position for 10 years, but that he was deceased at the time the report was offered in evidence, and that he had made and presented the writing on June 18, 1903, to the superintendent of Dun & Co. The material parts of the report are: An abstract of a portion of the articles of incorporation of the bankrupt company dated June 1, 1903, showing its authorized capital stock, $500,000, its successorship to the business of the old company and names of the subscribers for 2,430 shares of $100 each of the new capital stock and specifying the number taken by each subscriber. It then proceeds:

"Ben Howe, the president, states there has been actually paid in cash $250,000, that the assets consist of machinery, merchandise, etc., and that the new company has no indebtedness. He further states that the company has purchased a wholesale plumbing and steam fitting supply business, for which they paid $150,000, and that they have also purchased another business for a like amount at Birmingham, Ala., and, while all deals have been completed, they are not ready to make a detailed statement of the company's affairs. It is their intention to elect three more directors. Claims that the entire capital of $500,000 will be paid up within the next two weeks. * * * It will be seen that they have not completed their affairs and just what amount of actual capital they have cannot be ascertained."

J. J. Saunders testified that he was then manager of the mercantile agency at Louisville, and at the time the report was made he was assistant manager. He further testified that the paper offered in evidence was a "copy of the report from our records," production of the original having been waived, and, referring to what he called the "record" of the report in question, he further said that his deceased brother was the author of the report; that the records show that his brother

had received the statement contained in the report and had made it a matter of record; that "it was kept in our regular files to be given to anybody that wanted information of that company (the Howe Mfg. Co.) at that time"; and that such statements "are placed on record for the purpose of giving them to inquirers." He was, however, not present when Howe purports to have made statements to the deceased brother, but it was agreed that J. J. Saunders would if recalled testify:

"His knowledge of such alleged statements was and is based on his knowledge of the record on file in the office of R. G. Dun & Co., and on his knowledge of the making, filing, and preserving of said record, and on his knowledge of the business of R. G. Dun & Co., and the methods, rules, customs, and circumstances governing the statements made to R. G. Dun & Co., and governing the making, filing, and preserving of other records of such statements."

He delivered to Chess a copy of the report on August 4, 1903.

The objection urged against receiving this report is that it is hearsay. We think the right to resort to secondary proof in the circumstances stated is reasonably well settled. The principle underlying the admissibility of such evidence is that the person making the report was engaged in the regular course of a distinct business, before any dispute arose, and in the discharge of a duty to record matters for others, without having any personal interest in the subject recorded.

It is well settled in what we regard as kindred cases that the duty thus discharged need not be imposed by law. It is enough that the duty is recognized. The fact that the record is designed for the use of all persons rightly interested in the subject, and that the success of the business of supplying the information so obtained is dependent upon its accuracy, cannot, we think, but enhance the obligation and sense of duty involved. When it is shown that a record was made in that way and with the motive indicated, that it has been carefully preserved, and that the author is dead, there can be no perceivable violation of any principle of evidence by treating the report as prima facie evidence that the acts and matters so recorded and purporting to relate directly to the business in hand occurred as there stated, subject of course to contradiction by other evidence.

In Nicholls v. Webb, 8 Wheat. 326, 337, 5 L. Ed. 628, when passing upon the admissibility of memoranda of a deceased notary, made in the regular course of his business, but not in obedience to law, Justice Story said:

"We think it a safe principle that memoranda made by a person in the ordinary course of his business of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty."

The contention of counsel for appellees that that decision has been repudiated by the Supreme Court is not tenable. This will be seen by comparison of the last case relied on by counsel—Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 227, 38 L. Ed. 106—with another case decided by the same justice later. We refer to Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. In

passing upon the admissibility of a memorandum made in pursuance of a practice and usage in the port of New York touching the posting of notices in the custom house of the time of unloading vessels, the learned justice said (69):

"The practice even of a private office if well established is presumed to have been followed in individual cases and is accepted as sufficient proof of the fact in question when primary evidence of such fact is wanting"—[citing among other cases, Nicholls v. Webb].

The authority of Nicholls v. Webb was recognized, also, by Mr. Justice White in Putnam v. United States, 162 U. S. 687, 695, 16 Sup. Ct. 923, 40 L. Ed. 1118. In Kennedy v. Doyle, 10 Allen (Mass.) 161, 167, Judge Gray said:

"In the United States the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts so recorded."

See, also, Lassone v. Boston & Lowell R. Co., 66 N. H. 345, 24 Atl. 902, including note to the case found in 17 L. R. A. 525, stating, "Careful research has failed to find any direct authority not cited in the report of the case;" Leland v. Cameron, 31 N. Y. 115, 120; Augusta v. Windsor, 19 Me. 317; Abel v. Fitch, 20 Conn. 90, approved in Town of Bridgewater v. Town of Roxbury, 54 Conn. 213, 6 Atl. 415; 1 Smith's Leading Cases, in note to Price v. Earl of Torrington, p. 571; 2 Wigmore on Evidence, §§ 1517–1522.

Treating the report of the mercantile agency then as prima facie evidence of the fact that the president of the bankrupt company made the representations therein stated, the question arises: To whom were they addressed? Was Davis entitled to rely upon them? This question is not of easy solution. Davis was not a patron or subscriber of R. G. Dun & Co. He obtained the report through Chess, and Chess obtained it from Dun & Co. through his membership of the Chess-Wymond Co., which seems to have been a patron of R. G. Dun & Co. It is clear enough that, if Chess had obtained the report for either his firm or himself for the purpose of determining whether to give credit in the way of sales of material or loans of money, he might rightfully have placed faith in the report; for ordinarily such statements are given for the very object of fixing a basis of credit. As stated in National Bank of Merrill v. Illinois & Wisconsin Lumber Co., 101 Wis. 247, 253, 77 N. W. 185, 188:

"The commercial agency which gathers and circulates reports as to the financial standing of business houses is an institution now so well established, and its reports are so universally used, that no court or merchant can plead ignorance of its purpose or functions. When a merchant states to such an agency his financial condition, he knows it is for publication to the business world, and that such publication will probably be consulted when he applies to any business institution for credit. He makes his statement, therefore, knowing that it will probably be used as a basis of credit. Upon what ground can it be said that such a statement is not a representation made for the purpose of securing credit as fully as if made personally to each business house with which he has dealings."

See, also, Genessee Sav. Bank v. Mich. Barge Co., 52 Mich. 164, 170, 438, 17 N. W. 790, 18 N. W. 206; Stevens v. Ludlum, 46 Minn. 160, 161, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 34, 38 Am. Rep. 389, limited in Macullar v. McKinley, 99 N. Y. 353, 358, 2 N. E. 9; Fechheimer v. Baum (C. C.) 37 Fed. 167, 177, 2 L. R. A. 153; In re Weil (D. C.) 111 Fed. 897, 898; In re Epstein (D. C.) 109 Fed. 874, 876; Bliss v. Sickles, 142 N. Y. 647, 36 N. E. 1064; Loveland on Bankruptcy (3d Ed.) § 152b.

It is further to be observed of these decisions that, where it is shown that the representations are falsely and fraudulently made, they are to be treated as having been made with that intent to each of the persons addressed precisely the same as if each person had been singled out and so sought to be influenced. In Genessee Sav. Bank v. Mich. Barge Co., the Supreme Court of Michigan in expressing its approval of the language employed in Eaton, Cole & Burnham v. Avery, supra, quoted the following from that decision (52 Mich. 170, 17 N. W. 793):

"* * * And, if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured."

The facts of the decisions thus far cited concern sales of articles or loans of money to the person making the report to the mercantile agency, and upon which reliance was placed by the sellers or lenders. It is not difficult, however, to conceive that it would be to the interest of business concerns whether owned by individuals or corporations to employ mercantile agencies as the means of communicating to others not merely responsibility in relation to desired purchases and loans, but also to attract dealers in investments and investors themselves. We think this conception is justified in this particular case, both by the report and the evidence adduced. In addition to the other features of the report which are obviously adapted to inspire confidence in the financial stability of the company, the report contains these statements (in substance): That about half the authorized shares had been subscribed, also that "Ben Howe, the president, states that there has been actually paid in cash $250,000, * * * claims that the entire capital of $500,000 will be paid up within the next two weeks." While the statements are not in terms expressive of a desire to sell stock, it cannot escape attention either (1) that all of the company's stock had not been taken; or (2) that the language was calculated to induce purchases of stock. But we now know that Howe was then wishing to sell treasury stock. In his testimony he stated:

"Q. Did you tell Mr. Davis that the company was desperately in need of money when you asked him to put in $5,000? A. That was one of the reasons I was trying to get subscribers for stock.

"Q. Do I understand you to say that the New Howe Manufacturing Company was in need of money or ready cash to pay its debts or run its business in the fall of 1903? A. We were, or we would not have been trying to get stock subscriptions.

"Q. In August and September, 1903? A. Yes, sir."

Now, wherever it is necessary to determine the scope of a given representation, of course, the intent and object of the one making it must be considered. Manifestly this company needed money and desired to sell stock to obtain it. Naturally it would not, and in truth it did not, confine its efforts to sell stock simply to persons from whom it might expect to buy materials or obtain loans. Why then should this report be so interpreted as to restrict the object of the company to an effort merely to establish a basis of credit? The company certainly had as much authority to sell treasury stock as it had to purchase materials or borrow money; indeed, at the time of making the report, it does not seem that the company was any more anxious to acquire a basis of credit than it was to obtain money through sales of stock. It is therefore not too much to say that one of the purposes of the report was to influence sales of stock.

Can the report then be regarded as having been addressed to persons desiring to buy treasury stock, but who were not patrons of the mercantile agency? The answer may, we think, be aided by the testimony. Saunders testified:

"Q. When statements such as these are made by business concerns to your agency, what is customarily done with them by you? A. Well, they are placed on record for the purpose of giving them to inquirers.

"Q. For what purpose do you furnish these reports, or copies of your records to applicants? A. Well, that is a pretty hard question for me to answer, because I do not know what use the people inquiring want to make of them. They are supposed to be for the purpose of determining credit. Maybe it ain't always that way.

"Q. How long has R. G. Dun & Co. been in this business? A. Since 1841.

"Q. Do persons who furnish facts to your agency for the purposes which you have named do so with any knowledge that such statements will be communicated by your agency to any other persons? A. Yes, sir; invariably. All statements are made as a basis for credit."

This testimony was received subject to objection, and, although courts are accustomed to take judicial notice of the methods of mercantile agencies, we see no reason why such knowledge may not be supplemented respecting disputed features of their methods of business by the testimony of experienced officers of the agencies themselves.

It is to be observed that the witness said that such statements are made "as a basis for credit"; but he also stated that they are placed on record for the purpose of giving them to "inquirers." It is urged that "inquirers" must be limited to patrons. The witness did not state any such limitation. Further, it does not appear that the persons making reports to the agencies impose any restrictions in this regard. It may be assumed that the primary object of the agency is profit; but even in this view it seems that the agency gathering the information, not those giving it, determines the conditions upon which it will be given circulation. Why, then, may not an agency rightfully give information so obtained to third persons generally, and upon such terms as the agency may choose to exact? Is not that in truth the ordinary course pursued by such agencies? Plainly it is consistent with the evidence that the reports "are placed on record for the purpose of giving them to inquirers."

If the agency had chosen to furnish Davis directly with a copy of the report, no matter on what terms, it is hard to see what reason the company would have to complain. The most that can be said in its behalf is that the agency did not furnish Davis with a copy. What happened was that Davis requested Chess to investigate, Davis testifying, "I was not in position to investigate this matter and would like to have him (Chess) investigate it for me." Later Chess did investigate, and as a result turned over to Davis a letter he had received from Mr. Jefferson, together with a copy of the report in dispute, and Davis testified that he relied on this report as well as the letter in purchasing the stock. Chess made the investigation both because of his interest in Davis and of his purpose to loan Davis half of the money necessary to buy the stock. But the last analysis of the situation would seem to be that Chess undertook the investigation as the agent of Davis.

Now, it may be conceded that Davis could not have treated the report as addressed to him, if he had come into possession of it wrongfully. But can it be justly said as between him and the bankrupt company that he did obtain the report wrongfully? Surely he did not do so as to the portion of the report which purported to be based on the articles of incorporation. In that portion it is stated in substance that 2,430 shares of the stock had been subscribed by persons there named. The articles had been recorded in the office of the clerk of the Jefferson county court, and were obviously addressed to the public.

In Emerson v. Steel & Spring Co., 100 Mich. 127, 132, 58 N. W. 659, 660, it appeared that the report of a mercantile agency had been based upon sworn reports of the company to the Secretary of State; and Montgomery, J., having occasion to pass upon an attachment in dispute, said:

"The next question was whether there were grounds for attachment. We think there was sufficient to show that the indebtedness was fraudulently contracted. It sufficiently appears that Dun's reports were based upon the sworn reports of the company to the Secretary of State, that both the plaintiffs in attachment extended credit upon the strength of these reports, and we are satisfied that these statements of the company were false, and could have been made with no other purpose than that of establishing a false credit."

It is true that the question there involved differed from the one now under discussion; but the point of the reference is that notice of a report addressed to the public may be acquired through the medium of a report of a mercantile agency, and that action may be rightfully taken upon the faith of the information so derived. As to the rest of the report, it is to be constantly borne in mind, as before pointed out, that the report is made to the mercantile agency for the very purpose of having its contents communicated to others; that is, as testified in this case, to "inquirers." Such a report cannot in the nature of things be of any sort of consequence to the mercantile agency, except only as the agency may itself choose to exhibit the report. It is not the case of one person authorizing another to make representations to a specified third person, for there the use to be made of the representations is expressly limited by the person making them.

But, according to the testimony in this case, the report was turned over to the mercantile agency with authority to dispose of it, indeed to sell it, upon such terms and to such persons as it might determine. How does this differ in principle from the law as laid down in the old case of Scott v. Dixon, decided by the Queen's Bench in 1859 and reported in 29 L. J. (Ex.) 62, note?

In that case a report in writing was made by directors of a bank and addressed expressly to the shareholders, but it was left at the bank, and copies could be had by sharebrokers or anybody applying for them who was desirous of information in regard to the affairs of the bank with a view to purchasing shares. Plaintiff Scott obtained a copy through a broker, and he and the other plaintiffs afterward purchased shares in their joint names. The report was held to be a representation made to persons other than the shareholders. Lord Campbell said:

"The next point which we have to consider is, Was this representation made to the plaintiffs? Upon that I cannot entertain the slightest doubt. Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and I have no doubt that the directors in the present case knew that this particular report would a few hours after its publication be in the hands of all sharebrokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs by the perusal of it were induced to buy shares in the bank. I have therefore no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs is most completely established. * * *".

In Peek v. Gurney, L. R. 6 App. 377, Lord Chelmsford approved of the decision in Scott v. Dixon, distinguishing it from the famous case in which he was then delivering his opinion, in the following language (397):

"* * * An action was brought against a director of a banking company for falsely, fraudulently, and deceitfully publishing and representing to the plaintiffs that a dividend was about to be paid out of the profits, which were sufficient for payment of the dividend, and that the shares were a safe investment for the money. The plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders which contained the false representations. Copies of this report were left at the bank, and were to be had by sharebrokers or any persons applying for it, who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The plaintiffs purchased at the bank, through their broker, a copy of the report. The Court of Queen's Bench held that there being positive evidence that the report was to be bought by any person who thought of becoming a purchaser of shares, and that it came into the hands of the plaintiffs in this manner, and by the perusal of it they were induced to buy shares in the bank, there was a publication to the plaintiff in the sense of the declaration. I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director."

The doctrine of Scott v. Dixon was approved by this court in Hindman v. First Nat. Bank, 112 Fed. 931, 943, 50 C. C. A. 623, 57 L. R. A. 108. It is true that in that case this court held that a certificate of a bank showing that a certain deposit of money had been made and filed with the state insurance commissioner, in form as required by the law of Kentucky, was a representation intended only to influence the commissioner; and, further, that the fact that it was the duty of the commissioner on demand to furnish copies of the certificate to any of the public, and also to include the certificate in his official report, did not change the character of the representation. But we think that was far from holding that a report like the one in question would not have a broader scope than that of the bank certificate then under consideration.

There is another class of decisions which seems to us to lend analogy to the question under discussion. Those decisions concern liability growing out of representations made by corporate officers touching the financial condition of their companies and sent to some state or federal official and subsequently published in pursuance of statutory requirement. One of the decisions alluded to is Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833. That action was based upon a false statement of the financial condition of an insurance company. The Iowa Code required such statements to be filed with the Auditor of State, setting out certain prescribed data, also that the Auditor should arrange the information contained in the statement and report the result to the Governor, and also that these reports should be printed and distributed as part of the annual report of the Auditor, and, further, that the companies themselves should annually publish a certificate showing their aggregate amount of assets and liabilities. The plaintiff bought stock in the Des Moines Insurance Company from stockholders on the faith of reports of this character, and afterward brought an action of deceit against the secretary upon the ground that the reports so made and published were false and fraudulent. Say the court at page 72 of 118 Iowa, at page 835 of 91 N. W.:

"Insurance companies know that their reports are thus made public, and it is not going too far to say that they make them as favorable to their interests as the facts will warrant, for the express purpose of inducing public confidence, and by so doing to increase the volume of their business. * * * It is said, however, that in the purchase of stock from a third person the plaintiff had no right to rely upon the representations made in the statement sworn to and filed by the defendant. If the defendant in fact falsely reported the financial condition of his company for the purpose of deceiving the public in relation to its responsibility as an insurer, it seems clear to us that we should not say as a matter of law that he only intended to wrong that particular class, and that those dealing in its stocks were not his intended victims; for he knew that stock in such companies was often bought and sold, and that reliance might be placed upon his sworn statement by those dealing therein.

See, also, Gerner v. Mosher, 58 Neb. 135, 146, 78 N. W. 384, 46 L. R. A. 244; Merchants' Nat. Bank of Hillsboro v. Thoms & Brenneman, Executors, 28 Wkly. Law Bul. (Cincinnati Superior Court per Judge Rufus B. Smith) 164, 168; Genessee Sav. Bank v. Mich. Barge Co., supra; Silberman v. Munroe, 104 Mich. 352, 62 N. W. 555. See

particularly Graves, etc., v. Lebanon National Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50, where the bank was directly affected.

The relevance of these decisions as they seem to us is that the persons making the representations did so with knowledge not merely that the particular officer to whom they would be addressed would be advised of their contents, but also that their substance would be published to all who might wish to deal with the companies and in its stocks. How can one escape the charge that he contemplated the effect such representations would have upon others at the very time he made them? As it seems to us, therefore, it is immaterial whether representations are made voluntarily or in obedience to law, wherever they are put out with general authority in some agency to make publication of them to third persons, in such manner and to such extent as the agency shall desire.

We do not overlook Irish-American Bank v. Ludlum, 49 Minn. 344, 51 N. W. 1046, relied on by counsel for the trustee. In that case one Thompson appeared to have sold notes to the bank, which had been made to his order by the New York Pie Company. The bank brought suit on the notes against Ludlum, as owner of the pie company. At the trial Thompson testified that he was a subscriber to the commercial agency of Dun & Co. and had "called for and received a report from it" upon the pie company. This, it should be observed, may have been (though this does not expressly appear) a special report made to him personally, and not a copy of the company record. He stated that he had lost this report, but could state its contents, and was permitted against objection to do so. The cashier of the bank was under objection allowed to testify that before receiving the notes he had been informed by Thompson of the nature and contents of the report of the agency, and believed in and relied upon the report in accepting the notes. It was held that this testimony "should have been excluded as immaterial and incompetent." If it was meant by this ruling to hold, as in fact the court did in substance say, that representations made to a mercantile agency are intended only for its patrons, we are not disposed to follow it, especially upon a comparison of its facts with the facts disclosed in the present case. Indeed, we are constrained to hold under the evidence of the present case that Davis was so connected with the representations in dispute as to entitle him to place faith in and rely upon them.

Treating the report then as admissible, we must next inquire into its alleged falsity. It cannot be expected that we shall discuss the vast amount of evidence in detail, which bears upon this report. We shall state some of our conclusions. In the first place, the subscriptions to capital stock were not in truth made according to the only inference that could be drawn either from the articles of incorporation themselves or as they are stated in the report to the mercantile agency. It cannot be pretended that T. L. Jefferson made a bona fide subscription for 1,150 shares as there represented. He testified that he only intended to subscribe for 250 shares for himself and 200 for his son Floyd Jefferson, and that he was induced to make the additional subscription on statements made by Howe that certain shares had been

practically taken, and that those sales should be made out of Jefferson's nominal portion. Jefferson also stated substantially the same thing respecting the apparent subscription of R. W. Bingham for 255 shares. The total number of shares apparently taken was 2,430. Immediately following the list of subscriptions is the statement said to have been made by Howe "that there has been actually paid in cash $250,000." The evidence does not warrant any such statement. It was not true. Another statement purporting to have been made by Howe was "that the company has purchased a wholesale plumbing and steam fitting supply business, for which they paid $150,000." As we understand the evidence, we are bound to say as to the payment of $150,000 that this statement was equally untrue. What warrant Howe had for the claim ascribed to him that "the entire capital of $500,000 will be paid up within the next two weeks" is not shown. This may in one sense be said to have been an opinion rather than a statement of a fact, but it certainly was an unwarranted forecast. If the features of the report so pointed out as not sustainable under the evidence had been omitted, the report would hardly have been calculated to influence either sales of merchandise or loans of money, much less investments in the stock. It is therefore not necessary to compare the rest of the report with the evidence. Why should such a report have been made; why should it not have been explained? It is said that Howe denied making the report. But, so far as we can discover, Howe did not in his testimony allude to the report. He did make one statement that is inconsistent with one portion of the report. He testified:

"Q. I will ask you to state whether or not you told Mr. Davis, or any one else, that the new Howe Manufacturing Company had bought the plant of T. A. Vogel & Sons, or the jobbing house in Birmingham, Ala. A. No, sir; I never told no one that in my life. Q. As I understand, you had an option on it? A. Yes, sir; an option on it, I never told any one that I ever bought it."

But it surpasses our understanding why Howe would not directly and emphatically have denied the representations contained in the report, if in truth they had not been made.

It follows that there was error in excluding the report, and that the report must be treated as having been designed fraudulently to influence the sale of stock in question. While it is true that Davis testified as before pointed out that he was influenced both by the report and the letter of Jefferson, we see no escape from the conclusion that the effect of the report alone was sufficient to entitle Davis to rescind the contract, unless he was guilty of laches in repudiating it. This conclusion renders it unnecessary to consider the part that Jefferson is said to have taken toward influencing the sale of stock. We have no hesitation in finding that, whatever Jefferson did, he did not do in an official capacity or as an agent engaged in the transaction of the business of the company. The company did not deal with Davis through Jefferson. It dealt with him through Howe, its president. The company can claim title to the money it received for the stock only through the acts of Howe and Davis. We therefore see no reason or room for introducing Jefferson into the transaction for the purpose of binding the company.

Had Davis through acquiescence and delay lost his right to rescind? If we were to consider merely the lapse of time between the purchase of the stock and the repudiation of the contract, a period of three years, it would seem under some of the decided cases that Davis should have ascertained his rights and taken action earlier. But as a rule the facts offered in support of defenses of laches vary so greatly that it is not ordinarily helpful to employ results reached in one case to determine the result that should be reached in another. There is, however, one principle pervading all the decisions that cannot be avoided here. It is that the defense of laches will not be entertained, unless it is made to appear that it would be inequitable to deny it. As observed by Justice Brewer in Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874, 36 L. Ed. 738, when speaking of the cases in which this defense had been invoked:

"It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. 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."

After commenting upon some of the decisions the learned justice proceeded at page 373 of 145 U. S., at page 875 of 12 Sup. Ct. (36 L. Ed. 738):

"But it is unnecessary to multiply cases. They all proceeded 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."

See, also, Ward v. Sherman, 192 U. S. 168, 176, 24 Sup. Ct. 227, 48 L. Ed. 391; Stevens v. Grand Central Min. Co., 133 Fed. (8th Circuit) 28, 31, 67 C. C. A. 284; Cook on Corp. §§ 161, 162. An instance of allowing the defense of laches against a subscriber to corporate stock, who had not been "vigilant in discovering such fraud and in repudiating his contract," appears in Chubb v. Upton, 95 U. S. 655, 667, 24 L. Ed. 523, where under the facts it would have been inequitable to enforce the subscriber's rights. In G. A. Joslin v. Cadillac Auto Co. (Sixth Circuit) 177 Fed. 863, 869, it was stated by Judge Knappen:

"Acquiescence and waiver are always questions of fact, and, where set up to defeat rescission, the burden is upon the defendant to make it out. Mudsill Mining Co. v. Watrous (6th Circuit) 61 Fed. 163, 186, 188, 9 C. C. A. 415; Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420."

As we understand the evidence, practically all the claims of creditors of the bankrupt company have been purchased by Howe and are held under some arrangement between him and Jefferson and the Western National Bank; and we are impressed with the belief that those parties, unlike the original creditors, parted with their money with notice of the claim now in dispute. Nor do we understand that the rights of any present stockholders were acquired without notice of this

claim; and, further, we do not discover anything tending to show that the assets are sufficient to admit of payment of a dividend to stockholders in any event. There is no secondary or double liability of the stockholders. But, apart from these considerations, we are not convinced that the trustee has discharged the burden of showing that Davis either gained knowledge of the true conditions under which he purchased his stock, or that his relations to the company were of a character rightly to justify us in imputing to him or otherwise charging him with such knowledge, prior to March, 1906, when the "four-cornered agreement" mentioned in the statement was entered into; and we think that he thereupon investigated into the facts and pursued the remedies open to him with reasonable diligence.

What has been said must, of course, result in permitting Davis to prove his loss for the sum of $5,000 with interest from July 27, 1906, the date of the rescission. But we cannot in this proceeding accord priority to the claim as was ultimately allowed by the referee. The referee ordered that the claim should be paid in full before any distribution of the estate should be made to Jefferson, Howe, or the Western National Bank. Our attention has not been called to any decision in which such priority was granted in a proceeding of this character. We do not see how such an order could be allowed without in effect determining the ultimate rights between Davis on the one hand and each of the parties named on the other. We do not think that the proceeding is in condition to admit of such an order. It is true that the proceeding is of an equitable character, and that the creditors named have voluntarily become parties to it. But no such issues have been formulated and presented as to enable the court properly to hear and determine the rights of Davis against the other persons named either severally or jointly. Such rights as Davis urges against them would ordinarily be enforced against them separately in actions for deceit. The evidence offered in the present proceeding might be admissible in each of those cases; but it is by no means certain that all of the evidence which the parties might wish and be entitled to produce is to be found in the present record.

The order of the court below will be reversed with direction to cause an order to be entered allowing the claim of Davis as a general claim with interest from July 27, 1906 (the date of rescission and demand), until the date of filing the petition in bankruptcy, against the estate of the bankrupt, and awarding to him his costs. Bankr. Act July 1, 1898, c. 541, § 1, subd. 10, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419); Id., § 63, 30 Stat. 563; rule 21, Gen. Orders Bankr. (89 Fed. ix; 32 C. C. A. xxii); Loveland on Bankr. (3d Ed.) § 117; Lowell on Bankr. § 198; Sloan v. Lewis, 22 Wall. 150, 156, 22 L. Ed. 832; In the matter of Freeman Orne, 1 Ben. 361, 364, Fed. Cas. No. 10,581.

In re LINGAFELTER.

PUGH v. LINGAFELTER.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,011.

DOWER (§ 49*)—EFFECT OF RELEASE IN VOID MORTGAGE.

A wife's right of dower in her husband's real estate cannot be separated from the principal estate, and where a mortgage given by him to secure a debt of his own, in which she joined for the purpose of releasing her dower interest, is set aside after his bankruptcy as a preference, and the property restored to his general estate, such mortgage is also inoperative to release or bar her dower right and cannot be enforced by the mortgagee as a conveyance of her dower interest in the property.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154–175; Dec. Dig. § 49.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern Division of the Southern District of Ohio, in Bankruptcy.

In the matter of James F. Lingafelter, bankrupt. On petition of Joseph N. Pugh, as receiver of the Homestead Building & Savings Company of Newark, Ohio, to review an order of the District Court. Affirmed.

The following is the opinion of the District Court by Sater, District Judge:

A mortgage given by the bankrupt to secure his valid pre-existing debt, in which his wife released her inchoate right of dower in the premises conveyed, was heretofore in these proceedings voided as against his creditors. Thereafter the trustee in bankruptcy sold the bankrupt's real estate. The wife prayed the computation and payment to her in cash of the value of her dower right. The Homestead Building & Savings Company, the mortgagee, asked that the value of her dower be paid to it. The referee found in its favor. The bankrupt's estate is hopelessly insolvent.

Bigelow on Frauds, vol. 1, p. 253, and vol. 2, p. 67, holds that, because a conveyance in fraud of creditors, though it be without consideration, is good as between the grantor and grantee, the wife's release of dower, if she is not also a victim of the fraud, remains good against her in favor of the grantee, although the conveyance be voided as against the husband's creditors, and all of the estate, except the wife's dower, be taken by them to satisfy their claims. The view there expressed is that, having solemnly parted with her interest in the estate conveyed by her husband, her release operates as an estoppel, though not as a grant. The author concedes that courts have not hesitated to hold to the contrary, and that while Woodworth v. Paige, 5 Ohio St. 70, on which the savings company relies, does not decide the point, the inclination of the court was toward the widow's right to her dower. The direct question at issue in that case was whether or not a wife, who, in a deed executed and delivered without any consideration and to defraud creditors, releases dower, is thereby estopped to claim against a purchaser for a valuable consideration from the fraudulent grantee. Judge Thurman in his opinion said:

"It would seem obvious that, if the deed of the husband and wife was executed for a sufficient consideration and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies."

Considering all that is disclosed by the statement of facts and the opinion, the above-quoted passage rests, in my judgment, on the assumption and

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

fact that the deed had not been set aside. If this be incorrect, the utterance is obiter dictum, because there was no issue involved in that case which called for an expression of opinion as to whether or not a wife who has joined her husband in a fraudulent conveyance by releasing her inchoate right of dower may assert such right against the fraudulent grantee, in case the conveyance is voided and the premises thereafter sold to pay creditors. Munger v. Perkins, 62 Wis. 499, 503, 22 N. W. 511, 512, cites, among other authorities, Woodworth v. Paige to sustain the point that:

"The joining with the husband in his conveyance is but a release by the wife of a contingent future right and operates against her by way of estoppel. And inasmuch as the release of dower, to be operative, must be in conjunction with the conveyance or other instrument which transfers title to the real estate, it follows that if the conveyance or instrument is voided, or ceases for any reason to operate, and no title is passed, or none remains, the release of dower does not after that operate against the wife, and she is again clothed with the right which she had released."

In Black v. Kuhlman, 30 Ohio St. 196, it appears that the husband had given two mortgages in which the wife had not joined. He gave a third mortgage in which she released her contingent right of dower. In foreclosure proceedings the property was sold, and the third mortgagee was, on distribution, awarded the money value of the wife's contingent dower interest, although the proceeds of the sale were insufficient to satisfy in full the two preceding mortgages executed by the husband alone. This case is claimed to be analogous to and decisive of the case at bar. The answer is that the third mortgage was not void and had not been so declared. The default decree, on which the property was sold, was based on it as a valid subsisting mortgage. The mortgagee was, and in fact remained, the husband's bona fide grantee in the conditional conveyance. In the present case, the title to the bankrupt's real estate was in the trustee in bankruptcy at the time the mortgage was voided. The title passed from him to the purchaser by the sale conducted under the bankrupt act, and, had the wife not waived her contingent right of dower and asked to be paid its money value, the purchaser would have taken the title encumbered by it. Ridgway v. Masting, 23 Ohio St. 294, 13 Am. Rep. 251. The savings company was adjudged to have acquired its lien or conditional conveyance wrongfully. The position of grantee is not occupied by it, but by the purchaser at the trustee's sale. It is not entitled to the value of her dower interest, because no one can avail himself of a wife's release of dower other than the person who claims under the very title which was created by the conveyance with which the release was joined, and, if the conveyance is set aside, a grantee cannot retain the dower interest of the grantor's wife. Bump on Fraudulent Conveyances, §§ 478, 637.

Light is thrown on the point here in issue by Lockett v. James, 8 Bush (Ky.) 28. The husband and wife executed a conveyance to Lockett, which was set aside because in fraud of the husband's creditors. The wife, as in this case, was not liable for any of his debts, nor was she a party to the suit. Lockett defended, claiming the lands as a bona fide purchaser. The proceeds, including the value of the wife's contingent dower right, was, by the trial court, awarded to creditors. Lockett claimed that though the deed of the husband and wife to him had been adjudged fraudulent and void as against creditors, and for that reason only had been annulled as to him, it was nevertheless effectual as a conveyance to him of the wife's dower interest. On that point (the husband having died), it was said that:

"The absolute invalidity of the deed as a conveyance of the legal title being judicially established and admitted, we are of the opinion that upon its avoidance at the instance of creditors * * * it was no longer effectual as between the appellant and the surviving widow, as a bar to her right of dower, either as a conveyance or in estoppel. 1 Scribner on Dower, 610; 1 Wash. Real Prop. 213; Robinson v. Bates, 3 Metc. [Mass.] 40."

This is in accord with the per curiam in Ridgway v. Masting, supra. A fraudulent mortgage and deed in which the wife had released her inchoate right of dower had been set aside in a proceeding to which the wife was not a party. The premises were, by order of court, conveyed to the defrauded party; but there was no release of dower. It was held that, because the

fraudulent instruments had been declared void, the plaintiff took no title from the husband of the petitioner (the widow), and that her rights in the property remained in the exact state they would have occupied had the fraudulent conveyance never been made.

Lockett v. James is cited in a note in Scribner on Dower, p. 646, to the point that it is well established by later cases that a widow may have dower where a conveyance fraudulent as to creditors is set aside as to them, and that the whole conveyance under such circumstances falls. The doctrine of estoppel, by reason of the wife's joinder in the deed, is not, in such cases, regarded as applicable.

The nature of the inchoate right of dower supports the view above expressed. It is a legal, contingent, valuable right or interest in the husband's lands; but it is not an estate. McArthur v. Franklin, 15 Ohio St. 509, and 16 Ohio St. 201; Jewett v. Feldheiser, 68 Ohio St. 523, 67 N. E. 1072; Ballard's Ohio Law of Real Prop. vol. 1, § 265; Kennedy v. Nedrow, 1 Dall. (Pa.) 415, 1 L. Ed. 202. It is not the result of contract, but is a creature of positive law founded on reasons of public policy and subject, while it remains inchoate, to such modifications and qualifications as legislation, for like reasons of public policy, may see proper to impose. Weaver v. Gregg, 6 Ohio St. 547, 549, 67 Am. Dec. 355. The wife alone cannot legally convey or transfer it (Black v. Kuhlman, 30 Ohio St. 199, 202), or assign it to a stranger to the title (McArthur v. Franklin, 15 Ohio St. 509), nor can it be sold under execution (Summers v. Babb, 13 Ill. 483). Where no lands are conveyed by a deed from the husband in which the wife releases her contingent right of dower, the right of dower does not pass as a separate substantive estate, for the law will not permit the alienation of such contingent interest. Douglass v. McCoy, 5 Ohio, 522, 527. It is but an incident to the principal estate and cannot be separated from, but falls and perishes with it. Bohannon v. Combs, 97 Mo. 446, 11 S. W. 232, 10 Am. St. Rep. 328. When the mortgage given by the bankrupt became inoperative as against his creditors to convey his estate, it became inoperative to release or bar his wife's contingent right of dower. Frederick v. Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. Rep. 283; Ballard's Law of Real Prop. § 275.

Other authorities supporting the views above expressed are Cox v. Wilder, 2 Dill. 45, Fed. Cas. No. 3,308; Rodgers, Dom. Rel., § 405; Kerr on Real Prop. §§ 1066, 1075; Loveland on Bank (3d Ed.) 482.

The referee is reversed.

Edward Kibler, for petitioner.

Roderic Jones, for respondent.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. The question presented in this proceeding is whether a wife's release of dower, contained in a mortgage executed by her husband and her for his benefit and upon his property, can be enforced by the mortgagee after the husband has been adjudicated a bankrupt and the mortgage has been adjudged to be null and void as constituting a preference under the bankruptcy act.

The referee in bankruptcy held that the receiver of the mortgagee could recover the estimated value of the contingent right of dower and made an order accordingly. Upon a petition for review the District Court reversed this order. Upon a petition to revise in matter of law and reverse the order of the District Court, the case is pending here.

On May 11, 1903, Lingafelter, the bankrupt, executed and delivered a mortgage on his property in which his wife released dower to the

Homestead Building & Savings Company of Newark, Ohio, to secure the payment of $50,000. A deed of trust conveying less property than that covered by the mortgage had been executed by Lingafelter alone and delivered to the Homestead Company prior to the giving of the mortgage. Lingafelter was secretary and manager of the Homestead Company, and the object of the mortgage, as well as that of the deed of trust, was to indemnify the company against shortages with which the secretary and manager was charged. The mortgage was not recorded until May 11, 1904, one year after its execution, and it is claimed that the reason for this delay was forbearance to expose the mortgagor, also to avoid financial trouble in the affairs of the Homestead Company itself and likewise of the Newark Savings Bank Company of which Lingafelter was cashier.

On September 6, 1904, within four months after the mortgage was placed of record, an involuntary suit in bankruptcy was commenced against Lingafelter, and on March 25, 1905, he was adjudged a bankrupt. The business of the Homestead Company was placed in the hands of a receiver, who presented for allowance proofs of a secured claim against the bankrupt's estate. The referee found the amount due to the receiver to be $81,843.65 growing out of shortages in the assets of the company, and caused an issue to be made up between the receiver and the trustee on the question of whether this sum should be allowed as a secured claim. Mrs. Lingafelter was not a party to the proceeding involving this issue. The referee found that the mortgage (as well as the deed of trust) was a "preference within the bankruptcy act, and as such is null and void and of no effect," and thereupon declared it to be "null and void" and ordered that it be "set aside as against creditors" of the bankrupt's estate; and at the same time ordered the trustee to sell the real estate "free and clear of * * * the dower interest" of Mrs. Lingafelter, but reserved the question of who was entitled to the "dower interest" for future decision. This order of the referee was affirmed by the District Court, and no proceeding to review that order was ever taken.

Mrs. Lingafelter filed an answer in the proceeding to sell, stating that she had "never assigned, transferred, or sold her dower interest in the property" except by the mortgage in question; that under the bankruptcy act the mortgage was "invalid as a preference" to the Homestead Company and of "no avail" to the company or to the general creditors for any purpose. The prayer was that in the sale of the property her dower rights be protected, and that "the said property may be ordered sold subject to her said dower rights, or that the value of her said dower rights in said real property be ascertained and ordered paid to her in money by the trustee herein or ordered invested for her use and benefit." The trustee sold the real estate free of dower, and the court determined the value of her dower right to be $849.21, and this sum is held by the trustee.

The single issue is whether this money shall be paid to Mrs. Lingafelter or to the receiver of the Homestead Company. It is insisted on behalf of the receiver that as between the Lingafelters and the Home-

stead Company the mortgage is valid, and that the wife can claim no part of the proceeds of sale until the mortgage is paid. The theory is that the mortgage was no more than a voidable preference, and that this was simply a name unless avoided at the instance of creditors.

This seems to us to overlook the necessary effect of the order vacating the husband's conveyance, upon his wife's release of dower. The transaction concerned the husband's debt, and, as regards the present question, his property alone. The Homestead Company demanded the mortgage, and Lingafelter and his wife yielded to the demand. The object manifestly was to apply the whole property free of dower, exclusively to the payment of the debt due to the company. The very contention that the mortgage is still valid as between the Lingafelters and the company impliedly concedes that the purpose of the mortgage could not have been accomplished except by the joint action of the husband and wife. Plainly the husband could have conveyed his estate in the land through his own separate act taken independently of any act of his wife; but it is not claimed that the wife could have acted in a corresponding manner with respect to her right of dower.

In the order of affirmance of the District Court adjudging the mortgage to be null and void and setting it aside as against creditors, it was also adjudged that the proceeds of the "property mentioned in said mortgage be distributed by the trustee equally between the general creditors of said bankrupt." Thus, whatever estate of the husband may be said to have passed to the mortgagee, it was as effectually diverted from the original object of the mortgage as if the instrument had never been executed at all. The result of the contention of learned counsel therefore comes to be that recovery can be maintained on the hypothesis that the wife's right of dower belongs to a stranger to the estate of her husband. We think the principle underlying the release of dower is so far ignored in this contention that it will not be amiss to notice and keep in mind some of the Ohio decisions bearing upon the subject.

In Douglass v. McCoy, 5 Ohio, 523, 527, the plaintiff, who was in possession of land purchased by him at judicial sale, had filed a bill to quiet title against claims set up by defendants. The judgment under which the sale had been made antedated a certain deed that the judgment debtor and his wife had executed conveying the land to another. It was in substance urged against plaintiff that, since the dower interest had not been acquired at the judicial sale, the grantee in the deed could set it up as a bar to the plaintiff's suit. Judge Lane, speaking for the court, said:

"Although the deed from Findlay and wife to McCoy extinguished the right of dower in the land conveyed, it was not intended to pass, nor did it pass, the right of dower as a separate substantive estate, if no lands were conveyed by the deed, for the law will not permit the alienation of such possible contingent interests. 4 Kent's Com. 254; [Stinson v. Sumner], 9 Mass. 143 [6 Am. Dec. 49]. Neither can it be aliened before assignment, so as to enable the grantee to maintain a suit in her own name, for it lies in action only. [Jackson ex dem. Clowes v. Vanderheyden] 17 Johns. [N. Y.] 167 [8 Am. Dec. 378]."

In Miller's Adm'r v. Woodman, 14 Ohio, 518, 521, in speaking of a dower interest vested in a widow, Hitchcock, J., said:

"It is not in the power of the widow to transfer any interest in it, until it has been actually assigned. When the dower is assigned, when it is aparted and set off to her by metes and bounds, then she may sell and convey, not before. The right, the chose in action, if I may so speak, is not assignable. It may be relinquished to him who has the next estate of inheritance in the land out of which it is to be carved, but cannot be transferred to a third person."

In Weaver v. Gregg, 6 Ohio St. 547, 551, 67 Am. Dec. 355, where a question arose touching the right of dower under certain statutory proceedings in partition, Brinkerhoff, J., said of the wife's right of dower in her husband's undivided interest in the land:

"She has a contingent possibility of interest in it, which may be released, but no property, no actual interest in it which is the subject of grant or assignment. Miller's Adm'r v. Woodman, 14 Ohio, 518."

In McArthur v. Franklin, 15 Ohio St. 485, 509, White, J., had occasion to say:

"Although the right of a wife to dower is contingent upon her surviving her husband, nevertheless it is a right or interest in the land, created by the law for her benefit and vested in her. * * * It is true she cannot assign it to a stranger."

In 2 Scribner on Dower (2d Ed.) p. 307, par. 40, it is said:

"It is well settled that it is no defense to an action for dower that the widow has released her dower to a stranger."

See, also, Rice on Modern Law of Real Property, p. 147; 1 Washburn on Real Property (6th Ed.) §§ 423, 483.

While it is held in Mandel v. McClave, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627, that a contingent right of dower is property and of ascertainable value according to mortality tables, etc., it is nowhere held in Ohio that it is susceptible of grant or assignment.

The logic, however, of the argument made on behalf of the Homestead Company is that a wife's right of dower may be withheld from her under conditions in which it could not have been acquired. The endeavor to work out this result is of a twofold character. One claim is that while the inchoate right of dower cannot be assigned it may be released; but to insist that the release is operative after the husband's conveyance is annulled is in effect to give to the release the attributes of an assignment. The other claim is sought to be maintained upon the familiar distinction between voidable and void instruments, but we think it comes to the same end concerning the release. For the idea is that, since the mortgage was merely voidable, the release of dower was good when made and remained so in spite of the annihilation of the mortgage so far at least as it affected the estate of the husband.

One vice, if there be any in such claims, is that they ignore the necessity of continuously sustaining the release of dower, as well as of acquiring it, as part of the estate and as an incident of a conveyance of the husband. The estate and conveyance of the husband are the

essential foundation of the release, no matter how the latter is effected. It is therefore most difficult after annulment of the husband's conveyance actually happens to perceive anything, and nothing is stated, upon which the release can any longer rest or operate. The last suggestion is that it is sustainable by estoppel; but, as said by Mr. Rice when speaking of a release of an inchoate right of dower (175):

"Such a release can be availed of only by one who claims under the very title created by the conveyance with which the release is joined."

And Scribner observes:

"Her renunciation of dower is to attend the conveyance of her husband; to endure while that endures and no longer." 2 Scribner on Dower (2d Ed.) p. 313, par. 49.

Illustration of the need of continuing the primary support of the release of dower may be found in Black v. Kuhlman, 30 Ohio St. 196, relied on by the Homestead Company. There the validity of the third mortgage in which alone the wife had joined was not questioned. Hence the only thing to prevent the third mortgagee from recovering more than the value of the dower interest was simply the circumstance that the property did not sell for enough to pay the claims of the first and second mortgagees and also the claim of the third mortgagee. Another illustration may be seen in the language of Earl, J., in Elmendorf v. Lockwood, 57 N. Y. 322, 325:

"But in all cases, when the wife unites with her husband in a conveyance, properly executed by her, which is effectual and operative against her husband, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred, and extinguished, for all purposes and as to all persons."

The difficulty confronting the Homestead Company is inherent in the subject-matter. When the mortgage was vacated and set aside, the title of the trustee under section 70a (4) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) and his right to administer the property of the husband for the equal benefit of all the creditors became absolute. The release being thus completely severed from the only support it ever had, it ought to follow that the right of dower attached again to the wife; and that too without regard to the cause of annulment of the husband's conveyance.

It is, however, insisted that decisions relating to instruments which are by statute denounced as void and not merely as voidable are not pertinent to the solution of the present question. The objection is that they proceed upon the theory only that the instruments were void ab initio. But we think the better considered decisions are also, if not chiefly grounded upon the principle before discussed, that a wife's release of dower can survive only so long as it attends the estate and conveyance of her husband; or, stated in another way, that, when the principal estate falls, the incident must fall with it.

Ridgway v. Masting, 23 Ohio St. 294, 13 Am. Rep. 251, we think may fairly be said to have recognized this principle; for, while the person there resisting the dower claim was the one at whose instance the deed containing the release of dower was set aside, yet the release was not allowed to operate after the deed was avoided and the hus-

band's estate declared to belong to a stranger to the deed. In that case Mrs. Masting sought dower in lands which her husband had in his lifetime agreed to sell to Mrs. Ridgway and of which he had given her possession. Afterward, Masting and wife mortgaged the land to one Carpenter, and subsequently joined in a deed to the wife of Carpenter conveying the premises absolutely. In an action brought by Mrs. Ridgway against the husband, Masting, and Carpenter and his wife, but to which the wife of Masting was not a party, the mortgage and deed were declared fraudulent and void and were set aside as against Mrs. Ridgway. It is stated in the syllabus:

"A release of dower by a married woman, who joins her husband for that purpose in a deed to defraud purchasers, is binding only as against the releasee and his privies; and where such fraudulent conveyance is set aside at the suit of the party injured, and a transfer of the premises, as against her husband, is decreed to the plaintiff, the wife, in the event of her surviving the husband, is entitled to dower as against such owner."

In the excellent work of Scribner before cited, the learned author said:

"A wife who joins with her husband in a conveyance of his lands is not a party thereto except for the purpose of relinquishing her dower. She is not to be regarded as alienating a real subsisting estate, but as releasing a future contingent right. Her renunciation of dower is to attend the conveyance of her husband; to endure while that endures, and no longer. Hence, if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired.

"It is upon this principle that dower is restored where a conveyance in which the wife has joined is set aside as fraudulent as to the creditors of the husband." 2 Scribner on Dower, p. 313, par. 49.

See, also, opinion of Maxwell, J., in Dubois v. Ebersole (Common Pleas, Ham. Co., O.) 20 W. L. B. 401. In Bohannon v. Combs, 97 Mo. 446, 448, 11 S. W. 232, 10 Am. St. Rep. 328, Sherwood, J., cited quite a number of decisions, which we refer to but do not set out, and from them he deduced this rule:

"Although there are authorities to the contrary, the better opinion is that when a conveyance of the husband in which the wife joins is set aside as being fraudulent as to creditors, this will result in reviving the wife's right of dower, for that, the deed of the husband being void, there is no estate left in the grantee upon which the relinquishment of dower can operate; hence, the wife is restored to her former rights."

After allusion to the overthrowal of the deed as fraudulent, the learned judge continued (page 449, 97 Mo., page 232, 11 S. W. [10 Am. St. Rep. 328]):

"* * * The grant of the inchoate right of dower fell with it, as it was not the alienation of an estate, but the mere incident of the principal thing, the conveyance of the fee by the husband, and of course perished with its principal, because there was no estate left to support it, and because there was no one in whom the bare relinquishment of dower could vest. Moore v. Harris, 91 Mo. 616 [4 S. W. 439]."

That decision was approved in Wells v. Estes, 154 Mo. 291, 297, 55 S. W. 255. In Elmendorf v. Lockwood, supra, it is said (page 325, 57 N. Y.):

"Hence, when the deed of the husband is for any reason void, or is set aside or superseded, so as to become inoperative, the wife's dower, although she joins in the conveyance, is not barred."

In Frederick v. Emig, 186 Ill. 319, 322, 57 N. E. 883, 884, 78 Am. St. Rep. 283, it was decided in respect of a release of dower, where the deed in the execution of which the wife had joined her husband was set aside:

"She was a party to the deed only for the purpose of releasing her dower, and her right to dower could not be separated from the principal estate, so that, when the deed became inoperative as against creditors to convey the estate of her husband, it became inoperative to release or bar her right to dower. As against creditors, the deed conveyed no estate of the husband, and in such a case a deed is not allowed to operate to release or bar the dower, but the wife may assert it after the death of the husband. Blain v. Harrison, 11 Ill. 384; Summers v. Babb, 13 Ill. 483; Stowe v. Steele, 114 Ill. 382 [2 N. E. 169]."

See, also, 1 Rice on Modern Law of Real Property, pp. 174–5; 1 Washburn on Real Prop. (6th Ed.) p. 214, § 426; Matthews v. Thompson, 186 Mass. 14, 19, 20, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550; Munger v. Perkins, 62 Wis. 499, 22 N. W. 511; Lockett, Adm'r, v. James, Adm'r, 8 Bush (Ky.) 28, 30; Sanford v. Ellithorp, 95 N. Y. 48, 51; Cox v. Wilder, 2 Dill. 45, 48, Fed. Cas. No. 3,308; Kennedy v. First Nat. Bk. of Tuscaloosa, 107 Ala. 170, 188, 191, 18 South. 396, 36 L. R. A. 308.

The claim that Mrs. Lingafelter received a consideration for her release of dower is not tenable. The only consideration suggested is alleged forbearance in recording and so publishing the mortgage. Conceding for the purpose of the question that this might be a sufficient consideration, still it does not appear that Mrs. Lingafelter made any request for or received any promise of any such forbearance, or that she had anything to do with the custody or control of the mortgage. Nor are we impressed with the claim that the Homestead Company's rights were enhanced by the fact that Mrs. Lingafelter in her answer in the proceeding of the trustee to sell the bankrupt's property, consented that the property might be sold free of dower. She expressly claimed her right to dower or its equivalent in money. All the objections that have been pointed out against releasing dower to a stranger in title to the property of the husband, apply to this claim.

We are therefore constrained to hold that the order of the District Court, from which no proceeding to review was ever instituted, vacating and setting aside the mortgage as null and void and directing the mortgaged property of Lingafelter, the husband, to be distributed equally among his creditors, operated to restore to his wife her right of dower in the property, regardless either of the claim urged under the bankruptcy act concerning voidable preferences (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Fed. 5, 1903, c. 487, § 13, 32 Stat. 800 [U. S. Comp. St. Supp. 1909, p. 1314]), or that might have arisen under any statute of Ohio (particularly sections 6343 and 6344; Loudenback v. Foster, 39 Ohio St. 203, 206; Robertson v. Desmond & Ryan, 62 Ohio St. 487, 497, 57 N. E. 235) relating to mortgages which may be declared void as to creditors (see, also, paragraph "e," § 67, Bankr. Act, 30 Stat. 564, and amendment, 32 Stat. 800); and that she has in no wise waived or lost that right.

The action of the court below must be affirmed, with costs.

In re NATIONAL GROCER CO

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,016.

1. COURTS (§ 366*)—EXEMPTIONS—CONSTRUCTION OF STATE STATUTES.
In applying exemption laws the bankruptcy courts are bound by the construction placed on such laws by the highest court of the state whose statute is involved, and also by the settled local law on the question of the validity of instruments affecting exemptions.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*
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. EXEMPTIONS (§ 79*)—TRANSFER OF EXEMPT PROPERTY—VALIDITY.
The mortgaging or conveying of exempt property to a creditor is not against the public policy of the state of Michigan.
[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 112; Dec. Dig. § 79.*]

3. BANKRUPTCY (§ 179*)—EXEMPT PROPERTY—VALIDITY OF MORTGAGE.
A mortgage or conveyance of exempt property good against the debtor under the state law is good against his trustee in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 179.*]

4. CHATTEL MORTGAGES (§ 50*)—DESCRIPTION OF PROPERTY—SUFFICIENCY.
Under Comp. Laws Mich. § 20,322, subd. 8, which exempts from levy and sale under execution "stock * * * to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250," and the law of the state which permits the mortgaging of after-acquired property, a mortgage by a merchant in Michigan of "all the goods and chattels now belonging to me in my business that are now or may be at any time hereafter exempt from levy and sale on execution against me" is not invalid for indefiniteness of description of the property.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 89; Dec. Dig. § 50.*]

5. BANKRUPTCY (§ 399*)—EXEMPTIONS—RIGHT OF ASSIGNEE TO SELECT.
A mortgage by a debtor of his exempt personal property, valid under the laws of the state, coupled with a delegation of authority to the mortgagee to select such property, which under the state statute may be done by the debtor "or his authorized agent," is not a waiver of the right of exemption, but an assertion of such right; nor is such delegation void as against public policy, and, on the filing by the debtor of a petition in voluntary bankruptcy in which he expressly waives his right of exemption, the mortgagee is entitled to select and hold the property which the bankrupt might otherwise have selected as exempt.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

Petition to Review an Order of the District Court of the United States for the Eastern District of Michigan.

In the matter of Thomas Hastings, bankrupt. On petition by the National Grocer Company to review an order of the District Court. Reversed.

C. L. Benedict (Bundy, Travis & Merrick, of counsel), for petitioner.
Moore & Wilson and Jas. A. Muir, for bankrupt.

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

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The matter here under review was heard below on the following statement of agreed facts:

"First. Hastings for upwards of three years previous to filing his petition was engaged solely and principally in the retail grocery business in the city of Port Huron, in one location. At the time of the delivering of the instrument hereinafter set forth, Thomas Hastings, the bankrupt, owed the National Grocer Company $250 and upwards.

"Second. In June, 1908, the National Grocer Company refused further credit unless Hastings gave some security, and Hastings then executed and delivered the following instrument:

" 'For a valuable consideration to me in hand paid, and as security for any sum that I now owe, or may hereafter owe to the National Grocer Company, I hereby bargain, sell, assign and transfer to said company all the goods and chattels now belonging to me in my business, that are now, or may be at any time hereafter exempt from levy and sale on execution against me, and I hereby authorize the said company to demand, select and receive such exemptions in my name, or otherwise, at any time and from any person from whom I might have demanded them, had this instrument not been made or to sue for said exemptions and for damages for the detention thereof.

" 'Dated this 4th day of June, 1908. " '[Signed] Thomas Hastings.

" 'Witness: E. E. Carson.'

"And the National Grocer Company subsequently sold him goods amounting to about $700, and received about the same amount in cash.

"Third. In December, 1908, Hastings filed a voluntary petition in bankruptcy, in which he made no claim for his exemptions, but specifically waived them.

"Fourth. At the first meeting of the creditors, the claimant asserted its rights under the instrument and from the inventory compiled by the trustees claimant selected from stock of goods certain goods in the appraised value of $250, and of the specie and kind exempt under the statute, had the bankrupt seen fit to claim them.

"Fifth. Demand was made upon the trustee for the same, and it was agreed that the trustee should sell the goods, so selected; and the funds should be held intact to await the decision of the courts."

The referee allowed the claim of the petitioner to the funds derived from the sale of the goods so selected. The District Court entered an order overruling the referee and disallowing petitioner's claim to the proceeds of the property in question. The reasons for the conclusion reached by the judge who heard the matter are thus stated in his opinion:

"By this instrument the debtor did not exercise his own discretion in selecting exempt property, or attempt to execute a mortgage on any specified property, but, on the contrary, attempted to mortgage generally all of his exempt property, then owned or thereafter acquired, and to vest in the mortgagee, when action might be required, the privilege of selecting the exempt property to be covered by the mortgage. I am of the opinion that this attempted delegation of the right of selection of the exempt property was against public policy and void; and that the instrument attempting to delegate this power of selection created no estoppel against the debtor himself, and is therefore ineffective as against the trustee in bankruptcy who takes the title of the debtor."

The correctness of this conclusion is the sole question presented to us.

In our opinion the learned judge erred in denying petitioner's lien. The right of exemption depends upon the Michigan statute. Section 6a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

By section 70a the title to the bankrupt's property is vested in the trustee "except in so far as it is to property which is exempt"; and by section 47, subd. 11, it is made the duty of the trustee to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." The title, therefore, to property of a bankrupt which is generally exempt by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The Michigan statute exempts from levy and sale under execution or other final process "stock * * * to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250.00." 3 Comp. Laws Mich. § 10,322, subd. 8. In applying exemption laws the bankruptcy courts are bound to follow the construction of such laws announced by the highest court of the state whose statute is involved. Loveland on Bankruptcy, p. 514; In re Irvin (8th Circuit) 120 Fed. 733, 57 C. C. A. 147; In re Nye (8th Circuit) 133 Fed. 33, 66 C. C. A. 139. See, also, In re E. H. Baker, recently decided by this court.[1] And on the question of the validity of an instrument reserving the mortgagor's exemptions under the laws of the state the settled local law controls. Wilson v. Perrin (6th Circuit) 62 Fed. 629, 631, 11 C. C. A. 66. See, also, Three States Lumber Co. v. Blank (6th Circuit) 133 Fed. 479, 482, 66 C. C. A. 353, 69 L. R. A. 283; In re First Nat. Bank of Canton, 135 Fed. 62, 67 C. C. A. 536. The mortgaging or conveying of exempt property to a creditor is not against the public policy of the state of Michigan. A mortgage of exemptions of the class here in question is not required to be signed by the wife. Charpentier v. Bresnahan, 62 Mich. 360, 28 N. W. 916; Miller v. Miller, 97 Mich. 151, 56 N. W. 348; Betz v. Brenner, 106 Mich. 87, 63 N. W. 970. Creditors cannot complain of transfers of exempt property. Buckley v. Wheeler, 52 Mich. 1, 17 N. W. 216; Fischer v. McIntyre, 66 Mich. 681, 33 N. W. 762; Bresnahan v. Nugent, 92 Mich. 76, 52 N. W. 735. As the trustee in bankruptcy stands in the shoes of the bankrupt, he can take no better title than the latter had at the time the bankruptcy occurred (York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; In re Cincinnati Iron Store Co. [6th Circuit] 167 Fed. 486, 488, 93 C. C. A. 122), and a transfer which is good as against the transferror is equally valid as against the trustee.

It is clear, under the foregoing decisions, that the bankrupt had the power to convey to petitioner his existing exemptions; and as under

[1] 182 Fed. 392.

the laws of Michigan one may lawfully mortgage or convey property thereafter to be acquired (Curtis v. Wilcox, 49 Mich. 425, 13 N. W. 803; Louden v. Vinton, 108 Mich. 313, 318, 319, 66 N. W. 222), it is plain that the lien in question was not rendered invalid from the fact that it was made to apply to the stock as it should exist at the time the lien was sought to be enforced.

It is urged by the trustee that the description of the exemptions transferred is inadequate, in that the exact property so intended to be exempted was not specified, and authorities are cited lending more or less support to this contention. In our judgment, however, the case is ruled, with respect to this proposition, by the decision of this court in Wilson v. Perrin, supra. In that case the mortgage, which contained a specific description of the property covered, was by its terms expressly made "subject to all exemptions from execution to which said first party may be entitled under the laws of the state of Michigan, and that his exempt interest is not covered by this mortgage." It was urged as invalidating the mortgage that, inasmuch as the mortgagee was garnished before a separation of the exempt portion had been made, there was no means to determine which portion of the stock of goods was conveyed and which was not. This court, speaking through Judge Lurton, disposed of the contention referred to in this language:

"We attach no particular importance to the suggestion that the conveyance is limited to what would be left after the exemptions should be set apart. The conveyance is of the entire stock of merchandise, subject to the mortgagee's right of exemption. This is the plain and obvious meaning. As to the exemptions, it would seem that the mortgagee would take a defeasible title, subject to be defeated upon separation of the statutory amount of exemptions from the stock."

We can see no difference in principle between the validity of a description which excepts from it in general terms exemptions to be thereafter determined and a conveyance in terms of statutory exemptions which must be determined in the same way.

It is urged, however, that even if it be conceded that the assignment of the exemptions in question was originally valid, it was defeated by the failure of the bankrupt to select his exemptions under the bankruptcy proceedings, and especially by his express waiver thereof in his petition for adjudication in bankruptcy. It is argued, first, that the provisions of the bankruptcy act, impliedly at least, forbid recognition of any right to exemptions except upon the specific claim thereto presented by the bankrupt himself. The provisions of the act which are thought to produce this result are section 2, subd. 11, which authorizes courts of bankruptcy to "determine all claims of bankrupts to their exemptions," and general order No. 17 (89 Fed. viii, 32 C. C. A. xix), which requires a trustee to report to the court "the articles set off to the bankrupt by him." In our opinion, the sections invoked cannot be construed as denying the power of the court to recognize the right of a party other than the bankrupt, holding under a valid and effective assignment, conferring in express terms authority to make the selection in the name of the assignor. If the exemptions in question were lawfully assigned by the bankrupt, the trustee obtained no title thereto; and, as the selection was made according to an appraise-

ment had under the direction of the trustee, there is no apparent difficulty in allowing the selection to be made by any one representing the bankrupt.

We are thus brought to determine the second objection to the enforceability of the assignment, and upon which the court below held the petitioner not entitled to enforce the attemped lien, viz., that the attempted delegation of the right to select exempt property is against public policy and void. It is true, as contended by the trustee, that the right to exemption is a personal privilege, and may be waived by the debtor, and that such privilege cannot be claimed for him by another. But this proposition is not decisive of the question before us, because the debtor did not in this case waive his privilege, but, on the contrary, took advantage of it in making the assignment in question. The assignment was based upon a valuable consideration, viz., the giving of future credit; and the authority to the assignee to make the selection, if originally valid, was irrevocable, as being coupled with an interest. Baker v. Baird, 79 Mich. 255, 259, 44 N. W. 604.

Several decisions in other jurisdictions are relied upon by the trustee in support of his contention that the assignment of the right to select exemptions is against public policy. None of these decisions are persuasive. Three decisions of the Supreme Court of Michigan, invoked by the trustee, require attention. These cases are Wilson v. Montague, 57 Mich. 638, 24 N. W. 851, Galbraith v. Fleming, 60 Mich. 408, 412, 27 N. W. 583, and In re Service's Estate, 155 Mich. 179, 186, 118 N. W. 948. In the first of these cases it was held that a mortgage of chattels upon which a subsequent execution had been levied is not affected by the levying officer's omission to appraise the property and set off to the debtor the amount of his exemptions; that the exemption is a personal privilege which a judgment creditor can waive. This case did not in any way involve the power of a debtor to assign the right to select exemptions, nor even the right to assign the exemptions themselves. In Galbraith v. Fleming, it was held that the statutory right of action by ejectment to recover unassigned dower is vested solely in the widow, and is not conveyable to her assignee. This was put upon the ground that the authority for bringing such action must rest entirely upon statute; that the Michigan statutes confer no express authority upon an assignee to recover dower previous to assignment; that while, before assignment, the widow may release her dower to the owner of the fee so as to unite it with the fee, she cannot alien or transfer it to a stranger to the title. This is but a statement of the general rule recently applied by this court in the case of In re Lingafelter, 181 Fed. 24. Neither of the Michigan cases just referred to bears any analogy to the case we are considering. In the case of In re Service's Estate, it was held that the statutory right of the widow to elect to take under the provisions of the statute, in lieu of the terms of the will, is a personal right, and not assignable. This case seems to have been to some extent relied upon by the judge below. Setting to one side the consideration that the holding just referred to was not necessary to a decision of the case, and assuming that the settled law of Michigan is as there stated, we are unable to recognize that case as authority for the proposition contended for here. The right of a wife to elect to waive the provisions of her hus-

band's will and to take under the statute of distributions involves a personal discretion, the exercise of which by any one other than the one for whose benefit the right is given, may well be held to offend against public policy. Conceding that there is an analogy between an election to waive the terms of a will and an election to waive the benefit of a statute pertaining to exemptions, we can recognize no such analogy between the first-mentioned right of election and the right to select exemptions which have not been waived, but which, on the contrary, have been expressly claimed, by a lawful assignment and transfer. The case before us does not involve the right of some one other than the bankrupt to insist upon or to waive his claim of exemptions, but only the right of the assignee under a valid assignment to make the selection of the exemptions so assigned, under an express authority therefor contained in the instrument of assignment. Had the bankrupt personally made the claim under the bankruptcy proceedings, there can be no doubt that the exemptions would have passed to the petitioner here. The assignment in terms authorizes the petitioner to make the selection in the name of the assignor or otherwise, thus constituting petitioner, to say the least, the agent of the assignor for the purpose.

It is to be noted that the Michigan statute in express terms permits the selection of exemptions to be made by the debtor "or his authorized agent." Comp. Laws Mich. 1897, § 10,326. This feature plainly distinguishes the case before us from the case of an assignment of a widow's right to elect whether to waive the terms of a will or to take under the statute of distributions, as well as from the case of a conveyance of unassigned dower, for neither of which acts is there any statutory authority. The personal discretion involved in the selection by an assignee, under power of attorney from a debtor, is of no more importance than in the case of a selection by an agent in the absence of an assignment. It is clear that this lawful authority to select exemptions, given upon a valuable consideration and coupled with an interest, could not be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof; and that the assignor was estopped so to do.

The order of the District Court is reversed, with directions to enter an order allowing petitioner's lien.

NORTHWESTERN STEAM BOILER & MFG. CO. v. GREAT LAKES ENGINEERING WORKS.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1910.)

No. 3,148.

(Syllabus by the Court.)

1. CONTRACTS (§ 306*)—DAMAGES FOR DELAY IN PERFORMANCE NOT LOST BY UNEXERCISED OPTION TO COMPLETE.

An unexercised option to take possession of and complete contract work does not exclude the contractee from his right to recover damages for the delay of the contractor who finishes the work after the stipulated time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1528; Dec. Dig. § 306.*]

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

2. DAMAGES (§§ 23, 45, 208*)—GENERAL AND SPECIAL—RULES FOR MEASUREMENT—FACTS—CONCLUSIONS.

Established rules which govern the recovery of damages for breaches of contracts are:

(a) Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case which are known to them when the contract is made, and those only, may be recovered in an action upon a contract.

(b) In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered.

(c) Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those implied by the contract, and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof.

The plaintiff which had agreed to build and deliver a steamship by a certain time, to pay $100 per day for the first 10 days' delay, and $200 per day for any delay thereafter, notified the defendant of this contract and especially of this stipulation to pay for delay, and that it should hold the defendant liable for any damages its delay in furnishing two boilers for this steamship caused and the defendant thereupon made a contract with the plaintiff to construct and deliver these boilers within a time fixed. The defendant furnished them later, and its delay compelled the plaintiff to pay the shipowner damages for the delay under the per diem stipulation above quoted.

Held, the defendant was liable to the plaintiff for the damages it thus caused.

(d) The defendant's plant was at Duluth where it built the boilers, and it agreed to deliver them at Detroit, but failed either to complete them or to deliver them within the time fixed, and the plaintiff claimed as damages expenses it paid for freight and marine insurance on the boilers from Duluth to Detroit, for a place at a slip for, and the delay of the ship which carried them, for laying up the new steamship after the boilers were placed in it in order to complete them, and for their completion.

Held, the questions whether or not under the circumstances of this case the delay of the defendant in completing and delivering the boilers was the proximate cause of these expenses, whether or not they were necessary, and the question of their amount, were within the province of the jury, and were rightly submitted to them.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 58, 62, 92–98; Dec. Dig. §§ 23, 45, 208.*]

3. COURTS (§ 405*)—FEDERAL COURTS—APPEAL AND ERROR—ASSIGNMENT SHOULD STATE SUBSTANCE OF EVIDENCE ERRONEOUSLY ADMITTED OR REJECTED.

Rule 11 of this court[1] requires the assignment of errors to "quote the full substance of the evidence admitted or rejected" when the error alleged is to the admission or to the rejection of evidence. An assignment of error in the admission of evidence contained in a writing that had been marked by letter or number at the trial as an exhibit which specifies the writing by the letter or number upon it only, and gives no information of the substance or nature of the evidence it contains, is insufficient under this rule.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1097; Dec. Dig. § 405.*]

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

[1] 150 Fed. xxvii, 79 Fed. xxvii.

4. COURTS (§ 405*)—FEDERAL COURTS—APPEAL AND ERROR—BRIEFS MUST CITE PAGES OF RECORD WHERE RULINGS AND EXCEPTIONS ARE RECORDED, OR THEY WILL BE DISREGARDED.

Rule 24 of this court[2] requires the brief to contain a clear statement of the points of law or fact to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point. The reference to the pages of the record required is to the pages where the rulings and exceptions, if any, which present the points, may be found as well as to the pages where the assignment of errors thereon are recorded.

Where counsel consider a point they present too trivial to inspire them to find and cite in their brief the place in the record where it was ruled upon and preserved by exception, the court will not ordinarily deem it of sufficient importance to require it to search out the record of the ruling and consider it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1097; Dec. Dig. § 405.*]

5. EVIDENCE (§ 355*)—LIST OF EXPENSES VERIFIED BY COMPETENT TESTIMONY MAY BECOME ADMISSIBLE EVIDENCE OF DAMAGES.

A list of items of expenditures for materials, or labor, or services caused by the breach of a contract, may be so verified as to be admissible in evidence by the testimony of qualified witnesses that these materials were purchased and these services rendered, that they were necessary, that these witnesses knew their cost or value, and that at the times of their rendition they checked them on the list and found them to be correctly entered there, although the items were never entered upon any account book.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1488, 1489; Dec. Dig. § 355.*]

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

Action by the Great Lakes Engineering Works against the Northwestern Steam Boiler & Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. B. Fryberger (Sullivan & Grant, on the brief), for plaintiff in error.

W. D. Bailey (J. L. Washburn and Oscar Mitchell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This writ of error challenges a judgment for damages for delay in the construction of two boilers for a steamship. The Great Lakes Engineering Works, a corporation, had agreed to complete and deliver a steamship to the Cleveland Cliffs Iron Company at Detroit, in the state of Michigan, on July 20, 1905, for $380,000, and to pay the Cliffs Iron Company for any delay beyond that date $100 per day for the first 10 days and $200 per day for any delay thereafter. Thereupon the engineering works made two contracts with the Northwestern Steam Boiler Manufacturing Company of Duluth, a corporation, for the construction and delivery of two boilers for the steamship. There was substantial evidence that before these contracts were made the engineering works informed the boiler company that it was liable to pay $100 per day for the first 10 days' delay after July 20, 1905, in the completion of

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

[2] 150 Fed. xxxiii, 79 C. C. A. xxxiii.

the steamship, and $200 per day for all delay thereafter, that it would hold the boiler company for these stipulated damages if the completion of the steamship was delayed by a failure of the boiler company to deliver the boilers in the time specified in the contracts and that with knowledge of and in view of these facts the boiler company made its agreements. By the first of these contracts the boiler company agreed in January, 1905, to construct and deliver the two boilers at the dock of the Engineering Works in Detroit on June 1, 1905, for $12,450. On June 17, 1905, the boilers were not completed, and the boiler company was in financial difficulty when the parties made a second contract that the boiler company transfer the title to the materials which it had assembled for the boilers and to the incomplete boilers to the engineering works, that the engineering works would pay for the materials and labor necessary to complete the boilers on the request of the boiler company, and would charge these payments against the purchase price thereof; that the boiler company would provide everything except the labor and materials for the completion of the boilers, and would deliver them finished at the shipyard of the engineering works in Detroit on or before July 15, 1905; and that the engineering works on becoming dissatisfied with the progress of the work or whenever it should become evident that the boilers would not be completed by the time specified had the right to enter the plant of the boiler company, to use that plant to finish the boilers, and to charge the expenses of their completion against the purchase price.

There was substantial evidence that the steamship was completed ready for the boilers on September 23, 1905, and that the boilers were not delivered until November 23, 1905. On account of this delay, for which it was claimed that the boiler company alone was responsible and on account of other delays in completing the steamship, the engineering works was compelled to pay, and did pay, to the Cliffs Iron Company, $13,300, and in this action it sought to recover of the boiler company, among other things, $6,000 on account of this delay. At the close of the trial, the court below denied a request of the boiler company to instruct the jury that the engineering works was not entitled to recover anything upon this claim for damages for delay, and this denial is the subject of the most serious complaint of the trial of this case below.

Counsel contend that the provision of the contract of June 17, 1905, that the plaintiff below had the right to enter the plant of the defendant, to use it to complete the boilers, and to charge the expenses thereof against the purchase price whenever it became evident that the defendant would fail to complete the contract on time, furnish the only measure of damages for any delay of the boiler company recoverable under this agreement. If the contract had never been completed, and if the plaintiff was seeking in this action to recover speculative damages measured by the difference between the estimated cost of a completion that was never effected and the contract price, this argument might be worthy of more serious consideration. American Surety Company v. Woods, 105 Fed. 741, 106 Fed. 263, 45 C. C. A. 282; Hunt v. Oregon Pacific Railway Com-

pany, 36 Fed. 481, 1 L. R. A. 842. But in the case in hand the boiler company made an absolute covenant to complete and deliver the boilers on a certain day. With the requested aid of the engineering works, it did complete and deliver them at a later day. Familiar rules of law and definite facts measure the damages for this delay and the fact that the plaintiff had an option, which it never exercised, to take possession of the plant of the defendant and to complete the work the boiler company had undertaken to do, did not deprive the engineering works of its right to recover these legal damages. An unexercised option to take possession of contract work and finish it in case of delay does not deprive a contractee of his right to recover damages for the delay in finishing it of a contractor who completes it after the day specified for its completion.

In support of the denied instruction, counsel argue and cite authorities which to them seem to support their views to the effect that the amount of $100 per day for the first 10 days' delay and $200 per day for delay thereafter, is so out of proportion to the price of the boilers and to the profit of the boiler company upon their construction that it could not have been in the contemplation of the parties that the boiler company should pay this amount unless it expressly agreed to do so, or unless it contracted so to do impliedly by reason of notice to it that it would be held liable for these damages, or unless the whole transaction showed that the boiler company consented to become liable therefor. The questions raised by these contentions are not novel. They have been exhaustively considered and discussed, and have been repeatedly decided by this court. A reconsideration of them in the light of the authorities cited by counsel for the boiler company has served but to confirm our opinion that these are the rules of law applicable to this issue of the measure of damages:

(1) Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case which are known to them when the contract is made, and those only, may be recovered in an action upon a contract. Rockefeller v. Merritt, 22 C. C. A. 608, 617, 76 Fed. 909, 918, 35 L. R. A. 633, and cases there cited.

(2) In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered. Drug Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; Railroad Co. v. Bucki, 16 C. C. A. 42, 46, 68 Fed. 864, 868; Hadley v. Baxendale, 9 Exch. 341, 354, 356; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; The Ceres, 19 C. C. A. 243, 72 Fed. 936, 943; Boyd v. Brown, 17 Pick. (Mass.) 453, 461; Ingledew v. Railroad, 7 Gray (Mass.) 86, 91; Railway Co. v. Mud-

ford, 48 Ark. 502, 3 S. W. 814, 816; Kempner v. Cohn, 47 Ark. 519, 527, 1 S. W. 869, 58 Am. Rep. 775.

(3) Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those implied by the contract, and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof. Boutin v. Rudd, 27 C. C. A. 526, 82 Fed. 685; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293, 297; Accumulator Co. v. Dubuque Street Ry. Co., 12 C. C. A. 37, 64 Fed. 70, 78; McDonald v. Kansas City Bolt & Nut Co., 79 C. C. A. 298, 149 Fed. 360, 365, 8 L. R. A. (N. S.) 1110; Iowa Mfg. Co. v. B. F. Sturtevant Co., 89 C. C. A. 346, 162 Fed. 560, 462, 18 L. R. A. (N. S.) 575.

In the case last cited, the very question in hand, the question whether or not one who contracted to furnish machinery for a builder who was, with knowledge of the contractor when he made his agreement, liable to pay $25 per day for any delay in completing the building, was liable to pay these damages for such delay caused by his failure to furnish the machinery at the stipulated time, was argued, considered, and decided, and in our opinion rightly decided in favor of the builder.

There was evidence in the case at bar for the consideration of the jury to the effect that, before the contracts in suit were made, the boiler company was notified that the engineering works was liable for $100 per day for the first 10 days' delay in the completion of the steamship and for $200 per day for any delay thereafter, and that, if by its failure to complete and deliver the boilers at the time fixed by the latter contract it caused such a delay in the completion of the steamship, the engineering works would hold it liable for those damages. In the absence of evidence to the contrary, these damages appear to have been moderate and reasonable. They were stipulated to be the damages for the loss of the use of a steamship worth $380,000, and they do not appear to have had any of the attributes of a penalty. The conclusion is that there was no error in the refusal of the court to instruct the jury that the boiler company was not liable for that portion of these damages which it caused the engineering works to suffer.

When the boilers were delivered at Detroit on November 23, 1905, they had not been completed or tested. They were placed in the steamship which was awaiting them, a trial trip was made, and it was then found that the boilers were leaking, and that considerable work must be done upon them before they would be fit for use in propelling the ship in the practical work of navigation. There was substantial evidence that it was necessary to do this work while the boilers were in the steamship, that it was so late in the season whey they were received that it was necessary to lay up the ship for the winter in order to carry on this work, and that the engineering works was compelled to go to the expense of about $955.73 in laying up the ship and to the expense of $8.74 for car fare of the men engaged in this work and to repaint a portion of the ship in order to properly complete the boilers. In the completion of this work it assisted the boiler company,

The latter company sent one of its employés from Duluth to Detroit to superintend and to labor at this work, which was finished about February 10, 1906.

Counsel insist that there was fatal error in the trial of this case, in that the court submitted the plaintiff's claim for these items to the jury when they were not pleaded and when they were too remote and inconsequential to form the basis of legal injury. After the verdict, the court below required the plaintiff to reduce, and it did reduce, its judgment by the amount which it claimed for the repainting, so that the question concerning that item is no longer at issue. Counsel for the plaintiff in error set forth in their brief a copy, taken from their assignments of error, of certain specifications of error upon which they say that they rely, and they add at the end of some of them the pages of the record where the rulings they question may be found while no pages are stated at the end of others. At a subsequent page in the brief, they present their point upon the lack of pleading, and cite by number only 19 of these specifications of error that they claim raise the questions of the submission of the items here challenged to the jury. At the expense of considerable time, we have examined each one of these 19 specifications by turning back from the place where this point is made in the brief to the copied specifications in the earlier part of the brief, finding there the numbers of the pages in the record and then reading those pages to ascertain how, when, and where this objection, on the ground that these items were not pleaded, was made and ruled. We fail to find in any page of the record so specified any objection to the admission of the evidence of these items on the ground that they were not pleaded. We do find, however, a statement in the specifications that the court was requested to instruct the jury that they could allow the plaintiff no item of damages not included in those pleaded in the complaint, and also a statement that the court was requested to charge the jury that there could be no recovery upon these items. But we find no reference to any page of the record on which this or any other request found in these 19 specifications, or any exception to a refusal to give any of them appears in the record and this record contains 486 printed pages. It seems to us that this brief fails to comply with rule 24 of this court which requires "a brief of the argument exhibiting a clear statement of the points of law or fact to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point." The reference to the pages of the record required where rulings on the trial are challenged are to the pages where the rulings made and the exceptions taken were recorded (Sipes v. Seymour, 76 Fed. 116, 118, 22 C. C. A. 90), as well as to those where the assignment of the errors was recorded. A reference to 19 different specifications of error to present the point that two items were submitted to the jury without pleading, imposing upon the court the labor of hunting through the pages of the record named at the end of each specification in vain for any objection or exception founded upon the point suggested, impresses the mind forcibly with the fact that this point was not deemed of very serious import by the counsel presenting it. If earnest objection had been

made when the evidence upon these items was first presented that they were not pleaded, the court might, and probably would, have permitted the plaintiff to amend its complaint and to plead them, and, if the judgment should now be reversed for this failure of pleading and a new trial should be ordered, it is probable that the court below would allow such an amendment before that trial could be had. As counsel do not seem to have deemed this objection of sufficient importance when they made their brief to hunt through this record and clearly point out the place therein where the objection upon this ground was made and an exception was taken to the decision overruling it, this court declines to search it out, if it may be found, and to reverse this judgment on account of it. Where counsel for the plaintiff in error considers a point they urge too trivial to warrant them in finding and citing the specific place in the record where it was presented and preserved by exception, the court will not deem it of sufficient importance to require it to search that place out. Hoge v. Magnes, 85 Fed. 355, 358, 29 C. C. A. 564, and cases there cited.

Moreover, many of the 19 specifications which relate to the admission of evidence regarding these items, notably numbers 52, 54 and 62, which challenge the admission of exhibits C, C–1, C–2, C–3, C–5, C–6, and C–7, present no suggestion of the character or the substance of the evidence they contain, and thus fail to raise in this court the question of their admissibility because the specifications do not "quote the full substance of the evidence admitted or rejected" as required by rule 11. It is not intended to so interpret this rule as to make it burdensome upon practitioners. It was not necessary that counsel should have inserted in these specifications the entire exhibits or any large part of them. A statement of the nature or substance of the evidence they contained in two or three lines would have been sufficient. But a mere reference to the exhibits by their numbers gives the court no indication of the character of the evidence and is a disregard of both the letter and the spirit of the rule. For these reasons the trial of this case may not be, and in our opinion ought not to be, set aside because the items of the expense of laying up the steamship and of paying the car fare of the laborers were not specifically pleaded.

Were these items so remote and inconsequential that they could not form the basis of legal injury? If the boilers had not been completed until the spring of 1906, the damages for the delay in completing them at the rate of $200 a day would have run on by the terms of the contract through the winter. There was substantial evidence that the boilers could not be finished before the winter arrived, and it was necessary to lay up the ship before that time in order to protect it and to complete the work upon the boilers. The expense of laying up the ship and of paying the car fare of the laborers was much less than the stipulated damages for an extended delay in the finishing of the boilers. It is an established fact, of which the boiler company had full notice when it made its contracts, that it is necessary to lay up a steamship on the Great Lakes when it has once been placed in the water before the freezing weather of

winter comes. The necessity of laying up this ship for the purpose of completing the boilers therein was the natural and necessary effect of the boiler company's delay in completing them, and in our opinion the expenses thereof and the car fare of the laborers employed in the work of laying up the ship to complete the boilers were not too remote or inconsequential to form a basis for the recovery of damages for the delay.

Complaint is made that the court submitted to the jury evidence that the plaintiff paid $1,000 for the carriage of the boilers from Duluth to Detroit, $520 for marine insurance on them on their trip down the lakes, $125 to the captain of the steamer Boyce which carried the boilers to reimburse him for money he paid to the captain of another boat to induce him to vacate a slip at Duluth in order to enable the boiler company to commence loading the boilers earlier, $1,500 to the steamer Mary Boyce to induce her to wait on her last trip down the lakes in the fall of 1905 until the boiler company could load the boilers upon her, and $2,554.55, to complete the boilers after they arrived at Detroit. But the boiler company had contracted to finish these boilers and to deliver them at Detroit. The engineering works and the boiler company were liable to pay $200 per day for delay in this completion and delivery, and a review of the record convinces that there was substantial evidence that all these expenses were necessary, that they were the natural and probable effect of the boiler company's disastrous delay, and that it was the province of the jury to determine the questions whether or not the boiler company's delay was the proximate cause of the payment of these expenses by the engineering works, whether or not they were necessary expenses to secure an early completion of the boilers and what the amounts of these expenses were. There was no error in the submission of the evidence upon these questions nor in the submission of these issues to the jury.

The next alleged error is that the court granted the motion of the plaintiff to strike out a portion of the answer of the boiler company wherein it pleaded excuses for its delay in the construction of the boilers prior to June 17, 1905, the date of the second contract. But the second contract was in writing. It was concise in expression and clear in meaning, and by its terms it fixed the measure of the boiler company's obligation at the completion and delivery of the boilers at Detroit on July 15, 1905. All previous oral negotiations for the construction and delivery of these boilers were merged in this agreement, and all previous delays and damages were thereby waived or released so that the excuses for these earlier delays set forth in the stricken portion of the answer were immaterial, and were rightly removed from it by the order of the court.

The sixth point in the brief of counsel for the boiler company is that the construction of this contract of June 17, 1905, and the entire theory on which this case was tried below, were fundamentally wrong, that the true effect of that agreement was to make the boiler company the agent of the engineering works to finish the boilers, that its only obligation was to furnish its shop, tools, and superintendence, for which it was to receive the difference between the

cost of the boilers and their price, $12,450, if the cost was less than that sum, while it was to receive nothing if the cost was more than that sum. It is assigned as error that the court below sustained a demurrer to two counterclaims of the defendant founded on this theory and excluded evidence in support of them—one for materials and the other for labor furnished by the boiler company in the manufacture of the boilers. Let us consider the situation and circumstances of the parties at the time they made this June agreement and the provisions of that contract, and see if its true meaning can be that the engineering works thereby made the boiler company its agent to complete these boilers. The boiler company was bound under the contract of January, 1905, to finish these boilers and to deliver them at Detroit on June 1, 1905, for $12,450. It had assembled a large part of the materials for and had commenced the construction of them, but it had not advanced far toward their completion when this second agreement was made. It was then in financial difficulty, and feared suits by its creditors and the seizure of these materials and the incomplete boilers by some process of the court. In this state of facts, it made this written contract with the engineering works in which the foregoing facts were recited and which contain these terms: The boiler company conveyed the boilers and the materials to the engineering works. It agreed to furnish everything except the labor and materials for the completion of the boilers and to superintend and push the work thereon to completion in accordance with the specifications of the January contract, except that the boilers were to be delivered complete at Detroit on or before July 15, 1905, instead of on June 1, 1905, and that the engineering works might take and use its plant and tools to finish them in case of unreasonable delay. The engineering works agreed to pay for the materials necessary to finish the boilers and to pay for such of the labor thereon as the boiler company should request it to pay for and after the boilers passed inspection to pay to the boiler company the difference between the amounts the engineering works expended for labor and materials and the contract price of the boilers. It agreed to pay for this labor and materials directly to the parties furnishing it, or that these payments might be made by the boiler company as its agent, and proper vouchers taken and immediately turned over to it. The contract contained a stipulation that the January agreement should be modified thereby, and it contained no other provisions material to the question under discussion. As the contract expressly made the boiler company the agent of the engineering works in the single instance of its payment for materials and labor, this provision, under the familiar rule that the expression of one excludes another, forbids the implication that it was its agent in any other respect. The provision of the contract that the engineering works should pay to the boiler company in addition to the cost of the materials and the labor the difference between that cost and the purchase price of the boilers is inconsistent with the theory that the contract of purchase was avoided and the relation of agency established, and, when the two contracts are read together and all the parts of each are given due consideration, as they must be to ascertain the true meaning

of the parties in the later one, the conclusion is irresistible that their intent and meaning was that the boiler company agreed to complete and deliver the boilers at Detroit by July 15, 1905, and the engineering works contracted to pay for them by paying for the materials and labor and then paying to the boiler company the difference between the amount of those payments and the purchase price. This was the construction of this agreement upon which the court below tried the case, sustained the demurrer to the counterclaims and excluded the evidence in support of them, and there was no error in that interpretation or in those rulings.

Counsel argue that the court erred because it admitted in evidence exhibits C, C–1, C–2, C–3, C–4, C–5, C–6, and C–7, and they cite specifications 52, 54, 58, and 62 of their assignment of errors as the basis of their contention. These specifications are defective, but we have examined the exhibits which are itemized statements of the plaintiff's claims and the evidence concerning them and are of the opinion that there was no error in their admission because many, if not all, of the items they contain were verified by witnesses who personally knew that the work there specified was done, who knew its value and who testified to the effect that they saw it done by the engineering works, that it was necessary in order to properly complete the boilers, that it was of the value or of the cost stated in these exhibits, and that at the time it was done they checked these items over on these exhibits and found them to be correct. The objection here urged to the exhibits is that they were not the books of account of the engineering works so verified as to be admissible as such under the Minnesota statute. Let that fact be admitted, nevertheless, one who knew that items of labor or service written out on a list were actually rendered, who knew their cost or value and who checked them on the list at the time they were rendered and found them to be correctly listed might lawfully testify to those facts and thereby make the list admissible in evidence for the consideration of the jury, although the items were never entered upon any books of account. In that way these exhibits, at least to the extent of the items so verified, were rendered admissible in evidence, and it would have been prejudicial error to have excluded them. It is said that the court erred because it refused to grant the request of the defendant below to instruct the jury that they could not allow the plaintiff any recovery on account of an item of $600 attorney's fees set forth in the complaint. But there is no reference in the brief to the place where this request and the exception to its refusal may be found in the record, there was no substantial evidence in support of this item of $600, and an examination of the record satisfies beyond doubt that no prejudice could have resulted from the failure to grant the request.

Counsel for the plaintiff in error have presented 107 specifications in their assignment. All those upon which they assert reliance in their brief or argument have been examined and considered and those of substantial importance have been discussed. This discussion and the decision of the questions treated therein have disposed of many minor questions presented by specifications not quoted, and

the conclusion is that the record discloses the fact beyond doubt that there was no prejudicial error in the trial of this case below, and that the judgment there rendered must be affirmed.

OHIO COUNTY, KY., v. BAIRD

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,033.

1. COUNTIES (§ 171*)—NOTES—DEFENSES—WANT OF CONSIDERATION.
A note purporting to be signed by a county fiscal court may be defended against for want of consideration, whether it was to take the place of a note paid or for claims against the county not allowed by the proper authority.
[Ed. Note.—For other cases, see Counties, Dec. Dig. § 171.*]

2. COUNTIES (§ 50*)—FISCAL COURTS—POWERS—DELEGATION.
Under St. Ky. 1894, § 1834, vesting the corporate powers of counties in the fiscal courts, a power from a court to two of its members to ascertain the amounts of claims held against a county by plaintiff, and to settle with him, was an invalid attempt to delegate power involving the exercise of discretion confided to the court, in the absence of proof of the origin and nature of the claims.
[Ed. Note.—For other cases, see Counties, Cent. Dig. § 61; Dec. Dig. § 50.*]

3. EVIDENCE (§ 178*)—SECONDARY EVIDENCE—LOST CLAIMS.
On proof of loss of claims against a county, secondary evidence is admissible in a suit to recover on them.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580–594; Dec. Dig. § 178.*]

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

Action by A. B. Baird against Ohio County, Ky. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Ernest Woodward, for plaintiff in error.

R. W. Slach, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. Baird, a citizen and resident of Oklahoma, recovered judgment in the court below against the county of Ohio, Ky., on the following instrument:

"On or before the first day of August, 1894, the Ohio county fiscal court and Ohio county promises to pay to the order of A. B. Baird at the Beaver Dam Deposit Bank five thousand eight hundred and ninety-two dollars and forty-three cents ($5,892.43), out of the first of the county levy of 1894, collected by the sheriff of said county as per order of said court made at its January, 1904, term. Ohio County Fiscal Court; and
"Ohio County Court,
"By Jno. P. Morton, G. W. Martin."

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

The parties stipulated that the issues of fact might be tried and determined by the court without the intervention of a jury. The court stated its findings of fact and conclusions of law separately; and the present proceeding in error was brought to reverse the judgment.

The controlling issue is whether the county ever received any consideration for the note. By the second paragraph of the original petition it was alleged that the county was indebted to Baird on "account of claims and interest, which he held against said county" exceeding $11,000, and that on the 6th day of January, 1894, at a regular term of the fiscal court of the county, the court made an order appointing two commissioners to settle with plaintiff and execute a note of the county and court for the sum ascertained and payable as stated in the note. A demurrer was sustained to this portion of the petition, on the ground that it did not state that the indebtedness "arose from the construction, repair or maintenance of some one or more of the utilities" of the county which were within the jurisdiction and control of the fiscal court. An amendment was filed, stating that prior to January 6, 1894, the fiscal court had employed persons to make repairs upon property in and belonging to the county, to wit:

"The jail, courthouse, and poorhouse building, and to build and repair bridges and do work upon the public roads in said county and to care for and maintain the sick paupers therein, and agreed to pay said persons therefor a sum exceeding $11,000, and prior to said date had made various and numerous orders for payment to them of said sums all of which orders and vouchers therefor had been duly assigned, transferred, and delivered to this plaintiff prior to said date."

By the answer it is denied that on January 6, 1894, the county was indebted to Baird in the sum alleged or in any other sum "in excess of $5,580.85." The allegations of the amendment to the petition just stated are denied, and it is denied that Baird delivered to the commissioners any vouchers or evidences of indebtedness in excess of $5,580.85. It is admitted by the answer that plaintiff held claims amounting to the sum last mentioned, and that two commissioners to whom they had been referred delivered to plaintiff a note of the Ohio county fiscal court, signed by the commissioners, for the sum stated, with interest from January 10, 1894, until paid, and that plaintiff accepted the note in full settlement of all claims against the county.

The note sued on differs in form from the one thus admitted in that the latter bore date of execution, and was for a less amount. There is conflict in the testimony concerning these two notes, the county claiming that the total indebtedness equaled only the face of the note admitted, and that the note sued on was given in lieu of the first one in consequence of certain false and fraudulent representations made to the commissioners by plaintiff to the effect that the first note was irregular and informal and not capable of being negotiated or discounted; that the second note was drawn so as to include the interest from the date of the first note until the day fixed for payment of the second, August 1, 1894, or $5,892.43; that plaintiff promised to surrender the original note but failed to do so, representing to the fiscal court later that the first note had been lost or destroyed; and,

further, that plaintiff in fact discounted the first note and so obtained the only money that was due to him from the county, and the county subsequently paid that note in full. The suit on the note in issue was not commenced for more than 13 years after maturity, and much is said in explanation of this delay. The court below found against the county on the question of fraud.

It must be conceded that the county by its answer, as we understand it, places itself in the anomalous position of having paid the very note that it alleges was to have been surrendered in lieu of the note in suit. The note which was admittedly paid does not appear to have been offered in evidence. But since it is undisputed that two notes were delivered as before pointed out, and that Baird received in money the face value less discount of the note subsequently paid by the county, it is clear that the note in suit is open to the defense of want of consideration, no matter whether it was to take the place of the note paid or was given for claims made against the county, and not sanctioned by any agency competent to commit the county for their allowance or payment.

So far as we shall consider the defense of want of consideration, the test will be found in the state of proof as to the nature and history of the claims against the county, which it is alleged Baird surrendered. Apparently it was as necessary to require proof in support of the averments of the amendment to the petition concerning these claims, as it was to sustain the demurrer to the original petition for lack of such averments; for a copy of the note was set out and averment of its execution and delivery was made in the petition. In referring to those claims in the opinion below, which was handed down with the findings of fact, it was said:

"The plaintiff introduced no direct testimony thereon, and it is objected that there is such a failure of proof as must result in a judgment for the defendants."

And the most that is claimed on behalf of plaintiff in this regard is that he testified:

"Q. State to the court the amount of the claims which you held against Ohio county at the date of the execution of this note? A. The claims and interest amounted to something over $11,000, and those claims were carefully gone over by the committee that settled with me, and received and executed those notes at one and the same time."

Manifestly this does not tend to show either the nature of the claims or whether they originated in any order of the fiscal court.

As we understand the opinion, the court based its findings touching the character and sufficiency of the claims upon "presumptions arising from the other testimony." The other testimony is alluded to in this way:

"First, that the properly authorized agents of the county executed a note for the amount sued on; second, that such action, especially at this late day, should be presumed to have been proper and to have been based upon the ascertainment of all the facts necessary to warrant that action; and, third, that in January, 1894, the claims were surrendered to the defendant in lieu of the notes the county then executed. * * *"

Now, one of the important questions of law urged in this court is whether the note was executed by "properly authorized agents"; and one of the vital issues of fact in the court below was whether claims in excess of the amount of the first note were in truth surrendered and above all what kinds of claims were comprised in the alleged excess. Turning to the only order made by the fiscal court which purports to have authorized settlement to be made with Baird, it appears that at a regular term of the court held January 6, 1894, in the courthouse at Hartford, there were present John P. Morton, Judge, and the following magistrates: Awtry, Boling, Bennett, Ellis, Myers, Martin, McKinley, Render, Turner, Stevens, and Woodward; and it was—

"Ordered that Judge John P. Morton and Esquire Geo. Martin, be, and they are, appointed commissioners to settle with A. B. Baird the claims held by him against Ohio county. They will ascertain the amount of said claims and execute a note of the county and court therefore, payable at the Beaver Dam Deposit Bank on or before August 1, 1894, out of the first money collected of the county levy for the year 1894. Said commissioners will include in said note all the claims of said Baird and the interest thereon. The sheriff of Ohio county is ordered and directed to pay said note with the first of the 1894 county levy collected by him."

It is not claimed that any report of what was done under the order was ever made to the court, except an oral one to the effect that the Beaver Dam Deposit Bank would not take the note Baird had first received. The only perceivable relation that this report had to the claims, assuming that it was made, was to limit their amount to the face of the first note, not to disclose their character. Hence no question of adoption or ratification by the court can arise. Are the acts of the fiscal court and of its two commissioners as indicated by the present record entitled to the presumptions indulged by the learned trial court? Must it be presumed that claims which had been sanctioned by the court so as to bind the county were surrendered for the note in suit? The answer to these questions must depend upon the statutory power of the fiscal court and the nature of the power attempted to be delegated.

Section 1834, Ky. St. (Ed. 1894, Barb. & Car.) p. 688, enacts:

"Unless otherwise provided by law the corporate powers of the several counties shall be exercised by the fiscal courts thereof respectively."

Section 1837 requires not less than a majority of the members to constitute a quorum for the transaction of business, and provides that no proposition "shall be adopted unless by the concurrence of at least a majority of the court present." Section 1839 confers power on the fiscal courts to levy certain taxes, and section 1840 is as follows:

"The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county; make provision for the maintenance of the poor, and provide a poor house and farm, and provide for the good condition of the highways in the county, and to execute all of its orders

consistent with the law, and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court or court of levy and claims."

Section 1842 provides for records of meetings and for reading and signing them. Section 1843 provides that:

"No minute or order of the fiscal court shall be valid until the same be signed as aforesaid, nor unless the record shows by whom the court was held."

It is plain that these courts are official bodies of special and limited statutory powers and jurisdiction. Our attention has not been called to any statute which purports to authorize such a court to issue promissory notes. It is true that those courts are empowered to refund certain previously authorized debts; for instance, by section 1852 the court may call in certain outstanding county bonds and issue and substitute therefor new bonds of the county; also by section 1857 the court may issue bonds to fund certain county debts contracted in the building, repair, etc., of a courthouse, jail, or other public building, bridges, or turnpikes. But it is to be observed in the first place of all of these enactments that they confer power on the fiscal courts, and in the second place that the powers so conferred are discretionary and seemingly are to be exercised by the courts themselves. Further, the very mode and limitations prescribed for the issue and sale (sections 1855–1857) of these securities negative any idea of express authority in any such court to issue promissory notes like the one in question to holders of claims against the county and in settlement thereof.

The Court of Appeals of Kentucky holds that the fiscal courts shall exercise their powers strictly in accordance with the statutes, and that persons dealing with them must at their peril take notice of the law of their creation. Illustrative of this rule is the decision in Perry County v. Engle, 116 Ky. 594, 598, 76 S. W. 382, 383:

"All persons must take notice that a county can contract only in the manner and by the person and for the purposes expressly provided by the statute."

See, also, Danville, etc., T. R. Co. v. Lincoln Co. Fiscal Court, 77 S. W. 379, 25 Ky. Law Rep. (pt. 2) 1162; Crittenden County Court v. Shanks, 88 Ky. 475, 478, 11 S. W. 468. In Claiborne County v. Brooks, 111 U. S. 400, 406, 4 Sup. Ct. 489, 491, 28 L. Ed. 470, Justice Bradley had occasion to pass upon a doctrine announced in the court below in the trial of that case that "the power of a county to erect a courthouse involves and implies the power to contract for its erection, and the power to contract involves and implies the power to execute notes, bonds and other commercial paper as evidence or security for the contract," and to say:

"We cannot concur in this view. The erection of courthouses, jails, and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes, and other commercial paper in payment of county debts and charges; and, if they have this power, then such obligations issued by the county authorities and passing into the hands of bona fide holders would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be

in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from such other power expressly given, which cannot be fairly exercised without it."

Notwithstanding this clear expression of the settled law, it might be conceded for the purposes of this case that the fiscal court could itself have issued or provided in the manner stated in its order for the issue of this particular note, in case it were proved that the note was issued as evidence of pre-existing and outstanding debts of the county to that amount, which had been considered and approved by the court. Indeed, it might be assumed that recovery could be had on such acts of the court. But this simply accentuates the necessity for independent proof. It does more; it affects the presumptive or probative weight of the instrument in dispute. It is not the case of a promissory note issued in the exercise of explicit power; but still we should not as at present advised (without regard to the question made touching the form of the instrument) be inclined to hold that a mere substitution of evidence of a just and valid debt should require the formality of a new suit based on the original evidence of the debt.

Furthermore, the nature of the power attempted to be delegated by the order of the fiscal court affords another test of the weight of presumption touching the acts of the commissioners. The power was as before stated to "settle with A. B. Baird the claims held by him against Ohio county," and to "ascertain the amount of said claims," and "include in said note all the claims * * * and the interest thereon." Neither the character of claims nor terms of settlement seem to have concerned the court. It was not stated that the claims held were claims that the court had ever remotely sanctioned. All questions relating to the legal sufficiency of the claims and the reasonable worth of the labor or materials they purported to represent were questions clearly within the scope of the power as delegated. Such latitude of authority would seem plainly to involve the exercise of corporate powers of the county and through an agency not designated by any statute of which we are advised.

It follows that, on the face of the order and in the absence of proof of the origin and nature of the claims, there was a futile attempt made to delegate power involving the exercise of discretion and judgment confided to the court itself. City of Bowling Green v. Gaines, 123 Ky. 562, 566, 96 S. W. 852; Birdsall v. Clark, 73 N. Y. 73, 76, 29 Am. Rep. 105; State, Danforth Bros. v. City of Paterson, 34 N. J. Law, 163, 168; Neill v. Gates, 152 Mo. 585, 594, 54 S. W. 460; Jewell Belting Co. v. Village of Bertha, 91 Minn. 9, 11, 97 N. W. 424; Continental Const. Co. v. City of Altoona, 92 Fed. (3rd Circuit) 822, 35 C. C. A. 27; Blair v. City of Waco, 75 Fed. (5th Circuit) 800, 21 C. C. A. 517; 1 Dill. Mun. Corp. (4th Ed.) § 96; Cooley, Const. Lim. (6th Ed.) p. 248; and in State ex rel. Traders' Nat. Bank v.

Winter, 15 Wash. 407, 409, 412, 46 Pac. 644, may be found an illustration of a distinction to be observed in the present case between an ordinance or order in which the discretion of the ordaining body is exercised and only a ministerial function delegated, and an order like the one under discussion.

We are not convinced that the circumstances attending the delay in commencing the action on the note in suit augment the evidential character of the instrument or of the official acts upon which its execution was based. Especially is this so in view of the testimony of the only surviving officer who signed the note, and of the surviving members of the court who were in office at the date of the order. Nor do we appreciate the legal hardship said to be cast upon plaintiff through the apparent loss of the claims, since appropriate secondary evidence would in that event be admissible. We do not pass upon further assignments of error.

The judgment must be reversed and a new trial awarded, with costs.

ELLSWORTH v. LYONS.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,017.

1. BANKRUPTCY (§ 467*)—REFEREE'S FINDINGS—CONCLUSIVENESS.
   The finding of a referee in bankruptcy that bankrupt was solvent at a particular time will be accepted on appeal.
   [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. CORPORATIONS (§ 545*)—RIGHT TO PREFER CREDITORS.
   A corporation can secure one class of stockholders over another.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. § 545.*]

3. CORPORATIONS (§ 545*)—CONTRACTS WITH STOCKHOLDERS—VALIDITY.
   In the absence of express statutory authority therefor, a contract between a corporation and a stockholder, by which the latter is to receive the par value or any part of his stock before all corporate debts are paid, is contrary to public policy, and void.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. § 545.*]

4. CORPORATIONS (§ 156*)—PREFERRED STOCKHOLDERS—DIVIDENDS—SOURCE.
   Under Comp. Laws, Mich. 1897, § 7073, providing for the payment of dividends on preferred before common stock, they are payable only from net earnings.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581–583, 596–603; Dec. Dig. § 156.*]

5. CORPORATIONS (§ 156*)—PREFERRED STOCKHOLDERS—NATURE OF RIGHTS.
   A holder of preferred stock under Comp. Laws, Mich. 1897, § 7073, is a stockholder, and not a creditor.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581–583, 596–603; Dec. Dig. § 156.*]

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

6. CORPORATIONS (§ 545*)—PREFERRED STOCK—VALIDITY OF SECURITY.
A corporation cannot as against its creditors secure the retirement of preferred stock issued under Comp. Laws, Mich. 1897, § 7073, by appropriating assets otherwise available to creditors, as by carrying an insurance policy out of the corporate assets, though creditors did not extend credit on the faith of the policy being a corporate asset.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. § 545.*]

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

In the matter of the Lansing Veneered Door Company, bankrupt. From an order of the District Court reversing an order of the referee directing certain payment, John E. Ellsworth appeals adversely to T. Rogers Lyons, trustee of the estate. Order affirmed.

B. B. Selling, for appellant.

W. C. Brown, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. The appellant, on behalf of himself and other holders of preferred stock of the Lansing Veneered Door Company (hereafter referred to as the "Door Company"), petitioned the referee for an order directing the payment to him and such other stockholders of the proceeds of a certain policy of insurance upon the life of Charles Broas, taken out by the bankrupt company for the purpose of securing the payment of the dividends upon said preferred stock and the ultimate redemption of the same at par. The referee granted the petition. The District Court, upon review of the referee's order, reversed the same and dismissed the petition. The important facts are these:

The Door Company was originally incorporated in 1896. It had then no preferred stock. In 1902 its capital stock was increased to $50,000; $30,000 being common and $20,000 preferred. This action was taken under the provisions of section 7073 of the Compiled Laws of Michigan hereafter referred to. The full $20,000 of preferred stock was subscribed by Charles Broas, secretary of the company, who had charge of the floating of the same. Section 1 of article 4 of the company's by-laws provides that:

"Three thousand shares shall be known as common stock, fully paid and non-assessable, with power of voting at stockholders' meeting, one vote for each share. Two thousand shares shall be known as preferred stock, drawing six per cent. interest, payable semiannually, and redeemable in nineteen hundred and twelve."

Sections 2 and 3 are as follows:

"Sec. 2. The preferred stock shall be retired in full at par on the first day of June, 1912. For the purpose of providing a fund for the redemption and retirement of said preferred stock there has been placed upon the life of Charles Broas, secretary, treasurer and general manager, twenty thousand dollars ($20,000) of life insurance in the Mutual Benefit Insurance Company of Newark, N. J. Said insurance is taken on the ten year endowment plan and the full amount is payable directly to this company on the death of the

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

insured, or at the expiration of ten years should the insured be then living.

"Sec. 3. After providing for the payment of dividends on the preferred stock and before any dividends shall be declared or paid upon the common stock there shall be set aside from the net earnings of the business of the company each year and paid to the Mutual Benefit Insurance Company of Newark, N. J., at the time when such premium becomes due a sum sufficient to pay such premiums, less the dividend paid on such policy. The moneys received ($20,000) by this company at the expiration of the endowment period, or by the death of the insured, shall be used for no other purpose whatsoever than the retirement of the preferred stock. It being specially provided that in case of the death of the insured the moneys due ($20,000) shall be used only for the purchase of preferred stock at par."

Section 4 provides that whenever the surplus in the hands of the company exceeds the amount necessary to pay the next year's premium on the insurance policy, together with the amount required to meet interest on the preferred stock for the next two years, "such surplus and such surplus only may be used in the payment of dividends on the common stock, or may, by a two-thirds vote of the owners of the common stock, be used in the purchase of preferred stock."

Section 5 requires the by-laws referred to, together with section 7073 of the Michigan statutes above mentioned, conferring authority for the issue of preferred stock, to be printed upon the certificates thereof, and forbids amendment or repeal of the by-laws without the consent of all the holders of preferred stock and of two-thirds of the holders of common stock. The by-laws, together with the statute referred to, were in fact printed upon the certificates of stock when issued, to which were attached semiannual coupons representing dividends for the 10-year period commencing October 1, 1902, each coupon containing this recital: "The same being six months' dividends on $500.00 preferred stock." The 10-year endowment policy was in fact taken out as contemplated, and the holders of preferred stock purchased the same in reliance thereon as security for such preferred holdings. Previous to February 18, 1904, the company paid in cash, out of its assets, premiums amounting to $4,408.89. After that date it paid only the sum of $22.49, which was interest due on a deferred payment maturing February 18, 1904. Later premiums were met through loans upon the policy. Proceedings in bankruptcy were begun against the company August 18, 1906. On November 23, 1906, the trustee in bankruptcy surrendered the policy to the insurance company, receiving therefor $2,310.71, as its surrender value. The referee concluded, apparently with considerable difficulty, that the company was solvent upon February 18, 1904, without taking into account the insurance policy. He also found that the Door Company had no creditors at the time of the adjudication in bankruptcy or at the time of the filing of the petition therein, who were such upon February 18, 1904, and that there was no evidence that any credit was extended by any creditor of the company "upon the basis or supposition that the said life insurance policy was an asset of said corporation for the payment of its debts." It also appeared that a further issue of preferred stock was made in 1906. This fact, however, does not become material in the view we take of the case.

The sole question presented is whether, as against the creditors of an insolvent manufacturing corporation organized under the laws of

Michigan, the preference attempted to be given stockholders of the character in question can be sustained as to assets set apart while the company is still solvent for the security of said holdings, but still held by the company under an attempted trust in favor of such holders. We say this because, in the first place, we must accept the conclusion of the referee that the company was solvent when the insurance premiums in question were paid. In the next place, no question of the lawfulness of the payment of the dividends actually paid is here involved, but only of the application of funds now on hand to the ultimate redemption of the preferred holdings. Moreover, the fund representing the proceeds of insurance was actually paid from the assets of the company, thus reducing to that extent the amount available to creditors and rendering it immaterial whether paid from earnings of the company or not. And, finally, the title to the securities representing the fund so paid from the assets of the company was still held by the latter at the time bankruptcy intervened. That the terms of the by-laws and stock certificates are intended to create the preference claimed is clear. The important question is whether the company had power to give such preference. The law is well settled that a corporation may lawfully give security to one class of stockholders over another class. Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769; Hamlin v. Toledo, St. L. & K. C. R. Co. (6th Circuit) 78 Fed. 664, 670, 24 C. C. A. 271, 36 L. R. A. 826; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C., N. D. Ohio) 86 Fed. 929, 949; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (6th Circuit) 95 Fed. 497, 531, 36 C. C. A. 155. It is equally well settled that a contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all corporate debts are paid is contrary to public policy, and void. Warren v. King, 108 U. S. 389, 396, 2 Sup. Ct. 789, 27 L. Ed. 769; Hamlin v. Toledo, St. L. & K. C. R. Co. (6th Circuit) 78 Fed. 664, 670, 671–672, 24 C. C. A. 271, 36 L. R. A. 826; Guaranty Trust Co. v. Galveston City R. R. Co. (5th Circuit) 107 Fed. 311, 46 C. C. A. 305; American Steel & Wire Co. v. Eddy, 130 Mich. 266, 269, 89 N. W. 952; s. c. 138 Mich. 403, 407–410, 101 N. W. 578; Clark v. E. C. Clark Machine Co., 151 Mich. 416, 424, 115 N. W. 416; Cook on Stocks and Stockholders (3d Ed.) § 271.

Appellant contends that the holders of this so-called preferred stock were not in reality stockholders at all, but were essentially creditors, and that the corporation could lawfully secure to them the repayment of loans made as such. It may be conceded that if the preferred holders in question were in reality creditors purely, and not stockholders, it was competent to secure the repayment of the money so advanced. The status of these holders must be determined largely by reference to the statute creating that status.

Section 7073 of the Michigan Compiled Laws of 1897 (which was added in 1893 by way of amendment to the general act providing for the incorporation of manufacturing companies, and under which the amendment of the articles of association of the Door Company and the issue of the preferred interests in question were had) confers power upon such manufacturing company "to create and issue certificates for

two kinds of stock, viz.: General or common stock, and preferred stock, which preferred stock shall at no time exceed two-thirds of the actual capital paid in, and shall be subject to redemption at par at a certain time to be fixed by the by-laws of said corporation, and to be expressed in the certificates therefor." It is further provided that:

"The holder of such preferred stock shall be entitled to a fixed dividend, payable quarterly, half-yearly or yearly, which said dividend shall be cumulative, payable at the time expressed in said certificate, not to exceed eight per cent. per annum, before any dividend shall be set apart or paid on the common stock."

It is further provided that:

"In no event shall the holder of such preferred stock be individually or personally liable for the debts or other liabilities of said corporation, excepting debts for labor."

It is further provided that both preferred and common stockholders shall participate in the election of the board of directors except when otherwise provided in the articles of association, with the express requirement, however, of such participation by the preferred stockholders whenever the common stock shall be impaired to the extent of 10 per cent. thereof or whenever any dividend due on the preferred stock shall remain unpaid for 60 days. The statute contains this further express provision:

"If for any reason said corporation shall cease business or become insolvent, then after the payment of all liabilities and debts, the remainder of the assets of said corporation shall be applied, first in payment in full of all preferred stock and then unpaid dividends due thereon, and the balance divided pro rata, share and share alike, among the holders of the common stock."

It is thus seen, first, that holders of the class here in question are throughout the statute treated as stockholders and not as creditors; second, that such preferred stock is not entitled to be withdrawn by the holder, but is only "subject to redemption," the provision in the by-laws for such right of withdrawal being thus without statutory authority; third, the return upon the stock is characterized as dividends and not as interest, and, while this dividend is not in terms payable only from the net earnings, such is its legal effect (Lockhart v. Van Alstyne, 31 Mich. 75, 18 Am. Rep. 156; Warren v. King, supra; Hamlin v. Toledo, St. L. & K. C. R. Co., supra); fourth, participation by the preferred stockholders in the management and control of the corporate affairs is provided for, not only in case of impairment of common stock or failure to pay dividends on preferred stock, but at all times, as the articles of association contain no provision to the contrary; fifth, no priority is allowed to preferred stockholders over creditors. On the contrary, the priority is awarded only as to common stockholders, and then only (in case of insolvency and by the express terms of the statute) "after the payment of all liabilities and debts." That the holder of preferred stock under this Michigan statute is a stockholder merely, and not a creditor, seems clear. We find nothing to the contrary in the obiter remark of Justice Grant in Continental Paint Co. v. Secretary of State, 128 Mich., at pages 624–625, 87 N. W., at page 901. On the other hand, the decisions of the Supreme Court of

Michigan in American Steel & Wire Co. v. Eddy, 130 Mich. 266, 89 N. W. 952, and 138 Mich. 403, 407, 408, 409–410, 101 N. W. 578, are peculiarly in point. In that case suit was brought to recover from a holder of preferred stock issued under section 7073 dividends received in alleged impairment of the capital stock, section 7057 permitting such recovery upon withdrawal or refunding to stockholders of any part of the capital stock before payment of all the debts of the corporation. The claim was made by the defendant that the subscription to the stock was merely a loan, and so intended. It was held that the money paid must be considered as a purchase of stock, and not a loan, and that one who loans money, but takes stock absolute upon its face, is liable as a stockholder. It was further held that notwithstanding the provisions of section 7073, exempting the holder of such preferred stock from liability for the debts and other liabilities of the corporation (excepting debts for labor), he was still liable for dividends received which were not paid out of the earnings; the preferred stockholder under section 7073 being held to have no greater right to a dividend from the capital stock of an insolvent corporation than any other stockholder until the debts are paid. The cases of Warren v. King and Hamlin v. Toledo, St. L. & K. C. R. Co., supra, are also well in point. In the former case the certificates declared that "the preferred stock is to be and remain a fixed claim upon the property of the company after its indebtedness," with provisions for semi-annual payment of interest from net earnings in advance of participation therein by the common stock. In deciding that these preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one to a priority over the holders of common stock, the court said of the security in question:

"But it is stock, and part of the capital stock, with the characteristics of capital stock. One of such characteristics is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock."

In Hamlin v. Toledo, St. L. & K. C. R. Co., supra, this court speaking through Judge (now Mr. Justice) Lurton, said:

"There is a wide difference between the relation of the creditor and the stockholder to the corporate property. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital stock of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is the fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary."

And again:

"If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby."

And still again:

"We will not presume that their purpose (that of the preferred stockholders) was to adopt a device by which they might withdraw their contribution to the capital stock and leave creditors unpaid. If they intended that, they have not made it plain, and, if it was plain, the device would be invalid as to creditors."

The holdings involved in that case, and held to be stock, had no voting power. As has already appeared, the fact that only subsequent creditors are affected is immaterial. In Clark v. E. C. Clark Machine Co., supra, a holder of corporate stock sold the same to the corporation, taking security therefor. There was no claim that the corporation was then insolvent. The good faith of all the parties was conceded. No creditors existing at the time of the stock purchase, if there were any, complained of the transfer. All the creditors who complained were subsequent creditors, who gave credit with the mortgage on file in the proper office. In rejecting the security as invalid, the Supreme Court of Michigan said:

"We are compelled to hold that the assessable stock and the assets of a corporation constitute a trust fund, not only for the benefit of existing, but also for future, creditors (American Steel & Wire Co. v. Eddy, 130 Mich. 266 [89 N. W. 952]; Peninsular Savings Bank v. Stove Polish Co., 105 Mich. 535 [63 N. W. 514]; Upton v. Tribilcock, 91 U. S. 45 [23 L. Ed. 203]), and that the assets of a corporation cannot be used by it in the purchase of its outstanding stock to the exclusion of subsequent creditors."

The fact that the stock involved in the Clark Case was common stock does not affect its application to the point to which the case is cited.

We are not to be understood as holding that a corporation cannot secure a creditor for money loaned by way of insurance upon the life of its manager paid for out of the assets of the company. What we do hold is that it is not lawful for a corporation, as against its creditors, to secure the retirement of preferred stock issued under the Michigan statute by an appropriation of the assets of the company otherwise available to creditors; and that it was clearly the intention of the parties concerned, plainly evidenced by the references to and reliance upon the Michigan statute, to make the holders thereunder stockholders and not creditors. It is true that the agreement in question attempted to secure the preferred stockholders, but that, as shown by the authorities cited, is incompetent as against creditors prior or subsequent, and is the vice of the situation. It can make no difference that creditors are not shown to have extended credit upon the supposition that the life insurance policy was a corporate asset for the payment of debts. On the other hand, although such proposition is perhaps not material, there is no showing that creditors extended credit with actual knowledge of the fact that the life insurance held by the corporation, and purchased with its assets, was pledged for the retirement of the preferred stock. None of the cases cited by appellant are in our judgment inconsistent with the conclusion we have reached. Thus W. C. & Phil. R. Co. v. Jackson, 77 Pa. 321, and Williams v. Parker, 136 Mass. 204, involved only preferences between different classes of stockholders; Fitch v. Wetherbee, 110 Ill. 475, involved no question of the respective rights of stockholders and creditors; Atwood v. Dumas,

149 Mass. 167, 21 N. E. 236, 3 L. R. A. 416, involved the liability of a co-operative bank to trustee process to reach the funds of a member which were by statute withdrawable by the member as a matter of right and as a deposit. The case there presented is similar to that involved in Wilson v. Parvin (6th Circuit) 119 Fed. 652, 659, 56 C. C. A. 268. Burt v. Rattle, 31 Ohio St. 116, differed from the case here presented in the important particulars that the statute there in question expressly authorized the corporation to guarantee not only dividends but actual payment at a fixed time; the holder of the preferred stock was not entitled to vote under any circumstances, nor was he liable for debts under any circumstances; while stockholders were by express provision of the constitution liable to creditors. The preferred holder in that case was held not to be a stockholder, the court saying:

"A stockholder in such a corporation in Ohio without individual liability is simply an impossibility. To declare a party not individually liable is prima facie to declare him not a stockholder."

The court was compelled, in order to sustain the constitutionality of the statute, to hold that the so-called preferred stockholders were intended to be creditors merely. In Heller v. Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212, the preferred stockholder was by statute given priority over "any subsequently created mortgage, or other incumbrance." The case of Totten v. Tison, 54 Ga. 139, was decided upon its own peculiar state of facts, the court recognizing the ordinary rule which gives preferred stockholders priority only over common stockholders, but holding that the so-called preferred stockholders were not preferred stockholders but creditors. The case of Little v. Garabrant, 90 Hun, 404, 35 N. Y. Supp. 689, contains nothing contrary to the views we have expressed.

The conclusion we have reached is that the District Court properly held that the preferred stockholders were not entitled to the proceeds of the life insurance policy in preference to the rights of creditors.

The order of the District Court is accordingly affirmed.

SNYDER v. COLORADO GOLD DREDGING CO.†

(Circuit Court of Appeals, Eighth Circuit. August 4, 1910.)

No. 2,928.

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 34*)—WATER RIGHTS—DOCTRINE OF APPROPRIATION PREVAILS IN COLORADO.

In Colorado, the common-law doctrine in respect of the rights of riparian proprietors never has obtained, and in its stead there was adopted the doctrine of appropriation which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and better right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 27, 28; Dec. Dig. § 34.*]

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

† Rehearing denied September 19, 1910.

2. WATERS AND WATER COURSES (§ 2*)—DOCTRINE OF APPROPRIATION COMPETENTLY ADOPTED IN COLORADO—CONGRESSIONAL SANCTION AS RESPECTS PUBLIC LANDS.

In choosing between the doctrine of riparian rights and that of appropriation, Colorado acted within the limits of her authority, first as a territory and then as a state, and her choice was recognized and sanctioned by Congress, so far as the public lands were concerned.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. § 2.*]

3. WATERS AND WATER COURSES (§ 21*)—WATER RIGHTS ACQUIRED ON PUBLIC LANDS NOT AFFECTED BY SUBSEQUENT DISPOSITION OF LANDS UNDER PUBLIC LAND LAWS.

When a water right and a ditch right connected therewith are acquired while the lands embracing the point of diversion and a portion of the ditch are public lands, those rights are not affected by the subsequent location, entry, and patenting of such lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 14; Dec. Dig. § 21.*]

4. WATERS AND WATER COURSES (§§ 9, 15*)—WHAT CONSTITUTES "APPROPRIATION" OF WATER IS QUESTION OF LOCAL LAW—LOCATION OF GOLD PLACER CLAIM DOES NOT OPERATE AS APPROPRIATION IN COLORADO.

What constitutes a valid appropriation of water to beneficial uses is a question of local law, and by the law of Colorado the location of a riparian gold placer claim is not in itself such an appropriation, for the actual application of the water to a beneficial use is the true test of appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 4, 7; Dec. Dig. §§ 9, 15.*

For other definitions, see Words and Phrases, vol. 1, pp. 466–468; vol. 8, p. 7580.]

5. WATERS AND WATER COURSES (§ 9*)—RIPARIAN RIGHTS ACQUIRED THROUGH PATENTS FOR PUBLIC LANDS ON NONNAVIGABLE STREAM USUALLY DEPEND UPON LOCAL LAW—PATENT FOR GOLD PLACER CLAIM IN COLORADO GIVES NO RIGHT TO UNAPPROPRIATED WATERS.

In so far as the rights and incidents of riparian proprietorship are concerned, conveyances by the United States of public lands on nonnavigable streams and lakes, when it is not provided otherwise, are to be construed and have effect according to the law of the state in which the lands are situate; and by the law of Colorado a conveyance of riparian land, even if it be a gold placer claim, does not carry any right to the unappropriated waters of the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 4; Dec. Dig. § 9.*]

6. WATERS AND WATER COURSES (§ 144½*)—RIGHT OF WAY FOR DITCH OVER PRIVATE LANDS—ACQUISITION NECESSARY.

The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 147; Dec. Dig. § 144½.*]

7. WATERS AND WATER COURSES (§ 144½*)—EASEMENT FOR DITCH DOES NOT GIVE RIGHT TO ALTER OR ENLARGE.

An easement for a ditch used in diverting and carrying water covered by an existing appropriation does not carry with it any right to enlarge the ditch, or to change its location or to use it in diverting and carrying a largely increased volume of water under a later appropriation, but is

limited to the maintenance and use of the ditch, substantially as then constructed, for the purpose of utilizing the existing appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 147; Dec. Dig. § 144½.*]

8. WATERS AND WATER COURSES (§ 144½*)—INCREASED APPROPRIATION OF WATER EFFECTED THROUGH WRONGFUL ENLARGEMENT OF DITCH—VALIDITY.

An increased appropriation of water which is initiated and maintained by an unlawful trespass upon the lands of another, in the nature of an unauthorized enlargement of an existing ditch, is of no validity against him whose property is the subject of the trespass.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 147; Dec. Dig. § 144½.*]

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

Bill by the Colorado Gold Dredging Company against C. M. Snyder. From an order granting an injunction, defendant appeals. Reversed.

E. T. Wells (W. A. Guyselman, on the brief), for appellant.

William V. Hodges (Clayton C. Dorsey, on the brief), for appellee.

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

VAN DEVANTER, Circuit Judge. This is an appeal from an interlocutory order granting an injunction, and the ex parte affidavits and other proofs upon which the order was granted show that the case is as follows: The Colorado Gold Dredging Company, spoken of as the plaintiff, is the owner of certain placer mining claims along the Swan river, a small nonnavigable mountain stream in Summit county Colorado, and Charles M. Snyder, spoken of as the defendant, is in possession of and has the right to mine and to purchase certain other placer mining claims, including one called the Mascot, higher up the same stream. These latter claims are owned by E. T. Wells and it is through a contract with him, made in 1907, that the defendant's rights in them were acquired. The Mascot embraces the bed of the Swan river and some of the valley land on either side. It probably was located in 1870, was entered by Wells at the local land office in 1895, and was patented to him in 1898. Prior to its location—that is, while it was still public land—a ditch, called the Galena, was constructed from a point on the Swan river well within the limits of the claim to a point lower down the valley and for several years a portion of the waters of the river was diverted therefrom and carried through this ditch to the vicinity of the claims first mentioned where it was used in mining operations. Some of the proofs strongly suggest that this ditch and water right were abandoned before Wells' entry at the local land office, but it will be assumed, for present purposes only, that their abandonment is not established. After the issuance of the patent to Wells, the North American Gold Dredging Company, claiming to be the owner of the old ditch and the water right acquired thereby, materially enlarged and partially reconstructed the ditch, including the portion upon the Mascot, and since then that company and its suc-

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

cessors in title, the American Gold Dredging Company and the plaintiff, have carried through the ditch at irregular intervals a greatly increased portion of the waters of the river, and have used the same in mining operations on the claims now owned by the plaintiff. Wells had no knowledge of the enlargement and reconstruction of the ditch until after the work was done, has not consented thereto or acquiesced in the enlarged use of the ditch, and has not been compensated in any wise for the enlarged taking and use of his land.

At the hearing upon the application for the injunction, the plaintiff claimed something by reason of another old ditch, called the Delaware, but counsel for the plaintiff now say:

"The Delaware ditch need not be considered at all. For the purposes of this argument we will admit that the Delaware ditch is abandoned."

After acquiring an interest in the Mascot, the defendant, for the purpose of working the claim and extracting the placer gold therein, as authorized by his contract with Wells, began the construction within the limits of the claim of a tunnel along and under the bed of the Swan river in the direction of the head of the Galena ditch. The tunnel is nearly parallel to the ditch, is over 120 feet distant therefrom, and has some tendency, by reason of the induced seepage through the adjacent porous soil, to diminish the natural superficial flow of the river and to lessen the amount of water which can be diverted therefrom by the ditch as enlarged and reconstructed. But this tendency, according to the present proofs, is not sufficient to justify the belief that the tunnel does now or ever will interfere with or injuriously affect the enjoyment of the water right acquired through the original construction and use of the ditch.

The injunction granted by the interlocutory order challenged by this appeal is directed against the prosecution of the work upon this tunnel, and the question to be considered is: Was the injunction improvidently granted? The common-law doctrine in respect of the rights of riparian proprietors in the waters of natural streams never has obtained in Colorado. From the earliest times in that jurisdiction the local customs, laws, and decisions of courts have united in rejecting that doctrine and in adopting a different one which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and superior right. Yunker v. Nichols, 1 Colo. 551; Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447; Platte Water Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 531, 21 Pac. 711; Crippen v. White, 28 Colo. 298, 64 Pac. 184. In so choosing between these inconsistent doctrines, Colorado acted within the limits of her authority, first as a territory and then as a state, and her choice was recognized and sanctioned by Congress, so far as the public lands of the United States were concerned. United States v. Rio Grande Irrigation Co., 174 U. S. 690, 702–706, 19 Sup. Ct. 770, 43 L. Ed. 1136; Gutierres v. Albuquerque Land & Irrigation Co., 188 U. S. 545, 552–554, 23 Sup. Ct. 338, 47 L. Ed. 588; Clark v. Nash, 198 U. S. 361, 370, 25 Sup. Ct. 676, 49 L. Ed. 1085; Kansas v. Colorado, 206 U. S. 46, 94, 27 Sup. Ct. 655, 51 L. Ed. 956; Boquillas Land & Cattle Co.

v. Curtis, 213 U. S. 339, 29 Sup. Ct. 493, 53 L. Ed. 822. Congress also by its first enactment upon the subject, now embraced in Rev. St. § 2339 (U. S. Comp. St. 1901, p. 1437), granted the right of way over the public lands for ditches employed in so appropriating and applying water to beneficial uses, and by another enactment, now embraced in Rev. St. § 2340 (U. S. Comp. St. 1901, p. 1437), declared that all patents subsequently issued for public lands should be subject to any vested rights to such ditches.

As the Mascot placer was still public land when the Galena ditch originally was constructed thereover and was made the means of diverting and applying to a beneficial use a portion of the waters of Swan river, and as there is no suggestion of any prior conflicting appropriation, it is altogether plain that, to the extent of that diversion and use, a valid appropriation of those waters was effected thereby, and that coincidently there was acquired the right to maintain and use the ditch, substantially as then constructed, for the purpose of continuing that diversion and use. And it is equally plain that neither the right to the use of the water nor that to the use of the ditch was lost or diminished by the subsequent location, entry, and patenting of the Mascot. If these rights were not abandoned and now are held by the plaintiff, it is entitled to have them recognized and protected by an injunction if necessary; but such relief as to them does not seem to be necessary now, for it does not appear that the defendant's tunnel does or will affect them injuriously. Therefore, the justness of the existing injunction must arise, if at all, from the largely increased appropriation which the plaintiff claims was effected by means of the enlargement and reconstruction of the Galena ditch subsequently to the location, entry, and patenting of the Mascot.

In opposition to the claim to an increased appropriation, the defendant advances the twofold contention that the location of the Mascot as a gold placer was in itself an appropriation of all the waters of the Swan river, not theretofore appropriated, in so far as they are required for the working of the placer, and that the United States by the patent to Wells granted to him all the unappropriated waters of the stream where it flows through the placer. Either branch of the contention, if sustained, would defeat the claim to the increased appropriation. In support of the first branch, it is said that a gold placer claim cannot be worked without water, that presumably one who locates such a claim intends to work it and to use any unappropriated waters that may be available for the purpose, and therefore that the location of a gold placer claim bordering upon or embracing the channel of a stream is constructively an appropriation of the unappropriated waters of the stream to the extent that they are required for the working of the claim. And in support of the second branch it additionally is said that the mining laws of the United States contemplate that a patented gold placer claim shall be of value to the grantee, and therefore that the patent carries, by implication, the right to the unappropriated waters of any stream bordering upon or traversing the claim. The argument is plausible, but not tenable. It is in conflict with the established doctrine of appropriation in Colorado and with its recognition and sanction by Congress as respects the public lands. That doc-

trine regards the waters of natural streams as entirely distinct from the lands through which they flow, and regards rights to the use of such waters as dependent upon actual appropriation. In these respects, it makes no distinction between public lands and private lands, between owners of riparian lands and owners of other lands, between places of use which are adjacent to a stream and those which are remote therefrom, or between individuals who desire to apply the waters to placer mining and those who desire to apply them to other beneficial uses. Nor does it recognize a merely constructive appropriation or one which rests only in intention. On the contrary, its requirements are satisfied only when by a union of intent and act the waters actually are subjected to a beneficial use. The Supreme Court of Colorado puts it in this way:

"The true test of the appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial." Thomas v. Guiraud, 6 Colo. 530, 533.

"When the individual by some open, physical demonstration indicates an intent to take for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designed, there is such an appropriation as is contemplated." Larimer County Reservoir Co. v. People, 8 Colo. 614, 616, 9 Pac. 794, 796.

"By the Constitution and laws of Colorado, state and territorial, from the earliest times, rights to the beneficial use of water from natural streams have been acquired by diversion through prior appropriation rather than by grant. It has been the settled doctrine of our courts that such appropriation, to be valid, must be manifested by the successful application of the water to the beneficial use designed, or accompanied by some open, physical demonstration of intent to take the same for such use. * * * The diversion of the water ripens into a valid appropriation only when the water is utilized by the consumer, though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch." Platte Water Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 531, 21 Pac. 711, 713.

"It must be applied to some beneficial use, and, in case of irrigation, it must be actually applied to the land before the appropriation is complete." Farmer's, etc., Co. v. Southworth, 13 Colo. 111, 114, 21 Pac. 1028, 1029, 4 L. R. A. 767.

True, gold placer claims cannot be worked without water, but this applies to nonriparian claims quite as much as to those which are riparian, and water usually is applied to both in substantially the same way; that is, by a ditch which diverts it at a point beyond the limits of the claim and then carries it to the place of use. Rarely can a riparian claim be worked successfully by the aid of the waters of the contiguous stream unless they be diverted some distance above the claim, and even then the volume of water is often so inadequate that it must be supplemented by drawing upon another stream. Nor are gold placer claims alone in requiring the use of water to render them productive or of value. In Colorado other claims to public lands, such as homestead claims and desert claims, have a like need of water. Indeed, the desert land law (Act March 3, 1877, c. 107, 19 Stat. 377; as amended by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096 [U. S. Comp. St. 1901, p. 1549]) conditions the right to make the preliminary entry upon the making of a declaration under oath of an intention to reclaim the land by conducting water upon the same, and conditions the right to make final entry upon the making of satisfactory proof of reclama-

tion by that means; and yet a preliminary desert entry, even if it be of riparian lands, never is regarded as in itself an appropriation of water, any more than is a preliminary homestead entry of nonriparian lands. Then, too, the location of gold placer claims is largely experimental; the antecedent prospecting seldom being sufficient to be truly determinative of their value. Subsequent and closer prospecting often results in their abandonment, and less than one-half of them ever are carried to the point where water really is used in working them. The locator does not agree to work the claim, but may do so or not at his option, and may prolong indefinitely his possessory right by performing one hundred dollars' worth of work, or making that amount of improvements, on the claim in each year. Considerations such as these point very persuasively to the absence of any good reason for excepting riparian gold placer claims from the doctrine prevailing in Colorado that the waters of all natural streams are subject to appropriation, and that actual application to a beneficial use is the test of appropriation. But it suffices to know that in that state the local customs, laws, and decisions of courts make no such exception.

In Schwab v. Beam (C. C.) 86 Fed. 41, a different conclusion was announced, but that decision stands alone, is not in accord with the decisions of the Supreme Court of Colorado respecting the application of the doctrine of appropriation as there prevailing to the use of water for purposes other than irrigation, and is not sustained by what seems to be the better reasoning. The several congressional enactments, whereby the local customs, laws, and decisions of courts relating to rights to the use of water have been recognized and sanctioned, disclose a settled purpose to make the subject one of local law, as respects the public lands and claims thereto under the public land laws; and in none of these enactments is there anything indicative of a purpose to treat riparian gold placer claims differently from other claims. Not only so, but the first expression of this recognition and sanction was incorporated in the mining laws of the United States at the time of their enactment and still remains a part of them. It broadly includes "rights to the use of water for mining, agricultural, manufacturing, or other purposes," and leaves no room to doubt that it was intended that the local law should apply to riparian gold placer claims the same as to other claims to public lands. Mr. Lindley, in his work on Mines ([2d Ed.] vol. 1, sec. 428), puts the matter quite accurately when he says:

"As to what rights accrue to a placer locator to the water of a nonnavigable stream found within the limits of the location, no definite rule can be stated. It will depend upon the locality in which the claim is situated. If in a state where the ultra doctrine of the common law prevails, his rights to the water would be limited to those of a riparian proprietor. If in a state where the riparian doctrines are abrogated or declared never to have been adopted, his right to use the water would depend upon its proper appropriation for that purpose, and the mere location of the placer claim would not of itself confer any right to the water."

What has been said disposes adversely of the first branch of the contention before stated, and also makes strongly against the second branch, viz., that a patent for a placer claim carries, by implication, the right to the unappropriated waters of any stream bordering upon

or traversing the claim. It needs only to be added that, by the settled rule of decision in the Supreme Court of the United States, conveyances by the United States of public lands on nonnavigable streams and lakes, when it is not provided otherwise, are to be construed and have effect according to the law of the state in which the lands are situate, in so far as the rights and incidents of riparian proprietorship are concerned. Hardin v. Jordan, 140 U. S. 370, 384, 402, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Hardin v. Shedd, 190 U. S. 508, 519, 23 Sup. Ct. 685, 47 L. Ed. 1156; Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857; Harrison v. Fite, 78 C. C. A. 447, 449, 148 Fed. 781, 783. Here it is not provided otherwise, either by statute or by the patent, and, as has been seen, the local law does not recognize a conveyance of the land as carrying any right to the unappropriated waters of the stream.

As, then, neither the location of the Mascot, nor the patenting of it altered the status of the waters of Swan river, not theretofore appropriated, and as they remained subject to appropriation for beneficial uses, including placer mining, at the time of the increased appropriation, which the plaintiff asserts was effected through the enlargement and reconstruction of the Galena ditch and its subsequent enlarged use, it will be necessary to consider whether the plaintiff is entitled to demand that that appropriation be recognized and respected by the defendant, notwithstanding the facts, as before stated, that Wells had no knowledge of the enlargement and reconstruction of the ditch until after the work was done, has not consented thereto or acquiesced in the enlarged use of the ditch, and has not been compensated for the enlarged servitude so attempted to be imposed upon his land.

The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch. In this regard the situation of an intending appropriator is analogous to that of a railroad company which, although empowered to construct, maintain, and operate a line of railroad between designated points, cannot construct its road over intervening private lands until the right so to do is granted by their owner or is acquired by condemnation. Since as early as 1861 the statutes of Colorado have authorized the condemnation of rights of way over private lands for ditches, but upon condition that just compensation therefor be paid; and the state Constitution, which antedates the increased appropriation now in question, contains the following provision (article 16, § 7):

"All persons and corporations shall have the right of way across * * * private * * * lands, for the construction of ditches, canals and flumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, * * * upon payment of just compensation."

Then in Stewart v. Stevens, 10 Colo. 440, 446, 15 Pac. 786, 789; the court gave effect to these statutes and this constitutional provision

by denying an asserted right to construct a ditch, for irrigation purposes, across the lands of another without a grant from him and without making compensation therefor; it being said in that connection:

"We have formed a Constitution which prohibits the taking of private property for private use without compensation; and the Legislature has provided the proceedings by which, upon the payment of just compensation, private property may be subjected to private use."

When the Mascot placer was patented to Wells, he took it subject to the easement therein which had been acquired under the congressional enactment by the construction and use of the original Galena ditch while the placer was still a part of the public lands, but that easement extended only to the maintenance and use of the ditch, substantially as then constructed, for the purpose of diverting and carrying the volume of water theretofore appropriated, and did not give any right to enlarge the ditch, or to change its location, or to use it in diverting and carrying a largely increased volume of water. McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Clear Creek Co. v. Kilkenny, 5 Wyo. 38, 44, 36 Pac. 819; Davenport v. Lamson, 21 Pick. (Mass.) 72; Jennison v. Walker, 11 Gray (Mass.) 423, 426; Darlington v. Painter, 7 Pa. 473; Moorhead v. Snyder, 31 Pa. 514; Jaqui v. Johnson, 27 N. J. Eq. 526; Long on Irrigation, § 64; 2 Washburn's Easements (4th Ed.) pp. 64, 175; Angell on Water Courses (7th Ed.) § 224; 14 Cyc. 1205, 1211. Thus it was essential that the right so to alter the ditch and to enlarge its use be acquired through a grant from Wells or through a resort to appropriate condemnation proceedings. But, as no such right was acquired, the change made in the ditch and its enlarged use were as unlawful and as much a trespass as would have been the construction and use of an entirely new ditch in the like circumstances. And not only was the increased water appropriation initiated by means of this trespass, but the maintenance and enjoyment of that appropriation are dependent upon a continuance of the trespass.

In these circumstances it seems altogether clear that the defendant, who practically stands in the shoes of Wells, is not bound to recognize and respect that appropriation.

The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but regards them as of no validity against those whose property is the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost. Smith v. Denniff, 24 Mont. 20, 22, 60 Pac. 398, 81 Am. St. Rep. 408; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. 1060, 30 L. R. A. 384; Bergquist v. West Virginia Co., 18 Wyo. 234, 106 Pac. 673, 684; Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732; Belk v. Meagher, 104 U. S. 279, 284, 26 L. Ed. 735; Erhardt v. Boaro, 113 U. S. 527, 534, 5 Sup. Ct. 560, 28 L. Ed. 1113. The present proofs do not disclose any such acquiescence or neglect; nor do they indicate that the use of the enlarged ditch in carrying the increased volume of water has come to be a matter of public concern within the rule applied in Roberts v. Northern Pacific R. R. Co., 158 U. S. 1, 10, 15 Sup. Ct. 756, 39 L. Ed. 873;

Stuart v. Union Pacific R. R. Co. (C. C. A.) 178 Fed. 753, and like cases.

No objection is made to the work in which the defendant was engaged, save the one that it constituted a wrongful interference with the water rights asserted by the plaintiff, and, as that objection appears to be certainly untenable, it is clear that the injunction was granted improvidently.

The interlocutory order is accordingly reversed.

In re WATTS-WOODWARD PRESS, Inc.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 304.

CHATTEL MORTGAGES (§ 97*)—RENEWAL—REFILING—TIME.

Lien Law N. Y. (Laws 1897, c. 418) § 95, provides that a chattel mortgage, except as otherwise provided, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of a year from the first filing, unless within 30 days next preceding the expiration of the term a statement containing a description of the mortgage, names of the parties, the time when and place where filed, the interest of the mortgagee, etc., is filed. *Held* that, on the expiration of a year from the date of the original filing of a chattel mortgage, it becomes invalid, in the absence of the filing of the statement required, and cannot be resuscitated by filing a statement some 5 months thereafter.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 97.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of the Watts-Woodward Press, Incorporated, bankrupt. An order confirming the report of a special master, finding that a chattel mortgage, executed by the bankrupt to one Sjostrom and assigned to Josephine Watts, was invalid for delay in refiling, was made by the District Judge. R. N. Asterley files a petition to revise. Affirmed.

F. X. Sullivan, for Josephine Watts.

Frank M. Patterson, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. January 4, 1908, the Watts-Woodward Press executed a mortgage on certain type, presses, motors, composing tables, furniture, and fixtures on its premises, 22 Thames street, to secure the payment of $5,000 to one Sjostrom. June 16th Sjostrom, who never had any interest in the matter, assigned the mortgage to Josephine Watts, the actual lender. June 20th the original mortgage was filed in the register's office. November 22, 1909, the assignment to Josephine Watts was filed, and the original mortgage, with a statement that the debt was still due, refiled in the register's office. November 24th the original mortgage was foreclosed, and the chattels cover-

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

ed by it sold for $500 to one Asterley. November 29th a petition in bankruptcy was filed and a receiver appointed. December 4th the Watts-Woodward Press was adjudicated a bankrupt.

The property sold under the mortgage remaining on the premises, without any change of possession whatever, the receiver took possession of and sold it for something over $9,000. The special master held that the chattel mortgage was void for delay in refiling, and his report was confirmed by the District Judge. Asterley, who bid for Sjostrom, and who had himself no interest whatever, and who paid nothing on account of the bid, claims title to the mortgaged chattels. Josephine Watts, on the other hand, claims that the sale to Asterley was void, and that the assignee of the original mortgage has a lien upon the proceeds of the receiver's sale in his hands.

The lien law (Laws 1897, c. 418) as to the refiling of chattel mortgages reads:

"Sec. 95. A chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless, (1) within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the name of the parties, the time when and place where filed, the interest of the mortgagee or of any person who has succeeded to his interest in the property claimed by virtue thereof. * * *"

We think the mortgage, at the expiration of one year from the date of its original filing, became invalid, and that the refiling some five months after was utterly ineffective for any purpose. Judge Peckham said in the case of Porter v. Parmley, 52 N. Y. 185, at page 188:

"The statute is express that the 'mortgage shall cease to be valid' at the expiration of one year from its filing 'as against creditors' of the mortgagor, if not refiled as directed. Laws 1833, p. 403, § 3. The mortgage thus and thereby as against such creditors becomes absolutely void. Ely v. Carnley, 19 N. Y. 496."

Judge Folger said, in the case of Marsden v. Cornell, 62 N. Y. 215, at page 218:

"But he chose in 1870 to avail himself of the provision of the statute which for one year kept his mortgage good for him. He thus brought it under the purview and operation of the statute—within its grasp, so to speak. It then became as if the statute was passed for it alone, and applied to it alone, of all the chattel mortgages in the state. Then the third section of the statute of 1864 said of it, as if of it alone: This mortgage shall cease to be valid as against subsequent purchasers in good faith, after the expiration of one year from the 22d September, 1870, unless within 30 days next preceding that expiration the plaintiff shall file it again, and unless he shall file therewith a statement of his interest in the property. This he did not, and lost the benefit of his security, if any bona fide purchaser came in."

See, also, Herder v. Walther (Com. Pl.) 9 N. Y. Supp. 926.

The language of the statute is perfectly explicit, and under it, unless the mortgage in question were continued within 30 days next preceding June 20, 1909, the expiration of one year from its original filing, it became invalid as against the bankrupt's creditors. It was as if it had never existed. No discrimination is made between creditors founded upon notice or upon the time credit was given, as is made

in case of subsequent purchasers or mortgagees. The trustee in bankruptcy was fully qualified to attack the mortgage. Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, and our own decision in Re Gerstman, 157 Fed. 549, 85 C. C. A. 211.

Order affirmed.

In re SCHMIDT.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 290.

1. CHATTEL MORTGAGES (§ 86*)—FILING—TIME.
Under Lien Law N. Y. 1897, c. 418, § 90, declaring that every chattel mortgage, not accompanied by immediate delivery of the goods mortgaged and followed by an actual and continued change of possession, is void as against creditors of the mortgagor, unless the mortgage, or a true copy thereof, is filed as required, such mortgages must be filed within a reasonable time; and hence a chattel mortgage not filed until nearly three months after its execution was invalid.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 161; Dec. Dig. § 86.*]

2. CHATTEL MORTGAGES (§ 197*)—FAILURE TO FILE—INVALIDITY—"CREDITORS."
Under Lien Law N. Y. 1897, c. 418, § 90, providing that an unfiled chattel mortgage is absolutely void as against the creditors of the mortgagor, the word "creditors" included all creditors, and not those only who were prejudiced by the mortgagee's failure to file.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 430; Dec. Dig. § 197.*
For other definitions, see Words and Phrases, vol. 2, pp. 1713–1727; vol. 8, pp. 7622, 7623.]

3. BANKRUPTCY (§ 184*)—MORTGAGES—VALIDITY—OBJECTIONS BY RECEIVER.
A receiver in bankruptcy may assail a chattel mortgage void as to creditors for failure to file within a reasonable time, as required by the state law.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*]

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

In the matter of Max Schmidt, bankrupt. From an order directing John W. McDonald, trustee, to pay a chattel mortgage debt due from the bankrupt to Augusta Mauersburger, he appeals. Reversed.

F. M. Czaki, for appellant.

B. H. Arnold, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. April 21, 1908, the bankrupt for the full present consideration of $2,000 executed and delivered a chattel mortgage on the furniture and fixtures of a restaurant carried on by him to Augusta Mauersburger. The mortgagee is unable to speak the English language and apparently entirely unacquainted with business. The mortgage was not filed in the office of the register for the city

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

and county of New York until July 8, 1908, through the omission of her attorney either to do so or to tell her to do so. October 16, 1908, the petition in bankruptcy was filed and a receiver appointed. December 31, 1908, the receiver sold the chattels covered by the mortgage, and the mortgagee moved for an order requiring him to pay the amount of the mortgage out of the proceeds of sale. February 16, 1909, this motion was referred to the referee as special master to take testimony and report. The above material and a good many immaterial facts having been established, the following colloquy took place:

"The Master: At this point I shall interpose, and will state that, assuming the facts as stated, or offered to be proved, the most favorable to the trustee, I have reached a conclusion, and will make my report accordingly. I now request Mr. Fried to state his offers of proof for the record.

"Mr. Fried: I offer to prove that on July 8, 1908, at the time of the assignment by Max Schmidt to a committee of creditors, represented by Exhibit A, of May 17th, that the said Schmidt was insolvent, and that the claimant knew he was insolvent. I also offer to prove that Mrs. Mauersburger knew what authority she was giving to Louis L. Kahn, her attorney, on the 10th of August, 1908, and that thereafter, and on or about the 4th day of September, 1908, the mortgage was delivered to Louis L. Kahn for $600 on the Long Island property, executed by Max Schmidt, according to the terms of the letter of August 10, 1908, and that on or about that date the said creditors' agreement—Exhibit 'C—was signed by the said Louis L. Kahn."

The mortgage of $600 on real estate on Long Island referred to was in no way connected with the chattel mortgage under consideration. May 20, 1909, the special master reported that the mortgage should be paid in full, with interest from April 21 to December 31, 1908, which report was confirmed by the court November 21, 1909, and the trustee has taken this appeal.

All parties have argued the case as if the only creditors as to whom the mortgage would be void under the law of the state of New York are those persons who became creditors between April 21, 1908, the day of its date, and July 8, 1909, the day it was filed. The lien law of New York (Laws 1897, c. 418) provides:

"Sec. 90. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article."

Section 92 provides that in the city of New York the mortgage must be filed in the register's office. As the lien law does not state the time within which the mortgage must be filed, the first question is whether that may be done at any time. The Court of Appeals has held that the filing must take place within a reasonable time after the execution of the mortgage. In Karst v. Gane, 136 N. Y. 316, at page 324, 32 N. E. 1073, at page 1075, Chief Judge Andrews says:

"It remains to be considered whether the failure to file the mortgage to the defendants for six weeks after its execution lets in the lien of the executions on the judgments in favor of the plaintiff, obtained after the filing of the mortgage, and gives them a preference over the mortgage. The second sec-

tion of the act of 1833 prescribes how and where chattel mortgages shall be filed, but it does not in terms prescribe the time within which this is to be done. The purpose of the filing is indicated by the last clause of the section, which directs that the mortgages, when filed in the proper offices, shall 'be kept there for the inspection of all persons interested.' While the act does not in terms require an immediate filing of a mortgage in order to make it valid against creditors or subsequent mortgagees or purchasers, the purpose of the act can only be satisfied by prompt and diligent action on the part of the mortgagee in filing his mortgage. The filing stands as a substitute for immediate delivery and an actual and continued change of possession of the property, and avoids the conclusive presumption of fraud which would otherwise attach to the instrument under the act of 1833 in the absence of delivery and a change of possession of the mortgaged property. Some time will necessarily elapse between the execution and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there was no unnecessary delay, and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lien holders could question the validity of the mortgage under the statute of 1833. The filing under these circumstances would be immediate, and make the mortgage valid as against liens subsequently acquired. But a delay of six weeks in filing the mortgage is not a compliance with the act. There were no circumstances rendering so long a delay necessary. There can be no doubt that if, during the delay in filing, a lien had been acquired by a creditor, the mortgage as to such lien would be void. The mortgage was, however, filed before the plaintiff's judgments and executions were obtained. This did not restore the validity of the mortgage as against creditors whose debts were in existence during the default in filing the mortgage, although judgments or executions were not obtained until after the mortgage was in fact filed."

And in the case of Tooker v. Siegel-Cooper Co., 194 N. Y. 442, 87 N. E. 773, a delay in filing of one month was held to invalidate the mortgage as to creditors.

The next question is whether the act means all creditors, or only those who could be held not to have been prejudiced by the failure to file. Judge Andrews, in the Karst Case, considered this question also, saying at page 319 of 136 N. Y., and page 1073 of 32 N. E.:

"It is to be observed that the limited meaning of the word 'creditors' in the act of 1833, insisted upon in behalf of the defendant, has no support in the literal reading of the act. The first section declares that a mortgage of chattels, which shall not be accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, 'shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed as directed in the succeeding section of the act.' There is nothing in the language of the section confining the meaning of the word 'creditors,' or restricting its natural sense, or which indicates an intention to distinguish between a creditor who became such before, and one who became a creditor after, the execution of the mortgage. The section speaks of 'subsequent purchasers and mortgagees.' There was a very good reason for this, since a prior purchaser or mortgagee would stand on his paramount right and needed no protection, or would have the means of protection against a subsequent mortgage. The use of the word 'subsequent' as applied to purchasers or mortgagees may not be of great importance in ascertaining the meaning of the word 'creditors,' but it indicates that the Legislature had in mind, and expressed in respect to one class of persons, to be protected by the statute, the time when their rights accrued with reference to the execution of the mortgage."

And at page 321 of 136 N. Y., and page 1074 of 32 N. E.:

"It was the plain purpose of the act of 1833, disclosed on its face, to require publicity to be given to chattel mortgages for the protection of the claims of persons mentioned therein. It is undoubtedly true that one, and

perhaps the most important, purpose of the act, so far as it applies to creditors, was to protect persons giving credit to the mortgagor in ignorance of the existence of a mortgage upon his property. But the legislative policy was broader than this single purpose. It is impossible to say that only creditors who became such during the existence of a mortgage may be injured by keeping the mortgage secret. It certainly is not improbable that in many cases antecedent creditors may be lulled into security, and forbear the collection of their debts at maturity, by the apparent unincumbered possession and ownership by the debtor of property covered by an undisclosed mortgage. The statute prescribes a general rule which must be observed in order to entitle a mortgagee to assert his lien as against creditors, and, although a creditor may have notice of an unfiled mortgage at the time the credit is given, yet it is held that, as to a creditor with notice, such a mortgage will be postponed to the lien of judgment and execution in his favor upon the debt so contracted. This was held in Sayre v. Hewes, 32 N. J. Eq. 652, by the New Jersey court under a statute similar to that in this state. The same rule has been declared in our courts. Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. (N. Y.) 484; Stevens v. Buffalo & N. Y. R. R. Co., 31 Barb. (N. Y.) 590. In these cases the act was extended to cases not within the policy which it is claimed is the sole reason for the legislation in question."

If the act had provided that the mortgage must be filed within 30 days, a failure to do so would obviously make it invalid against all creditors. See our opinion handed down with this in the Case of the Watts-Woodward Press, 181 Fed. 71, as to the effect of not refiling within the period fixed by the statute.

The receiver in bankruptcy had a right to assail this mortgage, Skilton v. Coddington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, and our own decision in Re Gerstman, 157 Fed. 549, 85 C. C. A. 211. We are reluctantly compelled to the conclusion that the order of the court below was erroneous. The mortgage should have been held invalid against all the creditors of the bankrupt because of failure to file it for nearly three months after its execution.

Order reversed.

MANN et al. v. DEMPSTER.

(Circuit Court of Appeals, Second Circuit. June 30, 1910.)

No. 234.

1. LIBEL AND SLANDER (§ 105*)—EVIDENCE—ASSOCIATED PARAGRAPHS.

Where a paragraph sued on as libel by innuendo referred to plaintiff by his Christian name and commenced "In this connection," the preceding paragraph, separated from the other by a line, in which his full name was given, was admissible.

[Ed. Note.—For other cases, see Libel and Slander; Cent. Dig. §§ 282–294; Dec. Dig. § 105.*]

2. LIBEL AND SLANDER (§§ 104, 105*)—EVIDENCE—ARTICLE AS WHOLE.

Where a newspaper article contains words which may be libelous by innuendo, plaintiff is entitled to put the entire article in evidence for consideration of the innuendo, and the question whether there was express malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284–294; Dec. Dig. §§ 104, 105.*]

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

3. LIBEL AND SLANDER (§ 4*)—"EXPRESS MALICE."
"Express malice" in libel is wanton and reckless disregard of the rights of others.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 3, pp. 2607–2611; vol. 8, p. 7658.]

4. APPEAL AND ERROR (§ 231*)—REVIEW—EVIDENCE—INSUFFICIENT RESERVATION OF EXCEPTION.
An objection to expunging matter from a paragraph admitted in evidence over objection cannot be reviewed where objector did not ask to have that matter read.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231.*]

5. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
Any error against defendant in libel in expunging matter from a paragraph admitted in evidence was harmless, where the matter contained allusions which would have tended to inflame the jury against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. § 1033.*]

6. LIBEL AND SLANDER (§ 101*)—FALSITY OF STATEMENT—BURDEN OF PROOF.
Plaintiff need not prove the falsity of libel; it being for defendant to justify by showing truth of the statement.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273–280; Dec. Dig. § 101.*]

7. LIBEL AND SLANDER (§ 120*)—PUNITIVE DAMAGES—PROOF REQUIRED.
The mere fact of libel does not authorize recovery in excess of compensatory damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

8. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.
An admission in a federal Circuit Court by defendants in libel of diverse citizenship that they published the article of plaintiff, and it was widely circulated, did not give them the right to open and close, where issues remained whether there was express malice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44–75; Dec. Dig. § 25.*]

9. LIBEL AND SLANDER (§ 123*)—JURY QUESTIONS.
Whether defendants in newspaper libel intended to charge by innuendo that plaintiff had with an immoral motive bought a house to cover an immoral relationship *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356–364; Dec. Dig. § 123.*]

10. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVENESS OF VERDICT.
The size of a verdict for plaintiff in libel is not reviewable in a Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

11. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.
Assignments of error not discussed in plaintiff in error's brief need not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

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

12. NEW TRIAL (§ 117*)—MOTION—TIME FOR MOVING.
A trial judge cannot set aside a verdict and judgment and grant a new trial where the trial term has long since expired, and has not been extended by order.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238–241; Dec. Dig. § 117.*]

13. TRIAL (§ 273*)—INSTRUCTIONS—OBJECTIONS—TIME.
Exceptions to instructions reserved after the jury retired cannot be reviewed, though the adversary assents.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680–682; Dec. Dig. § 273.*]

Noyes, Circuit Judge, dissenting.

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, and move to remand. Judgment affirmed. Motion overruled.

See, also, 157 Fed. 319.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, for $20,080.75, entered May 13, 1909, in favor of defendant in error who was plaintiff below. The action was for libel, the jury gave a verdict against defendants for $40,000, but the trial judge as a condition of denying motion for a new trial required plaintiff to reduce recovery to $20,000.

When the cause was reached and argument begun, we took it under advisement on a point of practice, which will be found disposed of in opinions filed April 26, 1910. 179 Fed. 837. Before final argument plaintiffs in error made a motion that the cause be remanded to the Circuit Court for further action.

Wray & Callaghan (Albert A. Wray, Stephen Callaghan, and Nelson L. Keach, of counsel), for plaintiffs in error.

C. O. Maas, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The motion to remand may be more conveniently considered after the cause has been discussed on the merits. The defendant Mann is the publisher of a weekly paper called Town Topics, issued in New York, which has concededly a large circulation here and in Pittsburgh, where the plaintiff resides.

On March 28, 1907, there was published in the paper the following paragraph, of which plaintiff complained:

"In this connection it is interesting to note that some time ago Samuel bought a handsome house in Craig street, and there installed a big voluptuous-looking lady whose ostensible occupation is trimming hats, an occupation made particularly lucrative through her intimacy with the Dempsters, an intimacy which must be very warm, since she was one of the few outsiders at Will's very small private funeral."

This particular paragraph was preceded by another, the two being separated by a line, both paragraphs referring apparently to the same individual. It is quite apparent that the last paragraph standing alone

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

in no way indicates who the individual is that is referred to as "Samuel." Plaintiff set out the entire article in the complaint, although he charged intent to libel only by the publication of the paragraph above quoted. Upon the trial defendants moved to strike out from the complaint all of the paragraph above the line, and objected to the introduction in evidence of the article as a whole.

The court expunged several passages from the first paragraph; i. e., he did not allow plaintiff to read them to the jury. So much of the paragraph as was admitted reads as follows:

"Not so many years ago the W. W. O'Neill was the largest of the ungainly, stern-wheel towboats plying on Western waters between the coal fields of the Pittsburgh district, down the Ohio and Mississippi to Southern coal ports, and the golden returns she brought were plentiful enough to generously reward those whose venture she was. The big boat is still in the business, but the man for whom she was named, Captain W. W. O'Neill, one of the old-time steamboat men and coal operators, has been dead these many years. He lived long enough, however, to see a family of dark-haired, Junoesque daughters ripen to a stage where their looks and his money made them good catches. When the last named, Lou, was married to Will Dempster, son of Alex. Dempster, one of the good old pillars of Pittsburgh, her prospects were considered the best of all the O'Neill girls. But last November Will died. It was on the bounty of the father that the son's widow and child found themselves thrown. They had reason to expect much, for the name of Dempster was synonymous with deeds of charity and philanthropy. But the widow had not taken into account her brother-in-law, Samuel."

Defendant contends that it was error to read this to the jury because "it tended to inflame and prejudice the minds of the jurors against defendants." The two paragraphs are both parts of the same article. The one below the line begins with the words "In this connection." Defendants before the reading admitted that by "Samuel" in the second paragraph "Samuel Dempster, the plaintiff, was intended," and now insist that, in view of that concession, it was error to admit the first paragraph. We do not so think. Where an article of this sort contains words which by innuendo may be held libelous, the plaintiff is entitled to put the entire article in evidence. It affords a side light for the jury when considering the innuendo and also the question whether or not there was any express malice, as the law defines that term, viz., "wanton and reckless disregard of the rights of others."

Defendants also now insist that it was error to expunge anything from the first paragraph before allowing it to be read to the jury. We do not find any exception on which to base such an argument. Defendants' counsel excepted to any part of the first paragraph being read. When his objection was overruled and the parts admitted were read, he did not ask to have the omitted passages also read. But, if it were error to omit them of which error he could here complain, the error was not harmful because the omitted passages contain merely some unkind allusions to the experiences of the "dark-haired Junoesque daughters," one of the allusions coming perilously near to an insinuation of unchastity. The jury would be more likely to become "inflamed" if they were in than if they were out.

The next proposition advanced by the defendants is that they were entitled to open and close. Leaving out all questions arising upon the

defenses affirmatively pleaded, the issues presented when the jury was impaneled were these:

(1) Whether or not plaintiff was a citizen of Pennsylvania.

(2) Whether or not defendants published the article in Town Topics, and widely circulated the same in New York, Pittsburgh, and elsewhere.

(3) Whether or not the statements in the article were published concerning the plaintiff.

(4) Whether or not they were false.

(5) Whether or not defendant made any effort to communicate with plaintiff prior to publication.

(6) Whether or not prior to publication defendants made any effort to verify the truth of the article.

(7) Whether or not the statements were made recklessly and maliciously.

(8) Whether or not the statements were made with the intent to convey to the public the impression charged in the innuendo.

If a published statement is libelous, plaintiff need not prove its falsity. It is for defendant to justify by showing the statement to be true. As to No. 4 plaintiff did not have the burden of proof. Nos. 5, 6, and 7 deal with the question of damages—whether or not there was such express malice as would sustain a claim for more than the compensatory damages to which plaintiff would be entitled if the libel were not justified. If plaintiff seeks to recover more than compensatory damages, he must show more than the mere fact that a libel was published. At the opening of the trial defendants conceded the affirmative of propositions 1, 2, and 3, but such concession did not give them the right to open and close on the whole case.

The proposition mainly relied upon by defendants is that "the printed matter was not libelous per se or libelous at all." The complaint averred that by innuendo defendants intended to and did charge and convey to the public an impression that plaintiff had with an immoral motive bought and paid for the house in Craig street, and installed therein the lady referred to, whose occupation of trimming hats was ostensible merely, and was a shield and cover to an "illegal and illicit and immoral relationship with plaintiff."

The paragraph complained of consists of a number of separate assertions, each of which, standing by itself, is perfectly innocent. Even the statement that the occupant of the house was "a big, voluptuous looking lady" is not libelous, though it may be impertinent and might tend to a breach of the peace on the part of her male relatives. But words perfectly innocent when standing by themselves may be thrown into such juxtaposition as to become libelous. To effect such a collocation is a common device of experienced paragraphers of personal gossip. When haled into court they are usually vociferous in asserting that no libelous statement can be found in the article, and frequently seek to becloud the case by introducing much testimony to establish the truth of the several separate statements, insisting that they have thus "justified" the publication. Thus one may publish of an

individual: "This is the same John Smith who got himself into serious trouble when he was in Arizona three years ago. Horse stealing is not popular in that community." He may safely assume that any court will take judicial notice of the fact that horse stealing is not popular in Arizona or even elsewhere. He may be able to prove that, when John Smith was in Arizona at the time stated, he insisted on riding a half-broken horse, was thrown in an infrequented part of an alkali desert, broke his leg, and lay there two days before he was rescued. But ability to prove the occurrence of such serious trouble would be no justification of the statement which the article by indirection conveyed, that John Smith when in Arizona was discovered to be a horse thief. So in the case at bar we have an ingenious collocation of innocent assertions which is certainly well calculated to convey the impression charged in the complaint. Whether or not it was intended to convey such impression was a question for the jury, but we should certainly have a poor opinion of the intelligence of 12 men, who might reach the conclusion that the paragraph was constructed with an innocent intent. If no more was intended than a publication of the various innocent statements as to the purchase of a house, the trimming of hats, and the attendance of some obscure person at a private funeral, why would space be given to such uninteresting details in the columns of the paper? It is difficult to escape the conviction that the paragraph found a place in Town Topics only because the innocent assertions were so skillfully put together as to make the article a spicy bit of gossip In this case as in our illustrative example, the evidence adduced in justification was confined to the innocent statements, such as the purchase of the house, etc. There is not a scintilla of evidence tending to show the existence of immoral or illicit relations. Moreover, it appears that the paragraph was published without the slightest effort on the part of defendants or their subordinates to make any investigation as to the existence of such relations.

It is further argued that the verdict is excessive, but it is well settled that the size of the verdict is not a subject of review in this court. There are various other assignments of error, which have all been examined. Since they have not been discussed in the brief, they need not be here rehearsed. We find in them no ground for reversal.

The preliminary motion may now be considered. The relief asked for was to remand the cause to the Circuit Court, to authorize and empower plaintiffs in error to make an application to the trial judge to set aside the judgment and the verdict and grant a new trial. Since the term at which the cause was tried has long since expired and has not been extended by order, the trial judge would have no power to grant such relief, if the cause were remanded. This is sufficient ground for denying the motion. The application was made because in our former decision it was held that exceptions to the charge reserved after the jury had retired could not be considered. Counsel for the plaintiff, while opposing the motion, expresses his willingness to have these exceptions considered. This, for reasons given in our former opinion, cannot be done. A majority of the court, however, in order to satisfy

defendants that errors in practice have not deprived them of any substantial rights, have added a footnote to this opinion.[1]

The judgment of the circuit court is affirmed.

NOYES, Circuit Judge (dissenting). For reasons stated in my opinion of April 26, 1910 (179 Fed. 839), I think that the action of the trial court in depriving the plaintiffs in error of the right to take lawful exceptions to the charge constituted error calling for the reversal of the judgment, and calling for such reversal none the less whether we think the plaintiffs in error would have been able to take meritorious exceptions or not.

But, if the judgment is not to be reversed upon this ground, I agree that the plaintiffs in error can have no other relief. The exceptions which they were able to take disclose no prejudicial error, and the trial judge would have no right to set aside the judgment if the cause should be remanded.

[1] The exceptions to the charge, which were dictated to the stenographer after the jury retired, were three in number.

(1) That the trial judge said: "I have no hestitation in saying for myself as a man (I hope of common sense and some experience) that the words do mean what the plaintiff says they mean." He also charged: "It is for you to say whether that is the meaning of those words, and I say again that that is entirely for you, and you can find anything your consciences dictate on that subject."

Reference may be had to the opinion of this court in Smith v. Sun Printing & Pub. Ass'n, 55 Fed. 246, 5 C. C. A. 91.

(2) That the trial judge said: "And I say, also, that, in my opinion, the defense of justification in this case has not been supported; but that also is for you to say, yet I have a right to express my own opinion, and I do so."

The judge had already charged: "He who alleges the truth of the matter must make his proof of the truth as broad as is the defamation. It will not do to pick out here a word and there a word and say these words are true and prove they are true. He must prove them as an entirety, and show that the alleged libel, as reasonably interpreted, is true. Unless, therefore, you as reasonable men are of the opinion that these words in their entirety and true meaning are true, as written and published, the defense of justification fails."

Reference may be had to the opinion supra as to proof offered in justification.

(3) That the charge "in words or in substance charges the jury that the reckless and careless publication as was shown in this case was sufficient evidence from which the jury might find malice."

No such statement is found in the charge.

What the trial judge said on this branch of the case was: "But, even where no actual malice is shown, exemplary damages may be given where there is proof of such wanton disregard or reckless indifference to the rights of others as is equivalent to the reckless violation of such rights. It is asserted here that the publication of what is claimed to be a libelous statement upon the plaintiff, without any other investigation than is shown to have been made in this case, is so careless as to amount to that reckless indifference or wanton disregard of the rights of others. If such carelessness existed, I advise you, then, you are at liberty to award punitive or exemplary damages."

SCHMIDT v. PENNSYLVANIA R. R.

(Circuit Court of Appeals, Third Circuit. August 19, 1910.)

RAILROADS (§ 358*)—INJURIES TO PERSONS USING—LICENSEE—DUTY OF RAILROAD TOWARD PERMISSIVE WAY ACROSS.

Defendant railroad company opened a freight train at a point where two paths crossing the track converged, near the center of a city block. These paths had been used freely by workmen and others who were accustomed to cross the tracks for a long time. Plaintiff, a boy of 8½, was injured while crossing through the opening between the cars by being run over by the train while being closed together after he had tripped and fallen over a rail. *Held*, that plaintiff was a mere licensee as to whom the railroad company was under no obligation to give warning before the closing of the cut, and that it was therefore not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1237; Dec. Dig. § 358.*]

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

Action by one Schmidt against the Pennsylvania Railroad. From a judgment for defendant, plaintiff brings error. Affirmed.

Alfred P. Skinner, for plaintiff in error.

Albert C. Wall and James B. Vredenburgh, for defendant in error.

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

ARCHBALD, District Judge. The plaintiff, a boy some eight and a half years old, was injured while crossing the tracks of the defendant company between the cars of a parted freight train, at a point intermediate between certain streets in the city of Newark. The place where the accident occurred was the center of a city block or square, across which the defendant company has two tracks, running north and south, and extending to a freight yard a short distance beyond. The land on the east side of the tracks, within the square, is entirely vacant, and nearly so on the west side; and on the east the space is frequently used by children as a playground. The square not being inclosed by fences, workmen and others are accustomed to cross freely from one side to the other, passing over the railroad tracks in doing so. Two well-defined diagonal paths, prior to the accident, had developed in this way on the east side, which converged and met at the tracks somewhere about the center of the square; and a simliar path starting just opposite to this across the tracks ran northwest to the side streets in that direction. This condition had existed for several years, and was well understood and made use of by persons living in the neighborhood.

On the day of the accident, the complainant and a companion, after watching some boys who were playing ball on the east side, started to cross the tracks, at the point where the two paths converged, in order to take the path on the other side, on their way home. Some cars of broken stone were being unloaded on the easterly track, and the stone was scattered in piles along it; and on the westerly track

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

there was a long train of freight cars with an engine attached, which had been uncoupled and cut in two for some purpose about at the point where the path crossed the tracks, the boys taking advantage of the opening in the train to get by. The first boy got safely through; but the plaintiff, in some way, caught his foot under the outer rail as he was about to step over it and tripped and fell, landing outside of the track; and just at that moment the cars were bumped together by the engine at the other end, a considerable distance off, and the wheels ran over and severed the plaintiff's leg. The contention is that, by the long acquiescence of the defendant company in the use of the paths running up to and crossing their right of way, the public had acquired the right to cross at that point, which the company was bound to take notice of and respect; and that, having cut and opened the train, which was on the westerly track, at the point where the path crossed it, the men in charge of the train, before closing the opening, were bound to give warning, either by some one stationed at the place for the purpose, or by the engine, at the other end, whistling or ringing its bell; and that to bump the cars together without notice, and without regard to whether any one was going across, as was done, was negligence which made the company liable to any one such as the plaintiff, who was injured thereby.

It is to be noticed that the plaintiff was not struck and thrown down by the sudden movement imparted to the cars, but in some unexplained way his foot was caught by the rail and he was thrown forward; the wheels of the cars coming on him and cutting off his foot, while he lay in that position. It is not altogether the same therefore, as if the cars, being suddenly started, bumped into him and threw him down. The accident resulted because he tripped and fell, without which it apparently would not have occurred. But passing this by, if the company, as contended, was bound by long acquiescence to respect this crossing, and after opening the train at it was required, before closing it again, to give reasonable warning, the plaintiff had a right to rely on this, and was entitled to go in between the standing cars, without incurring the danger of being caught by any sudden movement of them. And even though the immediate occasion of the accident was the catching of the plaintiff's foot under the rail, the result is not so remote but that it may be attributed to the neglect of the company, in failing to give due and timely warning, if that obligation in fact rested upon it.

It is the established rule in some jurisdictions that, where a railroad company for a long period of time has permitted the public to cross or travel along its right of way between certain points, it owes the duty of reasonable care to persons so using it, and cannot approach the place with moving trains without giving due and customary warning. 23 Amr. & Eng. Cycl. Law (2d Ed.) 740, 741. This is the rule in Pennsylvania. Taylor v. Delaware & Hudson Co., 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446. As it is in New York. Swift v. Railroad, 123 N. Y. 645, 25 N. E. 378. See, also, Harriman v. Pittsburg, etc., Railroad, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, and Garner v. Trumbull, 94 Fed. 321, 36 C. C. A. 361. But it is not the rule in New Jersey, where, under such circumstances, persons using the crossing

are regarded as mere licensees, towards whom the railroad owes only the duty of not doing wanton or willful injury. This is well established, and is illustrated by several cases. Thus in Vanderbeck v. Hendry, 34 N. J. Law, 467, the premises where the accident occurred was a lumber yard, which was uninclosed, and where persons were in the habit of crossing from street to street, making use of the passageways left between the lumber. The plaintiff having gone into one of these passageways was injured by the fall of a pile of lumber, which had been piled up in a negligent manner, and it was held that he could not recover. Being on the premises, as it is said, by mere license, and not by invitation, while relieved thereby from responsibility as a trespasser, he assumed the risk of the place, and the business carried on at it, and the owner owed him no duty except to abstain from acts of willful injury. This was reaffirmed in Phillips v. Library Company, 55 N. J. Law, 307, 27 Atl. 478, where, however, in view of the facts of the case, it was held that a different rule prevails, if the entry or use of the land is of right or by invitation of the owner, as distinguished from an entry by license or sufferance; the owner in the former case being under the duty of exercising ordinary care to render the premises reasonably safe, or at least to refrain from any act that will make the entry or use of the premises dangerous. In Devoe v. New York, Ontario & Western R. R., 63 N. J. Law, 276, 43 Atl. 899, the residents along a railroad track which, four years before the accident which resulted in the death of the plaintiff's decedent, was inclosed by a fence along the company's right of way, built a stile over the fence without the consent and notwithstanding the refusal of the company to permit it, so that they might go directly across the tracks to an adjoining station and a street beyond it. The plaintiff's decedent, on her way to school, made use of this stile, and in crossing the tracks of the company, just before she reached the platform of the station, was struck and killed by one of the company's trains; and it was held that mere acquiescence in the passage across the railroad for the benefit or convenience of the parties using it created no duty on the part of the railroad company except to refrain from acts willfully injurious, and, consequently, that there could be no recovery. So in Furey v. New York Central & Hudson River R. R., 67 N. J. Law, 270, 51 Atl. 505, a painter, who was at work assisting to paint a railroad shed, which covered the central portion of a river pier, while on his way to change his working for his street clothes, which he had left in the interior of the building, was injured by the closing together of two freight cars, between which he was passing, within the shed, which were moved by the company without warning. It was contended that by opening the train and leaving spaces between the cars, as was habitually done in the shed, which spaces were used with the knowledge of the company, by men at work on the job, to cross from one side of the building to the other, there was an implied invitation to the men to use these openings, and that a duty devolved on the company in consequence to give warning before closing them. But this was rejected, and it was held that the company was in no way liable, the openings between the cars being varied from day to day according to the exigencies of

the business, as it became necessary to have a car unloaded at one place or another; and that the fact that the plaintiff and others passed through these openings repeatedly without molestation with the knowledge of the company afforded no evidence or encouragement that the company intended them to use them. Such knowledge, it was said, might imply permission, but did not amount to an invitation, without which element there was no duty on the part of the company to give warning, or in fact to do anything, except to abstain from that which was willfully injurious.

The present case does not differ in principle from Pennsylvania R. R. v. Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361, decided by this court, in which the same rule was enunciated. The plaintiff there was injured by something which fell from a passing train, as he was walking along the right of way of the railroad on a customary path leading from a pottery plant, where he was employed in the city of Trenton, to the platform of an adjoining station. This path had been used for a long time by employés of the pottery plant in going to and from their work without objection on the part of the railroad company; and on the occasion in question the plaintiff was going to the station to meet a friend, who was coming in on the train. It was contended that, under the circumstances, he was not on the defendant's right of way by mere sufferance, but by implied invitation; but it was held that the acquiescence of the company in the adoption of the path along the right of way, as a means of going to and from the station, did not invite passengers or others having business there to make use of it, and did not therefore impose upon the company any duty beyond what it owed to a mere licensee. See, also, Sutton v. West Jersey R. R. (N. J. Sup.) 73 Atl. 256; Riedel v. West Jersey R. R. (C. C. A.) 177 Fed. 374.

These cases, which are declaratory of the local law as established by a long line of decisions of the highest courts of the state, recognized and enforced in this court, are conclusive upon the plaintiff, and require an affirmance of the judgment. Assuming that there was a customary path, leading up on either side to the railroad tracks where the accident occurred, by which the people of the neighborhood were wont to pass across these uninclosed lots, and that this had existed for such a length of time that the company was affected with notice and presumed to acquiesce in it, the use was merely a permissive one, which under the New Jersey law imposed no higher duty than not to do that which was recklessly or willfully injurious. Nor was this duty modified by the fact that, on the occasion in question, the train which was occupying one of the tracks, and which was the cause of the accident, had been opened at the point where the paths converged, which fact cannot be wrested into an invitation or allurement to the plaintiff to go in between the cars in the course of crossing over, so as to require a warning from the trainmen in charge before closing the cars together. The use was still merely a permissive one, and the plaintiff stood in no higher relation to the company than that of a licensee, who took all the ordinary risks incident to the place and the business, among which was the moving or shifting of the cars occupying the

track, back and forth upon it, according as it became necessary. The plaintiff therefore had no case, and a verdict for the defendant was properly directed.

Judgment affirmed.

RUPERT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1910.)

No. 3,052.

1. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY OF ACCUSATION—INDICTMENT IN LANGUAGE OF STATUTE.

An indictment charging a statutory crime in the language of the statute is sufficient when the statute fully, directly, and with certainty sets forth all the elements of the crime.

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

2. GAME (§ 9*)—SHIPMENT IN VIOLATION OF GAME LAWS—FEDERAL STATUTE—INDICTMENT FOR VIOLATION.

Under the Game Law of Oklahoma Territory (Wilson's Rev. & Ann. St. 1903, §§ 3069, 3078) which permits the killing of quail between October 15th and February 1st following but prohibits the shipping of quail from the territory at any time, an indictment charging a violation of the Lacey Act of May 25, 1900, c. 553, § 3, 31 Stat. 188 (U. S. Comp. St. 1901, p. 3181), by knowingly delivering to a carrier for transportation from the territory into another state the dead bodies of quail killed in the territory in violation of its laws, is sufficient where it avers that such quail were killed "with the intent and for the purpose of being shipped and transported out of the territory," and need not allege the months in which such quail were killed. The same is also true of an indictment under section 4 of the act for failing to mark the packages containing the bodies of such quail.

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

3. GAME (§ 3½*)—POWER OF STATE TO PROTECT AND REGULATE—PROHIBITION OF SHIPMENT OUT OF STATE.

A state or territory has authority to provide by legislation that wild game, such as quail, shall not be shipped out of the state or territory even though the game was killed during the open season.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 2; Dec. Dig. § 3½.*]

4. COMMERCE (§ 61*)—FEDERAL STATUTE PROHIBITING INTERSTATE SHIPMENT IN VIOLATION OF LOCAL LAWS—CONSTITUTIONALITY.

The provisions of the Lacey Act of May 25, 1900, c. 553, §§ 3, 4, 31 Stat. 188 (U. S. Comp. St. 1901, p. 3181), prohibiting the shipment or transportation in interstate commerce of game killed in violation of the local laws, and requiring all packages containing game shipped in interstate commerce to be plainly marked showing the name and address of the shipper and the nature of the contents, and making the violation of such provisions a criminal offense, are within the powers of Congress, and constitutional and valid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. § 61.*]

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

Paris N. Rupert was convicted on indictments for criminal offenses, and he brings error. Affirmed.

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

February 27, 1907, the grand jury of Blaine county, Okl. T., returned four indictments against defendant Rupert. In one case (No. 43) the charging part of the indictment is: "That on, to wit, the thirtieth day of November, in the year of our Lord one thousand nine hundred and five, in said county, and within the jurisdiction of said court, Paris N. Rupert, then and there being, did then and there, unlawfully, willfully and feloniously deliver to the Frisco Railroad Company, a common carrier, for transportation out of said territory and to the city of Chicago in the state of Illinois, the dead bodies of quail, which said quail had theretofore been killed in the Territory of Oklahoma in violation of the laws of said territory and with the intent and purpose of being shipped and transported out of said territory in violation of the laws of said territory." Except as to the date of the crime, and the railway to which the delivery was made, the indictment in case No. 45 is like that in case No. 43.

The charging part of the indictment in case No. 44 is as follows: "That on, to wit, the 30th day of November, in the year of our Lord, one thousand nine hundred and six, in said county, and within the jurisdiction of said court, Paris N. Rupert, then and there being, did then and there unlawfully, willfully and feloniously deliver to the Rock Island Railroad Company, a common carrier, to be shipped and transported by Interstate Commerce 139 boxes and packages containing the dead bodies of quail which had theretofore been killed in the territory of Oklahoma in violation of the laws of said territory, and with the intent and for the purpose of being shipped and transported out of the territory of Oklahoma and to the city of Chicago, in the state of Illinois, without having said boxes and packages plainly and clearly marked so that the address of the shipper and the nature and contents of the packages could be readily ascertained on the inspection of the outside of such boxes and packages."

The indictment in case No. 46 is the same as that in case No. 44 except as to the number of boxes of quail, and the railway company to which delivered.

After Oklahoma was admitted as a state, the cases were remitted to the District Court of the United States for the Western district in that state. There were demurrers to the indictment, which were overruled, pleas of not guilty entered, and the four cases were consolidated for trial purposes. A jury trial resulted in a verdict of guilty in every of the four cases. Motions for new trial, and motions in arrest of judgment were overruled, and judgment of a fine of one hundred dollars and costs were imposed against the defendant in each case. A writ of error was sued out to reverse the judgments.

William O. Woolman (C. R. Buckner, on the brief), for plaintiff in error.

John Embry, U. S. Atty.

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

SMITH McPHERSON, District Judge (after stating the facts as above). The record contains that which purports to be the testimony, the charge of the court, instructions refused, objections, rulings and exceptions, with recitals of what occurred during the trial, including motions for a new trial. None of these are evidenced by a bill of exceptions, and are, therefore, not of record. We cannot consider any of them. The office and necessity of a bill of exceptions in all actions at law and in criminal cases have long been recognized by the profession and required by all Appellate Courts. The practice, whatever it is, in Oklahoma as to bills of exception in actions at law and criminal cases, is of no effect here. The laws of the state do not control as to this. The common law, in conjunction with the United States Statutes, only must prevail. Michigan Insurance Bank v. Eldred, 143 U.

S. 293, 298, 9 Sup. Ct. 690, 32 L. Ed. 1080; Fishburn v. R. R., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; The Chateaugay Company, Petitioner, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508. Revised Statutes of United States, § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696). Courts make the records, and the trial judge must sign the bill of exceptions. The clerk is without authority to certify up anything, except that made of record by the orders of the court.

It therefore follows that the only questions we can consider are those pertaining to the indictment. The demurrers are to the same effect as the motion in arrest of judgment. And the motion in arrest of judgment is the same in every of the four cases, and is as follows:

"(1) That the indictment filed herein does not state facts sufficient to constitute a crime known and punishable under the laws of the United States.

"(2) That the law on which said indictment is based is unconstitutional and void."

It appears from the foregoing that in two of the cases the indictments charge that the defendant willfully and unlawfully delivered quail to a railway company for transportation from points within Oklahoma to Chicago, Ill., which quail had theretofore been killed in Oklahoma in violation of the laws of said territory.

The indictments in the other two cases charge defendant with willfully and unlawfully delivering to a railway boxes containing the dead bodies of quail which had theretofore been unlawfully killed within the territory, which delivery was for the purpose of shipping said quail by interstate shipments, to wit, to Illinois, and without having the boxes marked showing the contents.

Section 3 of the act of Congress of 1900 (Lacey act) provides that it shall be unlawful to ship from one state or territory to another state or territory any animals or birds when such animals or birds have been killed in violation of the laws of the state. Act May 25, 1900, c. 553, 31 Stat. 188 (U. S. Comp. St. 1901, p. 3181).

The local laws of the territory of Oklahoma allowed quail to be killed during certain months (from October 15th to February 1st). But the Oklahoma statutes prohibited the exportation of quail at any time. Therefore it follows that it was unnecessary for the indictment to allege in which months the quail were killed. It was lawful to kill quail in the territory for use within the territory during three and one-half months of every year. But it was unlawful every day of the year to kill quail for shipment elsewhere. So that any date within the statute of limitations could be alleged in the indictment. Wilson's Rev. & Ann. St. Okl. 1903, §§ 3069, 3078.

The purpose of the Lacey act as expressed in the statute (section 1) "is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct." Section 4 of that statute provides that all packages containing such dead birds, when shipped by interstate commerce, shall be plainly and clearly marked, so that the nature of the contents may be readily ascertained on the inspection of the outside of such packages. Or, to restate, it was unlawful to kill at any time, if for the purpose of export, and such were the indictments in two of the cases. And it was

unlawful to export without marking the packages making known the contents, and such were the other two indictments.

The familiar rule that an indictment in charging a statutory crime need only follow the language of the statute will suffice, particularly when the words of the statute, fully, directly, and with certainty, set forth all the elements of the crime. Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 33 L. Ed. 30; Cochran v. U. S., 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; Ledbetter v. U. S., 170 U. S. 606, 609, 18 Sup. Ct. 774, 42 L. Ed. 1162. There are exceptions to this form of pleading, when the statute does not with definiteness cover all the elements of the crime. Keck v. U. S., 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505. For a discussion of this question, and the holding by this court, see the case of Morris v. United States, as reported in 161 Fed. 672, 680, 88 C. C. A. 532. The contention of counsel for plaintiff in error that the recitals are not sufficiently specific is not in accord with the authorities. The indictments are good as to form.

Quail belong to the state or territory, or rather the people collectively thereof, and are subject to the local laws as to killing, and the times therefor, and the shipment. These propositions have been put at rest by the Supreme Court. Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. It is for the state Legislature to say when quail may be killed. It may provide that they shall not be killed at any time. It may provide that they may be killed for use at home only, and not killed for shipment out of the state, which if allowed would result in the extinguishment locally of such game. And no one doubts the validity of game laws, which prohibit killing of game on the lands of another. It is quite likely that every state of the Union has such laws, and such was the common law. The individual having no ownership in the game, and allowed at certain times, if at all, to kill the same at certain places, for particular uses only, it does not become the general subject of commerce free from all inhibitions. And as Congress is vested with the power under the commerce clause to regulate commerce between the states, it has the power to provide that there shall not be unrestrained commercial intercourse.

Thus in Cook v. Marshall County, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471, it was held that a state law limiting the right to sell cigarettes would be upheld, even though brought in from another state. This was so held, because the prohibition of the sale was a valid exercise of the police power of the state, and the commerce clause cannot be used to override that which is clearly within the police power of the state.

And so in Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159, a statute regulating the taking of fish was upheld and enforced, when it was sought to avoid the statute by showing that the fish were carried to the ports of other states on a vessel licensed under national authority. And a like holding was made as to oysters in McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248. It is one thing to prohibit property from being carried out of the state, and another to prohibit property from being brought into the state. And yet in Re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, the Supreme

Court upheld the act of Congress of August 8, 1900, commonly called the "Wilson Bill," which makes intoxicating liquors when brought into the state subject to the local laws. Such being the holdings, it surely follows that a congressional enactment like the Lacey act, which makes it a crime to carry out of the state that which can be and is lawfully prohibited by local or state laws, must be upheld.

Our holdings are:

(1) The territory of Oklahoma had the authority to provide by legislation, as it did, that wild game, such as quail, should not be shipped out of the state, even though the game was killed during the open season.

(2) The act of Congress is valid wherein it is declared that the shipment out of the territory in violation of the territorial law constitutes a crime under the national law.

(3) And to aid in the detection of such crimes, Congress had the authority to provide that all such interstate shipments should be plainly marked so that any person by a casual inspection would know the contents of the package.

All four of the judgments brought to this court for review by writ of error are affirmed; and it is so ordered.

MIDLAND VALLEY R. CO. v. FULGHAM.

FULGHAM v. MIDLAND VALLEY R. CO.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1910.)

Nos. 3,168, 3,284.

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—RES IPSA LOQUITUR INAPPLICABLE.

The happening of an accident which causes an injury to a servant raises no presumption of any negligence or wrongful act of his master. The doctrine of res ipsa loquitur is inapplicable to actions between employer and employé for injuries by negligence or wrongful act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898; Dec. Dig. § 265.*]

2. EVIDENCE (§ 597)—CONJECTURE WILL NOT SUSTAIN VERDICT—SUBSTANTIAL EVIDENCE OF CAUSE OF ACTION INDISPENSABLE.

Conjecture is an unsound and unjust basis for a verdict. Substantial evidence of the facts which constitute the cause of action, in this case of the alleged defect in the lift pin lever and automatic coupler, is indispensable to the maintenance of a verdict sustaining the cause.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. § 597.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—CONJECTURE—SUFFICIENCY OF EVIDENCE—FACTS—CONCLUSION.

A conductor was walking along the side of his train taking the numbers of the cars while his crew was making up the train. Starting at the rear of the train there were, first, three cars; second, a space of 18

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

or 20 feet; third, three more cars; fourth, a space of several feet, and, fifth, a long string of freight cars with the engine at their head. When the conductor reached the rear of the forward three cars, he gave the lift pin lever a jerk, and then reached in to put his hand on, or actually took hold of, the coupler, when the forward end of the train struck the forward end of the three cars in the act of coupling to them, knocked him down and ran over him. The car to which the coupler was attached had been inspected shortly before the accident, and the inspectors had found no defect. Several witnesses examined and operated the coupler and the lift pin lever immediately after the accident and found them in good condition and operating perfectly.

Held, in this state of the facts, the verdict of the jury that the coupler was so defective at the time of the accident that "it would not couple automatically by impact without the necessity of men going in between the cars" was based on conjecture, and it cannot be sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 962; Dec. Dig. § 278.*]

4. APPEAL AND ERROR (§ 151*)—COURTS (§ 356*)—CROSS-WRITS AND APPEALS: NOT MAINTAINABLE IN FEDERAL COURTS.

Cross-errors are not assignable in the federal courts. Parties who have secured all the relief they seek cannot appeal or sue out a writ of error, nor can they by assigning or arguing cross-errors confer jurisdiction on a national appellate court to consider or determine alleged erroneous rulings not otherwise presented. Guarantee Co. of North America v. Phenix Ins. Co., 59 C. C. A. 376, 379, 124 Fed. 170, 173.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947, 3053; Dec. Dig. § 151;* Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

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

Action by J. T. Fulgham, administrator of E. C. Pogue, against the Midland Valley Railroad Company. Judgment for plaintiff (167 Fed. 660), and both parties bring error. Judgment reversed on writ of error of defendant, and writ of error of plaintiff dismissed.

Ira D. Oglesby (Edgar A. de Meules, on the brief), for Midland Valley R. Co.

Oscar L. Miles, for Fulgham.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below, the administrator of the estate of E. C. Pogue, brought an action against the Midland Valley Railroad Company for negligence which he alleged caused the death of Mr. Pogue, a former employé of the railroad company and the conductor of a train which his crew was making up at a station at the time of the accident in which he died. When that accident happened, Mr. Pogue was walking along the side of the train with his book in his hand taking the numbers of the cars. Commencing at the rear there were upon this track, first, two or three cars; second, a space of 18 or 20 feet; third, a bunch of three cars; fourth, a space of several feet; and, fifth, a long train of freight cars with an engine at the head which the engineer and brakemen were about to couple to the three cars nearest to that part of the train. As, pursuant to signals from the brakeman, the engineer backed this part of the train to make the coupling, Pogue took hold of the lift pin lever at the rear of

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

the forward three cars and gave it a jerk. It made such a click as it commonly makes when it opens the coupler and as it sometimes makes when it cocks, but fails to open it. Pogue released the lever, reached his hand in, and placed it near or upon the coupler, and at that instant the forward part of the train struck the three cars, knocked him down, and ran over him. In his complaint the plaintiff charged two acts of negligence: (1) That the lift pin lever of the coupler would not open the automatic coupler, and therefore the latter would not couple automatically by impact without the necessity of an employé going between the cars to effect the coupling; and (2) that the engineer sent the cars back too rapidly and forcibly. The jury found that the engineer was not guilty of any negligence, but that the coupler was so defective that it would not couple automatically by impact without the necessity of men going in between the cars, and they returned a verdict against the company.

It is assigned as error that the court denied a request of the defendant that it charge the jury that the evidence was not sufficient to sustain the plaintiff's allegation with respect to the alleged defect in the coupler and that they should find for the defendant upon that issue. This specification presents the issue whether or not, when all the testimony and the natural and rational inferences from it are carefully considered, there was any substantial evidence that this coupler was defective. Upon this issue the testimony was that Pogue first took hold of the lift pin lever and jerked it, and then stepped in between the cars, and either placed his hand upon the coupler or was about to do so when he was knocked down; that couplers sometimes get rusty and it requires two or three jerks of the levers to open them; and that sometimes a jerk of the lever will cock the knuckle, but will not open the coupler, and then it is necessary for an employé to go between the cars and open it. Immediately after the accident and on the same day, the lever and coupler were examined and operated by several witnesses who testified that they were without defects and operated perfectly. No witness came to say that either the lever or the coupler was defective or inoperative in any way at the time of, or before or after, the accident. Nevertheless counsel for the plaintiff insist that it was a permissible inference that they were thus defective which the jury might lawfully deduce from the fact that after jerking the lever Pogue stepped in between the cars and put, or sought to put, his hand upon the coupler. But this inference rests upon two conjectures, the conjecture that the reason for attempting to put his hand on the coupler was that it was closed and he desired to open it, and the further conjecture that he was unable to open it by the use of the lever. Moreover, these are not the only conjectures which the accident presents and suggests. We may as well conjecture that the coupler was open before Pogue moved the lever, and that he jerked it to test its operation and stepped in to examine the pin or some part of the coupler; that the coupler was closed when he approached it; that he drew the pin by his jerk of the lever and then stepped in to examine some part of the pin or coupler, and, in view of the fact that inspectors who examined the coupler shortly before the accident found no defect in it and of the fact that employés who used it immediately afterward testi-

fied that it had no defect and operated perfectly, the conjecture that the cause of the deceased's entry between the cars was his curiosity and not the necessity to go between them to open the coupler is at least as rational as that the company failed to furnish or to maintain an operative coupler.

The plaintiff expressly alleged in his complaint that this cause of action arose under the act of Congress approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases" (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), which allows a recovery for the causal negligence of railroad companies engaged in interstate commerce. But the act of negligence charged was also a violation of a penal statute, of the safety appliance act as amended, which prescribes a penalty for a failure by a railroad company engaged in interstate commerce to furnish and maintain automatic couplers. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143). The case is therefore founded upon a charge of negligence and of violation of a penal statute, and the law which governs a case of this nature is nowhere better stated than by Mr. Justice Brewer in Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 663, 21 Sup. Ct. 275, 277 (45 L. Ed. 361). He said:

"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."

The application of these rules to the facts disclosed by this record necessitates a reversal of the judgment below. The case came to the trial court with the legal presumption that the defendant had furnished and maintained a lawful and operative lever and automatic coupler, for the legal presumption is that every one obeys the laws and discharges his duty. The plaintiff averred that the defendant had negligently failed to maintain a lawful lift pin lever and coupler, and that this failure had caused the deceased to step between the cars and be

killed. He proved that Pogue stepped between the cars and was killed, but he produced no evidence that the lift pin lever did not open the coupler when Pogue jerked it, or that the lever or the coupler were in any way defective or inoperative. All the witnesses who examined the coupler or the lever before or after the accident found them operative and in perfect condition. The result is that the conclusion of the jury that the coupler was defective was a mere conjecture; that there was no evidence in the case of any such defect; that the legal presumption that the defendant had furnished and maintained a lawful coupler was not overcome, but still prevailed; that this presumption was sustained by the evidence of all the witnesses who examined the coupling apparatus; and that the guess of the jury was without substantial evidence to sustain it.

The doctrine of res ipsa loquitur is inapplicable to actions between employers and employés for negligence or other wrongs. The happening of an accident which injures an employé raises no presumption of wrong or negligence by the employer. Chicago & Northwestern Ry. Co. v. O'Brien, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; Northern Pacific Ry. Co. v. Dixon, 139 Fed. 737, 740, 71 C. C. A. 555, 558; Cryder v. Chicago, R. I. & Pac. Ry. Co., 81 C. C. A. 559, 561, 152 Fed. 417, 419.

Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it. Missouri, K. & T. Ry. Co. v. Foreman, 98 C. C. A. 281, 174 Fed. 377, 383; Kern v. Snider, 76 C. C. A. 201, 203, 145 Fed. 327, 329; Spencer v. Railway Company, 105 Wis. 311, 313, 81 N. W. 407; Thomas v. Railroad Company, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; Hyer v. Janesville, 101 Wis. 371, 376, 77 N. W. 729.

There are various other assignments of error presented and argued by counsel for the railroad company, among others, the constitutionality of the act of April 22, 1908, but as the latter question is pending before the Supreme Court and it is not necessary in this case to consider it, or any of the other assignments of error, they are left without discussion. The judgment is accordingly reversed and the case is remanded to the court below with directions to grant a new trial.

The plaintiff below, although successful in obtaining a judgment for $7,500, sued out a writ of error and assigned several errors in the trial of the case, but at the argument his counsel stated that he did not desire a reversal of the case on account of the errors which had occurred in the trial below, but desired its affirmance, and abandoned his writ of error. Parties who have secured by judgment below relief with which they are content cannot confer jurisdiction upon an appellate court to hear, to consider, or to decide questions suggested by an assignment or by an argument of alleged errors in the trial by suing out writs of error or taking appeals. Guarantee Co. of North Americ v. Phenix Ins. Co., 59 C. C. A. 376, 379, 124 Fed. 170, 173; Rogers v. Penobscot Mining Co., 83 C. C. A. 380, 384, 154 Fed. 606, 610.

They must await their defeat. If that never comes, they will never suffer from the errors which they seek to suggest. If a judgment or decree is ultimately rendered against them, they will then have an opportunity to secure a review of any rulings of the court from which they have suffered injury.

The writ of error of the administrator is accordingly dismissed.

XXTH CENTURY HEATING & VENTILATING CO. v. TAPLIN, RICE-CLERKIN CO.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,012.

1. PATENTS (§ 165*)—CONSTRUCTION.
   The rule is that each claim of a patent covers a complete invention, and is in substance an independent patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 168*)—CONSTRUCTION—EFFECT OF ACQUIESCENCE IN REJECTION OF CLAIMS.
   If a claim of a patent is itself so changed through action of the Patent Office as to limit it to a particular means for performing a function, acquiescence therein by the inventor estops him from claiming any different device as an infringement, and also acquiescence in the rejection of certain claims for "means" generally, and the allowance of claims describing specific means precludes a construction of such claims which would include other means.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½–244; Dec. Dig. § 168.*]

3. PATENTS (§ 328*)—INFRINGEMENT—FURNACE GRATE.
   The Maag patent, No. 707,855, for a furnace grate consisting of two parts pivotally connected, the front one of which can be lowered in front to permit of cleaning, in view of the proceedings in the Patent Office, is limited to a construction in which such lowering is done by a swinging bail, the turning of which lowers or raises the shaker arm attached to the front section of the grate, sustaining it in each position. As so construed, *held* not infringed.

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

In Equity. Suit by the XXth Century Heating & Ventilating Company against the Taplin, Rice-Clerkin Company. Decree for defendant, and complainant appeals. Affirmed.

This is an appeal of complainant below as assignee of G. Maag, patentee, from a decree dismissing the bill of complaint. The suit was for alleged infringement of letters patent on a furnace grate No. 707,855, issued to Maag August 26, 1902. It was held that the defendant had not infringed. It is stated in the specification that "* * * the objects of my invention are to produce a grate which can readily and easily be cleared from accumulated ashes and the like, and one in which all parts are readily accessible; and a further object is to make the front portion of the grate capable of being low-

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

ered when desired, and finally to pivot the grate so that its entire surface is easily capable of being rotated."

The drawings accompanying the specification are as follows:

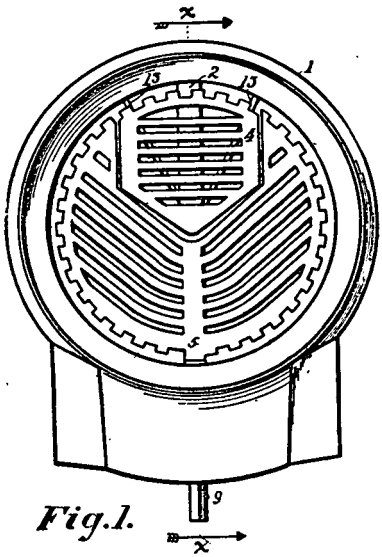

Fig. 1.

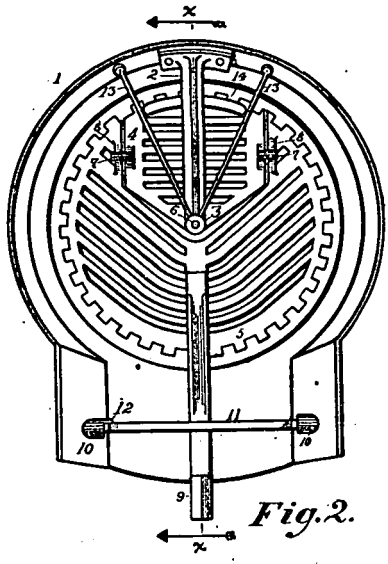

Fig. 2.

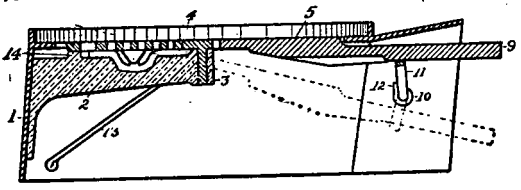

Fig. 3.

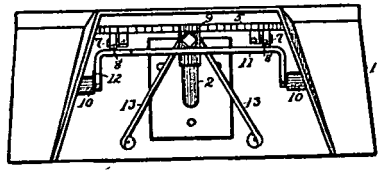

Fig. 4.

These drawings may be easily interpreted with the aid of a slight addition to a short description furnished by appellant's counsel, who states that the construction of the patent "* * * consists of a circular grate made in two sections pivotally hinged together, the rear section, 4, of which is always retained in horizontal position, while the front section, 5, is hinged to the rear section and provided with a shaker arm, 9, so that said front section can be lowered or inclined sufficiently to permit of the cleaning out of clinkers without dumping the contents of the firepot. The entire grate oscillates during the ordinary shaking operation about a pivot-pin, 6, on the under side of the rear section, 4, which is journaled in a bearing, 3, at the front end of a fixed supporting-arm, 2, beneath the grate."

The hinged section 5 and its shaker arm, 9, are supported alike in their horizontal and lowered positions by a swinging bail, 11. The swinging bail is mounted in the doorway of the ash-pit on journals, 10. When the bail is in

its normal position the arm, 9, and the entire upper surface of the grate are in one plane. It is stated in the specification: "The dumping portion, 5, of the grate is lowered into the position shown by dotted lines in Fig. 3 by giving a semirotation to the bail, 11, which permits the arm, 9, and the dumping portion to be lowered or inclined toward the doorway of the ash-pit, but retains it there from complete descent to the ground line."

The letters patent as issued contain two claims:

"1. The combination in a grate for furnaces and stoves, consisting of a two-part grate pivotally hinged together, a pivot for the entire grate mounted on one of said portions, an arm mounted on the other portion and means as a swinging bail to vary the inclination of one of said portions.

"2. The combination in a grate for furnaces and stoves of a two-part grate a lever mounted on one of said parts a swinging bail mounted in said ash-pit arranged when swung in one position to keep said grate level, and when swung in the other direction to lower one of the portions of said grate into an inclined position."

W. A. Owen, for appellant.

G. W. Rea, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The court below regarded the invention in suit as of doubtful patentability and at most as entitled only to a narrow construction. The alleged infringing device was never patented. It is not necessary to describe defendant's grate further than to say that it is a two-part grate, and, it must be said, is similar in construction and operation to the patent in suit, except as to the method of sustaining and operating the projecting shaker arm. The point of difference between the two devices upon which the trial court rested its decree of noninfringement, was in the means adopted respectively for sustaining in horizontal position and also in lowering the dumping portions and shaker arms of the two devices. The dumping portion and the shaker arm of defendant's grate are held in normal or horizontal position by the co-operation of a hook-shaped lug, cast as part of the upper surface of the shaker arm, with a segmental flange cast integrally with the upper and exposed surface of the ash-pit. The flange is long enough to admit of rotating the grate by moving the arm back and forth while its lug engages the flange; but when the arm is moved beyond either end of the flange, there is nothing to prevent the arm from dropping to the ground line.

In determining the scope of the patent in suit and its alleged infringement, it is necessary under one of the defenses set up in the answer to examine into the history of the application as it is revealed by the file wrapper of the Patent Office. Maag's original application contained nine claims, as follows:

"1. A grate for furnaces and stoves consisting of two parts pivotally attached to one another, one of said portions capable of being inclined, the other portion being pivoted to permit horizontal rotation to both portions in unison, substantially as shown and described.

"2. The combination in a grate for furnaces and stoves, of an ash-pit, an arm projecting into said ash-pit, a bearing mounted in the end of said arm, a grate made in two pieces, one whereof is arranged to pivot on the said bear-

ing, trunnions on said pivoted portion, and means to connect said other portion of said grate with said pivoted portion.

"3. The combination in a grate for furnaces and stoves consisting of two portions pivotally united, means to sustain one part of said grate, and means to permit one part of said grate to be inclined downward.

"4. The combination in a grate for furnaces and stoves of an enclosing ash-pit, a bearing mounted on an arm projecting from said ash-pit, a grate made in two portions arranged to pivot horizontally on said bearing, means to connect said portions of said grate pivotally together, and means for raising and lowering one of said portions, substantially as shown and described.

"5. The combination in a grate for furnaces and stoves, consisting of a two-part grate pivotally hinged together, a pivot for the entire grate mounted on one of said portions, an arm mounted on the other portion and means as a swinging bail to vary the inclination of one of said portions.

"6. The combination in a grate for furnaces and stoves consisting of two parts, the two parts whereof are pivotally hinged together, a pivot mounted on one of said parts to permit horizontal rotation of both parts in unison, and means to permit the inclination of the other part of said grate, substantially as shown and described.

"7. The combination in a grate for furnaces and stoves consisting of an enclosing ash-pit, an arm mounted on the interior of said ash-pit, a bearing on said arm, a two-part grate, a pivot on one of said parts to enter said bearing, a lever mounted on the other part, and means to vary the vertical inclination of said lever.

"8. The combination in a grate for furnaces and stoves of a two-part grate a lever mounted on one of said parts a swinging bail mounted in said ash-pit arranged when swung in one position to keep said grate level and when swung in the other direction to lower one of the portions of said grate into an inclined position.

"9. The combination in a grate for furnaces and stoves of a two-part grate, one portion whereof is arranged to pivot on a supporting arm, the other designed to be vertically inclined as desired and a supporting arm to sustain said pivoted portion, substantially as shown and described."

Only two of these claims were ultimately allowed; omitting intermediate changes in numbers, the two allowed were original numbers 5 and 8, now claims 1 and 2 as they appear in the statement. All the claims were rejected by the examiner on reference to the Goodenow patent, No. 369,334, dated September 6, 1887, entitled "Grates Rotary." Thereupon Maag through his counsel canceled original claims 1, 3, and 6, and stood on claims 2, 4, 5, 7, 8, and 9, changing their numbers consecutively from 1 to 6, and claiming that the Goodenow patent differed from the device described in the claims so retained. Among the grounds stated in support of the difference so claimed was this:

"Again the 'swinging bail' is a novel feature, and not found in the cited case. It is of peculiar use, as it sustains the 'arm, 9,' both at its upper and lower position."

The claims so presented a second time were regarded by the examiner as unpatentable, and were again rejected. Further reference was made to Mearns, 191,702, June 5, 1877, "Grates Compound Movement." Reconsideration was asked and given, but the claims were once more rejected; additional reference being made to Brown, 108,754, November 1, 1870, "Hot Air Furnaces." Upon appeal to the board of examiners, the examiner was affirmed as to claims (newly numbered) 1, 2, 4, and 6, and reversed as to claims 3 and 5. Afterward Maag canceled all these claims except 3 and 5, and

asked that they be changed in numbers to 1 and 2, and at the same time added two new claims. The new claims were refused for formal reasons, and so need not be set out or further noticed. Thus all of Maag's claims were rejected and canceled save only his original claims 5 and 8, now 1 and 2 (shown in statement as before mentioned). It is plain that the examiner regarded Maag's device as wholly anticipated by the references made in the orders of rejection; and the only difference between him and the board of examiners related to the two claims allowed. It is to be observed that in each of these two claims, express reference is made to a "swinging bail"; and that the only device mentioned in the specification or displayed on the drawings as affording any means of supporting and operating the shaker arm and dumping portion of the grate is a "swinging bail." In the first claim these supporting and operating features are associated with a "swinging bail" by the words "means as a swinging bail to vary the inclination of one of said portions," that is, such dumping portion; while in the second claim these sustaining and operating features are associated with "a swinging bail mounted in said ash-pit arranged when swung in one position to keep said grate level, and when swung in the other direction to lower one of the portions of said grate into an inclined position."

Now, it is admitted that claim 2 is not infringed, but it is insisted that claim 1 is. The only difference that need be noticed between the language of the two claims in the respects just mentioned is that in the first the words are "means as a swinging bail," and in the second the words are "a swinging bail." The language of the first claim in regard to varying the inclination of one portion, and the language of the second claim in that behalf may, we think, be treated as in effect identical; because only two positions, the horizontal and the inclined, are described in the specification as having any importance whatever.

Do the words "means as," found in claim 1 and not in claim 2, signify a distinction between the two claims respecting the element of the swinging bail? It is true that the employment of different words in separate claims indicates a purpose to secure distinct inventions; indeed, the rule is that "each claim of a patent covers a complete invention, and is, in substance, an independent patent." Celluloid Mfg. Co. v. Zylonite Brush & Comb Co. (C. C.) 27 Fed. 291, 294; United Nickel Co. v. California Electrical Works (C. C.) 25 Fed. 475, 479; Leeds & Catlin v. Victor Talking Mach. Co., 213 U. S. 301, 319, 29 Sup. Ct. 495, 53 L. Ed. 805.

But in the present case we are concerned not merely with a difference in forms of expression found in the two claims of the patent, but also and especially with what effect, if any, the rejection of seven out of nine of the original claims and the inventor's acquiescence therein had upon the two claims granted. If claim 1 had itself been changed so as definitely to limit its scope to the swinging bail, acquiescence therein on the part of the inventor would manifestly have estopped him from using any other device than the bail to support or operate the dumping portion of his grate, no matter whether anything in the prior art required such a limitation or not. See decisions

cited in Campbell v. Am. Shipbuilding Co. (C. C. A., Sixth Circuit) 179 Fed. 498, 502, 503; also Brown v. Stilwell & Bierce (C. C. A., Sixth Circuit) 57 Fed. 731, 741, 6 C. C. A. 528; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; Royer v. Coupe, 146 U. S. 524, 530, 13 Sup. Ct. 166, 36 L. Ed. 1073; Hubbell v. United States, 179 U. S. 77, 83, 21 Sup. Ct. 24, 45 L. Ed. 95.

Now it is hard to perceive any difference in principle between acceptance of a limitation made in the Patent Office through change of a single claim, and acceptance of a limitation imposed upon that claim through denial of other claims of the same application. Of course it would generally be more difficult definitely to work out an estoppel in the latter case than in the former; and it must be conceded that estoppel will not lie in either of the cases suggested, unless its elements are definitely traceable to the inventor through his acquiescence in adverse action taken in the Patent Office. Vrooman & Vrooman v. Penhollow (C. C. A., Sixth Circuit) 179 Fed. 296. In the present instance, however, unlimited scope was sought through the rejected claims to introduce devices for supporting and operating the dumping portion of the grate. But in their rejection, the swinging bail was brought into distinct prominence in this very particular.

It is certain that a broader construction should not be placed on the claim in suit than would be accorded to any of the claims disallowed and canceled. As stated by the present Mr. Justice Lurton in announcing the opinion of this court in Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 543, 36 C. C. A. 375, 394:

"The third and fourth claims should, as a consequence of the cancellation of claims 1 and 2, be so construed as not to include the broad claims of the rejected application."

Again in United States Repair Co. v. Assyrian Asphalt Co., 183 U. S. 591, 22 Sup. Ct. 87, 46 L. Ed. 342, patents were involved relating to the method of repairing asphalt pavements and apparatus for that purpose. The decision of the court below (100 Fed. 965, 41 C. C. A. 123) was affirmed upon a question which we think apposite here. Two claims were declared in the Patent Office to be the same in substance, and it was in effect required by that office that one or the other of the claims should be withdrawn; and the withdrawal having been made, the ordinary rule was applied, Mr. Justice McKenna adopting the language of the court below (page 601 of 183 U. S., page 91 of 22 Sup. Ct. [46 L. Ed. 342]):

"Having voluntarily abandoned the claim for a method limited to the use of 'a blast of heat,' the patentee or his assignee may not now insist that a broad claim, containing no suggestion of such intention, shall nevertheless be subjected by construction to the same restriction."

Turning, again, to the action taken in the Patent Office upon the present application, we think any comparative study of the references there made in connection with the rejected and granted claims will show that the only part of the combination in suit that was regarded by any of the officials of that department as novel, was

the swinging bail. A grate composed of two pieces was mentioned in every one of the claims as made. Connection between the parts and pivotal support to admit of horizontal rotation were common to all the claims, as also contrivances for sustaining and lowering the front portion of the grate. The Goodenow patent relating to grates for furnaces consisted of "two parts pivoted to each other, the forward pivoted portion adapted to drop downward, and held in its closed position by a dog secured to the front portion of the rim of the grate." The declared object of the device was "to afford a ready means for cleaning the surface of ashes and clinkers and to prevent clogging of the grate during the operation of shaking."

Again, the Mearns patent is a two-part grate, and it is said in the specification in allusion to what is there called a front crank:

"On one end of the front crank is a lever, E, and connected therewith is a slip-lever, F. The latter is used for shaking the grate and for bringing it down to a half-dumped position, but is too long for dumping the grate, and consequently has to be slipped off the lever, E, which is used alone for that purpose."

The Brown reference involves a single part grate, but is arranged for dumping and cleaning, and has an extended arm for supporting the grate in horizontal position, and allowing it when disengaged to drop to an inclined position.

But without entering further into the details of these patented devices, we think enough is disclosed to justify the belief of the officials of the Patent Office that the references were fairly suggestive of every part of the patent in suit, except the swinging bail. The marked feature of the bail is the facility it affords within its own structural limits for alternately holding the shaker arm with the tilting part of the grate in the two useful positions described, one the normal and the other the inclined.

Furthermore, the elimination of the word "means," by the rejection of original claims 2, 3, 4, 6, and 7, could not fail to attach distinct significance to the words "swinging bail" as used in the only claims allowed. Especially is this true of original claim 4, in which reference was made to the two pivotally connected portions of the grate, and "means for raising and lowering one of said portions." Why should not that claim have been granted, if any other means than the swinging bail had been regarded as without the range of mechanical skill and the prior art? Why was it that in no instance was the word "means" suffered to remain in connection with the elevation or lowering of the shaker arm and tilting portion, except only when the word was definitely explained and restricted thus: "means as a swinging bail to vary the inclination of one of said portions"? The inventor was compelled to surrender everything else. Surely the object of this surrender cannot be misunderstood. As before pointed out, it was specially sought by the inventor to differentiate one of the references by insisting upon the novelty of the swinging bail. The action of the board would seem unerringly to be a response to that contention. If, then, the words "means as a swinging bail" do not denote a limitation to the bail itself, they certainly do to a device that would in and of itself through simple

manipulation perform the double function attributed to the swinging bail. It is true that this is yielding to the patent a very narrow construction; but to give it greater scope would clearly be to extend to it a scope beyond the limits of at least one of the claims denied.

Illustration is given of the unconscious violation of the rule in this regard by learned counsel of appellant. Their argument is carried to the extent of claiming that the bail arms might be made so long as not to "support the (shaker) arm in its inclined position." This is plainly inconsistent with their other and distinct claim repeated so often as a novel feature of the bail, viz, "permitting the front half of the grate to drop sufficiently to have the clinkers raked out and yet not low enough to drop the coal above it." Neither could a bail so extended escape the prior art, especially the Mearns patent in the respect above pointed out; for, judging from Maag's specification and claims, Maag did not foresee any more than Mearns foresaw the quality of at once admitting of removal of the clinkers and preventing dropping of the coal. Nor is it easy to see why the necessity so to enlarge the bail in order to show infringement, does not in effect concede a material distinction between the two devices in issue both as to construction and operation.

We are thus constrained to believe that if we assume, as we shall for the purposes of the case, patentable quality in the invention in suit, the appellant must be restricted to the particular device described in the claims. It is only necessary then to consider for a moment the difference of manner in which the dumping portions and extended arms of the two devices in issue are raised and lowered and there held respectively. As before shown, the swinging bail alone is employed for these purposes under the patent in suit. In other words, the arm is held in and restored to horizontal position and also in its inclined position by the bail; the bail "retaining" the arm "from complete descent to the ground line." The dumping portion of appellee's device is held in horizontal position (and in that position only) by a hook cast in the upper surface of the shaker arm, which engages a segmental flange cast in the top surface of the entrance to the ash-pit. When the arm is moved beyond either end of this flange (unlike the arm of the patented device) it drops to the ground line. The only way to move or use it when in that position or to restore it to a level plane is directly by hand. The differences then in structural support and also in operation of the shaker arms and tilting portions of the two grates are enough, we think (in spite of the apparent motives of one of its officers), to relieve appellee from the charge of infringement. Ross-Moyer Mfg. Co. v. Randall (C. C. A., Sixth Circuit) 104 Fed. 355, 359, 43 C. C. A. 578; Rich v. Baldwin, Tuthill & Bolton (C. C. A., Sixth Circuit) 133 Fed. 920, 923, 66 C. C. A. 464; Central Foundry Co. v. Coughlin (C. C. A., Fifth Circuit) 141 Fed. 91, 94, 72 C. C. A. 93; Hardison v. Brinkman (C. C. A., Ninth Circuit) 156 Fed. 962, 967, 87 C. C. A. 8; Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100.

The decree below must be affirmed, with costs.

UNION CARBIDE CO. v. AMERICAN CARBIDE CO.

(Circuit Court of Appeals, Second Circuit. June 29, 1910.)

No. 226.

1. PATENTS (§ 42*)—NOVELTY—CHEMICAL COMPOUND—CHANGE OF FORM.
A chemical compound in a new form may be patentable where by reason of its greater purity or efficiency or of its comparative cheapness it is made a commercial, instead of merely a laboratory, product.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 49; Dec. Dig. § 42.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CRYSTALLINE CALCIUM CARBIDE.
The Willson patent, No. 541,138, for "crystalline calcium carbide, existing as masses of aggregated crystals," discloses patentable novelty, although calcium carbide was previously produced in laboratory experiments in an amorphous condition; the result of the patentee's discovery being a commercially new product of great utility. Nor is such patent anticipated by the Woehler process, published in 1862, the product of which is not shown to be crystalline, nor invalid because of prior public use for more than two years, it not being shown that such use was for other than experimental purposes. While the patent is limited to that form of crystalline carbide which exists as masses of aggregated crystals, it is immaterial whether such crystals are perfect or imperfect; both forms being within its terms. As so construed, *held* infringed.
[Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Machine Co., 59 C. C. A. 620.]

3. WORDS AND PHRASES—"CALCIUM CARBIDE."
Calcium carbide is a combination of calcium and carbon in the proportion of one part of calcium (Ca) to two parts of carbon (C), and is expressed in the chemical formula CaC^2. The principal use of calcium carbide is to make acetylene gas which is used for illuminating purposes.

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

Suit in equity by the Union Carbide Company against the American Carbide Company. Decree for defendant (172 Fed. 120) and complainant appeals. Reversed.

Appeal from a decree dismissing the bill in a suit to restrain the alleged infringement of letters patent No. 541,138, granted June 18, 1895, to Thomas L. Willson for an alleged "new and useful product existing in the form of crystalline calcium carbide," and assigned to the complainant. This suit may properly be designated the "product suit" to distinguish it from another suit pending between the same parties called the "process suit."

Edward N. Dickerson and Louis C. Raegener, for appellant.

Charles Neave and Willis Fowler, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patentee states at the commencement of his specification:

"This invention relates to the production of a new form of crystalline calcium carbide.

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

"Before my invention calcium carbide had existed in an amorphous condition, due either to the method of its preparation or the impurities contained in it.

"By my invention herein described calcium carbide is produced in a new form, namely, in crystalline condition, having a bluish or purplish iridescence. The carbide so existing is in a condition particularly applicable, on account of its purity, for conversion into other compounds."

The specification then describes the process followed to obtain the product. The patentee states, in substance, that he takes mechanically powdered coke and lime in the proportion of 35 per cent. of coke and 65 per cent. of lime, thoroughly mingles them by mechanical means, and subjects them to the action of an electric current in a furnace. He further states that the action of the current upon the material is a smelting action, and that the fused calcium carbide when allowed to cool crystallizes, and, when broken, shows iridescent surfaces.

The patent contains but a single claim, which is as follows:

"As a new product, crystalline calcium carbide existing as masses of aggregated crystals, substantially as described."

The defenses are:

(1) That the patent is invalid because there is no patentable novelty in the crystalline form of calcium carbide.

(2) That the patent is invalid because it is anticipated by the Woehler carbide.

(3) That the patent is invalid because the product was in public use more than two years prior to the filing of the application.

(4) That the defendant does not infringe.

Before examining the defenses, it will be well to consider briefly the chemical composition of the product in question, its properties, the uses to which it is put, and the forms which it takes.

Calcium carbide is a combination of calcium and carbon in the proportion of one part of calcium (Ca) to two parts of carbon (C) and is expressed in the chemical formula CaC_2. When calcium carbide (CaC_2) is placed in water (H_2O) the carbon unites with the hydrogen of the water and forms acetylene gas (C_2H_2) leaving lime (CaO) as the residue. Acetylene gas is employed for illuminating purposes, and has come into general use during the last decade. The principal use of calcium carbide is to make this gas.

In considering the form of the product we note at the outset that bodies in general are divided into two classes: (1) Crystalline and (2) noncrystalline or amorphous. A crystalline body consists of or is made of crystals and a crystal is defined in Webster's Dictionary as follows:

"The regular form bounded by plain surfaces which a substance tends to assume in solidifying, through the inherent power of cohesive attraction."

It appears that calcium carbide under different conditions takes both the crystalline and the amorphous forms. The specification itself states, as we have seen, that the substance had existed in an amorphous form prior to the invention, and the patent relates solely to the crystalline form. Whether it is broad enough to entirely cover that form will later be considered.

Taking up now the different defenses, the defendant in the first place contends that, even if the patent broadly covers crystalline cal-

cium carbide and even if all the calcium carbide of the prior art were amorphous, still crystalline carbide is not patentably novel. It is said that the patent is not for a new product, but for a new form of an old product, having the same composition, properties and uses as the old.

This contention requires us to examine to some extent the history of calcium carbide and to cover some of the ground of the second defense—the alleged anticipation by the Woehler product.

Acetylene gas made from substances other than calcium carbide was discovered in 1836 and different articles about it were later published. In 1862, Woehler, a German chemist, for the first time published in a chemistry year book an article regarding the formation of acetylene from calcium carbide and to some extent indicated the process of making the latter product. This article is printed in full in the footnote,[1] but the especially material part of it is contained in the following lines at the beginning:

"At a very high temperature a calcium carbide can be produced from the alloy of zinc and calcium prepared by Caron, in contact with carbon, whose mode of formation and characteristic will be given later."

As will be observed, the remainder of the article describes the properties of the compound—its decomposition with water and the formation of acetylene gas—and the characteristics of the gas, but says nothing more about the process of making the carbide. There is nothing to indicate that that which Woehler did was anything more than to make and describe a laboratory experiment, and, although his work was generally recognized in treatises upon chemistry, it does not appear that any appreciable amount of calcium carbide was made by any person before the present patentee came into the field.

Concededly the Woehler compound was the highest development of the prior art in calcium carbide, and so we recur to the question whether with that compound in the art—assumed to be amorphous for the purposes of the present discussion—there was patentable novelty in the crystalline form.

In determining the question of patentable novelty, there can be no hard and fast rule. Each case must be decided upon its own facts. Mere change of form in and of itself does not disclose novelty. A new article of commerce is not necessarily a new article patentable as such. But patentable novelty in a case like the present may be founded upon superior efficiency; upon superior durability, including the ability

[1] "At a very high temperature a calcium carbide can be produced from the alloy of zinc and calcium prepared by Caron, in contact with carbon, whose mode of formation and characteristic will be given later. This compound has the remarkable property to decompose with water into calcium hydrate and acetylene gas C2 H2 the same hydrocarbon which was first discovered by Davy and which more recently has been produced by Berthelot, not only by the decomposition of different organic substances at a red heat, but also directly from carbon and hydrogen under the influence of the electric arc. The gas produced by means of this calcium carbide has not yet, it is true, been analyzed, but it is characterized by the three distinguishing properties of acetylene, namely, to burn with a brilliant smoky flame, to explode with chlorine gas even in diffused light with the phenomenon of fire, and the separation of carbon, and to precipitate from an ammoniacal silver solution the compound which explodes so violently when heated."

to retain a permanent form when exposed to the atmosphere; upon a lesser tendency to breakage and loss; upon purity, and, in connection with other things, upon comparative cheapness. So, as supplementing other considerations, commercial success may properly be compared with mere laboratory experiments.

Now, broadly comparing amorphous and crystalline carbides, we are convinced that the complainant's expert was substantially correct in testifying as follows:

"Usually speaking the amorphous substance is less dense, more soluble, has a lower melting point and less hardness. That would seem to mean that in all probability, even between equally pure compounds, that bulk for bulk, the yield of gas in the case of the amorphous compound would be smaller, that the tendency to breakage would be greater, both because the substance is more porous and less hard, that for such matters as transportation and dangerous dust the amorphous would be the inferior material even if equally pure. In my opinion, however, the amorphous carbide is far less likely to be pure or equally pure with the crystalline, because heterogeneity and quantity of impurity are great helps in formation of the amorphous compound. If more impure, it is obvious that the yield, bulk for bulk, is still less than with the pure material, and that the amount of residue after use is greater."

And, if we turn specifically to the Woehler product as it was made before the application for the patent in suit, we reach similar conclusions. The Woehler publication is meager. All that is said about the preparation of calcium is contained in a single sentence. No information is given concerning the proportions of the ingredients, their preparation, or other similar matters necessary to an understanding of the process. Still it seems that, whenever before the time of the present patent the compound was prepared in accordance with what information the article did furnish, the result was a black pulverulent mass. This powdery material was worthless commercially, and was never commercially used. It would be unfit for use in gas generators, and we are satisfied would rapidly deteriorate when exposed to the air. The product of the patent is more durable. It is hard, compact, and so unlike the powdery mass as almost to amount to a new body. Moreover, we think the complainant correct on its contention that the iridescent surfaces of the crystalline carbide would protect it to some—although, perhaps slight—extent from atmospheric action.

It is also quite clear that Woehler published a mere result of a laboratory experiment which was put to no practical use. Crystalline carbide, on the other hand, has been a great commercial success, and has furnished the foundation for important industries.

Taking the Woehler compound as it was made before Willson applied for his patent, we are satisfied that the product of the patent marked a patentable advance over it. And if we also make comparisons in the light of the recent experiments made in behalf of the defendant—which we will consider later and will not now discuss—it is sufficient to say that our conclusion is not changed. We think that there is a patentable difference between the later product and the product of the patent, although such difference exists in less degree than in the case of the earlier Woehler product.

For these reasons, it is held that the product possesses the requisite patentable novelty. And we must regard this conclusion as not only

well founded in law, but as most just. To hold an important discovery which has given to the world a commercially new product—a product the high utility of which must be conceded—not entitled to protection for want of novelty, would, as it seems to us, be applying the patent statute to defeat its fundamental purposes.

The defendant's second defense, as we have noted, is that the patent, if broadly for crystalline calcium carbide, is invalid, because it is anticipated by the Woehler carbide.

Our examination of the first defense covers most of the ground necessary to be examined in considering this defense. But there are essential distinctions. It was assumed in considering the first defense that the Woehler product was amorphous. But such assumption was for the purpose of testing that defense only. If the Woehler compound were amorphous, it manifestly did not anticipate the crystalline product in view of the differences between the forms already pointed out. To anticipate, the Woehler compound must be shown to be crystalline, and the defendant in the present defense strenuously insists that it is crystalline. It is not shown that any of the Woehler compound which was made before the application for the patent was crystalline, and, indeed, we think the testimony tends to show that it was amorphous. But it is contended that experiments made by the defendant's witnesses for the purposes of this suit demonstrate the crystallinity of the Woehler carbide. Now, as already pointed out, the Woehler article furnished very little information concerning the process of making calcium carbide. Practically, all it said was that at a high temperature calcium carbide could be produced from an alloy of zinc and calcium in contact with carbon. Woehler was making note of a laboratory experiment evidently employing minute amounts of material, and seems to have been more interested in the formation of acetylene from the carbide than in the formation of the carbide.

The defendant's experts in following the Woehler process used considerable amounts of material in a furnace, applied a high degree of heat for a long time, and obtained a hard, compact mass of material having no resemblance to the Woehler product as already described, viz., a black powdery substance. Without discussing the details of the experiments, it is enough to say that we are not at all satisfied that the defendant's experts in producing their compound did no more than follow the teachings of the Woehler article. Assuming, however, that this compound was produced by the Woehler process, the next question is whether the defendant has established its crystallinity. Upon this question, the testimony of the expert witnesses called by the defendant and complainant is wholly irreconcilable. The experts for the defendant testify that this compound does exist in a crystalline condition. On the other hand, the experts for the complainant testify that the calcium carbide is not crystalline, although they say that the compound does contain another substance—calcium cyanamide—in crystalline form. It would serve no useful purpose to review this conflicting testimony nor to discuss the reasons pro and con given by the experts. It is sufficient to say that upon careful consideration of the testimony we are not satisfied that the carbide of the experiments was crystalline. The burden is upon the defendant to

establish crystallinity, not upon the complainant to disprove it, and, among other things, we cannot ignore the possibility that the defendant's witnesses may have attributed the crystallinity of the calcium cyanamide in the product to the calcium carbide. Consequently the Woehler product, whether correctly represented by the earlier compound or by the result of the recent experiments, must be held not to anticipate.

The defendant's third defense is that the patent in suit is invalid because the claimed product was in public use for more than two years prior to the filing of the application. The application for the patent is dated March 4, 1895, so that we must see whether a public use of the product prior to March 4, 1893, is established.

We find experimental uses of the product before that time. We find that Lord Kelvin in a foreign country put some of the carbide in water, and lighted the gas which was generated. We find that the patentee gave samples of the product to different persons for experimental purposes. But it is well settled that an inventor has the right to experiment in perfecting his invention and demonstrating its utility, and we are not satisfied that the patentee in this case did anything more. We think that the proof fails to establish that there was any public use of the invention more than two years prior to the application for the patent.

The fourth defense is that the defendant does not infringe, and the examination of this defense requires the consideration of the construction to be placed upon the claim of the patent. Ordinarily, in interpreting a claim, we should, at the outset, seek to ascertain its meaning from the language used. But in view of the contentions of the parties and of the decision of the Circuit Court, we think it preferable in this case to first trace the passage of the claims of the patent through the Patent Office.

The file wrapper of the patent shows that Willson's original claim was as follows:

"As a new product, crystalline calcium carbide having a bluish iridescence, substantially as described."

This claim was rejected, and the applicant then filed an amendment stating two claims, as follows:

"1. As a new product, crystalline calcium carbide existing as masses of aggregated crystals having a bluish iridescence, substantially as described.

"2. As a new product, crystalline calcium carbide, existing as masses of aggregate crystals, substantially as described."

The Patent Office then said that the two claims were not patentably different and the applicant erased the first claim, leaving the second—the present form—as the single claim of the patent, which was thereupon issued.

It is strenuously urged by the defendant, and was held by the judge at circuit, that the defendant by amending his claim in consequence of the action of the Patent Office deprived it of any broad application. It is said that the applicant in his original application having broadly claimed crystalline calcium carbide and having acquiesced in the rejection of the claim cannot now contend that "crystalline calcium car-

bide existing as masses of aggregated crystals" means nothing more than crystalline carbide. As we think, this contention is correct. The claim is undoubtedly limited to the form of crystalline carbide which exists as masses of aggregated crystals. There must be an aggregation. The claim does not cover an individual crystal nor any number of separate crystals not aggregated or joined together. To illustrate: Had there been a question whether the Woehler powdery substance was amorphous or composed of minute separate and distinct crystals, the claim as amended would have excluded it in either case, while the original claim would have been anticipated by it had it been composed of crystals. That this distinction might reasonably have been in the mind of the framer of the claim is shown by the statement in the defendant's brief that "crystalline powder" is well known.

But it is urged that the limitation of the word "crystalline" is not by the word "aggregated," but by the word "crystals." It is said that the phrase "masses of aggregated crystals" has a specific and limited meaning—i. e., it means "crystal aggregate," which is a union of two or more fully developed crystals as distinguished from "crystalline aggregate," which is a mass of crystal grains devoid of their characteristic forms and closely packed together. But we are by no means satisfied that any such fine distinction as this—based upon academic definitions in the Williams book—is so generally recognized by authorities upon crystallography or chemistry that we would be warranted in applying it in construing the claim in suit, especially when reading the claim in connection with the specification. To draw such a distinction is to say that there are two forms of crystalline calcium carbide: (1) Aggregations of perfect or well-faced crystals, and (2) aggregations of broken, confused crystals. But it is certain that masses of perfectly developed crystals could not be produced by the process described in the patent, and it is not certain that they could be produced by any known process. To confine the claim of the patent to masses of perfectly developed crystals would be, we think, by a strained construction to read out of the claim the only product producible by the process of the patent and to deny protection to a meritorious invention.

In our opinion the patent covers crystalline carbide when the crystals are aggregated in masses, whether such crystals be perfect or imperfect, and, as it is admitted that there are crystals in the defendant's carbide and as those crystals are so aggregated, we think that the product of the defendant infringes.

The decree of the Circuit Court is reversed, with costs, and the cause remanded, with instructions to enter a decree for the complainant for an injunction, an accounting, and costs.

UNION CARBIDE CO. v. AMERICAN CARBIDE CO.

(Circuit Court of Appeals, Second Circuit. June 29, 1910.)

No. 225.

PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF PRODUCING CALCIUM CARBIDE.
The Willson patent, No. 563,527, for a process of producing calcium carbide by subjecting lime and a carbonaceous deoxidizing agent to the heat of an electric arc in an electric furnace, *held* not infringed.

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

Suit in equity by the Union Carbide Company against the American Carbide Company. Decree for defendant (172 Fed. 136), and complainant appeals. Affirmed.

Appeal from a decree dismissing the bill in a suit to restrain the alleged infringement of claim 1 of patent No. 563,527, granted July 7, 1896, to Thomas L. Willson, for improvements in the production of calcium carbide. This suit may properly be designated the "process suit" to distinguish it from another suit pending between the same parties called the "product suit."

E. N. Dickerson, Louis C. Raegener, and S. L. Moody, for appellant.

Charles Neave and Willis Fowler, for appellee.

William Houston Kenyon and Alan D. Kenyon, amicus curiæ.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The question of infringement in this case depends upon the result of the inquiry whether the defendant employs the arc, as distinguished from the incandescent, principle in its electric furnace in the manufacture of calcium carbide. The burden is upon the complainant to establish by a fair preponderance of testimony—and not by mere scientific speculation—that the defendant does use the arc. We are, however, not entirely satisfied that the complainant has sustained this burden, and accordingly feel constrained to affirm with costs the decree of the Circuit Court upon the opinion of the judge holding it; and it is so ordered.

MURRAY CO. v. E. VAN WINKLE GIN & MACHINE WORKS.

(Circuit Court, N. D. Georgia. June 2, 1910.)

PATENTS (§ 328*)—INFRINGEMENT—FEEDER FOR COTTON GIN.
The Murray patent, No. 472,607, for an improvement in apparatus for elevating, distributing, and feeding seed cotton to gins, the novel feature of the combination being an automatic valve produced by the cotton itself which prevents choking in the chute, *held* not infringed upon evidence showing that the patented combination will not work successfully without the use of a trip valve, which has been added as a new element in defendant's machine.

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

In Equity. Suit by the Murray Company against the E. Van Winkle Gin & Machine Works. Decree for defendant.

Oliver Mitchell, J. J. Eckford, and Smith, Hammond & Smith, for complainant.

Wimbish, Watkins & Ellis, for defendant.

NEWMAN, District Judge. This is a bill brought by the complainant against the defendant to enjoin the latter from the infringement of letters patent No. 472,607, issued by the Patent Office April 12, 1892. The patent which it is claimed the defendant company has infringed is for a "new and useful improvement, in apparatus for elevating, distributing and feeding seed cotton to gins." The claims of the patent which are alleged to have been infringed are Nos. 1, 2, 9, and 12 of said letters patent No. 472,607. Those claims are as follows:

One:

"In apparatus for elevating, distributing and feeding seed cotton to gins, the combination, with a suction pipe or tube, of a box or casing having side air-passages and a central screened space, and a chute or feeder communicating with said space, substantially as described."

Two:

"In apparatus for elevating, distributing and feeding seed cotton to gins, the combination, with a suction pipe or tube formed in its under side with an opening, of a box or casing having a central space communicating with said pipe or tube and provided with side air-passages having inner screen-walls and a chute or feeder communicating with said central space, substantially as described."

Nine:

"In apparatus for elevating, distributing and feeding seed cotton to gins, the combination, with the chute or feeder of a set of feed rollers supported at the bottom of said chute or feeder, and means for regulating the feed of said rollers, substantially as described."

Twelve:

"The combination, with a suction pipe, of the box or casing constructed of two or more central spaces and provided with the screened air-passages and a chute or feeder suspended beneath each of said central spaces, substantially as described."

Complainant then sets up in its bill, and relies upon a decision by the Circuit Court of Appeals for the Third Circuit in Murray Company v. Continental Gin Company, reported in 149 Fed. 989, 79 C. C. A. 499, which decision enjoined the infringement of claims Nos. 1, 2, 9, and 12. Complainants insist that this case should be followed here.

Complainant also relies upon the decision in the Circuit Court for the Northern District of Texas in the case of Murray Company v. Ray et al.[1] for the infringement of letters patent No. 472,607. In that case a preliminary injunction was granted by the court against the infringement of claims Nos. 1, 2, 9, and 12 of the same letters patent. Complainant, alleging that the defendant is infringing claims

[1] No opinion. Case dismissed by agreement.

1, 2, 9, and 12 of this patent No. 472,607, prays for an injunction restraining the defendant, its agents, servants, and employés, from making, using, or selling any apparatus or machines containing and embodying the invention covered by said patent claims Nos. 1, 2, 9, and 12. It then prays for an accounting of the profits which defendant has realized from the use of its invention. Discovery is waived.

The answer denies the validity of the patent, and claims that the state of the art was such at the time letters patent No. 472,607 was issued as that there was no invention, but merely an aggregation of well-known mechanical appliances, and that an apparatus made under the patent sued on would not perform the functions claimed for it by the complainant. The defendant also claims in its answer that the elevator manufactured by it is made under patents owned by the defendant and regularly issued by the Patent Office. As to the case of Murray Company v. Continental Gin Company, the defendant in its answer claims that in that case the Murray Company contended that its apparatus claimed to be made under the patent described in its bill contained an automatic valve produced by the seed cotton itself, and claimed that its apparatus for elevating, distributing, and feeding seed cotton to gins was automatically regulated by the seed cotton.

Defendant claims that certain language used in the opinion in the Continental Gin Company Case shows that the complainant there relied upon having an apparatus containing a new element of automatic regulation by seed cotton itself, and upon information and belief denies that said complainant has such an apparatus, and denies that the apparatus of complainant is automatically regulated by the seed cotton itself, and says, if complainant has an apparatus regulated automatically by the seed cotton itself, that the apparatus used, manufactured, and sold by this defendant is not so regulated, and is therefore not an infringement of complainant's apparatus. Defendant further denies that at the time alleged in the bill, nor at any other time, did it make, use, or vend any new and useful improvement in apparatus for elevating, distributing, and feeding seed cotton to gins containing and embodying the invention set forth and claimed by said letters patent, or that it has in any way infringed upon the exclusive rights, if any, or any rights of complainant's, and denies that it has derived, or realized, any profits which complainant would have derived from his alleged exclusive rights, and denies that complainant is deprived of any royalty, or has incurred any damages by any unlawful or wrongful acts of this defendant. Defendant then sets up that it is the owner of patent No. 777,024, originally issued to James Theodore Jackson, of Corsicana, Tex., on the 6th day of December, 1904, and thereafter regularly and duly assigned to this defendant; that it is the owner of patent No. 823,858, issued June 19, 1909, to Thaddeus S. Grimes, assignor, to Edward Van Winkle, which patent has been by duly executed assignments assigned to defendant; that under patents previously obtained and expired, and using devices not patented or patentable, and under said patents, and by virtue of its right to so do, this defendant has for more than three years manufactured and sold its present apparatus for elevating and feeding

seed cotton to cotton gins, which apparatus of defendant contains nothing that infringes any right of complainant, and which apparatus is not controlled by the seed cotton, and contains the same general principles in use by said defendant since 1886.

Defendant then sets up that its apparatus is controlled by a valve so arranged as to work automatically by the same force that drives the fan, opening and closing as often as desired by reason of a machine device operated by a driving pulley, and which may also be operated by hand. The device for controlling the seed cotton in its being fed to the gin, being in no way mechanically controlled or regulated by the seed cotton itself, the device of this defendant operating whether or not there is any seed in the machine at the time it is being operated, and cutting off the feeding of the seed cotton at stated times, which can be regulated by the machinery, but not by the cotton; the device, whether singly or in combination used by the defendant, not being in conflict with any new or patentable device used by the complainant in the patent sued on.

Several interesting questions were raised on the argument of this case, and also in the very well prepared briefs filed since the argument by counsel for both complainant and defendant. The principal question in the case, however, and that to which the argument has been mainly directed, and upon which the case seems to turn, is whether or not the perpendicular chute for lowering the seed cotton in the gin is as described in the complainant's patent, and constructed under it, a practical device; that is, one that will work in practical operation. The claim is that the weight of the seed cotton is sufficient at a reasonable height in this chute to cause it to overcome the suction which keeps the valves at the lower part of the chute closed; and, when so overcome, the claim is that the cotton descends through the opening in the valve caused by its own weight, and passes on over the rollers into the gin. The complainant claims that this would be accomplished satisfactorily, and the defendant, that it would not.

A further material feature of the complainant's apparatus insisted upon here is a screened space arranged in complainant's apparatus, below the cotton suction pipe, which, it is claimed, acts to prevent any choking of cotton in the horizontal portion of the suction pipe over the gins because the cotton acts automatically by covering the screen in the chutes. The claim is that the apparatus is thus controlled automatically, this automatic regulation secured by the cotton itself covering the screened space in the chute. The contention for the defendant is that, in order that the weight of the cotton should overcome the suction of the valve, the cotton must rise to a height in the chute, which would make it impracticable to use such chutes on account of their height in an ordinary cotton ginning establishment. The defendant further says that, in order to work satisfactorily, it is necessary to have in the chute what is called a trip valve, which closes the chute, stops the suction, and allows the cotton to descend by gravity from a point below the trip valve, the valve at the bottom dropping open when the suction is withdrawn. This trip valve as defendant has it on the machine, which is claimed to be an infringement, opening and shutting at regular intervals, is attached to, and

operated by, the gin machinery. As a matter of fact this trip valve is used by both the complainant and the defendant in the apparatus they now manufacture and sell.

Which of the respective contentions is true? And, if the defendant is correct, does the trip valve differentiate the apparatus sufficiently to defeat the claim of infringement, and will complainant's apparatus work satisfactorily without the trip valve? Tests made by both parties are described in the evidence, and discussed principally by Mr. S. D. Murray for the complainant, and Mr. James S. Shields for the defendant.

An extract from the testimony of Mr. S. D. Murray is as follows:

"Q. * * * A. The apparatus was constructed especially for the test, the purpose being to make it work, as called for or as claimed in the patent specifications, excepting that in the patent specifications it speaks of a depth of 15 inches of cotton over the canvas valve being required, whereas this apparatus was constructed of sufficient length to determine just what the facts would be as to the depth of cotton required in this experiment. The chute from the bottom of the cotton pipe down to the lower end measured 11 feet, as I remember it. The canvas valve was placed directly at the lower portion of the chute, the lower edge of the canvas valve being even with the lower edge of the chute, the upper edge of the canvas valve standing two feet above the lower edge. The boards forming the chutes are made smooth on the inside and varnished to cover up any unevenness or roughness of the boards, and the lower portion of the chute is a little wider from front to back so that the cotton can come down easier. The glasses shown in the front portion of the chute are put in even with the inside walls of the chute so as to leave them flush—when I say flush, I mean substantially so—so as to leave there no impending recess to check the downward movement of the cotton. We took all the precaution in building this machine that any one versed in the art would naturally take in building a machine designed for the cotton to force its way down by gravity in opposition to the external air pressure upon the canvas valve. The connection from the elevator to the fan is a sheet iron pipe passing through a hole in the wall of the ginnery and to a 35-inch fan on the inside of the ginnery. The 35-inch fan which we had there for causing the suction in a four-gin outfit which we had in operation in that house in the ginnery. There was no valve trip in the pipe or connected with the cotton supply by means of an iron pipe. The rollers are supported at the bottom of these chutes and means for actuating the feed rollers are supplied by a feeder, cotton gin feeder, set to one side, and which was driven by a belt from the line shaft on the inside of the ginnery. This cotton gin feeder was used merely as a convenient means of getting the regulative devices on it to use in regulating the speed or movement of the feed rollers in the bottom of the chute. The regulating device referred to is on the right-hand side of the feeder, and does not show in this picture. When a large amount of cotton was first carried and piled as shown on the right-hand side of the picture, piled about the intake end of the cotton pipe and when the fan was started in operation, the cotton was fed to this pipe. The cotton was drawn into the chute of the apparatus, and settled down in the chute upon the canvas valves, which were, of course, drawn in close by the suction. The cotton accumulated upon these canvas valves before the weight of the cotton opened the canvas valves and passed down by them onto the feed rollers. Then the feed rollers were started by throwing the feeder gear on the right-hand end of the feeder, shown in the picture, in action, and the feeder changed speed mechanism was fixed at a point of speed that was sufficient for feeding cotton gins at a maximum feed. This action was kept up for a period of 20 minutes or more time; that is, the apparatus continued to run, the suction drawing the cotton into the top of the chutes, and the feed rollers paying it out at the bottom of the chutes, and the picture shows just how the apparatus looked when in operation. After the quantity of cotton or pile of cotton that was around the intake end of the suction pipe was all fed in, then baskets were used to carry the cotton away from the lower portion of the chute where it had been paid

out, out of the chutes back to the supply pipe, and this was kept up for the period of time as stated, 20 minutes or more, and finally, after this period of time, we stopped feeding cotton to the suction pipe, but allowed the suction to continue and allowed the feed rollers to continue paying the cotton out of the lower portion of the chutes, and the cotton continued to flow downward and be paid out or drawn out by the feed rollers until it had reached a depth, a vertical depth above the canvas valves of three feet and four inches. Then the canvas valves drew up by the suction and stopped any more cotton from flowing past them. The canvas valves, however, in drawing up, drew up above a portion of the cotton in the lower part of the chute; that is, the canvas valves in drawing up left some of the cotton at the lower portion of the chute still to be discharged, so that, when the canvas valves drew up closed by the suction, the cotton stood above the canvas valves as stated, three feet and four inches. This was the end of our test.

"Q. Right there I wish to ask: After you ceased to feed the seed cotton at the source of supply, and the cotton dropped down in the chute to what distance? A. The cotton dropped down into the chute to a distance of three feet and four inches above the canvas valves.

"Q. Is that the time you apply valve 27, or some equivalent? A. The time to apply valve 27 is shortly before that time, so that the feeding can go on. That is so that the feeding can go on or the cotton go down to a point where the valve 27 would not be stopped in closing by the cotton; that is, the cotton must get down below the valve 27, and then as soon as that occurs valve 27 can be closed, cutting off the suction from the lower part of the chute and allowing the cotton to continue on passing out of the chute, and in the meantime the next bale would be coming in on top of valve 27, to be ready to be discharged downward in the chute as soon as that below valve 27 has been all ginned out, so that there would be no time lost between the ginning of one bale and another and the separation would be perfect unless the cotton resting upon the feed rollers would all go out, and there would be no appreciable slacking until it had all gone out, and there would be no need of any loss of time between one bale and another. The custom, however, is in ginning to lose sufficient time to allow the press boxes to be operated, or, rather, to be moved, to allow the press that is filled to be turned away and the new emptied press or press box brought into position to receive the next cotton.

"Q. In changing from one supply of cotton to another, say of different characters of cotton or different persons' cotton, is there always some little time elapses before one moves out and the other moves in? A. No; the wagons are always, * * * where the business is conducted with a view of no loss of time, the wagons are kept at the suction pipe so that there would be no need of loss of time from the wagons not being in position. The only loss of time, that is as I stated a minute or less time, that is generally consumed in arranging the press box or baling apparatus to receive the new lot.

"Q. Well, the press box has nothing to do with this? A. There is absolutely no necessity for any loss of time in the elevator part or in the elevator itself. One bale can follow another in quick succession without the perfect separation of one bale from another. That is a characteristic of the Murray elevator that is well known everywhere."

An extract from the testimony of Mr. James A. Shields concerning the test made by him is as follows:

"Q. Did you ever test it? A. I have.

"Q. When? A. I tested it several days ago.

"Q. Was anybody present when you tested it? A. There was.

"Q. Who were they? A. You were present, and Mr. John M. Hooks was present, and Mr. W. L. Wallis was present, and my assistants in showing the operation.

"Q. Did you use cotton in that test? A. I did.

"Q. What kind of cotton did you use? A. Seed cotton, ordinary seed cotton.

"Q. Was it dry or wet? A. It was dry. I had had it in the warehouse. I keep cotton there for experimental purposes the year round. This is cotton I bought last fall. I have had it there in the factory, in sacks, since that time, and it had become very dry.

"Q. Is it such cotton as is ordinarily used in the ginning of cotton? A. It is.

"Q. What happened when that chute became filled up to the top of the screen 8? A. The telescope refused to take any more cotton.

"Q. Did you continue operating the fan? A. I did.

"Q. How long? A. Thirty minutes.

"Q. During that 30 minutes did the flexible valve 25 turn loose the cotton, and let it drop into the feeder? A. It did not.

"Q. Why didn't it turn it loose? A. Because the atmospheric pressure against the flap valve was greater than the weight of the cotton pressing downward in the chute, and wouldn't allow the cotton to force its way down, and the current of air being continuous from the fan held the flexible valves intact, and it was impossible for it to get loose from it.

"Q. Do you make that statement based upon your theory as to the operation of it, or upon your actual experiments with it? A. My actual experiments.

"Q. S. D. Murray, testifying for the complainant in this case, testified that, when the cotton was filled in the chute, to a height less than the top, the weight of the cotton would be sufficient to open the flexible valve 25, and let the cotton drop down into the feeder. From your experience with this machine, is that true? A. It is not true. (Counsel for complainant objects to the foregoing as not a correct statement of the testimony of Mr. Murray.)

"Q. In the patent of Mr. Murray, he says: 'The falling cotton will accumulate upon the flexible valves 25 until it has acquired a vertical depth of say fifteen inches, at which depth the weight of the cotton begins to overcome the atmospheric pressure on the flexible valves, and, pushing these valves out of the way, the cotton will fall down on the rollers 15 and 16.' From your experience with the apparatus that you have described is this description read by me from the patent of S. D. Murray correct? A. It is not correct.

"Q. What depth of cotton in your experiment did you have in the chute? A. I had about 38 to 40 inches.

"Q. Above the flexible valves? A. Above the flexible valves. I want to say there now, I, of course, have not measured that distance, but I had all of the space above the flexible valves that the elevator would bring cotton into, and it was about 38 to 40 inches above the flexible valves.

"Q. Did that depth of cotton overcome the air pressure on the flexible valves, and push those valves out of the way of the cotton, and let it fall down on the feeder? A. It did not. I will say that I took my hand and tried to pull the flexible valves down to see how much it lacked of doing what Mr. Murray claimed, and I found quite a resistance offered by trying this with my hand. I have the cotton gin in operation, and can demonstrate this at any time to any one.

"Q. Have you ever seen any of the Murray Company's apparatus put on the market without the trip valve, or the cut-off valve? A. I never have.

"Q. From your experience as a mechanic and as an expert, and from your experience with this particular apparatus, state whether or not the S. D. Murray patent No. 472,607, as patented, without the cut-off value, would operate? A. It would not. It might drop a little cotton. It would drop the cotton down in there, but with that flexible valve he might fill that, might make that chute long enough to put enough cotton on there that would weigh enough to overcome the atmospheric pressure on the flexible valve, to cause the valve to open and discharge the cotton, provided he built the thing high enough, but when that cotton had reached a point in depth above that flexible valve, about 38 or 40 inches above, it would then stop delivering, and the balance of the cotton would remain in the elevator.

"Q. And when would it be discharged? A. Never, unless assisted by some other means.

"Q. If the chute were made long enough to first begin to take in, and continue to take in cotton until the weight of the cotton pressed it open, what would the gin be doing while that amount was being accumulated in the chute? A. It would be standing idle, doing nothing.

"Q. Then, even if the chute were made long enough for the weight of the cotton to press open the valve 25, would that be a practical machine? A. It would not, for this reason: Cotton is brought to the ginhouse in wagons, usu-

ally about 1,500 pounds of seed cotton, and practical outfits are supposed to commence on a farmer's bale of cotton, and take it up into the elevator, and through the elevator and transmit it to the feeders, and from the feeders to the gin, and to the press, and give that farmer back all of the cotton that he had brought in that wagon. Farmers in bringing cotton to the ginhouse—one farmer will bring in a bale of cotton that has been excellently picked, carefully picked, by careful hands, and he has a very fine grade of cotton. Possibly his neighbor will bring a bale of cotton that is just picked out most any way, leaves and trash and off the ground, and so on, and there might be a man come in with the finest grade of seed cotton that is brought to the gin, and the next man the poorest. We will use that as an illustration to show the inability of this machine operating without the trip valve, the cut-off valve. We will get the man with the good cotton. He will commence to feed in, and the chute is long enough that, by gravitation, the seed cotton will press down this flexible valve 25, and cause it to open and discharge into the valve 25 into the feeder as long as the cotton was fed in sufficient quantity from the wagon to keep the altitude of the cotton in that chute to the point where the weight of the cotton would overbalance the atmospheric pressure on valve 25, and, if he continued to feed enough entirely through the bale, that machine would operate as Mr. Murray claims until the wind-up of that bale of cotton, taking the last lock of cotton out of the wagon into there, and when the cotton would reach a point of only 38 or 40 inches, as I have shown, about 38 or 40 inches, as shown by the operation at our factory, the atmospheric pressure on the valves would then hold the balance of the cotton in that chute, and the man who had brought a fine bale would leave that much of it in there for the other fellow to get in with his poor bale of cotton, to be spilled in on it, mixed, unless they opened up the machine by hand, or some other process, and took it out by hand or by some other means than is provided for in the machine, and as described in the patent for taking it out. * * *

"Q. How frequently does that trip valve open and shut in use? A. We vary the opening and shutting of that trip valve to suit the conditions.

"Q. About what is the average time it is set to open and shut? A. About once in a minute to two minutes.

"Q. Can you set it so it will open oftener than that? A. We can.

"Q. Then from the time you start the elevator cotton will reach the feeder as quickly as that opens? A. Yes, sir.

"Q. If it is set for 15 or 20 seconds, you can go and begin ginning cotton in 15 or 20 seconds? A. Yes, sir; in 15 or 20 seconds.

"Q. If you didn't have that cut-off valve, you would have to wait until the chute filled up enough? A. Entirely up, so as to overcome the atmospheric pressure on the flexible valve 25, so as the weight of the cotton in the chute would be sufficient to press itself down."

Mr. James A. Shields, being recalled the next day, was questioned, and answered as follows:

"Q. Mr. Shields, on yesterday you testified that in the test you made of the Murray apparatus now at the Van Winkle Gin & Machine Works the cotton above the flexible valve 25 was at the time of the test 38 to 40 inches deep. Have you made any measurements since then as to the exact depth? A. I have, and I find that I was in error as to the 38 to 40 inches. It is from about 28 to 30 inches in depth above the flexible valve. * * *

"Q. Does the apparatus built by the Van Winkle Company include a cut-off? A. It does. You mean a trip valve?

"Q. A trip valve? A. It does.

"Q. What purpose does the trip valve serve? A. It serves the purpose of cutting off the suction from the elevator; that is, cotton that has reached the chutes in this elevator above the flexible valve 15, when this suction is cut off, the flexible valve will release itself, and allow the cotton to pass down into the feeder below this chute."

The testimony of Mr. Murray is supported substantially by two gentlemen who were present at the test, Mr. H. G. Patterson and

Mr. George T. Loutitt. The testimony of Mr. Shields is corroborated by that of Mr. W. L. Wallace, Mr. W. H. Henderson, Mr. J. T. Terry, Mr. F. M. Scott, and Mr. John M. Hooks, who were present at the test.

After going carefully through the evidence in this case, and considering thoroughly the respective arguments, it seems to me that the complainant has failed to maintain its proposition that the Murray apparatus will work as claimed in the particular respect to which the above testimony has been directed; that is, it appears to me that it will not deliver the cotton through the chute in the manner claimed, opening by its own weight and by gravity the valves at the lower part of the chute, and passing the cotton through. It appears from the evidence that the use of the trip valve in the chute is essential to a practical operation of the feeding apparatus. If this trip valve in the chute is necessary to a practical operation of the apparatus, it would seem to be such a distinguishing and differentiating feature as to relieve the defendant company from the charge of infringement. Confessedly the Murray patent is a combination of old elements; the claim being that the combination is such as to produce a new and useful result. That the defendant may take the old elements and combine them with a new device the trip valve, so as to make it a more satisfactory and effective apparatus, and to accomplish better results, would seem to be unquestioned. The claim of the complainant company is that its apparatus is cotton regulated, that it works automatically, the cotton delivering itself by its own weight as stated. This claim of automatic cotton regulation in connection with the effect of the screened space at the upper end of the chute I understand to be the basis and the main element of patentability claimed by the Murray company for its apparatus. The defendant company does not claim this at all, as I understand it, but claims and insists that the trip valve is absolutely essential and necessary to the regular and satisfactory delivery of the cotton through the chute to the gin.

One of the witnesses for the complainant, Mr. J. H. McDonald, president of the complainant company, in his testimony states with reference to the operation of the Van Winkle gin:

"Q. Have you ever examined the elevator manufactured by the Van Winkle Company to see whether it is cotton regulated or not? A. I saw the one working in the Farmers' Union Gin Company plant at Lancaster.

"Q. Is it regulated by cotton? A. I think not."

And the whole testimony is to this effect.

In the case of Dudley E. Jones Company v. Munger Cotton Machine Company, 49 Fed. 61, 1 C. C. A. 158, decided in the Circuit Court of Appeals in this Circuit, in the opinion by Judge Locke, it is said:

"But it appears to us plain that the functions of that element, the feeding of the cotton to the gin, after being cleaned, is not performed in the same manner in the defendant's machine as in complainant's. The one operates by maintaining the current; the other by interrupting it. The one requires and maintains a comparative vacuum. The other requires for its operation the destruction of the vacuum. The one feeds regularly and continuously, the other by entirely different means feeds intermittently. In short, in construction, operation, and result there is a decided difference between the 'means for

delivering the cotton from the conveyer to the gin,' as claimed in complainant's second claim, and the apparatus used by the defendant in discharging the cotton from 'the receiver.' In combinations the doctrine of equivalents is construed most strongly against him who alleges an infringement, and each party is held to his own element or device, or a positive and exact equivalent which performs the same functions, in the same manner; the burden being upon complainant to show this. In this case we cannot consider that the flexible expanding valve of the defendant opened and closed by the automatic arrangement of the second valve with the chain belt and catch links is an equivalent of the rotary valve of the complainant, and we must find the charge of infringement has not been sustained, and the bill must be dismissed, with costs."

This was a test between the R. S. Munger patent No. 308,790, granted December 2, 1884, and the B. A. Sailor patent, No. 362,041, granted April 26, 1887, in which, reversing the judgment of the Circuit Court, the Circuit Court of Appeals held that the Sailor patent was not an infringement on the Munger patent. Certainly at the time application was made for the Murray patent there was nothing new in the use of a chute, nor was there anything new in the use of the flexible valve. It was the automatic regulation in delivering the cotton that was claimed to have been brought about by Murray's new combination of old elements.

In the case of Dudley E. Jones Company v. Munger Machine Company, supra, Judge Locke further said:

"The first question presenting itself for consideration is whether this patent is for a combination of well-known elements which had been in common use, and therefore not patentable, unless shown to be a useful and novel combination, or whether there is entering into it any novel and newly-invented device. Taking each element separately, and examining the prior patents, we find that the pneumatic tubes have been known and used for years in various forms and for various purposes, and have been found as an important element. In patent of Johnson, No. 56,948, and Von Schmidt, No. 185,600, the pneumatic tube was used for dredging purposes; in that of Beach, No. 96,187, for conveying letters, parcels, and other freight; in that of Penman, 124,851, for conveying wool; in that of Pearce, 168,282, for conveying cotton; in those of Taggart, 213,709, and Reynard and De la Haye, 219,019, and several others for conveying grain. The telescopic drop-pipe claimed in the claim No. 4 can only be considered as an equivalent for an extension of said pneumatic conveyer in another form, and would not be patentable for novelty; the flexible joint being but an equivalent for any other means by which the pipe or conveyer could be turned in any direction, and is found in the flexible hose in the invention of Taggart, or the ball and socket joint of the telescopic pipe of the Von Schmidt patent. Similar valves to those found in the pneumatic tube are found in the pneumatic tubes in the patent of L. Smith, 305,976. The exhaust chamber and wire screens of the claimant's patent are found in the air-tight box and wire gauze of the Beach patent. The means for conveying the cotton from the exhaust chamber to the gin, which is found in the specifications and in actual use in complainant's machine—i. e., the shaft upon which are affixed certain valves working in an air-tight box—is found in the receiving boxes of said Beach's patent. The exhaust fan for the purpose of producing the air current is found in the Penman, the Craven, the Pearce, the Taggart, and the Williams patents. The dust chimney is found in the conductor of the Craven machine. It appears, therefore, that every element found in the complainant's machine is found in a prior patent, and was well known to the art. His patent, therefore, must be treated as for a combination of well-known elements and devices."

The complainant, as has been stated, relies upon the decision by the Circuit Court of Appeals for the Third Circuit, in Murray Company

v. Continental Gin Company, 149 Fed. 989, 79 C. C. A. 499. I do not think that case should be considered as controlling authority in this case. It would be highly persuasive, of course, and would be followed if it involved the precise question for determination here. In that case two issues were made. The first was as to whether or not the Murray Company had shown title to its patent No. 472,607, and the next was whether the Murray patent was anticipated by the Munger patent No. 308,790, dated December 2, 1884, the Sailor patent, No. 362,041, dated April 26, 1887; and the Schulze patent, No. 478,473, dated July 5, 1892, or, as expressed by the court in the opinion, "whether they narrowed the art to such an extent that the complainant's patent No. 472,607 must be narrowly and strictly construed in order to maintain its validity, and that thus construed the defendant's apparatus did not infringe claims 1, 2, and 12 thereof."

The court further says:

"The Schulze patent undoubtedly represents the highest development of the art prior to the Murray patent under consideration, and it was upon that patent that counsel for the defendant mainly relied to show anticipation. It is quite true that the Schulze and Murray machines are in some respect alike, and from a mere cursory examination they might seem to be so much alike that very little, if anything, of novelty or invention could be discovered in the Murray patent; but, when carefully examined, it will appear that, while the elements embodied in the Murray patent are old, they are nevertheless combined and organized in such a way as to accomplish a new and decidedly useful result. What Murray more especially claims by his patent is an automatic valve produced by the seed cotton itself, so that, when the cotton becomes choked in the chute, and fills it to the top of the screen walls, the air suction is entirely cut off, and the delivery of cotton to that particular chute is suspended until the stoppage of the chute is overcome, or, adopting the language of the patentee: 'When the cotton accumulates in the feeder too fast and reaches to the top of the screen-walls of the space 5, it is evident that the suction from pipe or tube 1 will be cut off and the cotton will cease to be drawn in; but, as soon as one or more of the feeders have fed out sufficient of the cotton to allow some part of the screen-walls to be free or open, the suction again becomes effective in the manner already explained.'"

It is true the court says that the evidence there showed that the Murray patent would produce the result described in the specification, but the issue there was not at all like the issue here, nor is the evidence in the cases alike, so far as can be gathered from the opinion. Here infringement is claimed by the Murray Company against the Van Winkle Company, but the evidence fails to show that in practical operation the Murray patent will work successfully or satisfactorily without the use of a trip valve to aid in the discharge of the cotton through the chute; and clearly, infringement being claimed against the Van Winkle Company, the burden would be on the complainant to maintain its case, and to show, as against the defence interposed, that its apparatus is one which is of practical use, and commercial value, and that it will do what is claimed for it, without the important addition made to the apparatus by the Van Winkle Company.

It seems from the evidence submitted in this case that, when testimony was first taken, the case was regarded as very much like the Continental Gin Company Case, supra, but that during the taking of testimony the parties respectively made the test alluded to, as

to the practical operation of the machine in actual use, and the result is that the case turns almost entirely upon the effect of such test and the evidence with reference thereto. The case of Dudley E. Jones Company v. Munger Machine Company, supra, decided by the Circuit Court of Appeals in this Circuit, pertinent as it is, in my opinion, to the issues made here, is at least as strong authority in this case as the Continental Gin Company Case. Judge Meek in the Texas case only granted a preliminary injunction. This certainly cannot be regarded as authority. If Judge Meek on the case made here by pleadings and proof had determined the matter, I should regard it as very high, and probably controlling authority. In view of what has been stated above, I do not think that the feed rollers as a part of complainant's combination should have any effect in the determination of the case. If the complainant has failed to sustain by the weight of the evidence its contention that the cotton would pass satisfactorily through the chute by gravity, and of its own weight, thereby overcoming the atmospheric pressure against the valves, aided by the screen at the top of the chute to relieve choking, then it is immaterial how effective a part of the combination the feed rollers may be. I do not understand that the claim is made that there is anything new about the feed rollers, except in combination with the other elements of the elevating apparatus.

The question of whether or not the Murray patent was anticipated by the Schulze patent has not been discussed, nor has the Munger patent or the Sailor patent as related to this case, because the case is controlled, in my opinion, by the actual and practical tests which have been referred to and discussed above.

I do not believe for the reason above stated that the complainant has maintained its claim of infringement against the defendant company, and it must be held, therefore, that defendant is entitled to a decree dismissing the bill, with costs.

WELSBACH LIGHT CO. v. COHN.

(Circuit Court, S. D. New York. June 21, 1910.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING INCANDESCENT MANTLES.

The Von Bultzingslowen patent, No. 638,004, for a machine for making incandescent mantles, was not anticipated and discloses invention, the machine being very successful and of substantial value; also, *held* valid as against the claim that the patentee was not the inventor, and infringed.

[Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Machine Co., 59 C. C. A. 620.]

2. PATENTS (§ 51*)—ANTICIPATION—UNUSED MACHINE.

One who invents and constructs a machine, but permits it to slumber, and neither applies for a patent nor makes any public use of it, cannot resort to such invention as an anticipation of a subsequent patent obtained by another.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66–74; Dec. Dig. § 51.*]

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

3. PATENTS (§ 129*)—ASSIGNMENT—EFFECT AS ESTOPPEL.
One who becomes a stockholder in a corporation organized for the purpose of taking title to a patent, and selling the same, and who participates in such sale and receives his share of the profits, is estopped to attack the validity of the patent as against an innocent purchaser for value.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. § 129.*]

4. PATENTS (§ 64*)—ANTICIPATION—APPLICATIONS PENDING AT SAME TIME.
An inventor having two applications for patents pending at the same time, both of which disclose his invention, may base his broadest claims on the one which he considers shows the best form of mechanism, although it may be the later application, and the patent issued thereon will not be anticipated by a later patent issued on his earlier application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

5. PATENTS (§ 196*)—ASSIGNMENTS—FORMAL REQUISITES.
Patents are creatures of the federal statute, and an assignment is sufficient if it conforms to the requirements of Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387), regardless of the state statutes.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 275; Dec. Dig. § 196.*]

6. PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—LACHES.
The fact that the owner of a patent permitted a suit for its infringement to be dismissed without a trial on the merits is not such laches as to bar a second suit against the same defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. § 289.*

Laches as a defense in suits for infringement, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.]

In Equity. Suit by the Welsbach Light Company against Samuel Cohn. Decree for complainant.

C. D. Kerr, Livingston Gifford, and C. P. Byrnes, for complainant.
Jos. L. Levy, for defendant.

MARTIN, District Judge. This bill of complaint alleges, in substance, that the complainant is the owner of letters patent No. 638,004, granted November 28, 1899, to the Incandescent Mantle Machine Company as assignee of Bruno von Bultzingslowen, the patentee; that said company assigned said patent to the complainant October 18, 1900, for $22,500, and that the defendant is an infringer of said patent, and prays for an injunction and accounting. The complainant insists that this is a pioneer patent, as applied to this particular work, and that the defendant is an infringer of claims 1, 5, 8, and 10 thereof.

The defendant by his answer, evidence, and argument contends:

First. That Von Bultzingslowen was not the inventor of the patent in suit. That defendant Cohn or Dr. Nienstadt was the real inventor. That Cohn prior to the time of Von Bultzingslowen's invention had constructed a machine which showed substantially the invention of the patent in suit, and that the complainant's patent is void for want of novelty.

Second. That, if he was the inventor, his invention is not practicable.

Third. That Von Bultzingslowen obtained two patents, the one in suit and No. 659,617, and that claims 1, 5, 8, and 10 of the patent in suit disclose no patentable advance over those of said No. 659,617, which was issued upon the first application of the patentee.

Fourth. That the complainant is precluded by laches from maintaining this suit in equity.

Fifth. That the assignment to the complainant is illegal and void.

Sixth. That the defendant's device does not infringe.

These are the issues:

The patent in suit is for a machine to make incandescent mantles, used in lighting, which mantles are constructed of a knitted cotton fabric saturated with a solution of mineral salts and tubular in form. The cotton fabric is burned away, leaving a skeleton form of earthy substances, which gives out light under a high heat imparted by the flame. The earthy skeleton takes the exact form and appearance of the fabric, circular and seamless, and the top is brought together by shirring or folding and an asbestos cord inserted, from which the mantle is suspended over the flame. The process of shirring the top of the mantle was formerly done by hand, but is now done by a machine, which it is claimed is covered by the patent in suit.

The practical working of the complainant's machine is very successful and of substantial value in this particular work.

The shirring or folding of different kinds of cloth is not an invention, and is not claimed to be by the complainant. Such work has long been done by the hand and needle of the seamstress, but these mantles are seamless and cylindrical in shape. The shirring of the top and the insertion of the loop, when done by hand, required skill and experience to get the folds even, and was a slow and expensive process. The gathering together of one end of a bag and running a rope or string through the fold is not new. That can be, and has been, done by machines, but the manner of doing that work is wholly unlike the work required in the shirring and stringing of incandescent mantles.

The defendant claims that other machines manufactured before this patent was obtained were adapted to the shirring and stringing of incandescent mantles.

Hundreds of pages of testimony are devoted to the claim of the defendant that the White patent of 1899 developed in art practically every principle of the Von Bultzingslowen patent. The machine of the White patent had a slotted mantle supporting barrel with folder adapted to move outward through the barrel slots and formed radial folds, and a curved needle was adopted to engage the folds. While the inventor of the White machine sought to perform the same work as that of the complainant's machine, it was in an entirely different way, and far less satisfactory results were obtained. A careful examination of the design of the two patents, as well as the working of the machines constructed thereunder, shows conclusively that they are constructed on different ideas, and that the White machine was a failure, while the Von Bultzingslowen was a success.

It is claimed by the defendant that the Russell patent of 1903 showed the development of the same art that is claimed for the patent in suit. That is a machine for stringing bags. It folds bags and strings them together by the inserting of a needle, but it does not contain the essential elements of the complainant's patent for this particular work. That inventor made no claim for the shirring of a circular fabric like an incandescent mantle.

The Green patent is referred to in defendant's evidence, and it was claimed in argument to be a development of the same art as the patent in suit, but that is a plaiting attachment for sewing machines. The only essential process in the Green patent that is involved in the complainant's patent is the plaiting and needle insertion. Quite a number of other patents have been brought into the record which to my mind it is useless to discuss, as I am satisfied that they do not affect the particular claims of the patent in suit, for the infringement of which the complainant demands relief. I am satisfied from the evidence that the inventor of the patent in suit developed a new and useful process of making a cylindrical seamless incandescent mantle. The defendant Cohn testified, in substance, that he invented a machine that embraces the essential particulars set forth in the complainant's patent, and that he did that some years before the complainant's patent was applied for. He produced a machine as an exhibit and claimed that said machine was his invention, but that he laid it away in his house. He does not claim that he did anything more than to make mantles in a quiet way, which mantles he sold to the trade. There are circumstances which lead me to question this statement, but whether true or not he never made any public use of that machine. Neither was the inventor of the patent in suit informed of the defendant's invention or of the making of a machine by the defendant Cohn. If defendant Cohn did invent and construct a machine, as his testimony tends to show, he permitted his inventive genius as applied to that machine, if applied at all, to slumber. He cannot now resort to that silent invention of his unused machine as evidence affecting the state of the art when the patent in suit was obtained.

The evidence fairly shows that Von Bultzingslowen submitted his work to the defendant and some other persons, and their services were obtained in making improvements, especially in the application of the needle and shuttlecock arrangement, processes which are incidental to the real patent, but the defendant for that service accepted pay, and then made no claim that he had previously developed the real art embodied in Von Bultzingslowen's invention. Besides, the defendant, with others, became a stockholder of the Incandescent Mantle Machine Company, which company he then understood and knew was to be the owner of the Von Bultzingslowen patents. He participated in the sale of the patents from the Incandescent Mantle Machine Company to the complainant, and in the profits of the sale, and my conclusion is that whatever he did in developing a successfully working machine under the patent in suit has no bearing whatever upon the plaintiff's right of relief prayed for, both as to the specific recovery and restraint.

Quite a portion of this bulky record is devoted to the claim of Dr. Nienstadt to the effect that Von Bultzingslowen got his ideas of the

patent in suit from him. The testimony of Dr. Nienstadt, introduced by the defendant, is seriously contradicted, but I do not deem it advisable to enter into a protracted discussion as to the nature and effect of his testimony, in view of the fact that he became a stockholder of the Incandescent Mantle Machine Company, and practically admits that he received his stock and some payments of money to quiet his claim as to being the real inventor of the Von Bultzingslowen patent. The Incandescent Mantle Machine Company was organized for the sole purpose of taking and holding title of the Von Bultzingslowen patents until they could make sale of the same. Dr. Nienstadt, as a stockholder of that company, became interested in these patents, and, whether he took that stock to become a real owner in good and valid patents or as hush money, the defendant Cohn cannot now, through Dr. Nienstadt, be permitted to invalidate those patents in the hands of an innocent purchaser from said company.

Witnesses have testified in contradiction of each other as to what Von Bultzingslowen, Dr. Nienstadt, defendant Cohn, and others did in working on the patent, what amounts of money were paid, who paid it and when, yet all agree that the final arrangement made was to have these patents issued to the Incandescent Mantle Machine Company, in which all these persons were to be stockholders. They were all interested in the sale of the patents to the complainant, and the Incandescent Mantle Machine Company received a substantial sum from the sale to the complainant. These different persons named in the record received benefit from the sale. While I find from the evidence that Von Bultzingslowen was the real inventor, yet, in view of these facts, I do not deem it material to enter into a discussion of this conflicting testimony and state my findings as to the balance of proof that leads me to this conclusion. I hold, under the facts developed by the evidence, that defendant Cohn is estopped from attacking the patent involved in the case at bar.

Double Patents.

The defendant devoted many pages of his brief and much time in argument to the claim that Von Bultzingslowen obtained two patents which the complainant claims to own, and that this suit is brought upon the wrong patent. The patentee, Von Bultzingslowen, made two applications for patents, and they were co-pending, and both disclosed the essential elements of the patent. The broad invention applies to both patents. He chose, as his first and basic patent, the application which was filed last, so the first patent obtained was upon the second application, and it is the patent upon which this suit is brought. May not a patentee, having two or more applications pending at the same time, base his broadest claims upon the particular application which he considers shows the best form of mechanism? If he does that in the first patent taken out, although it may rest upon a later application, and the first application is followed by later patents, can it be said that the first is void? I think not. This question seems to be covered by the following cases: Victor Talking Machine Co. et al. v. American Graphophone Co., 145 Fed. 351, 76 C. C. A. 180; Ide et al. v. Trorlicht, Duncker & Renard Carpet Co. et al., 115 Fed. 137, 53 C. C. A. 341; Anderson v. Collins, 122 Fed. 451, 58 C. C. A. 669.

Assignment.

The patent in suit was issued, as before stated, to the Incandescent Mantle Machine Company of New York, and by that company assigned to the complainant, the Welsbach Light Company. The assignment was duly executed by the Incandescent Mantle Machine Company through Alwin von Auw as its president. The seal of the company was attached thereto, and the same was duly acknowledged before a notary public. The defendant contends that the acknowledgment is not in the form prescribed for corporate acknowledgments under the laws of New York, and therefore is invalid.

The statutes of the United States, § 4898, provide that:

"Every patent, or any interest therein, shall be assignable in law by an instrument in writing * * * and shall be acknowledged before any notary public. * * * The certificate of such acknowledgment under the hand and official seal of such notary or other officer shall be prima facie evidence of the execution of such assignment." (U. S. Comp. St. 1901, p. 3387.)

This is the statute upon which the question of assignment must rest. Patents are creatures of the federal statute, and it is within the province of Congress to provide the manner of their transfer.

Giving this statute the construction that was given it by Justice Woods in Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851, there seems to be no question as to the validity of this transfer. This defendant, as a stockholder in the corporation, received valuable consideration for this patent, and should not in equity be permitted to challenge the title. Whether the defendant is estopped or not, I think the title in the complainant sufficiently appears.

Laches.

The defendant claims that the complainant is guilty of laches, in that two suits were brought under two patents, which suits were not prosecuted and were finally dismissed for want of prosecution. Neither of said suits was tried on the merits. The defendant knew from the first all about the complainant's patent, what claims the complainant was making under it, and of the complainant's claim of defendant's infringement thereof. The fact that the complainant did not press its former suits to judgment or make greater protest against the defendant's use of his machine under his patent may be entitled to consideration upon an accounting for damages, but the defendant's claim as to laches cannot stand as a bar to this action.

Infringement.

Has the defendant infringed? The machine of the complainant shirs the mantle head of the fabric for the insertion of the needle. It is so shirred as to lie across the path of the needle. Or, in other words, it is a mantle shirring machine having a notched or toothed central folder with intermeshing side folders, which, acting together, corrugate a fabric by their intermeshing engagements with side guards which hold the mantle in place while being perforated by the needle.

The defendant's machine grips the shirred head of the mantle fabric outside and inside when being pierced by the needle, and does the same work, though the thread of the defendant's machine is inserted in the

forward stroke, while that of the patent in suit is by the backward stroke. The jaws of the defendant's machine that fold the mantle head work simultaneously while those of the complainant work singly, but the principles of each are the same.

It is useless to discuss other differences in the two machines, for it cannot be seriously questioned that in this particular line of work the defendant's machine, accomplishing the same purpose, embodies substantially the principles of claims 1, 5, 8, and 10 of the patent in suit.

The complainant may have decree as prayed for in his bill.

ROWLAND v. BIESECKER.

(Circuit Court, S. D. New York. June 21, 1910.)

1. COURTS (§ 376*)—COMPETENCY IN FEDERAL COURTS—CONFORMITY STATUTE.
Rev. St. § 858, as amended by Act June 29, 1906, c. 3608, 34 Stat. 618 (U. S. Comp. St. Supp. 1909, p. 242), which provides that "the competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held," applies as well to suits in equity as to actions at law.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 376.*]

2. PATENTS (§ 209*)—LICENSES—CONSIDERATION.
A license under a patent in which the licensee promises to pay a royalty, to use diligence to push the use and sale of the patented article, and not to sell competing machines not legally patented nor to competitors in business of the patentee, is not without sufficient consideration.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 300–303; Dec. Dig. § 209.*]

3. EVIDENCE (§ 445*)—VARIATION OF WRITING BY PAROL—SCOPE OF RULE.
The rule that a written contract may not be varied collaterally applies only to the negotiations which finally take form in the written contract itself, and does not affect a subsequent transaction between the parties although oral.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2065; Dec. Dig. § 445.*]

4. FRAUDS, STATUTE OF (§ 141*)—OPERATION—CONTRACT AS DEFENSE.
Conceding that a contract relating to a patent license is subject to the statute of frauds, it is only the continuing obligations which are affected, and not the effect of the license while unrevoked as a defense against a charge of infringement.
[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 343; Dec. Dig. § 141.*]

5. PATENTS (§ 211*)—LICENSES—CONSTRUCTION AND OPERATION.
A license under a patent for a term of 5 years "with a privilege of 10 years" gives the licensee the right to continue the license in force for the extended term, and if any notice of his election to do so is necessary, beyond his continuing to make the patented machines, it may be given orally.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304–311; Dec. Dig. § 211.*]

6. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—EVIDENCE CONSIDERED.
Evidence considered in a suit for infringement of a patent brought by an assignee after the death of the patentee against a former licensee, and

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

held to establish the claim of defendant that the license had been extended in accordance with its terms.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

In Equity. Suit by James Rowland against John S. Biesecker. Decree for defendant.

This is an ordinary bill in equity upon a patent for a butter cutter, assigned by the patentee, Reuben S. Stone, to the complainant on November 13, 1906. The defendant, who is a dealer in dairy machines, acknowledges the infringement, and pleads in justification a written license from Stone dated July 31, 1899, for a period of five years "with a privilege of ten years." The grant of the license is in the following words: "Said party of the first part (Stone) agrees to give party of the second part (the defendant) the exclusive trade and control in the United States of the aforementioned Stone Butter Cutter." Stone was to furnish all machines that the defendant wanted at $70 each, and if the defendant could get them made for less than that Stone would take $25 royalty on each. The first five years of this agreement expired on July 31, 1904, and most of the testimony concerns the question whether Stone, who is now dead, had ever extended the time to July 31, 1909, which was 10 years from the date of the agreement. The suit was commenced by service of a subpœna in February, 1909, and the defendant has sold no patented machines after July 31, 1909, nor does he claim any right to do so after that date. The patent was granted on May 2, 1899. The complainant asserts that no testimony of the defendant is competent to any transactions between him and Stone, though he concedes that such a license would be binding upon him regardless of his own notice. Further, he insists that the testimony in any case is void as showing an oral contract to vary a written license, and that the agreement was also bad under the statute of frauds. Finally, he disputes the existence of the extension in fact, and asserts that it was in any event without consideration. The testimony will be considered below in the opinion.

McDonald & McDonald, for complainant.
Geo. C. De Lacy, for defendant.

HAND, District Judge (after stating the facts as above). I agree that since the change in section 858 of the Revised Statutes no testimony of conversations or other transactions between Stone and the defendant is competent evidence, and I shall disregard it altogether in the conclusions I shall make. Section 829 of the New York Code makes all such testimony incompetent and section 858 applies as well to suits in equity as to actions at law.

So far as concerns the claim that the license was without consideration, I need not consider whether a license without consideration is good until revoked, because there was good consideration in any event in the defendant's own promises. In the license he promises "to use the diligence, push, and perseverance he uses in his business in general to advance the sale of the aforementioned butter cutter"; also "not to handle or sell any butter cutter machine competing with the above machine that is not legally patented," and in addition "not to sell any of the above machines to dealers competing in the butter trade" with Stone. Of course an unpatented butter cutter was not necessarily a legal infringement of the patent in suit, and the defendant's undertaking was therefore by no means the same thing as to promise not to do that which he was already bound not to do. Moreover, the agreement

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

not to sell to competing dealers was alone consideration enough. Of course no subsequent transaction between Stone and the defendant, though oral, could be obnoxious to the rule that a written contract may not be varied collaterally, because that rule only applies to the negotiations which finally take form in the written contract itself.

The point that the extension was not a real extension at all, but a new agreement for five years, and so within the statute of frauds, depends, even if sound in law, upon the defendant's story that he had found the price of the machines so low that at it they could not be made strong enough. He says that Stone agreed with him that $70 was not enough to make the machines solidly and that he should make them himself and allow Stone no royalty, but pay him a fair amount for any information brought by Stone which led to the sale of a machine. Even assuming that such a contract was within the statute of frauds, the complainant has objected to the only evidence which establishes the variation in its terms upon the ground that it is incompetent. With that testimony out of the case there is no evidence of anything but a mere extension of the license for the remainder of the period, to which the complainant himself concedes no writing was necessary. By excluding that testimony he necessarily excluded all consideration of the change upon which he relies to say that it was a new contract. Of course, that may leave the defendant liable to Stone's estate or to the defendant for certain royalties reserved under the license, but that is quite another matter and the subject of a different proceeding, and it cannot be made the basis of this suit which presupposes that the defendant has illegally sold the machines in question.

But there is another and more substantial reason why this defense is not good. Even assuming that a contract relating to a patent license is subject to the statute of frauds (Buhl v. Stephens [C. C.] 84 Fed. 922), it is only the continuing obligations which are affected. A license is, however, only the waiver of the illegality of the infringement, and it is not an obligation at all. It is not necessary here to determine whether the complainant here could have revoked the license, for he did not do so prior to suit brought. All the defendant's acts up to that time were legal under the license, and the bill when filed was without justification. And although in equity the decree speaks as of the time when entered, now the defendant has discontinued infringement. I know that such discontinuance is not a good excuse when a valid ground of equity existed at the time the bill was filed, but here the bill had no basis in fact for an injunction, because the complainant had not asked the defendant to stop or revoke the license. He sprang upon him from the dark at a time when all his acts were privileged and licensed. If he would take advantage of his subsequent reliance upon the license, which was revoked by bringing this suit, he must file a new bill. No injustice is done by this, as the question is now solely of royalties, and those can be collected at law. In what I have said I have only assumed without deciding that the license for the remaining five years was void. It may well be that the only void part of the contract was Stone's agreement to forbear his royalties.

Hitherto I have spoken of the written agreement of July 31, 1909, as a license because the defendant so regards it, and the complainant does

not in his brief seem to question that it was not an assignment. However, it is quite clear that it was not an assignment, because the patentee clearly had the right to make and use as many of the machines as he chose and the defendant had no right to make them, unless he could do so below a certain price, and, so far as appears, he had no right to use them at all. His rights of "exclusive trade and control" were not the full rights necessary to an assignment. Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923.

The issues, therefore, are narrowed down to this: Whether, disregarding the testimony of Biesecker to any transaction between himself and Stone, the defendant has by the preponderance of evidence established that he had a license to make these machines between July 31, 1904, and July 31, 1909, for, if he had, both sides concede that the complainant was bound by it. To determine this the meaning must first be ascertained of the words "with a privilege of ten years." It is clear that the privilege intended was that of the defendant; he was the licensee, and, though he did make certain engagements in regard to the conduct of the trade while the patent endured, still it would be a very strained construction of the whole contract to say that Stone had the privilege to hold him to those engagements for the added five years. However, it is not even necessary to decide that, because, even if both had the privilege, either could exercise it ex parte. Nor were there any formalities prescribed as to the mode of its exercise. Had the defendant orally told Stone that he meant to go on, that was enough, whether Stone assented or not. Indeed, it is not clear that more was necessary than that the defendant, without notice, should go on making the machines, or in any other way indicating his intention to use the remaining period of the license.

But it is not necessary to decide this, because there are two witnesses clearly competent who testify to interviews with Stone, which if true clearly show that the license was extended. One of these, Benson, swears that in May or June, 1904, Stone was in the office and the defendant said to his brother, Edgar, "This settles the sale of Dr. Stone's butter cutter for the next five years;" to which Stone answered, "That is right." It is true that the brother was not called, and that was probably because he did not remember the conversation, and it is also true that Benson then was, and now is, the defendant's bookkeeper. Nevertheless, I cannot and should not for those reasons simply disregard his testimony. The other witness, Charles N. Biesecker, another brother of the defendant, testifies that late in 1904 or early in 1905 he complained about the machines to Stone, who said that he would not be bothered with them any more, that he would turn them all over to the witness and that the license had been renewed. Further, the defendant says that after July 31, 1904, Stone saw one of the newly constructed machines in the store and handled it. All these witnesses say that Stone was constantly in the defendant's office, and the obvious purpose of his visits was in regard to this butter cutter. It is of course possible that he did not know that the defendant kept on making them after July 31, 1904, but it is unlikely in view of the frank advertisement of the machine in the 1904 catalogue. No one suggests that

he at any time objected to their manufacture. Of course, all testimony of what a dead man has said and done must be taken charily. I feel the disadvantage of the complainant here, but still it is too much, when there is no inherent probability, but quite the contrary, to ask me to hold that each one of three apparently honest men is deliberately perjuring himself about a matter of obviously very trivial interest to them. Disregarding all the defendant's testimony as to any personal transactions I am satisfied that Stone knew before July 31, 1904, or thereabouts, that the defendant meant to go on with the manufacture of the cutters, and that is enough, I think, to be an exercise of his privilege, even assuming that anything more was necessary than for the defendant to go on as he had been doing.

Bill dismissed, with costs.

HARTFORD et al. v. MOORE et al.

(Circuit Court S. D. New York. June 20, 1910.)

1. PATENTS (§ 27*)—INVENTION—ADAPTING OLD DEVICE TO NEW USE.
   A patent is not void as for a new use of an old thing, unless the old device can be used for the new purpose without material modification or change, and a very slight modification is often the result of a wholly new conception and invention.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

2. PATENTS (§ 40*)—INVENTION—ADAPTING OLD DEVICES TO NEW USE.
   Novelty of selection of old devices or elements, remote in structure and purpose, for a new use, may evidence patentable invention.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 47; Dec. Dig. § 40.*]

3. PATENTS (§ 328*)—INFRINGEMENT—SHOCK-ABSORBER.
   The Truffault reissue patent, No. 12,437 (original No. 695,508), for a shock-absorber for spring-supported vehicles, used extensively on motor cars, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by Edward V. Hartford, George W. Hartford, and the Hartford Suspension Company against Harold J. Moore and Ruth H. Moore. Decree for complainants.

This is an ordinary bill upon a patent for a shock-absorber upon spring-supported vehicles. The commercial adaptation of the patent is the well-known Truffault-Hartford shock-absorber used extensively upon motor cars. The present patent is a reissue, No. 12,437, of January 16, 1906, of an original patent, No. 695,508, issued March 18, 1902. The device is simple in character, and merely consists of two arms each pivotally mounted upon one of the relatively moving parts of the vehicle, which are kept apart by the springs. These two arms are united at their free ends, and can be pressed together by a nut at any desired degree of friction exercised upon a washer introduced between them. In the commercial device the ends are enlarged to a considerable area. As the two relatively movable parts approach each other through the compression of the spring, these two arms move to a more acute angle. As the parts separate through the reaction of the spring, the arms assume a more obtuse angle. The friction caused by the rotation of the united ends together with the friction in the rotation of the fixed ends of each arm produces two results: First, it adds to the strength of the spring upon its compres-

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

sion, and, second, it in part prevents the too violent reaction of the spring. Thus the shock which is especially felt upon the rebounding of the spring is in part avoided.

The defendant's device is of substantially similar character; the details not being necessary to be stated. The claims in suit are as follows:

"I. In a vehicle, the combination with a supporting-spring between the parts of the vehicle movable relatively to each other, of rotating frictional means between the parts which provides a yielding resistance to movement, said means producing a retarding effect on the reaction of the spring, substantially as described.

"II. In a vehicle, the combination with the wheel thereof, the frame carried by said wheel and a spring interposed between said wheel and frame, of rotating frictional mechanism which provides a yielding resistance to the movements of the parts, said means serving to materially and uniformly exert a retarding effect on the said movements of the parts in both directions substantially as described.

"III. A retarding device for vehicle-springs comprising rotating friction members, adjustable clamping means, and means for connecting the rotating members to the parts of a vehicle movable relatively to each other, substantially as described."

Charles C. Linthicum and Clifford E. Dunn (A. J. Baldwin, on the brief), for complainants.

Cheever & Cox, for defendants.

HAND, District Judge (after stating the facts as above). Two questions are raised—one of anticipation and the other as to the validity of the reissue. Upon the second I am concluded by Hartford v. Hollander, 163 Fed. 948, 90 C. C. A. 308, which held distinctly "that the original patent covered the rotating device separately, as well as when acting in conjunction with the other devices." It is true that three years intervened between the original issue and the application for reissue, and this has been held in many cases too long a time to extend the patent, but an explanation is offered of the delay, and that explanation has once been sufficient for the Circuit Court of Appeals. That matter must, therefore, be regarded as settled in this court.

As to infringement, the operation of the defendant's patent is so like that of the patent in suit that no serious question can be raised about it. Indeed, I understand that Mr. Cheever at final hearing conceded that, if the claims are to be supported, the defendant does infringe. The question therefore becomes one of interpretation and validity. As the first three claims upon which here the complainant especially relies are not ambiguous when applied to the defendant's device, no need of interpretation exists, unless the prior art forces it upon me to save the patent. I shall therefore at once consider such anticipations as the art shows.

The complainant concedes that the Gibbs patent, No. 488,474, anticipates the broad claim to the use of frictional devices to retard and partially neutralize the reaction of springs in a spring-supported vehicle. The patent in suit, however, operates by the partial rotation of the friction area, and is differentiated functionally from Gibbs, first, by the constant area of friction surface; and, second, by the relatively limited movement of the friction surfaces. The defendant does not contend that Gibbs taken alone and with no other prior art is enough to deprive the patent in suit of invention, but he does claim that it gave the germinative idea upon which the patent in suit was

based. Gibbs does indicate the general conception of friction as applied to spring-supported vehicles and the patent in suit is not a pioneer. The defendant's theory is that the modifications of the patent in suit were immediately suggested by other disclosures read in the light of the fundamental idea shown by Gibbs.

The disclosures which the defendant cites as anticipating the patent are of several kinds. First come those which are used in spring-supported vehicles for example: Reinwald, 242,983, Murphy, 620,952, Klörstadt & Johnson, 655,247, Stubbs, 664,444, Hunter, 414,048. All of these could with slight modification be transformed into the patent in suit. They are all devices which are interposed between the movable parts of a spring-supported vehicle, and, when modified, they would have rotating frictional parts which would provide a yielding resistance to movement and several of them have adjustable clamping means. No one of them, however, would, as it stands, be an efficient substitute for the patent in suit, and no one of them was designed for the purpose of the patent. It is said of each one of them that "the tightening of a nut" would be enough to adapt them for the use in question, and, while this is not literally true in the case of any one, I should have no difficulty in finding that the patent in suit was only a nonpatentable modification of several of them were the thought apparent anywhere of their use as a shock-absorber. In each one by enlarging the friction area and tightening the nut—the function described in the claims—they would at once become operative, and the question therefore arises whether the patent in suit is not merely a new use of an old device. Nevertheless the device as described would not answer because in each case the joints in question are made as frictionless as possible. In the case of Stubbs it is true that rubber was inserted at the toggle joints, but I am satisfied with the explanation of the complainant's expert that rubber was placed there solely to prevent rattling as the specifications indicate. A patent is not void as the new use of an old thing only in case it can be used for the new purpose. Toplitz v. Toplitz, 145 U. S. 156, 161.[1] While the modification involved in tightening the nut may seem a very slight one, it nevertheless does change the structure, and it has been held many times that a very slight modification of structure is oftentimes the result of a wholly new conception and invention.

The suggestion of that adaptation the defendant says is to be found in the Gibbs patent which indicated friction as a means of retarding the spring reaction. But I do not agree that the ordinary skilled mechanic having in mind friction as a proper means for retarding spring reaction would have at once seen that the device in question could be adapted to perform that function. The very fact that in all of them the absence of friction was peculiarly necessary would, it seems to me, have turned away the mind of an ordinary man in looking for a friction device. It took a person of inventive faculty to see that by a modification adopting them to a diametrically opposed use rotary friction could be used for the same purpose as reciprocal friction was used in the Gibbs patent. It certainly cannot be necessary to repeat the well-known principle that it is no indication of noninvention that the device should seem obvious after it has been discovered.

[1] 12 Sup. Ct. 825, 36 L. Ed. 653.

Many great inventions are of this character, and the reason why the ordinary man does not discover them although they are so plain when some one else has done so is that habit has limited his power to see what he has not been accustomed to see, and his selective attention is fast bound by his past experience. In this case all suggestions of the device cited were, as I have said, away from the ideas of friction, and it took an unconventionally minded man to see the remoter analogies between the device and the patent in suit.

The following patents were frictional: Morse, 64,024, Norcross, 235,892, Taylor & Tyrrell, 393,039. But they were remote in suggestion from the patent in suit. It is true in the case of Morse and Norcross that they related to vehicles and vehicles of a kind normally carried on springs, but they related to a part of the vehicle which had nothing to do with the springs, and the problems of which were quite different from those of neutralizing spring action. They are, in fact, as remote from the patent as the friction by which the arms of mechanic's calipers are held at a fixed distance from each other. It certainly cannot be urged that any device containing rotary friction is suggestive of the patent in suit. Rather it is the very kernel of the invention to select rotary friction as a suitable means of solving this problem; and valid anticipations would be found only where that selection had once been accomplished. Taylor & Tyrrell, above mentioned, is of precisely the same kind. The friction at the joint was not used to modify the action of a spring and to absorb its shock upon the recoil, but it was a re-enforcement of the spring. Moreover, its very use upon a cash-car was so very remote from the suggested matter of the patent in suit as to make it unsuggestive in my judgment.

The two buffer patents, Westinghouse, 672,116, and the British patent, Turton and Root, fare no better. The Westinghouse patent was for use in taking up a part of the initial shock of a car-buffer. Undoubtedly in this case the friction device was circular in form, but it did not operate constantly because the series of opposite frictionless surfaces in the rotating wheel began at their maximum and ended at zero, at which point the wheel was clamped down again for a repetition, operating not constantly, but spasmodically. In this complicated mechanism I can see no suggestion whatever of the patent in suit except the fact that friction surfaces were used to modify the action of a spring. It seems to me much more likely that as an original proposition the complainant should have discovered his device from Gibbs alone than from this. Turton and Root is an almost equally complicated mechanism. The defendant concedes that, in so far as the friction arises from the operation of the two spiral shoulders against each other, it is not an anticipation, but he says that there is friction between the ends of the device and the abutments on which they act, which friction tends to prevent their rotation, and thus to modify the force of the recoil. It is somewhat doubtful just what the action of that friction is, and perhaps the best test was the practical attempt to use them in place of the complainant's device upon a motor car which showed they were idle. Whether or not the friction in question, which is constant in area, has an effect in preventing the natural resiliency of a spring, the device is of such a remote character

and apparently was so concealed from the inventor himself that it does not seem to be in any sense suggestive of the patent in suit.

The lamp-carrier (Jeffery, 454,171) is also remote in my judgment. Disregarding the controverted question as to whether the retardation upon the spring is due to the yielding of the bushing or to a real friction exercised between the parts, a question as to which I do not think the evidence permits any certain decision, the whole device was very remote in structure and in purpose from the patent in suit. Nor do I think it would have been suggested here at all had it not been that the lamp was to be used upon a bicycle.

There remains only one citation which is at all near to the device here in question, and that is Myers, 170,887. This seems to me a much closer reference than any other which the defendant makes, and, indeed, it would actually serve in substance for the patent in suit, if it were made larger than was necessary for the purposes for which it was invented. I do not mean to say that it is in structure precisely the same as the complainant's commercial device, but, if it were used upon a motor car, it would precisely answer all three of the claims which are here in question. It would consist of a rotating frictional means providing a yielding resistance to movement and producing a retarding effect on the action of the spring in either way. The free ends would be connected by a clamping device with friction material between them, and there would be means for connecting them to either of the relatively movable parts. This friction could be adjusted by the clamping means, and, although the device so used might not be in detail as effective as the commercial shock-absorber, it would be to all intents and purposes the same invention. Therefore a plausible argument may be made that the patent in suit is nothing but a new use for this old instrument without modification except that of size, which, of course, would be readily suggestible to any trained person. Yet, in spite of this similarity, I do not consider that it is a valid anticipation, because some one must have selected it for the purpose, and, as I have already said, novelty of selection is oftentimes a sure sign of patentable invention. The device in question was used to modify the action of a door spring. The question is whether the usual person with all the art before him would have thought of the possibility of applying such a device in modifying the action of a spring on a vehicle. Here again when once the suggestion is made it is simple and obvious, but the problem before a person seeking to modify the action of a spring upon a vehicle is one which of itself does not suggest the problem of modifying the problem of the spring door. Such a door when actuated by a spring slams to at once and catches, and there is no rebound of the spring even when the door has no catch. Moreover, such springs as used upon doors operate by uncoiling, and they have no rebound like that of an elliptical or helical spring which has been compressed. The device on doors was used to modify the action of a spring as it uncoiled and it had no use such as the patent in suit has. Therefore neither the matter nor actual problem was at all similar to that of the complainant's here, and it seems to me as much an invention to apply that kind of device to these circumstances as it was to apply the principle of friction calipers. Were not the novelty

of the application a valid test of patentability, no strictly combination patent could be valid, for in all such patents each element is old, and it may be said that each element is simply applied to a new use. Union Sugar Refining Co. v. Mathiesson, Fed. Cas. No. 14,397; Hailes v. Van Wormer, 20 Wall. 353, 368, 22 L. Ed. 241; American Tobacco Co. v. Streat, 83 Fed. 701, 703, 28 C. C. A. 18. The formative conception of the application of old elements to a new purpose in which they are mutually interdependent requires more than a common-place mind. Moreover, even to use old tools in a new way may be a valid invention. Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275.

Therefore in this case it does not seem to me that, even with Gibbs in mind, the complainant has done only what an ordinary man might do, and I think the patent is valid. This conclusion is corroborated by the fact that until 1905 no device of any similar character appeared for use upon motor cars. No one will deny that there has seldom been a machine which has so quickly acquired such an extraordinary, almost miraculous, vogue as the motor car itself. During the last 10 years the industry which has grown up under the demand for these machines has become one of the largest in the country. Even their remotest details have been the subject of the most careful and intelligent experiment and scrutiny. It was well known that any man who could successfully add even a slight modification which would have advantages might make a great fortune. Certainly thousands and tens of thousands of skilled mechanics have become familiar with the whole mechanism, its needs, limitations, possibilities, and failures. Indeed, so thorough has been the adaptation to the present possibilities of the arts that the machine has now apparently reached its limit, and, except for some revolutionary changes, will probably remain substantially what it is. All this is common knowledge. Among the problems which have from the outset most troubled inventors was to modify the shocks resulting from high speed over rough roads, particularly in this country where the roads are bad. Especially was this true since the problem of spring shocks was connected with that of tires, the most difficult of all. This device has in a measure solved part of the difficulty of spring reaction, and, if the solution was obvious, why did no one of these skilled mechanics who have studied the machine inch by inch and screw by screw discover so simple a device? The pressing need for it existed for quite five years before it was discovered to the public. This is after all the best test of whether it was in the reach of the ordinary skilled artisan, and the defendant has contributed its own quota of assent to the utility of the device by what we are taught to be the sincerest commendation—a very frank imitation.

Under all the facts, I do not feel that there can be any doubt of the validity of the invention. Let the usual interlocutory decree pass.

BYERLEY v. SUN CO.

(Circuit Court, E. D. Pennsylvania. July 15, 1910.)

No. 201.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ASPHALTIC PETROLEUM PRODUCTS AND PROCESS OF MAKING SAME.
The Byerley patent, No. 524,130, for a process of making asphaltic products from the residuum of petroleum after distillation and for the product itself, called "Byerlyte," as a new article of manufacture, was not anticipated and discloses invention, the product being one of utility which has become widely known and used; also *held* infringed.

2. PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—DEFENSES—LACHES.
The defense of laches to a suit for infringement of a patent *held* not sustained.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 289.*

Laches as a defense in suits for infringement, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.]

3. TRIAL (§ 39*)—INTRODUCTION OF EVIDENCE—EXHIBITS.
Documents or other things produced by a witness on request in his cross-examination and marked for identification are not before the court as evidence, unless offered and admitted as such.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92-98; Dec. Dig. § 39.*]

In Equity. Suit by Francis X. Byerley against the Sun Company. Decree for complainant.

W. K. Richardson and Harrison F. Lyman, for complainant.
Wm. L. Pierce and Augustus B. Stoughton, for respondents.

ORR, District Judge (specially presiding). The complainant, who is the inventor and owner, charges the defendant with infringement of letters patent of the United States No. 524,130, dated August 7, 1894, and issued to the complainant, Francis X. Byerley, for a process of making asphaltic products and also for the products themselves. The bill is in the usual form, and prays the customary relief. The defenses in the answer are many, and such as have been urged in the proofs or arguments will hereafter be considered in detail.

As stated by the patentee, the invention relates more particularly to the manufacture of solid bodies from petroleum. He says:

"In the manufacture of petroleum products, it has been customary to distill the crude oil in externally heated stills, so as to drive off the naphtha and the burning oil, with more or less of the heavier oils, leaving a residuum or tar which can be further distilled, if desired, down to a solid body. As the distillation of petroleum residuum or tar has heretofore been commonly conducted, it has resulted, when pushed to the production in the still of a body which is solid in the still or which solidifies on codling, in the formation of a coke or a coke-containing pitch."

Again he says:

"In accordance with the present invention petroleum residuum or tar is distilled down to a solid body by a prolonged exposure to a pitch-forming noncoking temperature, say about six hundred degrees Fahrenheit (600°) F.,

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

more or less, with agitation and exposure to air or analogous gas or gaseous mixture. By this means, are produced black (or very dark brown) bodies readily soluble in petroleum naphtha, say benzine of 62° Baume, which the cokes or pitches heretofore made from petroleum, so far as I am aware, are not unless in comparatively small proportions. These bodies are believed to be new and are included in the invention as new articles of manufacture, as well as their process of production. They vary, according to the extent to which the process is pushed, in hardness at atmospheric temperatures (say at 60° Fahrenheit) from a rubber-like consistency to a mass of hardness and conchoidal fracture like the natural asphaltums (as for example Trinidad asphaltum and the so-called gilsonite from Utah). At a lower temperature the less hard bodies become harder and have a conchoidal fracture. The bodies melt at from about 200° Fahrenheit to about 400° Fahrenheit. The higher melting bodies, say those melting at from 350° Fahrenheit to 400° Fahrenheit, or in other words those which have been sufficiently freed from oil to have a drying quality, are well adapted to varnish-making, being employed in place of the natural asphaltum. These bodies may be used also for paving and roofing and analogous purposes to which natural asphaltums are applied, but in order to melt at the temperatures which workers in those industries have found convenient to use, it is necessary, as with Trinidad asphaltum, to employ oil or the like to render them sufficiently limpid at such temperatures; and it is better therefore for such uses to employ bodies of less hardness, which have sufficient oily matter present to melt at a convenient temperature."

The patentee then calls attention to the different compositions of crude petroleum from different localities, and says that, while he has successfully treated petroleum residuum proceeding from the ordinary distillation of Lima oil, yet it is intended by him "to include tar or residuum from other petroleum." Likewise, after describing his apparatus and an illustrative run with Lima tar, he says:

"It is also not to be understood that the temperature most advantageous for Lima tar is necessarily the most advantageous for other petroleum tar or tar other than petroleum tar; but from the illustration and working figures given those skilled in the art will be enabled to effect a useful result on other tars."

One further reference to the specifications is proper at this point. The patentee says:

"It is important in all cases to avoid a coking temperature, as the coke produced is not only itself an injurious ingredient in the asphaltum, but its formation indicates an alteration in the tar, or in bodies thereof, which it is desirable to avoid."

The claims of the patent alleged to be infringed are as follows:

"1. The process of making asphaltic products, by prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still, with agitation of said tar, and exposure of the same to air, substantially as described.

"2. The herein described new asphaltic petroleum products, soluble in benzine, varying in hardness at atmospheric temperatures from a rubber-like consistency to a mass of a hardness and conchoidal fracture like the natural asphaltums, the less hard having also a conchoidal fracture at lower temperatures, melting at from about 200° Fahrenheit to about 400° Fahrenheit according to hardness, and in general having characteristics belonging to asphaltic residual products from a prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still with agitation of said tar, and exposure of the same to air in contradistinction to previously known natural or artificial products of a more or less asphaltic character, substantially as set forth.

"3. The process of making asphaltic products, by prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still, with exhaus-

tion of the products of distillation, agitation of the tar, and exposure of said tar to air, substantially as described.

"6. The process of making asphaltic or pitchy bodies, by prolonged exposure of petroleum tar to a pitch-forming temperature in a still, with agitation of said tar, and exposure of the same to air, substantially as described.

"7. The process of making asphaltic or pitchy bodies, by prolonged exposure of petroleum tar to a pitch-forming temperature in a still, with exhaustion of the products of distillation, agitation of said tar, and exposure of the same to air, substantially as described.

"8. The process of making asphaltic or pitchy bodies, by subjecting pitch-yielding tar to a pitch-forming noncoking temperature, with agitation of the tar, and exposure of the same to air, substantially as described.

"9. The process of making asphaltic or pitchy bodies, by subjecting pitch-yielding tar to a pitch-forming noncoking temperature, with exhaustion of the products of distillation, agitation of the tar, and exposure of the same to air, substantially as described.

"10. The process of distilling petroleum or pitch-forming oil (including tar), by heating the same in a still, with exhaustion of the products of distillation, agitation of the oil, and exposure to air, the temperature of said oil be gradually increased during the distillation to a pitch-forming noncoking temperature and continued at such temperature until a solid or product solidifying on cooling is obtained, substantially as described."

All of said claims, except claim 2, relate to the process. The process claims 1 and 3 are similar except for the provision in the latter that the products of distillation are "exhausted." Claim 6 differs from claim 1 in the use of the word "pitchy" and in omitting the word "noncoking," where reference is made to temperature. Claim 7 is the same as claim 6, with the addition of the "exhaustion" feature. Claim 8 differs from claim 1 in the use of the word "pitchy" and in referring to pitch-yielding tar instead of petroleum tar. Claim 9 is the same as claim 8, with the addition of the "exhaustion" feature. Claim 10 covers the process in which the product is made with oil rather than tar. The product claim (2) defines the "new asphaltic petroleum products," and brings in the process as characterizing the product.

To his product the complainant gave the name "Byerlyte," by which it became widely known and used. It was thought by some to be superior to the natural asphaltums and became widely used for making varnishes and waterproof roofing, and for other purposes. Its utility cannot be questioned by the defendant because the defendant is making in large quantities asphaltic products which are described in the Byerley specifications, but called by the defendant "Hydrolenes." Its Hydrolene "B" is the same as "Byerlyte."

The patentee's apparatus, as described by him, is simple. It consists of a closed still of usual construction with fire chamber below. Air pipes, open at both ends, extend from the top through, and nearly to the bottom of, the still. A goose-neck connects the vapor space of the still with an ordinary condenser which communicates by pipes with a receiver for condensed liquids, and an air pump at the upper part of such receiver. By means of the air pump a free flow of air is maintained through the bottom of the air pipes, and therefore through the contents of the still during the subjection of the contents to the prolonged heat. The apparatus used by the defendant is not widely different. It consists of a closed still with fire chamber below. An air pipe extends vertically nearly to the bottom of the still, and connects

with one or more horizontal air pipes which are perforated. A pipe connects the vapor space of the still with an air chamber, where condensation takes place. The defendant by an air pump forces the air through the vertical air pipe, through the horizontal pipes and through the perforations of the latter, and thereby a free flow of air is maintained through the contents of the still during the subjection to the prolonged heat. Here it is well to consider certain differences urged by the defendant against infringement.

Defendant's contention that there is no distillation in its process is not sustained by the evidence. Its argument, therefore, that there can be no still where there is no distillation, need scarcely be mentioned. The process is not for the purpose of distillation, but for the purpose of making asphalts. Distillation has already taken place in the treatment of the petroleum resulting in the residuum which is used by the defendant. There is then further distillation, to a greater or less degree, in the process of making the asphalt by the subjection of said residuum to a proper temperature, and by its exposure to and agitation by air. Defendant also insists that there is no infringment because it does not use the same temperature as is expressed by the patentee. This is not tenable because the patentee expressed a wide range of temperatures suitable to tars or residuum of petroleum of various kinds from various localities. His caution was that the temperature should be "pitch-forming noncoking." Defendant also insists that there is no infringement because it forces the air through the pipes into the bottom of the still, instead of drawing the air into the still by means of an exhaust pump, as does the complainant. It plainly appears from the evidence that there is no substantial difference in carrying out the process whether the air is drawn or blown through the charge in the still. The one method is the equivalent of the other. Indeed, it appears to the court that every variation by the defendant in apparatus or process is the equivalent of something described by the patentee.

The defendant further insists that Byerley's claims are met by the prior art. The burden of proving this has not been sustained by the defendant. Many patents were cited to that end. Some had the idea of producing asphalt from petroleum residuum, but by mixing with it sulphur, permanganate of potash, or some other chemical. United States Patent to Jenney, No. 178,061, dated May 30, 1876, was specially dwelt upon at length. His raw material was "sludge oil," a waste product obtained in a certain process for the purification of hydrocarbon oils, containing both carbon and sulphur as well as sulphuric acid. The purpose of the process, as set forth in Jenney's patent, was to manufacture a residuous substance. The chemical constitution of the Jenney products is different from those of the complainant and defendant. There are physical differences between them, also, which may be easily observed. Moreover, the evidence of Jenney's prior use of his product is unsatisfactory and unconvincing. If there were such use, it was not successful and ceased many years before the plaintiff's product discovered. As further bearing upon the prior art, satisfactory oral testimony shows that prior to the introduction of "Byerlyte" no artificial asphalt was known to commerce. The

court is satisfied that there is not a prior patent or prior use relating to the production of asphaltic products from petroleum simply by the prolonged exposure to high temperature and the action of air. The utility and novelty of complainant's product and process being established, and infringement having been found, he is entitled to a decree unless the defense of laches be good. That there has been considerable delay is clear. It has not, however, been unexcused. The defendant called the complainant, Francis X. Byerley, and his son, Francis A. Byerley, as witnesses, and thereby declared that they were credible. It could not therefore impeach their testimony, and cannot now declare them to be unworthy of belief. Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421. On July 20, 1903, one Ellis an assistant manager of the defendant wrote to complainant:

"We have a refinery here for refining Texas oil, and we are anxious to try blowing some of the residuum with air. The residuum stands about 450 fire test, and we would like to blow it at say 400°. Would it be safe to blow this in one of our 800 barrel stills such as we are using for distilling the crude?"

To this complainant replied on July 23d following:

"As to blowing oil or residuum when heated, I think the best information I can give you is that this process forms the basis and is covered by a patent which I hold and which we are using here. We have used it very successfully on Texas oil also. Of course, we would deprecate any infringement of the patent, and advise you of it, to avoid difficulties. Should you wish to use the patent I should be glad to hear from you."

Subsequently complainant by suggestions in correspondence and interviews tried to induce defendant to take an interest in his patent. In November, 1903, Francis A. Byerley, the son, visited defendant's plant, and asked the assistant manager, Ellis, if they were using air for making asphalt. He replied that they were not. At that time an air blower had been partially, if not completely; installed. Ellis himself does not directly deny this. Again, in the summer of 1904, Ellis told the same witness, Byerley, that they were not using air. Complainant had a right, therefore, to assume that defendant was mindful of his rights and claims under his patent. He first saw a sample of defendant's Hydrolene in the spring or summer of 1907. Up to that time he had no reason to suppose the defendant was infringing his patent. It is perhaps unnecessary to refer to the pecuniary embarrassment due to the burning of the complainant's plant and the rebuilding of same from which he was not relieved until October, 1908. Complainant, after seeing defendant's product, deemed it necessary to put detectives in defendant's plant. These reported in the fall of 1908. The bill was filed soon after. The complainant has not been guilty of laches.

Another matter must be considered. Upon cross-examination, defendant's expert was requested to produce "all correspondence, reports, notes, diaries, or other written expression, concerning in any wise matter" to which he had testified. He produced 34 different things, and had them marked for identification. Many of these were said by him to be the products of laboratory work. While these products were not offered in evidence, yet defendant now insists that they are in evidence, although the time for rebuttal testimony in regard to them has

long passed. Because they were included in response to the request is no reason why they are before the court. It might perhaps have been defendant's privilege to refuse their production or at least to refuse to permit their inspection unless they were received as evidence. Not having so refused, and not having offered them, the defendant cannot now make them self-serving indicia of the industry of its expert. It is unfortunate, perhaps, for defendant that its expert did not at least appear to be disinterested. His zeal for the defendant (whom in correspondence he called his "client") in efforts to procure witnesses and on the witness stand indicated a bias to support the cause upon which he had embarked, and lessened the value of his evidence.

The complainant is entitled to relief. Let a decree be drawn in accordance with this opinion.

LANGAN v. WARREN AXE & TOOL CO.

(Circuit Court, W. D. Pennsylvania. June 25, 1910.)

No. 11.

1. PATENTS (§ 168*)—CONSTRUCTION—EFFECT OF PROCEEDINGS IN PATENT OFFICE.

A patentee, who canceled all the original claims in his application on objections by the Patent Office, and substituted a new claim which was allowed, is estopped to claim a construction of such claim which would make it equivalent to those canceled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. § 168.*]

2. PATENTS (§ 328*)—INVENTION—AGGREGATION OF OLD DEVICES—GRAB HOOK.

The Langan patent, No. 595,181, for a grab hook used for skidding logs, is for an aggregation of an old form of grab hook with an old draft device, for which no novelty was claimed, by means which involved nothing patentable, and is void for lack of novelty and invention.

In Equity. Suit by David H. Langan against the Warren Axe & Tool Company. Decree for defendant.

William N. Cromwell, for complainant.
James Hamilton, for respondent.

YOUNG, District Judge. This case comes before us for final hearing upon bill, answer, replication, and proofs. The plaintiff charges that the defendant has infringed his patent No. 595,181, for an improvement in grab hooks used in skidding logs.

An examination of the patent in controversy shows that the following claim in the application was allowed:

"The combination with a pair of grab hooks, each consisting of a shank having an eye at its front end and at its rear end having a projected, perforated ear, immediately in front of which latter is located an angularly disposed driving tooth, said shank being widened above its tooth for the purpose of producing an increased impact surface, of a draft device connected with the eyes at the front ends of the shanks, substantially as described."

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

The complainant must be held to this combination, and, if he has failed to establish either that his combination was patentable or that the defendant has infringed, his case must fail. Figure 1 of his drawings is here inserted.

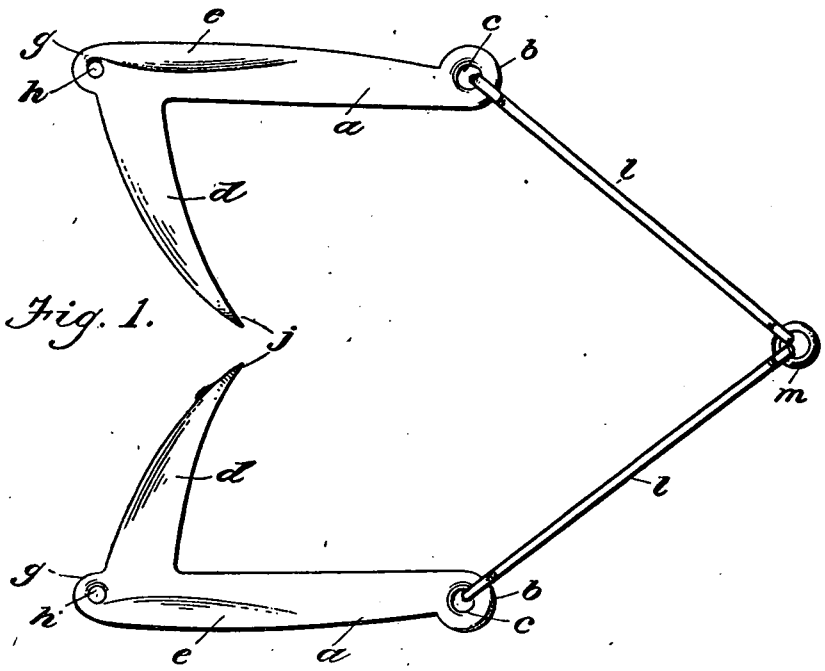

Fig. 1.

So that we may understand precisely what the complainant's patent means, we must consider the history of his application filed on January 25, 1897. He has set out in his specification, among other things, the following:

"My invention relates to improvements in grab hooks employed for skidding logs."

He then describes the ordinary way of making a grab hook, which has resulted in the thinning of the angle made by the tooth with the shank, thereby easily breaking in use, and resulting also in the sharpening of the back of the shank upon which the blow is received in driving it into a log resulting in the destruction of the maul and the placing of an ear perforate or imperforate in the shank in the rear of the tooth so as to afford a means by the insertion of a pointed tool or lever of removing the grab from the log.

He then described the feaures of his invention as follows:

"One of the prime features of my invention is to so construct the hook as to obviate undue wear and destruction of the mauls and to thereby increase the period of their utility from a half day to a month, more or less; secondly to so construct the tooth of the hook as to adapt it to be more readily driven in

the side of the log to be skidded; thirdly to increase the strength of the hook at the point at which the greatest strain occurs, to wit, the angle; and, fourthly, to so form the hook as to facilitate its withdrawal from its engagement with the log by means of the usually employed pike-lever. With these various objects in view, my invention consists in the particular and peculiar form of hook herein described, and pointed out in the claim. * * * Having described my invention, what I claim is:

"1. The herein described improved grab hook, the same consisting of a shank having an angularly disposed driving tooth, the same being substantially triangular in cross-section and tapered to a driving point and having its opposite faces or sides between its edges, concaved, substantially as specified.

"2. The herein described improved grab hook, the same comprising a shank having an angularly disposed driving tooth, said shank in line with the tooth being widened to form an increased impact surface, substantially as specified.

"3. The herein described improved grab hook, the same consisting of a shank having a driving tooth, said shank at that side thereof opposite to which the tooth is located being provided with opposite overhanging elongated flanges to form increased impact surface opposite the tooth substantially as specified.

"4. The herein described improved grab hook, consisting of a shank having a driving tooth, and beyond the same at its rear end provided with a projecting ear adapted to be engaged by a pike-lever or other device employed for prying the hook from a log, substantially as specified.

"5. The herein described improved grab hook, the same consisting of a shank having a driving tooth at one side, and at its rear end above the tooth provided with a projecting ear having a perforation to receive the spike of a spike-lever, substantially as specified.

"6. The herein described improved grab hook, consisting of a shank having an eye at its opposite ends and between the same provided with a driving tooth, said shank being widened above its tooth for the purpose of producing an increased impact surface, substantially as specified."

His entire specification refers to improvements in the making of a single grab, and the only reference to the use of the grab is as follows:

"Fig. 1 is a plan of a pair of grab hooks illustrating their relative arrangement when in an engagement with a log, for the purpose of skidding the same.

"In use, a pair of these grab hooks is employed for skidding a log; such pair being shown in Fig. 1. The links, or chains, l, are connected to the eyes, c, and these in turn are connected at their front ends by a ring, m, to which is attached the usual draft appliance not considered necessary to be herein shown."

While his application was pending in the Patent Office, upon objection by the Examiner, he canceled all his claims and inserted claim 3, which is as follows:

"The combination with a pair of grab hooks, each consisting of a shank having an eye at its front end and at its rear end having a projecting perforated ear immediately in front of which latter is located an angularly disposed driving tooth, said shank being widened above its tooth for the purpose of producing an increased impact surface, of a draft device connected with the eyes at the front ends of the shanks, substantially as specified."

All the claims except claim 3 having been rejected by the Examiner and canceled by the applicant, claim 3 was allowed. An examination of the claim allowed shows that there was clearly no intention on the part of the applicant at the time of filing his application, or at any subsequent time, as shown by the file wrapper and contents, to claim anything except an improvement in the grab hook. There was nothing in his application to show any intention on his part to claim as new

the combination subsequently allowed him, except claim 3, and it was inserted upon the decision of the Examiner that:

"Claim 6 is incomplete without the links, and the eye in the end of the shank is useless without the other elements."

The complainant having canceled all his original claims is now estopped to claim the benefit of them or such a construction of his present claim as would be equivalent thereto.

As was said in Morgan Envelope Company v. Albany Perforated Wrapping Paper Company, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500:

"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."

Even though the applicant had not canceled his claims, they were clearly met by the patents referred to by the Examiner and by others produced by the respondent at the hearing. It is certain, therefore, that all the elements claimed by plaintiff which went to make up the grab hook proper were old.

The only remaining elements in the combination for which he obtained his patent are links inserted in the eye at the end of the shank in front of the tooth in each of a pair of hooks, the chain or link attached thereto, and the uniting of the two in a single link or ring to which in use the draft device may be attached.

The applicant in his claim and the Patent Office in its allowance of the claim regarded the links in the eye, the chain attached thereto, and the union of the chains by a link or ring as a draft device. The elements then that went to make up the combination were the grab hooks and the draft device. We have seen that the grab hooks were old, and that the patentee does not have a patent for them and could not have. The draft device alone remains.

There seems to be no novelty in the draft device. Our own experience would show us that from time immemorial the device used in drawing an object by attaching the drawing device to two separate points has been used. The ordinary clevis used at the end of a plow beam is the most common form, as is also the placing of a pair of shafts near each end of the axletree. It was not regarded by complainant as novel. The words of his specification indicate this, for it is nowhere there claimed as being either new or of consequence. He does not in his evidence claim that the draft device is new; his whole idea being that the grab hook, with its strengthening angle, flat back, and perforated shank behind the tooth, is what he intended to have patented and which he supposed was patented. His expert witness, Arthur P. Greeley, also believed that to be the fact. He testifies on pages 91 and 92 (complainant's record):

"It would also seem to be clear that the patentee did not consider that it was necessary to explain, or to show, any details relating to the draft appliance, beyond the mere indication of the links and the ring. I think this paragraph would also indicate that the patentee was familiar with the fact that it was necessary in the use of grab hooks to employ them in pairs and connect

the pair of grab hooks by the use of links or chains to the rope or chain connected with the power employed to skid the logs. Taking this paragraph in connection with what succeeded it, I think that there can be no doubt that the patentee considered his invention to be the improvements in the grab hook, and not in the draft appliance or any particular way of coupling up grab hooks or connecting them to a draft device."

Again on cross-examination (page 175 of complainant's record), he says:

"As I take it, the patent in suit does not assert any novelty in the draft device which is shown, or in the broad idea of connecting two grab hooks with a draft device. The drawings and specifications show and describe the grab hook of the patentee's invention connected up with the draft device for the purpose of showing the manner in which the grab hooks are to be used. It seems to me that the particular grab hooks disclosed in the patent in suit, when so connected up with the draft device, form a combination of devices adapted to perform a definite function better than the devices referred to in the patent as prior in date. The draft device is necessary to the practical use of the grab hook, and, in my opinion, combines with grab hooks of the patent in suit for a useful purpose; the useful purpose being materially modified by the specific construction of the grab hook."

And again on page 193, on cross-examination:

"The structure called for by the claim is the combination of two grab hooks having the peculiar and particular construction shown and described in the patent in suit with the draft device commonly employed with grab hooks. While, in my opinion, this is a true combination, the novelty of the combination lies in the particular and peculiar construction of the hook and its combination with the draft device, in a certain sense the addition of the draft device as an element of the claim might be regarded as unnecessary to a definition of the invention which the patentee made, though it is necessary to make a complete device for use in the skidding of logs, as I understand it, in the ordinary practice."

It has been included in former patents in combination with grab hooks. Patent of Sykes, No. 67,375, dated July 30, 1867, shows this device. Also, patent of A. A. Porter, No. 370,350, patented September 20, 1887. The draft device, therefore, was not patentable.

In our opinion, therefore, every element of the combination was old, and the means of combining these old elements has nothing either new or patentable in it. The case cannot be better described than in the words of Justice Brown, in Richards v. Chase Elevator Company, 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225:

"To make a combination of old elements patentable, there must be some new result accomplished, and, as the result in this case is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, we see nothing upon which a claim to invention can be based."

The complainant's bill must therefore be dismissed, with costs to the defendant.

Let a decree be drawn accordingly.

EAGLE WAGON WORKS v. COLUMBIA WAGON CO.

(Circuit Court, E. D. Pennsylvania. August 3, 1910.)

No. 32.

1. PATENTS (§ 26*)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
A new combination, with a new mode of operation, may be invention, even if all the parts thereof are old, and even if the function of the combination is also old.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 26*)—NEW COMBINATION OF OLD ELEMENTS—EVIDENCE OF INVENTION.
While a new combination of old elements often appears simple, where there was a prior defect which was thereby overcome, and the new device was immediately recognized, and went into extensive and general use, it is persuasive that more than mechanical skill was required in bringing together the elements in such a combination to each other as to bring about the success.
[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.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DUMP WAGON.
The Van Wagenen patent, No. 699,262, for a dump wagon, while for a combination of old elements, obviates prior defects and discloses patentable invention. Also *held* infringed by the device of the Garrison patent, which, if it contains patentable novelty, is for an improvement only in one element of the Van Wagenen combination.

In Equity. Suit by the Eagle Wagon Works against the Columbia Wagon Company. Decree for complainant.

Parsons, Hall & Bodell, for complainant.
M. W. Sloan and Hector T. Fenton, for respondent.

HOLLAND, District Judge. This is a bill of complaint charging an infringement of patent No. 699,262, issued to M. Van Wagenen on May 6, 1902, for an improvement in dumping wagons. The defenses are: (1) Noninfringement; (2) want of patentable novelty.

The patent is for a combination of devices, all of which have been in prior use, either in the form in which they appear in this combination, or embodying substantially the principles involved. The improvements relate to that class of dump wagons in which the bottom wall of the receiving chamber consists of movable sections hinged to the lateral side walls of the box and having the adjacent free ends adapted to meet substantially midway to said side walls; said movable bottom sections being elevated by a suitable drum and cable and adapted to open or drop by gravity when released, and should either chain, for any reason, become lengthened, or either door obstructed while being closed, the invention has provided a rocking member or device in the rear of the wagon body for taking up the sag in either chain resulting from an inequality of movement of the doors. The

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

claim in the patent in which it is alleged the defendant has infringed is as follows:

"4. The combination with a dump wagon having movable bottom sections hinged to its side walls, a rotary drum at one end of the movable sections, a rocking member at the other end, cables or chains connected to said drum and to said rocking member at opposite sides of its pivot, the intermediate portion of said cable being connected to the bottom sections and means for rotating the drum."

The wagon body is boxed shape, and the bottom has two long doors or sections, which are hinged longitudinally adjacent to the side walls of the wagon body so that the free edges will meet; a winding drum located at the front of the wagon body and having mechanism for rotating it, arranged in convenient reach of the driver; means to rotate the drum with the ratchet and pawl mechanism, and a single rocking member pivotally mounted on the rear of the wagon body, and two separate chains, or two lengths of a single chain, each individual to one of the doors and extending in a lengthwise direction beneath the same parallel with and adjacent to, its free side edge; the front ends of the chains being connected to the winding drum, and the rear ends thereof being connected, respectively, to the rocking member on opposite sides of its pivot. This device enables a driver to dump his load and to close the bottom doors. The chain individual to each door is so contrived that, if one of the doors is prevented from its upward movement, the companion door may be further raised until both doors are brought to a closed position, or, should one chain be longer than the other, the compensating mechanism in the rear, together with the winding drum, will take up the sag and enable the driver to bring both sides closed to a tight fit. The defect in prior closing mechanisms used on this class of wagons was that, where each door was raised by its own run of chain, any operative inequality in their length of lifting action, caused by sagging or stretching, would prevent a tight closing of the doors. This defect was obviated by the use of the pivotally mounted rocking member placed upon the rear of the complainant's wagon.

Wagons previously manufactured of this kind contained two of the elements of claim 4, to wit, movable bottom sections hinged to the side walls, and a rotary drum at one end of the movable sections. The ends of the chains at the rear were immovable, and there was no means of providing for an inequality in length of chain, or any means by which the sag of the chains resulting from an inequality of movement in closing the doors could be taken up. This was a defect which was recognized, and it was overcome by the combination worked out and placed upon this class of wagons by the patentee. It is not claimed that there is any new principle involved in any of the elements used in this combination; but it is claimed that it is a new combination of old elements, resulting in a new mode of operation. The elements are old; but they have never been found correlated in the same way as the patentee in this case has combined them, nor has there been any device placed upon these wagons which would close the bottom doors in the same way and so satisfactorily as the device found in the patent. A new combination with a new mode of operation may be in-

vention, even if all the parts thereof are old, and even if the function of the combination is also old. Walker on Patents, p. 40; Steiner & Voegtly Hardware Co. v. Tabor Sash Co. (C. C.) 178 Fed. 831.

In order to establish the defense of a lack of patentable novelty, three patents have been introduced, showing the state of the art prior to the issuance of the complainant's patent: The Weber, the Blake, and the Lawrence patents. The Weber patent is for a cart, and, in order to dump it, it is necessary to tilt the whole body. In the Blake patent, we find the movable bottom section hinged to the side walls of the body, with two runs of chain for each door, to independently lift and close the hinged doors, a winding drum on the wagon forward of the doors, to wind up the two runs of chain, and means to operate the drum, but no rocking member. The Lawrence patent is for a dumping device on a railroad car, provided with a hopper bottom, and this hopper bottom at about the middle thereof is provided with an opening designed to be closed by two hinged doors, which are arranged transversely of the car, and are of a less length than the width of the bottom. A winding drum is arranged beneath the bottom of the car and parallel to the sides of the door, and there are two pulleys spaced at a distance apart from each other, over which is guided the intermediate parts of the chain, the lengths or runs of which extend transversely of the two doors, each length or run being common to both doors and co-operating directly with both doors for raising the same. The pulleys are not located at the ends of the doors, but are mounted beneath the bottom of the car, and are spaced a distance from the hinged side edge of one of the doors.

These two pulleys, placed at the rear of the doors in the Lawrence patent, embody exactly the same compensating principle found in the rocking member placed on the rear of the body of the wagon in the patent in suit. There is no difference whatever, so far as the operation in both is concerned. In the Lawrence patent the same result is attained by two pulleys that is accomplished by the rocking member used by complainant. There is no pretension on the part of complainant that there is any difference in principle. While it is true that none of the elements entering into this device is new, yet they are put in such a combination that they bring about the result which is regarded by the general public as a great improvement in dump wagons. The old mechanism failed to give satisfaction, and the combination brought out and perfected by the patentee in this case overcame the difficulties and objections theretofore expressed, and we think it is such a correlation and combination of old elements as to indicate an exercise of the creative faculty of the inventor, and not merely the ingenuity of the skilled mechanic, and that there is patentable novelty involved. It appears very simple now, after what has been accomplished by Van Wagenen.

Patents for the combination of old elements found in the prior art are usually susceptible of the attack of want of novelty, because of the apparent simplicity of the combination after success has been attained; but where there was a prior defect long suffered, and an immediate recognition of the new device, which immediately went into general and extensive public use, it is persuasive that more than mechanical

skill was required in bringing together the elements in such a combination in relation to each other as to bring about the success. Johnson v. Forty-Second St., etc. (C. C.) 33 Fed. 501; Regent Mfg. Co. et al. v. Penn Electrical & Mfg. Co., 121 Fed. 83, 57 C. C. A. 334; McMichael & Wildman Mfg. Co. v. Ruth, 128 Fed. 707, 63 C. C. A. 304; Los Alamitos Sugar Co. et al. v. Carroll, 173 Fed. 280, 97 C. C. A. 446; Expanded Metal Co. v. Bradford, 214 U. S. 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

"Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention." The Barbed Wire Patent, 143 U. S. 283, 12 Sup. Ct. 447, 450, 36 L. Ed. 154.

The defendant further sets up the defense of noninfringement, and claims that it is manufacturing its wagon under a patent issued to Garrison on April 30, 1907. An examination of this patent shows that it is an exact duplicate of the wagon manufactured by complainant; the dumping mechanism being exactly similar, excepting that the rocking member is eccentrically pivoted, "having arms of unequal length and unequal weight, the longer and heavier arm acting at all times to maintain the shorter and lighter arm in elevated position," which enables one door to be moved upwardly toward its closed position after the companion door has reached its closed position, and after its closing position has been arrested.

The Garrison patent, if it contains patentable novelty, is an improvement on the rocking member employed by the complainant; and, while he may be entitled to protection for this discovery, he has ingrafted it upon the patent belonging to the complainant, and it cannot be regarded other than an improvement on the complainant's invention, and does not avoid the infringement of the claim in issue, which is directly readable upon his structure. Cramer & Haak v. 1900 Washer Co. (C. C.) 163 Fed. 299; Underwood Typewriter Co. v. Typewriter Inspection Co. (C. C.) 177 Fed. 230; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

The complainant, having shown invention and infringement, is entitled to an injunction and an accounting as prayed for in the bill filed. Let a decree be drawn in accordance with this opinion, with costs.

PRESSED PRISM GLASS CO. v. CONTINUOUS GLASS PRISM CO.

(Circuit Court, W. D. Pennsylvania. August 27, 1910.)
No. 14, November Term, 1904.

1. PATENTS (§ 318*)—INFRINGEMENT—ACCOUNTING FOR PROFITS—PROCESS PATENT.

On an accounting for infringement of patents for a process of making prism plate glass and a machine for practicing such process, the measure of defendant's liability for profits is the saving or advantage secured by the use of the infringing process and machines. To ascertain such saving

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

comparison is to be made with other processes open to defendant which were capable of producing an article of similar character and value if there were such, the measure of liability being the saving in the cost of manufacture by the use of the infringing process, and the amount depending on the quantity made which was fit for market, without regard to what was actually done with it. If there was no other process open to defendant's use which would produce an article of equal value in the market, the difference in the market value of the article as made by the patented process and that made by that nearest in character may be considered, and may be taken as the measure of liability, where the cost of manufacture by the two processes is substantially the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577–586; Dec. Dig. § 318.*

Accounting by infringer for profits, see note to Brickill v. City of New York, 50 C. C. A. 8.]

2. PATENTS (§ 318*)—INFRINGEMENT—DAMAGES RECOVERABLE.

Where complainant, which was the owner of the Ripley & Wadsworth patents, Nos. 661,025 and 661,024, for a process of making pressed prism plate glass and a machine for practicing such process, and defendant, which was an infringer of such patents, were the only parties engaged in the manufacture of such glass, and in direct competition for the trade, and complainant was fully equipped to supply all the trade there was, on an accounting for the infringement, complainant is entitled to recover as damages the amount of profits it would have made on the quantity of such glass sold by defendant, estimated at the prices it would have received but for the infringing competition, and also the amount it lost on its own sales by reason of the low prices forced by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577–586; Dec. Dig. § 318.*]

In Equity. Suit by the Pressed Prism Glass Company against the Continuous Glass Prism Company. For opinion sustaining the patents and finding infringement, see 150 Fed. 355. On exceptions to report of H. D. Gamble, master. Exceptions sustained and account stated.

Charles Neave, for complainants.

Augustus B. Stoughton, for defendants.

ARCHBALD, District Judge.† The result of this litigation is certainly anomalous. After having diligently practiced the patented process for upwards of three years, and contested its validity through the various steps of a protracted and expensive lawsuit, persisting in the infringement, after a decision had been rendered, up to the very day that the decree was signed, it now turns out, according to the report of the master, that the defendants were in no way benefited thereby, and this, by the peculiar logic, that the process was so superior to anything in the prior art as to have out-distanced all others, producing a new kind of prism plate commercially, if not theoretically, and leaving nothing in the art on which to base a comparison of advantages. It is even found that in some respects the process was a detriment; one-third of the quantity produced having been ultimately consigned to the cullet heap. There would seem to be something out of the way in the reasoning to reach these conclusions.

The patents infringed being for a machine and a method (the product patent not having been sustained), the advantage or saving to the

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

† Specially assigned.

defendants is the measure in the first instance of that for which they are liable; and this, of course, depends on the quantity which they made. From May 1, 1904, to February 7, 1907, which covers the period of infringement, the defendants admittedly produced 90,308 square feet of pressed prism plate glass by the use of the patented process; 48,682 plain, and 41,626 re-enforced with wire. Of this 57,591 was sold, and 2,088 was in stock at the time of the hearing, the balance, 30,629, having been broken up, according to the defendants, and thrown on the cullet heap. If that which was thus thrown away was defective, and was discarded because it was of no commercial value at the time it was produced, the defendants are not to be held for it. The saving or advantage by the use of the process amounted to nothing save only as it produced a commercial article. But, on the other hand, if that was true of it at the time it was produced, it is of no consequence whether the defendants sold it or retained it in stock, as appears to have been the case, until it was superseded by something better, brought about by experience and improved practice. The saving or advantage is to be judged by the results when the process was complete, and as to glass which was then fit for the market, no matter what happened to it afterwards. And that this was true of the whole quantity named there can be no question. Mr. Harris, the secretary and treasurer of the defendant company, testifies that it represented glass that was cut off at the end of the lehr, and put in stock as salable glass; and Mr. Kerr, the superintendent, states that the difference between the glass sold or in stock and the total product represented glass that was considered sufficiently good for sale at the time it was manufactured, but that, as they improved in their work, it was broken up because it did not come up to the standard. But it is not what the defendants disposed of, but what they produced that is to be considered in this part of the accounting. Infringement was complete, when the process was used, and advantage was derived from it to the extent that it was successful, which is not affected by the disposition that was made of the product afterwards. The defendants are liable therefore for the full 90,308 square feet of salable glass manufactured, regardless of what they happened to do with it.

In order to determine the amount of money saved in the production of this quantity of glass by using the patented process, comparison is to be made with others which were open to the defendants. In passing upon the validity of the patent, two other processes were principally considered, one for the molding of prism tiles, according to the Heidt patent, and the other for the rolling of prism plate, according to the Cummings. As to the one of these it was found that, while the prisms were of fairly sharp outline, the tiles were necessarily of limited size, and, a number of them having to be assembled together and set in a metal frame to make up a skylight or window, not only did this add to the expense, but it detracted seriously from their commercial acceptance and efficiency. And, as to the other, it was pointed out that there was a difficulty in securing sharpness and accuracy of prisms, and that, having to be made thin, the plate could not be polished, and had thus to be put on the market in a comparatively imperfect condition. The process of the patent in suit by comparison over-

came these objections, turning out a superior character of glass, with sharply outlined prisms, in large sheets, without lateral or structural strain, and able to be properly annealed and polished. The same two processes are brought forward in this accounting, but are differently relied on. According to the complainants, the saving in cost over the manufacture of prism tiles furnishes the criterion by which the advantage to the defendants of the use of the patented process is to be determined, which is no doubt considerable. But, according to the defendants, rolled prism plate, made after the Cummings patent, is the one to be taken, this process being open to them, having been declared in Daylight Manufacturing Company v. American Prismatic Light Company, 142 Fed. 454, 73 C. C. A. 570, to be invalid; judged by which there was no saving in cost of production, pressed prism plate and rolled prism plate in this respect being equal. But the method which is taken for comparison in any such case must not only be open to the public, but also must be capable of equally satisfactory results. Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263. And it must therefore in the case in hand have been adequate to produce glass of similar character and value. Novelty Glass Works v. Brookfield, 170 Fed. 946, 95 C. C. A. 516. But with regard to prism tiles, while structurally of the same quality as pressed prism plate, having the same clear and sharply cut angles, they have other disadvantages, by reason of which they cannot be considered as in the same category. It is true that it was these, rather than rolled prism plate, that pressed prism plate came in competition with and displaced. But, having to be assembled and framed, prism tiles are not like the clear and unobstructed sheets of pressed prism plate, and do not therefore come up to the standard required as the basis for comparison. The same is true also with regard to rolled prism plate, which is the other alternative. The decision adverse to this process was not made until December 11, 1905, and before that it could not be used without the danger of a lawsuit. But assuming that it was open for the whole period of infringement, and conceding that, in a general way, rolled prism plate is of the same character as pressed prism, there can be no question that the quality is inferior, for which, if nothing more, there is the market price of it, and it is not therefore to be brought into comparison with pressed prism plate in cost of production, which at present concerns us, any more than prism tiles are. Both these processes being thus found unavailable, it is not necessary to go into the vexed question of what it cost the defendants to produce pressed prism plate, although, if it were material, the figures of Mr. Wadsworth would have to be taken, his testimony being most convincing, amounting to a demonstration, where that of the defendants' witnesses is very unsatisfactory, not to say inconsistent and contradictory.

But the rejection of these processes, as a basis for determining the saving to the defendants by the use of the patented process, does not leave the complainants without remedy. The superiority of product, as shown by the price obtained, is equally a measure of the advantage secured by it. Rolled prism plate, as we have seen, is the nearest in

character; but pressed prism plate was worth a great deal more, and the difference in price was thus what the defendants got by the practice of the one process over the practice of the other. The situation is not unlike that in Novelty Glass Company v. Brookfield, 170 Fed. 946, 957, 95 C. C. A. 516, where the complainants were awarded the entire profits derived from the sale of articles made by the defendants on the infringing machines, it being shown that articles made by the use of other machines which were open to them were not salable. The defendants here by using the patented process were able to produce glass for which they got just so much more than they got for glass made by the Cummings process, and the difference was the saving or advantage to them; the cost of production in each case being substantially the same. The average selling price of the defendants' pressed product was 26 cents a square foot, and the average price in the market of rolled prism plate was not to exceed 12 cents, the defendants contracting to sell their whole product to the 3-Way Prism Glass Company as low as 8 and 10 cents. This was a gain of 14 cents a foot. And as 90,308 square feet of salable glass was manufactured, and we are dealing not with the question of profits, but with the relative value of the product made, the total gain to the defendants, on this basis, from the use of the patented process, was $12,643.12—that is to say, 90,308 times 14—to which extent, in any event, they must account. There is nothing of this, it is to be noted, to be attributed to the wiring, nor to the fluted or lenticular back, of which something is made in the evidence. These features no doubt contribute to the market value of prism glass where they are used. But in the figures named the prices for glass of that character are not taken, but only the price of plain pressed prism plate.

But this is not all for which the defendants should account. They are liable by way of damages for the sales, if any, which the complainants lost; and they sold some 57,591 square feet, which, if the patents had been respected, the complainants, in all probability, would themselves have sold. The complainants and the defendants were the only parties engaged in the manufacture of pressed prism plate, and were in direct competition for the trade, the complainants being abundantly equipped to take care of whatever trade there was. It is reasonably certain, therefore, that, if the defendants had not sold this glass, the complainants would. The comparative diagram made by Mr. Wadsworth demonstrates this, the sales made by the complainants increasing as those of the defendants fell off, and going up with a bound, notwithstanding the augmented price when the injunction cut off the infringement. Something, it may be, is ordinarily to be allowed for business enterprise, by which goods are advertised and pushed; all that one party disposes of not necessarily being taken away from the other. But in the face of the showing made this can hardly be held to apply here. The trade in this character of glass was within narrow lines, being confined to the two parties before the court. It was not as in Brookfield v. Novelty Glass Company, 170 Fed. 960, 95 C. C. A. 516, where there were others in the field. That profits of which the holder of a patent has been deprived by reason of lost sales due to infringement are a proper subject of damages there can be no doubt.

Covert v. Sargent (C. C.) 38 Fed. 237; National Company v. Elsas, 86 Fed. 917, 30 C. C. A. 487; Rose v. Hirsh, 94 Fed. 177, 36 C. C. A. 132, 51 L. R. A. 801; Kinner v. Shepard (C. C.) 107 Fed. 952; Goulds v. Cowing, 105 U. S. 253, 26 L. Ed. 987. And in the present instance, if the complainants had not been interfered with, they would have been large. The prices which the complainants established early in 1904, when they first offered pressed prism plate to the trade, varied from 42¾ to 60 cents a square foot, according to the size of the sheet, and whether canopy or skylight, or cut to order, or in car load lots, these prices being a little less than the mean average price for prism tiles. While the infringement was going on, however, these figures were cut nearly one-half, and sales made as low as 18²/₉ cents, although by far the largest quantity was sold at 33⅓ cents. And, when the defendants were enjoined, the prices were put back to where they were before, notwithstanding which advance, as already stated, the sales largely increased. It is fair to assume, therefore, that, except for the infringement, the prices originally established would have prevailed, the average of which was about 50 cents, at which there was a profit to the complainants of some 42 cents above the factory and other costs, which were about 8 cents. And this on the whole quantity sold by the defendants—57,591 square feet—would amount to $24,188.22. To this sum the complainants are entitled by way of damages for profits lost on sales of which they were deprived.

This also suggests another source of damage of which they may further complain. If, except for defendants' infringing competition, the complainants would have been able to maintain prices at the figures which they started out with, and to which they subsequently returned when the infringement was stopped, they are entitled to be recouped for the loss which ensued by reason of the low prices to which they were forced to come down. As is said in Yale Lock Company v. Sargent, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. Ed. 954:

"Reduction of prices and consequent loss of profits, enforced by infringing competition, is a proper ground for awarding damages."

And there are numerous other cases to the same effect. Boesch v. Graff, 133 U. S. 697, 705, 10 Sup. Ct. 378, 33 L. Ed. 787; Creamer v. Bowers (C. C.) 35 Fed. 206; Kinner v. Shepard (C. C.) 107 Fed. 952. The sales of the complainants during the year 1905, as to which alone claim on this account is made, amounted to 36,282.6 square feet, and they were made at prices ranging all the way from 54 to 18²/₉ cents, the total amount realized therefrom being $11,780.28. But at 50 cents a foot, at which, as we have seen, it is reasonably certain that the same quantity and more could have been sold, the complainants would have received $18,141.30, a loss of $6,361.02, directly due to the low prices which the defendants forced. It is said that, while the complainants were selling 36,282.6 square feet, the defendants sold but 3,852, by which it is not possible that any such damage was done. But this does not state the whole case. The fact that the complainants reduced their prices, and were compelled to do so because the defendants were in the market at lower figures for the same goods, clearly appears, and the defendants are chargeable with the consequent loss to the com-

plainants, regardless of the quantity of goods sold by them during that time. That the complainants' sales increased while the defendants' fell off may well have been due to the reduction in price which the complainants made, which, with the monopoly of the market by reason of their patents, if no infringing goods were put out, would not have been required of them.

As the result of these conclusions, the defendants must therefore account:

(1) For the gain or saving which they have made by the use of the patented process over others which were open to them, producing the same character and grade of glass.....		$12,643.12
(2) For damages		
(a) By reason of sales of which the complainants were deprived, and by which they would have profited to the extent of.....	$24,188.22	
(b) For the loss of profits occasioned by the reduction in prices, compelled by the infringement.....	6,361.02	30,549.24,
Making the total amount for which the defendants are liable.....		$43,192.36.

It is urged by the complainants that the damages should be trebled under the power given by the statute. Rev. St. §§ 4919, 4921 (U. S. Comp. St. 1901, pp. 3394, 3395). But there seems to be no occasion to carry the case to that extreme.

It is urged, on the other hand, by the defendants, that full costs should not be given, only two of the three patents relied on being upheld, and one claim of the method patent not having been infringed, to say nothing of the claim of the machine patent, which was abandoned in the course of the suit. But it does not appear that the expenses to which the defendants were put were increased to any appreciable extent by reason of the patent or claims which went out, and, if so, there would seem to be no occasion for withholding a part of the costs, and the defendants' one exception which goes to this question is overruled. But the complainants' exceptions, so far as the master's report is at variance with this opinion, are without further specification sustained.

Let a decree be entered in favor of the complainants for $43,192.36, with costs.

STANDARD MACH. CO. v. RAMBO & REGAR, Inc.

(Circuit Court, E. D. Pennsylvania. August 11, 1910.)

No. 43.

1. PATENTS (§ 328*)—VALIDITY—CIRCULAR KNITTING MACHINE.
The Houseman patent, No. 774,473, for a circular knitting machine, claim 22, which is a broad fundamental claim, in view of the prior art, is unwarranted, and void for anticipation.

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

2. PATENTS (§ 72*)—VALIDITY—ANTICIPATION.
A patentee cannot avoid anticipation of broad claims by showing the presence in the alleged anticipatory device of elements which would not obviate infringement of such broad claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91; Dec. Dig. § 72.*]

3. PATENTS (§ 328*)—ANTICIPATION—CIRCULAR KNITTING MACHINE.
The Wilcomb patent, No. 645,676, for a circular knitting machine, claims 4 and 8, which are substantially for a thread catcher, which engages such threads as are at times inoperative when knitting striped or reinforced work, are broader than the invention of the patentee, and void for anticipation in the prior art.

In Equity. Suit by the Standard Machine Company against Rambo & Regar, Incorporated. On final hearing. Decree for defendant.

Harding & Harding, for complainant.
Wilmarth H. Thurston, for respondent.

BUFFINGTON, Circuit Judge. This bill charges infringement of claim 22 of patent No. 774,473, granted November 8, 1904, to Houseman, and of claims 4 and 8 of patent No. 645,676 granted March 20, 1900, to Wilcomb. Both patents concern circular knitting machines. Such machines have two cylinders, one carrying the needles, and called the "needle-cylinder," the other carrying the cams, and called the "cam-cylinder." The cams operate on the butts of the needles, and cause them to reciprocate longitudinally and consecutively, and thereby receive the yarn in their hooked ends, and then draw such looped yarn through the loop of the previous course. The fabric adjacent to the needles lies over the end of the needle-cylinder, and, as the ends of the needles pass below the cylinder end, they shed the old loop and pull the new one through it. Hence it will be seen the greater the needle reciprocation the longer the loops will be. Such variation is determined by the distance between the top of the needle-cylinder and the lowest point of the stitch cam. This lengthening of stitch produced what is termed fashioning or the shaping of the stocking to conform to the calf of the leg.

Addressing ourselves, first, to the Houseman patent, we note that fashioning was well known and successfully practiced in circular machine knitting. We find examples of mechanism, therefore, for example, in the patent of Coburn, No. 395,314, of January 1, 1889, where as shown in figure 2 there are "inclines, H, which inclines correspond with inclines, I, in the lower end of the needle-cylinder, and the cylinder rests on said ring, so that by turning the ring or annulus the needle-cylinder may be raised or lowered." While, as stated, the device "is particularly designed to control the position of the needle-cylinder vertically, so as to gradually lengthen and shorten the stitches in knitting a tubular web for a stocking to the end that such tubular web may be formed to fit the leg and foot of the wearer," yet it will be observed that the incline or eccentric by which this is accomplished is fixed and nonvariable. Of the same general type is patent No. 529,508

of November 20, 1894, to Stewart, wherein as said by respondent's expert:

"Cam 14 has an eccentric surface gradually increasing in radius all the way around from the lowest to the highest point (practically like the Coburn construction)."

It will be thus seen that these types of machines, while they fashioned the stocking leg by a range of stitch, were limited in such range and in its progressive size by the fixed nonvariable character of their inclines, which were integral, inseparable parts of the machine. In the patent of Hemphill, however, No. 629,503 of July 25, 1899, we find a departure from this nonvariable eccentric practice. It is true Hemphill's machine was for knitting half hose, in which there is no fashioning, but its significance lies in the fact that his mechanism is addressed to lengthening the stitch. And, while he uses this loop lengthening in the heel and toe of half hose to permit the use of an additional or reinforcing thread, it is substantially the same loop lengthening which when used in knitting the leg of a stocking permits fashioning. In his device Hemphill embodies in the same roller removable and changeable members, whereby the level of the needle-cylinder is changed in order to affect the length of stitch in the heel and toe portions of half hose. This is done by means of two eccentric cam surfaces, one for the heel and one for the toe, each of which are detachably mounted on the cam-roller. Now, to our mind, this construction so suggestively disclosed the general principle of adapting, in circular machine knitting, a cam-roller to adjustable, and therefore, if desired, variable eccentric capacities, that thereafter no one could monopolize that general idea or cover all means for accomplishing such result. Indeed, were the question of the patentable novelty of what even Hemphill did now before us, we would feel impelled to give due weight and regard to the fact that the general principle of obtaining variable effects in the same mechanism from eccentric variation therein was a prior mechanical principle and practice for which it suffices to refer to the Jones patent, No. 284,860, dating back to 1883, for a variable cam adapted "to increase or diminish the circumferential extent of this swell by the adjustment of one of the plates so that the cam may have a longer or shorter swell on the roller or other object which the cam has to actuate."

Without then discussing the testimony relative to other phases of the prior art, we inquire as to what advance Houseman made therein, and especially what he was entitled to claim in view of his disclosure. His improvement, stated in his words in his specification, is:

"A quadrant of this cam-roller is partially cut away and there is inserted a portion in eccentric with the remainder of the cam-roller. This piece or portion m is secured by the screw, m', working in the slot, m^2. By moving this portion in and out the slot the eccentricity may be varied. In order, however to prevent a ledge being formed at the point of juncture of the inserted portion with the remainder of the cam-roller M at the point where in the rotation of the cam-roller M the follower, l^2, passes this point, I form the slot in a line at right angles to a line drawn from this point to the center of the cam-roller, and thus with any outward or inward motion of the pin, m', the juncture of the main portion of cam-roller M and the portion m are at the same level. The follower, l^2, is made of such width as to cover both the por-

tion, *m*, and the main portion of the cam-roller at the point where the eccentric quadrant is inserted."

Accepting as correct the contention of complainant's expert that Houseman was granted protection for this specific device in claim 23 which reads as follows: "In a circular knitting machine, in combination, a needle-cylinder, supported so as to be vertically movable, a roller having a portion thereof cut away, a piece inserted therein eccentric with the remainder of the roller and adjustable thereon in a line at right angles to a line from the juncture of the inserted piece and main portion of the roller at the periphery to the center, means to rotate said roller and connection between said roller and the needle-cylinder support"—we next inquire whether in addition thereto he was entitled to the protection of claim 22 here in controversy. That claim is a broad one, and, if sustained, would close the door against any one seeking to vary his cam-roller through an adjustable eccentric portion of any kind or in any way. We cannot countenance such a result. The improvement of Houseman was not fundamental. There is no proof of its great utility or its general adoption or of its supplanting, when used, other forms of circular knitting machines. Claim 23 presumably afforded complete protection for the only form of device Houseman disclosed and to make such a subordinate device a means of burdening a successful industry through a broad, fundamental claim would to our view pervert the avowed purpose of the patent law which is to encourage, and not to throttle, improvements. We are therefore of opinion that claim 22 was unwarranted and should be adjudged invalid.

We next turn to the patent of Wilcomb No. 645,676, of March 20, 1900, which as we have seen is also for a circular knitting machine. The fourth and eighth claims are by this bill alleged to infringe. They are substantially for a thread catcher which engaged such threads as at times were inoperative when knitting striped or reinforced work, and thus prevented entanglements.

Wilcomb describes as follows the object he had in view:

"My invention relates to circular-knitting machines of that class in which a plurality of threads are fed to the needles to produce striped or reinforced work and in which the threads thrown out of work remain attached to the inner side of the tubular fabric. It is the object of my invention to provide means for taking care of the threads which are out of work and which in the continued revolution of the machine become twisted and entangled, tending to draw the fabric up through the cylinder and interfering with the successful working of the needles and also drawing and distorting the loops of the fabric where the threads are attached to it or breaking the thread away from the fabric in case of tender yarn. My invention is designed to obviate these difficulties and defects by providing a thread-engaging device which in the revolution of the machine engages the loosely-attached inactive thread and draws it to the center of the cylinder where it is held, so as to prevent it from interfering with the work."

The means by which he accomplishes this object are, as disclosed in his patent, as follows:

"My invention consists of a take-up finger or thread engaging and measuring device, F, arranged to work inside of the needle circle, having a scroll form, the longer curved end 4 of the scroll reaching out near to the needle row just back of the thread feeds. This end of the thread-engaging device or

scroll I prefer to give a slight curve upward to enable it more readily to pass above the thread that is attached to the fabric in the first few revolutions of the machine after the thread has been thrown to the center of the cylinder by being caught by the engaging device as shown in Fig. 1. The smaller curved end or eye, 5, of the scroll works approximately in the center of the circle of needles. As the cam-ring revolves this thread finger or scroll engages the loosely-attached thread extending from the thread-guide to the fabric and draws it to the center of the needle-cylinder to the small part of the scroll, thereby drawing the yarn from the spool or supply. This thread-finger is set slightly above the top of the needle-cylinder, so that the thread-finger will pass above the thread where it is attached to the fabric, and at each revolution of the machine the thread is passed underneath the thread-finger, preventing the fabric from lifting. As the fabric feeds down through the cylinder more yarn is drawn from the supply end, and this strand or all these strands are held taut and never become slack or interfere with the work. When any of these inoperative threads are brought into action again, the loop end is still held by the scroll until the needle has drawn the new thread into the body of the fabric, when the long upturned end of the scroll will immediately pass above this part of the thread, and the continued revolution of the machine will allow the loop (both ends of which are now attached to the fabric) to slip off the small curved end of the scroll. This thread is now attached to the fabric in two places and hangs loosely on the inside of the fabric in the form of a loop. * * * In the case of a reinforced fabric where only one strand of thread is used in addition to the main thread this scroll operates on this reinforcing-thread in the same manner, keeping it taut at all times, preventing the thread from flying into engagement with the needles, and thus making imperfections in the fabric. * * * I do not wish to limit myself to an engaging device of the exact scroll-like form shown, as I am aware that surfaces of other forms would catch and hold the threads, and the scroll may be made in a manner different from that shown. I have illustrated in Fig. 3 one instance of the manner in which the engaging device may be modified, which figure shows the device in the form of a hook, E, of substantially U-shape."

Upon this device, several specific claims involving the scroll-like structure were granted, of which claim 2 is an example, viz.:

"In combination with a circular-knitting machine having multiple feed devices, a thread-engaging device having a scroll-like surface to engage the inactive or floating threads on the inside of the fabric, substantially as described."

None of such claims are here in controversy, but the claims involved are of much broader character, in that the thread-engaging devices have practically no limitation. These claims are (4) "in combination with a circular-knitting machine having multiple feed devices a thread-engaging device inside the needle row to guide and hold the inactive floating threads extending from the fabric to the feed out of engagement with the needles and adapted to release the thread when it is introduced to the needles again, substantially as described," and (8) "in a circular-knitting machine, in combination, a plurality of thread-carriers, and means to move one or more of said thread-carriers in and out of operative position, and a device within the needle-cylinder adapted to catch and retain the thread to the carrier out of operative position."

Now, it is clear that the only device Wilcomb disclosed was the scroll shaped one he described. Such a scroll shape he specifically outlined and in it he alleged his invention lay, and while in words we have quoted above he properly guarded himself against modifications thereof, yet the fact is clear that nothing was disclosed in his specification

save the scroll-like structure. For this, as we have seen, he made claims, and such claims presumably protected him from any use thereof or of any substantial or equivalent reproduction. But such claims, as we have seen, are not alleged to be infringed by respondents, but complainant would hold them as infringers, because it is alleged they come within the much broader scope of the claims in question which without limitation to a scroll-like structure covers in the fourth claim any "thread-engaging device inside the needle row" adapted to guide, hold, and release the inactive thread, and, in the eighth, "a device within the needle-cylinder adapted to catch and retain (return?) the thread to the carrier out of operative position." We are thus brought face to face with the question whether the specific, scroll-like structure Wilcomb devised and disclosed to the public warranted him in claiming a monopoly over all the thread-engaged devices covered by the broad claims here involved. To our mind clearly not, and we think the disclosure of the prior art strengthen such conclusion. For example, in Appleton's patent No. 425,362, of April 8, 1890, we have a circular-knitting machine. It has multiple feed devices and a thread-engaging device inside the needle-row. During the knitting for which it is adapted, namely, when a movable yarn-guide to control, an extra thread is employed in connection with a nonmoving yarn-guide which knits all the time, its thread-engaging device guides and holds the inactive thread, and is adapted to release it when it is reintroduced to the needles. It is said, however, that such machine is limited to styles of knitting different from Wilcomb's, and that it avails itself of tension to accomplish its object. It should, however, be noted that Wilcomb also alleges his device is adapted to "reinforced work." But, ignoring such fact, it still remains that there is no limitation in either of these particulars, viz., tension or reinforcing work in the claims in controversy, and, if they are valid, an infringer could not, by embodying such features or capabilities to his machine, thereby escape infringing. So conversely a patentee cannot avoid anticipation of broad claims by showing the presence of elements which would not obviate infringement of his broad claims. Indeed as respondent's expert properly says:

"Both claim 4 and claim 8 of the Wilcomb patent might as well be predicated upon the construction shown in the Appleton patent as upon that specifically shown in the Wilcomb patent itself."

Moreover, the broad scope of those claims is such that standing by themselves they contain no limitations which preclude their application also to the thread-engaging device shown in the patent to Stewart No. 451,703 of May 5, 1891, for a thickening thread-feed mechanism for knitting. Without, therefore, commenting further on other practices of the prior art, we are of opinion that in view of the instances cited, of the comparatively narrow sphere of Wilcomb's device with relation to the developed art of circular knitting, and to the absence of proof of its general adoption, he cannot sustain the claims in controversy. And, in considering these prior instances, we are not to be misunderstood as finding in them an anticipation of Wilcomb's scroll-like device. That would be a pertinent inquiry were the claims

for that specific device here in question, but their relevancy consists in their bearing on the broad, fundamental claims which could only be sustained by ignoring the thread-engaging devices of the prior art entirely. While conceding for present purposes, Wilcomb's right to these specific claims he made, it by no means follows he is entitled to the broad ones here in controversy.

Let a decree be drawn dismissing this bill.

PHŒNIX KNITTING WORKS v. BRADLEY KNITTING CO. et al.

(Circuit Court, E. D. Wisconsin. June 15, 1910.)

1. PATENTS (§ 43*)—PATENTABILITY—DESIGNS.

A design is patentable if it presents to the eye of the ordinary observer a different effect from anything that preceded it, and renders the article to which it is applied pleasing, attractive, and popular, even if it is simple, and does not show a wide departure from other designs, or if it is a combination of old forms.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 50; Dec. Dig. § 43.*]

2. PATENTS (§ 45*)—NOVELTY—PRESUMPTION AND BURDEN OF PROOF.

A patent is prima facie evidence of novelty, and a party seeking to overthrow the presumption in its favor must make a case so persuasive as to leave no room for doubt or controversy.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51–53; Dec. Dig. § 45.*]

3. PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR NECK SCARF.

The Mead design patent, No. 39,347, for a design for a neck scarf, was not anticipated and discloses patentable novelty; also *held* infringed.

In Equity. Suit by the Phœnix Knitting Works against the Bradley Knitting Company, J. J. Phœnix, W. B. Tyrrell, and W. H. Tyrrell. Decree for complainant.

This is a suit in equity based upon a design patent No. 39,347, granted to one Mead June 9, 1908, for an original and ornamental design for an article manufactured, to wit, a neck scarf, which patent was thereafter, and before the alleged infringement, duly assigned and transferred to the complainant. The bill sets up infringement by the defendants, and prays for an accounting and injunction. The answer admits the citizenship of the parties, the issuance of the design patent to Mead, denies that Mead was the first or original inventor of the design covered by said patent, denies infringement, denies also that the alleged invention is patentable, and alleges that the said supposed invention and every substantial part thereof had been known to, used, and disclosed in prior publications and patents of the United States long prior to the date of the alleged invention of Mead. Several patents are cited by way of anticipation, that the alleged invention and improvement set out in said patent had been in public use and on sale in the United States prior to the supposed invention by Mead, and more than two years before the application for said letters patent was filed, and the names and addresses of several parties are given as having manufactured and used the said neck scarf. Issue is joined by replication in the usual form. Evidence was offered by the defendants tending to show that the several neck scarfs bearing more or less resemblance to the scarf of Mead had been manufactured by different people in different places. These scarfs were for the most part experimental, were none of them sold or offered for sale, but abandoned. Some of them were given away to operatives in the factory where said experimental scarfs were pro-

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

duced. Some of them are shown to have been worn by the parties to whom they were given; but the evidence is vague and uncertain as to the extent or character of such use.

Winkler, Flanders, Bottum & Fawsett, for complainant.
Erwin & Wheeler, for defendants.

QUARLES, District Judge (after stating the facts as above). Section 4929, Rev. St. (U. S. Comp. St. 1901, p. 3398) provides:

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

It was conceded that complainant herein is regularly engaged in the business of the manufacture and sale of a flat neck muffler known as the "Phœnix Muffler," some of which are provided with serrated edges as shown by the exhibits and exhibited in the design of the patent in suit, some of which are provided with straight edges only, or other designs of knitting. Evidence was offered showing that the complainant had extensively advertised this scarf, and had sold as many as 150,000 dozen similar to the two scarfs introduced in evidence by complainant. The law is well settled, as stated by Mr. Robinson in his work on patents (volume 3, p. 727): A design presenting a new appearance to the eye and creating a demand for the goods on which it is impressed is patentable, although simple and resembling other designs. In Untermeyer v. Freund (C. C.) 37 Fed. 342, the law is stated as follows:

"If a design presents a different impression upon the eye from anything that precedes it, if it proves to be pleasing, attractive, and popular, if it creates a demand for the goods of its originator, even though it be simple and does not show a wide departure from other designs, its use will be protected. * * * A design requires invention, but a different set of faculties are brought into action from those required to produce a new process or a new machine. In each case there must be novelty, but the design need not be useful in the popular sense. It must be beautiful. It must appeal to the eye. The distinction is a metaphysical one and difficult to be put in words"—[citing Gorham v. White, 14 Wall. 511, 20 L. Ed. 73].

The test is the appearance to the ordinary observer, not to experts. Kraus v. Fitzpatrick (C. C.) 34 Fed. 39; Redway v. Ohio Stove Co. (C. C.) 38 Fed. 582. This is true even though old forms and familiar objects be combined. If the new design imparts to the eye a pleasing impression, such production is patentable. Eclipse Manufacturing Co. v. Adkins (C. C.) 44 Fed. 280; Smith v. Stewart (C. C.) 55 Fed. 482; General Gaslight Co. v. Matchless Mfg. Co. (C. C.) 129 Fed. 137.

With these principles in mind, the patents set up by way of anticipation, some being for neckties, some for stockings, neck, and chest protectors, do not disclose the design of the patent in suit. The fact that the art of knitting was old, that certain stitches employed were

old, that four-in-hand neckties were old, that various scarfs were old, did not prevent Joseph Mead from furnishing a muffler of the design of the patent which was entitled to protection. The fact that various elements of this scarf were found in various other designs would not defeat his application.

The court was strongly impressed while examining the complainant's samples and the various advertisements thereof in newspapers and magazines that there is something very attractive about complainant's design. It is difficult to describe the peculiar elements which produce this effect. It may, in the language of the trade, be said to be "jaunty," "natty," "smart," "neat." Its lines are graceful. It is not the zigzag stitch alone, it is not the color nor the serrated edges, but what the French would call the "tout ensemble," that is responsible for this pleasing effect. Other scarfs have been exhibited showing various features that seem quite like the scarf of Mead; but they do not awaken the pleasing impression that is so marked in the complainant's design. Some are clumsy and coarse, and none of them approximate the complainant's design as to the general effect on the eye of the ordinary observer.

There is another fundamental proposition of law which has an important bearing upon this controversy. A patent is prima facie evidence of novelty, and this presumption is of great weight. The party seeking to overthrow it must make a case so persuasive as to leave no room for doubt or controversy. Miller v. Handley (C. C.) 61 Fed. 100; Mast, Foos & Co. v. Dempster Mfg. Co., 82 Fed. 327–332, 27 C. C. A. 191. The unsupported oral testimony which will warrant a finding of prior use must be clear and satisfactory. It is always open to explanation. It ought to be sufficient to establish such a use beyond a reasonable doubt. Barbed-Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. Many other cases are cited by complainant's counsel which are equally persuasive.

Applying these principles to the evidence in this case, I cannot find that the defendants have discharged the burden which the law places upon them in such a case. It would be a waste of time to consider the evidence in detail. It will be remembered that some of the rules applied to mechanical patents are wholly inapplicable to those for design. In Untermeyer v. Freund, supra, the court say:

"To speak of the invention as a combination, or to treat it as such is to overlook its peculiarities."

In Smith v. Stewart (C. C.) 55 Fed. 481, the court say:

"Such designs generally, if not uniformly, contain nothing new except the appearance presented to the eye by arrangement of previously existing material, such as lines, scrolls, flowers, leaves, birds, and the like. The combination, where several separate objects are employed, need not be, and cannot be, such as this term signifies when applied to machinery. * * * The object sought in a design is a new effect upon the eye alone, a new appearance, and the several parts need not have any other connection than is necessary to accomplish this result."

The scarfs manufactured by defendants appear to be close imitations of the complainant's scarfs. The addition of a V-shaped piece

at the back of the neck, which is not disclosed either when the scarf is worn or packed in the box, will not relieve it from infringement. It is a mere mechanical adjunct which may improve the utility of the scarf by keeping it in place, but which contributes nothing to the appearance of the design.

I am constrained to hold that the complainant's patent has been sustained, and that the same has been infringed.

An interlocutory decree will be prepared in accordance with this opinion.

PHŒNIX KNITTING WORKS v. GRUSHLAW.

(Circuit Court, E. D. Pennsylvania. August 22, 1910.)

No. 537.

1. PATENTS (§ 43*)—PATENTABILITY—DESIGNS.

A design, to be patentable, must be new and original, but this requirement does not preclude the selection and adaptation of an existing form, provided it is more than the exercise of the imitative faculty and the result is in effect a new creation producing a different effect on the eye of the ordinary observer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 50; Dec. Dig. § 43.*]

2. PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR NECK SCARF.

The Mead design patent, No. 39,347, for a design for a neck scarf, *held* not anticipated, valid, and infringed, on a motion for a preliminary injunction.

In Equity. Suit by the Phœnix Knitting Works against Samuel Grushlaw, individually and trading under the style of the Pennsylvania Knitting Mills, and also trading under the style of Penn Muffler Company. On motion for preliminary injunction. Motion sustained.

Fraley & Paul, for complainant.

Frank S. Busser and Hector T. Fenton, for respondent.

HOLLAND, District Judge. This is a bill in equity filed to restrain the defendant from infringing design patent No. 39,347, granted to Joseph Mead June 9, 1908, for "a new, original and ornamental design for neck scarfs," which patent was thereafter and before the alleged infringement duly assigned and transferred to the complainant.

The defendant does not deny the charge that he has been making a neck scarf in exact imitation of the one designed by complainant, but sets up nonpatentability, and for the purpose of establishing this defense at the hearing produced a number of articles which have been manufactured for the past 10 or 15 years, containing, as the defendant claims, the same design; that is, a design exhibiting the zigzag or herring bone stitch and the serrated edges. Among the exhibits presented by the defendant were a number of knitted sleeve blanks, which, it is claimed, in all respects as to shape, zigzag stitch, and serrated edge, are exactly similar to the complainant's design, and of which the patent in suit is an exact duplicate. A suit based upon this patent was

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

instituted in the Eastern District of Wisconsin, and after a final hearing, upon proofs submitted by both sides, Judge Quarles on June 15, 1910, rendered a decision sustaining the patent. It is now urged, however, that the knitted sleeve blanks which contain the zigzag stitch, and serrated edge produced in evidence in the case at bar, were not submitted in the Wisconsin case. An examination of the defendant's record, in the latter case, shows that a great number of articles were placed in evidence containing the very same design found in the knitted sleeve blank. The zigzag stitch and serrated edge are both shown in a girl's jacket, which was in evidence in the Wisconsin case. The zigzag or herring bone stitch appears both in the sleeve and in the side of the jacket, and the serrated edge distinctly appears in the front or side thereof. It is true that the defendant here has shown the use of the herring bone stitch, which necessarily produces the serrated edge, for a great number of years prior to the date of the patent, but there has been no exhibit which shows its use in exactly the same ornamental style which appears in the design in question. The effect upon the eye is entirely different, and in design patents that is the test. It must be new and original, but this requirement does not preclude the selection and adaptation of an existing form, provided it is more than the exercise of the imitative faculty, and the result is in effect a new creation. Smith v. Whitman Saddle Co., 148 U. S. 674, 679, 13 Sup. Ct. 768, 770, 37 L. Ed. 606. The court says:

"The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he could be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

Judge Quarles held that:

"There is something very attractive about the complainant's design. It is difficult to describe the elements which produce this effect. It may in the language of the trade be said to be 'jaunty,' 'natty,' 'smart,' 'neat.' Its lines are graceful. It is not the zigzag stitch alone, it is not the color nor the serrated edges, but what the French would call the 'tout ensemble,' that is responsible for this pleasing effect. Other scarfs have been exhibited showing various features that seem quite like the scarf of Mead, but they do not awaken the pleasing impression that is so marked in the complainant's design. Some are clumsy and coarse, and none of them approximate the complainant's design as to the general effect on the eye of the ordinary observer."

The same can be said of the exhibits presented in this case, especially the similar design found in the knitted sleeve blanks and jacket. While they exhibit the zigzag or herring bone stitch and the serrated edge they are much more clumsy and coarse, and do not "awaken the same pleasing impression that is so marked in the complainant's design." There is evidence of originality and invention in Mead's adaptation of the herring bone stitch and serrated edge to the manufacture of these neck scarfs, and he is entitled to be protected. Others have used the same lines and the same stitch, but they have failed to produce the same design and appearance, and that is the test. The real end to be attained is the impression upon the mind of the observer; that is, the appearance of the substance not in itself nor to an expert,

but to the eye of an ordinary observer. Gorham Co. v. White, 81 U. S. 511, 20 L. Ed. 731; Phœnix Knitting Works v. Bradley Knitting Co., 181 Fed. 163.

Our attention has been called to a suit which had been instituted on this patent in the Second Circuit at New York, and upon motion a preliminary injunction was refused by Judge Coxe. This, however, occurred prior to the final hearing in the Wisconsin case. Phœnix Knitting Works v. Bradley Knitting Co., supra. There had been no adjudication of the patent at the time the question was before Judge Coxe.

The refusal of the New York Circuit Court to award a preliminary injunction under the circumstances is no sufficient reason for this court to withhold its restraining order after the patent has been found to be valid on final hearing upon full proofs. Electric Mfg. Co. v. Edison E. L. Co., 61 Fed. 843, 10 C. C. A. 106. A preliminary injunction against the defendant will be granted.

The defendant, however, insists that he will be able to show his right to manufacture these neck scarfs as now made by him, and that a preliminary injunction at this time will result in loss and damage. In order that he may be assured that he will be protected against any loss in case he is able to establish his claim, the plaintiff will be required to file a bond in the sum of $10,000, conditioned for the payment of any damage which may result to the defendant by reason of the issuing of the injunction against him.

A decree may be prepared in accordance with this opinion.

SHAW v. ROYERSFORD FOUNDRY & MACHINE CO.

(Circuit Court, S. E. D. Pennsylvania. July 5, 1910.)

No. 39.

PATENTS (§ 328*)—NOVELTY—SHAFT COUPLING.

The Shaw patent, No. 674,024, for a shaft coupling, is void for lack of patentable novelty.

In Equity. Suit by Frank Shaw against the Royersford Foundry & Machine Company. Decree for defendant.

Parsons, Hall & Bodell, for complainant.

Henry N. Paul, Jr., and Joseph C. Fraley, for respondent.

JOHN B. McPHERSON, District Judge. The patent in suit is No. 674,024, granted May 14, 1901, to Frank Shaw, the complainant, for improvement in shaft couplings. The application was filed in April, 1896, and its course through the office was tedious and beset with difficulties. It belongs to the class of compression couplings, and consists of an inner sleeve which encircles the two shaft ends, and an outer shell or ring which clamps the sleeve tightly around the shaft. Both shell and sleeve were confessedly old in the art, and the applicant relied mainly, if not wholly, upon the number and

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

arrangement of certain slots in the sleeve as the novel feature of his invention. But slotted sleeves also were old, and neither the number nor the arrangement of his slots made any impression upon the Office. They were repeatedly decided to present no patentable improvement over the prior art, and in the final ruling upon this subject the applicant acquiesced. Nothing need be added to the references in the file wrapper upon this subject. After numerous vicissitudes the claims finally emerged in the form they now appear, and the patent was allowed. The claims are as follows:

"(1) In a shaft-coupling, the combination with an outer shell consisting of sections having tapering inner faces, and clamping means for adjusting the sections endwise toward each other; of a shaft, and a sleeve for encircling the shaft, said sleeve being arranged within the outer shell and having its inner face normally of less diameter than said shaft to be encircled thereby, and being provided with substantially longitudinal movable parts for engaging said tapering inner faces and the periphery of the shaft, said substantially longitudinal movable parts having substantially concave inner faces, and having portions thereof connected and additional portions thereof separable from each other, for permitting the sleeve to be expanded to encircle the shaft without change in the curvature of the inner faces of said movable parts, substantially as and for the purpose described.

"(2) In a shaft-coupling, the combination with an outer shell consisting of sections having tapering inner faces, and clamping means for adjusting the sections endwise toward each other; of a shaft, and a sleeve for encircling the shaft, said sleeve being arranged within the outer shell and having its inner face normally of less diameter than said shaft to be encircled thereby, and said sleeve being formed with longitudinal substantially equidistant slots extending from one end face into proximity to the opposite end face, and thereby forming a plurality of longitudinal yielding parts connected together at one end of the sleeve, and having substantially concave inner faces, and being also formed with additional slots extending alternately between the former slots from said opposite end face of the sleeve into proximity to the former end face of the sleeve for dividing said yielding parts into yielding divisions or branches, the divisions or branches of each yielding part being connected at the free end of said part, and said parts and their divisions or branches having their portions on opposite sides of said slots separable from each other, for permitting the sleeve to be expanded to encircle the shaft without change in the curvature of the inner faces of said movable parts and their divisions or branches, substantially as and for the purpose set forth."

The defendant is charged with contributory infringement in making slotted sleeves of $1^{11}/_{16}$ inch gauge. It will be seen that the claims are for a combination of three elements: (1) A particular kind of shell; (2) a shaft; and (3) a particular kind of sleeve. It is clear that the shell described was old; that a shaft was old; that slots in the sleeve were old; and that the proposed combination of an old shell, an old shaft, and a slotted sleeve offered nothing new to the art. The applicant showed six slots in place of four, although there is nothing in the specification or the claims to confine the number to six, but the Office refused to consider this as patentably novel, since nothing new was accomplished by the larger number or by the slightly different arrangement. This eliminates everything in both claims except one feature of the sleeve that has not been referred to. If this feature is also old, it is hopeless to look for novelty in the patent. The sole point upon which the validity of the invention can be argued with even a faint expectation of success is that the sleeve has "its inner face normally of less

diameter than said shaft to be encircled thereby." Of course, the principal object of such a construction is to make it harder to force the sleeve over the shaft—or to force the shaft ends into the sleeve—and thus to make the grip of the coupling more effective. This result seems fairly obvious without the possession of special skill in any art. To take a familiar instance, the more tightly the joints of a fishing rod fit into one another, the less likely they are to discommode the angler by slipping apart. Numerous other examples might readily be given, but I think the fact may be assumed without illustration. It is not surprising, therefore, to find a well-established shop practice in the very art now in question, which antedated the patent by a good many years, and took advantage of the physical fact referred to. The defendant has proved beyond reasonable doubt, I think, that such a practice existed, and that sleeves of compression couplings were often bored less in diameter than the shaft for which they were intended. In the face of the evidence, I do not see how it is possible to support an opposing contention, and, if this fact has been established, nothing remains of the patent. The complainant's expert admitted without qualification that a structure would not infringe which responded to the claims in every other particular if the shaft corresponded in diameter precisely to the internal diameter of the sleeve. If, therefore, it was common practice before Shaw applied for his patent to bore the sleeve less in diameter than a shaft of the same gauge, it seems to follow irresistibly that there was no novelty in this remaining feature of the patent.

Much else might be said in reply to the complainant's case, but I do not think it necessary to continue the discussion. Other branches of the argument have been lucidly dealt with in the brief of defendant's counsel, and it would be difficult to say anything new thereon. It is just possible that the patent might be saved by confining it to the precise number and arrangement of slots shown in the drawings. The specification and the claims are too broad to be sustainable in view of the prior art, but, if they can be limited by the drawings, the patent might stand for the particular construction shown in the illustrative figures. But in that event the defendant does not infringe, for its set of slots differs in arrangement from the set of the drawings and the result would in like manner be the dismissal of the bill. I am convinced, however, that the patent should not have been granted, and I prefer to put the decision upon the single ground that no patentable novelty appears in the application.

A decree may be entered dismissing the bill, with costs.

McCASKEY REGISTER CO. v. DIVENS.

(Circuit Court, W. D. Pennsylvania. August 11, 1910.)

No. 53.

PATENTS (§ 328*)—INFRINGEMENT—ACCOUNT-RECORDING APPLIANCES.

The McCaskey patent, No. 783,126, for account-recording appliances, in view of the prior art, must be limited to the new and precise devices shown in the drawings and described in the specification. As so construed, *held* not infringed.

In Equity. Suit by the McCaskey Register Company against John R. Divens. Decree for defendant.

Edward R. Alexander and John H. Roney, for complainant.
Bond & Miller and Clarence P. Byrnes, for defendant.

ORR, District Judge. Complainant alleges infringement by the defendant of letters patent of the United States No. 783,126, issued to Perry A. McCaskey on February 21, 1905, for improvements in credit account appliances, and now owned by the complainant. The defenses are invalidity and noninfringement. The evidence discloses that the patent is a late one in a crowded art. That the patentee was aware of this appears from the following quotation from his specification:

"This invention relates to systems for keeping records of credit sales of merchandise and also the cash payments thereon; and the invention has reference particularly to the apparatus and appliances for carrying out the systems. The objects are to improve credit systems that are carried out by means of duplicate account-slips or bills and bill-holders in lieu of regular sets of account-books, and to improve the various means employed for carrying out such systems as referred to above, so that the apparatus and appliances therefor may be conveniently handled and at the same time be inexpensive in first cost and economical in use. With the above-mentioned and other objects in view, the invention consists in improved apparatus and appliances whereby credit accounts may be recorded and kept, in the novel features of construction of the apparatus and appliances comprised in the means for carrying out the credit system, and in the novel combinations and arrangements of parts, as hereinafter particularly described and pointed out in the appended claims."

Out of the 22 claims of the patent the complainant has selected four which the defendant is charged with infringing. They are as follows:

"2. Account-recording appliances, including a frame and pivoted bill-holders provided with a yoke for temporarily preventing pivotal movements of the bill-holders relatively to the frame."

"13. Account-recording appliances, including pivoted bill-holders, bill-clamps mounted on the bill-holders, tab-holders attached to the bill-clamps near the free ends thereof, and index tabs mounted on the tab-holders."

"15. Account-recording appliances, including a bill-holder frame, bill-holders mounted on the frame and having pairs of apertures therein, bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof, and rubbing-strips on the bill-holders in pairs on opposing holders and co-operating one with another."

"22. In account-recording appliances, the combination, with a plurality of pivoted bill-holders, of a plurality of bill-clamps mounted on the holders, tab-holders attached to the bill-clamps, and index tabs attached to the tab-holders."

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

It is difficult to find anything in the apparatus described in suit, either by way of combination or otherwise, which is essentially different from that found in prior patents. Such apparatus is simply a loose-leaf book set up in a cabinet. Upon the leaves are means such as clips for attaching the account slips (which are loose pieces of paper) thereto in divers spaces made by partition strips fastened to and made part of each side of each leaf. The book of leaves may be taken out of the cabinet and placed in a safe. The pivotal movement of the leaves may be prevented by using a yoke, a clasp, or some equivalent device. In the United States patent No. 634,713, issued to Yorger and West under date of October 10, 1899, there are hinged or pivotal leaves to which bills or accounts are fastened, set up in a cabinet. The "billing-leaves", as therein named, and the frame to which they are attached, may be removed from the cabinet. While that patent shows clips upon one side only of the leaves, yet the United States patent No. 661,710 issued to Braddock November 13, 1900, shows means for retaining the bills against the leaves by tape, band, or cord extending through holes in the leaves, and thus operating on both sides. In United States patent No. 708,230, issued to J. T. Huber September 2, 1902, there are shown wire clips extending through each leaf and operating on both sides to hold sales slips. Perry A. McCaskey was also named as patentee in United States patent No. 717,247, under date of December 30, 1902, for a credit-accounting appliance. It shows clamps with legs inserted in holes extending through the leaves or bill-holders. It shows also the partition strips or rubber strips, which like the clamps are only on one side of the leaf. Practically all that McCaskey accomplished in his later patent was the duplication of clamps and partition strips on opposite sides of the leaf. There are so many ways that the pivotal movement of the leaves can be prevented that it would prolong this opinion unreasonably to show all the yokes or clasps to be found in the prior art as shown by the evidence, which perform the same function as that of McCaskey. The yoke used by defendant is found in United States patent No. 639,031, issued to Hall December 12, 1899. Nor is it at all necessary to do more than say that the evidence is clear that it is old in the art to attach a tab or tab-holder to a wire loop or clip.

In view of the foregoing, it does not appear necessary to consider the claims in suit separately or at length. They must be limited to the new and precise devices as shown in the drawings and described in the specification. Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973. It is not enough that there may be a duplication of parts (Burnham v. Union Mfg. Co., 110 Fed. 765, 49 C. C. A. 163), or a different arrangement of parts (Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574), even if there should be a better result (Union Co. v. Keith, 139 U. S. 530, 11 Sup. Ct. 621, 35 L. Ed. 261). Defendant's account register does not embody any features to be found in complainant's which are not found in the prior art. There is no infringement.

The bill should be dismissed. Let a decree be drawn.

ARMSTRONG v. BELDING BROS. & CO.

(Circuit Court, D. Connecticut. July 13, 1910.)

No. 1,217.

PATENTS (§ 326*)—INJUNCTION AGAINST INFRINGEMENT—VIOLATION—ATTACHMENT FOR CONTEMPT.

A defendant, charged with contempt for violation of an injunction against infringement of a patent, is entitled to all the rights of one charged with a criminal offense, and a court of equity will not grant an attachment for contempt in such case, if the violation of the injunction is to a reasonable extent uncertain.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. § 326.*]

In Equity. Suit by Benjamin L. Armstrong against Belding Bros. & Co. On motion for attachment in contempt. Motion denied.

See, also, 178 Fed. 554.

Gifford & Bull and Ernest Chadwick, for complainant.

Robert B. Honeyman and A. Parker-Smith, for defendant.

PLATT, District Judge. A court of equity does not attach a defendant for contempt of an injunction forbidding the infringement of patent claims when the violation of the injunction is to a reasonable extent uncertain. The defendant is entitled to all the rights which belong to one charged with a criminal offense. The violation must be obvious to the senses and apparent upon mere inspection.

At the hearing complainant conceded that the making and sale of Exhibit Defendant's Contempt Package only violated claim 1 of the Schroeder patent, 546,251. That claim has been held by this court and by the Circuit Court of Appeals to be entitled to a liberal construction, but there has been no intimation that such liberality would ever be extended into prodigality. It certainly has to do with a structure which must be something more than a wrapper for a skein of silk. The device must be so constructed as to have not only "a folded casing embracing the skein," which would be a silk wrapper pure and simple, but that casing must be "provided with a bearing piece," and that bearing piece must be "folded upon itself" so as to form a "bearing for the skein," and "a partition between the sides of the skein," and must be "permanently attached to one only of the opposite sides of the casing."

The specifications of the patent which contain this claim go, with some minuteness, into a description of the bearing piece or core, as it is indiscriminately termed, and make it clear that something more was in the patentee's mind than a folding of the casing upon itself. All the interested parties know that the sympathy of the court is with the complainant, but, after a strong effort to suppress that sympathy, it still seems impossible to rid oneself of a suspicion that the Exhibit Defendant's Contempt Package has been evolved as an ingenious evasion of the letter of the claim; but, whether so or not, it has such marked differences from the offending package, made under the Bon-

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

ner patent, which was enjoined, that it would be unjust to decide the very delicate questions which instantly spring up before one's eye without a full hearing and thorough investigation. Contempt proceedings are not adapted to such an examination.

Without prejudice to complainant's rights to adopt such further proceedings as he may deem advisable, the motion for attachment is denied.

In re AUGSPURGER.

(District Court, S. D. Ohio. December, 1909.)

1. BANKRUPTCY (§ 407*)—FALSE STATEMENT—CONCEALMENT OF DEBTS—REFUSAL OF DISCHARGE.

Where at the time a bankrupt made a statement to a commercial agency for credit, he had received $3,500 from his father and $1,585 from his wife, for both of which he had given notes, neither of which he disclosed in such statement, but included them in his list of creditors in his assignment for the benefit of creditors, and also in his bankruptcy schedules, and about the time he made an assignment in trust for the benefit of his creditors, he further acknowledged the indebtedness to his wife by giving her a second note to cover the amount due her, his claim that the concealment of such debts was not intentional and willful because the debt to his father represented money advanced to him which was to be deducted from his share of the father's estate in case he lost the money, and that he did not regard the debt to his wife except as an advancement to enable him to go into business, etc., was unsustainable.

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

2. BANKRUPTCY (§ 407*)—INSOLVENCY—KNOWLEDGE—PRESUMPTION.

Where a bankrupt was insolvent in fact when he made a financial statement in which he concealed certain of his debts, he should be presumed to have had knowledge thereof.

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

3. BANKRUPTCY (§ 407*)—FALSE FINANCIAL STATEMENT—INTENT TO DECEIVE.

Where a bankrupt had knowledge of his insolvency at the time he made his financial statement, concealing certain debts to his father and wife, his intent to deceive will be presumed.

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

4. BANKRUPTCY (§ 407*)—DISCHARGE—FALSE STATEMENT—COMMERCIAL AGENCIES.

Where a false financial statement made by the bankrupt to a commercial agency, recited that it was designed as a basis for credit, and a creditor objecting to the bankrupt's discharge, extended credit on the faith of the statement, a discharge should be denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 760; Dec. Dig. § 407.*]

In the matter of W. K. Augspurger, bankrupt. On exceptions to bankrupt's discharge. Sustained.

W. A. Haines, for bankrupt.

O. H. Mosier, L. F. Ratterman, and M. F. Roebling, contra.

SATER, District Judge. Section 14, cl. "b" (3), of the bankruptcy act (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.

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

S. Comp. St. Supp. 1909, p. 1310]), debars from discharge a bankrupt who has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

In Gilpin v. Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, the word "false," as occurring in that clause, is said to mean more than merely erroneous or untrue, and to be used in its primary legal sense as importing an intention to deceive. It was further held that the statement specified in such clause, to constitute a bar to a discharge, must have been knowingly and intentionally untrue. There are cases which hold that the statement need not be intentionally false. As the result here must be the same, whether the rule announced in those cases or that adopted in the Gilpin Case be followed, I shall treat the question presented as this, Did the bankrupt knowingly and intentionally make a false statement as charged in the specifications?

At the time Augspurger received from his father $3,500 he executed and delivered to him two promissory notes aggregating that amount. On cross-examination, in explanation of why he did not report in his signed statements to the R. G. Dun Company the notes held by his father, he said:

"The reason for not including them was, when my father gave me that money, he told me if I lost it, it would come out of my inheritance, and in fact it has been so arranged that it is to be taken from what I otherwise would inherit, and I regarded that money as part of my capital and used it as such. The fact of those claims being presented was not at my instigation. I always considered that as part of my working capital, and used it as such, and had no intention of deceiving any one; simply used it that way. It didn't occur to me that I should report it, and always understood that that money was advanced to me to do business with."

On redirect examination the following questions were asked of and answered by him:

"Q. You gave a note to your father at the time he advanced this money? A. Yes, sir. Q. Was there anything on that note to show that it was an advancement? A. The matter was advanced for father to make a will, but mother was averse to making a will, and I did this to protect the other children. There are other children, and I didn't want to take advantage of them; this was done to protect them. Q. And the understanding you had with your father was that it was an advancement and to be deducted from what you would eventually inherit? A. Yes, sir; and if I lost it, it came out of my share of the estate."

The bankrupt also owed his wife, including interest, $1,585, for money used in his business. For a part of this he gave her a note some years ago. The residue was represented by advancements made on checks. On redirect examination he testified regarding his indebtedness to his wife, as follows:

"Q. Why didn't you include that in your statement? A. Advanced to me to be used in the business, and I expected to be successful and pay it back. Q. You knew it was a debt that you owed her? A. I didn't look at it that way. It was advanced to me to go into business. Q. You gave her a note? A. Yes, sir. Q. You knew that was evidence of the debt that you owed her? A. Yes, sir. Q. When was this other note made out, in 1907, or 1908, that you spoke of? A. To my wife? Q. Yes. A. That was made some time in December, 1907."

The notes executed and delivered by Augspurger to his father and wife were in themselves evidences of indebtedness, given by him without compulsion. After he made his assignment in trust for the benefit of his creditors, under the state law, without objection on his part or that of his attorney, those notes were proved and allowed as valid claims against his estate. When he voluntarily filed his petition in bankruptcy, he named his father and wife as creditors and listed the notes as due from him to them respectively. These recognitions of liability do not comport with his evidence. The claim that the sums obtained from his father and wife were merely advancements from them respectively was an afterthought. If those claims were so far valid as to be scheduled by him under oath as valid debts and to share in the distribution of his estate, and they did so share without protest from him, they were so far bona fide that they should have been listed as obligations in any statement made by him as to his financial condition to obtain credit. The sum obtained from his father cannot, under Augspurger's own evidence, be treated as an absolute advancement. If the father should lose all his property other than the $3,500, Augspurger would be compelled to repay all excepting what his portion of the $3,500 would be, otherwise the other children of whom he did not want to take advantage would not be protected. His statement that if he lost the $3,500 it was to be taken out of his share of his father's estate implies that if he did not lose it he was to repay it. The giving of notes to protect the other children of the family is inconsistent with the idea of an absolute gift or advancement. There was at least a conditional, if not an absolute, liability. If Augspurger treated the $3,500 as a part of his working capital and as a sum not to be repaid, good faith required of him that he should resist the proving of the claim as a valid one against his estate. The father manifestly did not regard the $3,500 in the light of an advancement or a gift, and it is significant that neither he nor the bankrupt's wife was called as a witness. Had he returned his indebtedness to his wife and the notes which his father held against him, his liabilities would have been approximately $5,100 greater than recited in his signed statements. As he shows in one of them an excess of assets over liabilities of $3,200, and in another $3,400, he was insolvent at the time such statements were made in the sums of about $1,900 and $1,700 respectively. He had not lost all that he had obtained from his father, and if it be true that if he lost the $3,500 evidenced by the notes given to his father, that sum was to be treated as an advancement, the condition had not arisen, when such respective statements were made, that absolved him from liability on such notes, or as would justify him in treating the money represented by such notes as an absolute advancement from his father. He states that an arrangement has been made whereby the $3,500 are to be taken from his inheritance, but for aught that appears that arrangement may have been made after his father had received his distributive share of the bankrupt's estate.

There was no mention in any statement that he ever gave out for the purpose of obtaining credit, of any liability to his wife. He says he expected to be successful and to pay it back. This statement is susceptible of no rational construction other than a recognition of a

debt due to his wife. He does not say that he did not expect to pay it back if he was not successful. It was an advancement, or assistance rendered to him by her to enable him to go into business, and to evidence his obligation to her he executed and delivered a note. Either shortly after or before he made an assignment in trust for the benefit of his creditors, he further acknowledged his indebtedness to his wife by giving her a second note to cover the sums obtained from her on checks. He knew of his obligation to her. The presumption is that he knew his own financial condition. Loveland, Bankr. 189. In view of his outstanding obligations to his father and wife, he must be charged with knowledge of his insolvency, and, having such knowledge, his intent to deceive by his written material, false statements, in view of the nature of the transactions and his acts in connection therewith, must be conclusively presumed.

Should the exceptions be overruled and the bankrupt discharged because his representations as to his financial condition were made to a mercantile agency?

In 14 Am. & Eng. Enc. Law (2d Ed.) 151, it is said:

"If a person makes to a mercantile agency a false statement as to his own or another's pecuniary condition, with the intent that it shall be communicated to and believed by merchants, and shall induce them to extend credit, the representation will be considered as made to any merchant to whom it shall be communicated, and who shall rely upon it in extending credit."

Judge Hough, in Carton, In re (D. C.) 148 Fed. 63, 67, manifestly concurs in this view, for he says:

"If, however, such a report as is here shown, be obtained from a merchant by a commercial agency at the request, disclosed or undisclosed, of one or more of the agency's customers, it seems to me incredible that the merchant furnishing such report can be supposed to have given it for any other purpose than of enlightening those persons who habitually deal with him on credit as to his true financial condition. The custom of trade is so well known that when an agency applies to a merchant for a specially signed report of his condition, he must know that such report is for the special purpose of enabling those who usually vend him goods to decide upon his financial responsibility."

See, also, Remington, Bankruptcy, § 2752; Katzenstein v. Reid, 41 Tex. Civ. App. 106, 91 S. W. 360, 16 Am. Bankr. R. 740; Wilmot v. Lyon & Co., 7 O. C. D. 394 (11 Cir. Ct. Rep. 238); Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Re Dresser, 146 Fed. 383, 76 C. C. A. 655.

In Pincus, In re (D. C.) 147 Fed. 621, it was in substance ruled that a written financial statement made by a party to a commercial agency, which shows on its face that it was made as a basis for credit with the associate members of such company, and which is communicated by such agency to members who give credit on the faith of it, is equivalent to one made directly to them, and if materially false, will debar the debtor from the right to a discharge in bankruptcy. I incline to the views expressed in the above authorities, although a doubt as to their correctness is suggested by Collier on Bankr. 287.

Each of the statements signed by Augspurger recites that it is designed as a basis for credit. It is admitted that the exceptor's claim is a valid one, and that at the time the bankrupt made each of the written statements he knew that it was obtained for the purpose of giving him

a rating for the use of merchants. It is shown by the evidence that the business of the R. G. Dun Company was to obtain reports for the protection of the trade, and that the exceptor was a customer of that company, and relied on its reports alone in extending credit to the bankrupt. The bankrupt obtained the property of the exceptor on credit, on the strength of his statement of his financial condition, which was relied on by the creditor, which statement was in writing, was materially false, and was knowingly made for the purpose of obtaining credit and property from such exceptor and any other merchant to whom it might be submitted by the mercantile agency.

The exceptions to the bankrupt's discharge are sustained.

AMERICAN LEAD PENCIL CO. v. L. GOTTLIEB & SONS.

(Circuit Court, S. D. New York. July 22, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT.
   The trade-mark "Knoxall," as applied to lead pencils, constituted an infringement on the phrase "Beats-All" previously used on pencils by complainant.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 59.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 65*)—SIMILARITY—INFRINGEMENT.
   Whether trade-mark infringement exists does not depend solely on similarity to the eye or ear, but on whether there is such similarity as readily leads the mind of customers to confusion.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 64; Dec. Dig. § 65.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 85*)—INFRINGEMENT—CONDUCT OF COMPLAINANT.
   An objection to the maintenance of complainant's bill for infringement of complainant's trade-mark "Beats-All," as applied to lead pencils, that such mark was applied to a cheap inferior pencil and was a fraud on the public, was unsustainable when made by defendant who was pirating complainant's business by the use of an infringing trade-mark "Knoxall" on a similar pencil.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 85.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 93*)—INFRINGEMENT—BAD FAITH—EVIDENCE.
   Necessity of proof of bad faith in a suit for infringement of a trade-mark does not obtain where defendant continued to use the mark after warning.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

5. EVIDENCE (§ 594*)—UNCONTROVERTED EVIDENCE—EFFECT.
   Where, in a suit for infringement of a trade-mark connected with the sale of lead pencils in interstate commerce, the bill alleged that defendant was engaged in interstate commerce, and complainant made some proof thereof, to which defendant made no effort to reply or to indicate what part of his trade was interstate and what was not, he could not complain of the insufficiency of the proof that he was engaged in interstate commerce in the sale of such articles.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

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

6. TRADE-MARKS AND TRADE-NAMES (§ 45*)—DESCRIPTIVE PHRASES—SECONDARY MEANING—REGISTRATION.

Trade-Mark Act (Act Feb. 20, 1905, c. 592, 33 Stat. 725 [U. S. Comp. St. Supp. 1909, p. 1278]) § 5, provides that the act shall not prevent registration of any mark used by the applicant or his predecessor, or by those from whom title to the mark is derived, in the commerce with foreign nations or among the several states or the Indian tribes which has been in actual and exclusive use as a trade-mark by the applicant or his predecessor for 10 years next preceding the passage of the act. *Held* that, where complainant had used the trade-mark "Beats-All" attached to lead pencils since 1888, and in interstate commerce since before April 1, 1895, and on April 17, 1906, obtained registration of the mark in the Patent Office, such registration gave to the words which originally were only descriptive and not the subject of a valid trade-mark, a secondary meaning indicating goods exclusively manufactured by complainant, which made the words available as a proper trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 53; Dec. Dig. § 45.*]

In Equity. Suit by the American Lead Pencil Company against L. Gottlieb & Sons. Decree for complainant.

This is a suit between citizens of the state of New York upon a registered trade-mark "Beats-All," which is applied to lead pencils of the complainant. The complainant states in the bill and affidavits that it has used the mark "Beats-All" since 1888, and in interstate commerce since before April 1, 1895, and that on the 17th day of April, 1906, it obtained the registration of the trade-mark in the Patent Office. The defendant has bought lead pencils from the National Pencil Company of Atlanta, Ga., bearing the name "Knoxall," which are similar in general appearance to those of the complainant. There is no dispute that the defendant sells these lead pencils in competition with the complainant. Defendant has answered the bill under oath (although oath was waived), and has failed to deny the allegations of the bill that it has sold the lead pencils bearing the trade-mark in interstate commerce. This allegation is contained in Article XV of the bill and the corresponding article of the answer, although denying much of the allegation in that article, avoids denying the allegation in question. The complainant also submitted two affidavits, one of Hamilton M. Kendrick and Frederick H. Croasdale, purporting to be of an interview with one, Myer Singer, of Chicago, who said that he had purchased from the defendant "Knoxall" pencils. These affidavits the defendant has not answered. The defendant raises 10 objections to the preliminary injunction as follows: (1) The federal trade-mark act of 1905 is unconstitutional, and jurisdiction cannot be sustained on any other ground. (2) In any event, only technical "trade-mark infringement" as distinguished from "unfair competition" can be urged, and there is no color for such claim here. (3) The two trade-marks are wholly different and distinct. (4) Complainant's trade-mark is not valid, being expressive of quality and character simply, and such meaning is not infringement. (5) Complainant's own trade-mark is deceptive and fraudulent, the use of "Beats-All" as applied to a cheap, inferior pencil, being a fraud upon the public. (6) Trade custom ac-

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

counts for all the resemblance in color or size. (7) Complainant has been guilty of laches. (8) Relief against defendant should be denied, in view of the fact that it merely bought "Knoxall" pencils outright in good faith. (9) In the absence of proof of any actual deception, and the failure to make out a clear case, the motion for a temporary injunction should be denied. (10) No substantial interstate commerce by defendant is involved, justifying an injunction.

Kenyon & Kenyon, for complainant.
Stroock & Stroock, for defendants.

HAND, District Judge (after stating the facts as above). I will take up the objections of the defendant in the order in which they are given.

1. So far as the unconstitutionality of the trade-mark act is concerned I shall not pass upon it. I should certainly not hold unconstitutional an act of Congress enacted after such care as this, and acted upon together with its similar predecessor for nearly 30 years, unless it appeared with certainty that it was unconstitutional. Prima facie I must assume it to be valid, and the mere challenge of it by the defendant in no sense raises any question of its validity. Until that question can be considered at much greater length the statute must enjoy the presumption of validity universally accorded to acts of Congress.

2 and 3. The second and third objections I shall consider together. I have no difficulty in finding that the phrase "Knoxall" is an infringement of the phrase "Beats-All." There is no such limitation as the defendant puts upon the infringement of a trade-mark; i. e., that the similarity must go only to the eye or ear. The question cannot be treated in any such technical manner, for always the substantial question is whether the defendant is likely to steal the complainant's trade by the use of the trade-mark in question. I am quite satisfied in this case that there is such similarity between the two phrases as would readily lead in the mind of customers to confusion; a case in point is the infringement of "Keepclean" by "Sta-Kleen." Florence Manufacturing Company v. J. C. Dowd & Co. (C. C. A.) 178 Fed. 73. There are many other decisions in the books which show that it is not alone similarity to the ear or eye which constitutes infringement. In the case of Moore & Co. v. Auwell, 178 Fed. 543, the Circuit Court of Appeals held that "Muresco" was not infringed by "Murafresco," Judge Lacombe dissenting upon that point. I interpret that decision as meaning that, as the defendant's name was substantially a description of the article, to wit, mural fresco, the scope of the trade-mark could not extend to prohibiting defendant's use of a descriptive term, else it would itself be bad as a trade-mark.

4. The next objection is that the trade-mark is expressive of quality and character. I agree with this objection. Proctor & Gamble Co. v. Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405, Cooke & Cobb Company v. Andrew Miller et al., 169 N. Y. 475, 62 N. E. 582, and some obiter remarks in Coats v. Merrick Thread Co., 149 U. S. 562,

13 Sup. Ct. 966, 37 L. Ed. 847. I should deny the injunction upon that score except for considerations which I shall indicate later on.

5. The objection to the complainant's own conduct is frivolous. We have not yet got to the pass that the courts are closed to a man who says that a penny pencil "beats all." The defendant's unctuous regard for the good faith of the man whose business he is pirating in this case only suits some better world than this.

6. I do not rely in any sense upon the resemblance in color and size between the pencils. The question is one strictly of trade-mark and I agree that the bill could not be supported upon the theory of unfair trade.

7. I think that the laches are sufficiently explained in the case.

8. There is much talk in the books about the necessity of bad faith in trade-mark and unfair trade cases, but I think there is no case in which it has been held a bar to relief where the defendant has continued to use the trade-mark after warning.

9. It has been repeatedly decided that actual deception need never be proved provided there is reasonable likelihood of its occurrence. Of course the complainant must make out a clear case of infringement but I think he has done so.

10. Nor do I think that the defendant is in a position to state that there is substantially no interstate commerce involved under the decision in the Elgin Case, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. The bill alleges that the defendant is engaged in interstate commerce and makes some proof of it. The defendant, who has under its control all the facts, makes no effort to reply or to indicate what part is interstate trade and what is not. Until he does he cannot complain that little is proved.

The only question therefore which remains is the character of the complainant's mark. As I have already said, it certainly denotes excellence, and is prima facie invalid on that account, but it is also clear that it might easily, under well-known principles, obtain a secondary meaning. If by long association it has come in the minds of the public to indicate the complainant's manufacture, even though it originally was only a kind of puff to the wares, that is enough. There can be no need of going over the cases from Reddaway v. Banham, L. R. A. C. (1896), 199, which have made this doctrine now familiar, i. e., that although words are originally descriptive, the public frequently does get to associate them with the manufacture of a given man so that they obtain what is known as a secondary meaning. Were there proof in this case that the word "Beats-All" had obtained that secondary meaning, the complainant's case would be complete. I think that proof is prima facie supplied by the registration of the mark and that that was the intention of Congress. The mark itself purports to be given under the last proviso of section 5 of the statute (Act Feb. 20, 1905, c. 592, 33 Stat. 726 [U. S. Comp. St. Supp. 1909, p. 1278]) which is as follows:

"Nothing herein shall prevent registration of any mark used by the applicant or his predecessor, or by those from whom title to the mark is derived, in the commerce with foreign nations or among the several states or the Indian tribes which was in actual and exclusive use as a trade-mark,

of the applicant or his predecessor from whom he derived title, for ten years next preceding the passage of this act."

Registration is made only prima facie proof under the statute in any case, and it would have been consistent with its general import for Congress to establish what should be prima facie proof of secondary meaning. I think by this section it intended to provide a period of time during which if an applicant himself made exclusive use of even a descriptive phrase as a trade-mark, it should be assumed to have acquired a secondary meaning. Any other person could, of course, meet that presumption by proof that it had in fact never acquired any such secondary meaning, but until he does, the mark is good under the act. In the earlier proviso of the same section Congress had forbidden the registration of any descriptive or geographical names, or names indicating character or quality, and the subsequent proviso I have quoted could only have meant to exclude from the operation of that prohibition such descriptive phrases as had been exclusively appropriated for more than 10 years prior to the act. The most reasonable inference is that, in analogy with the law as then settled, that period of exclusive use was to create a presumption of secondary meaning. Indeed it was a fair presumption in fact to suppose that such marks would have acquired a secondary meaning, if the applicant had used them exclusively for so long. It is true that Congress might well have made such a period of 10 years always constitute prima facie proof of secondary meaning whenever the period began, instead of limiting it to a use prior to April 1, 1895, but it is no ground for misapprehending their purpose that they might have made it more general. English-speaking people lived for several centuries under a prescriptive statute that dated every adverse user from the reign of Richard I, and there was good precedent for Congress to limit the exclusive user of such marks from a fixed date that gets progressively remote.

The writ will, however, only go against the use of the mark in interstate or foreign trade. If the defendants wish to reply to the affidavits regarding sales in interstate trade they may do so on or before the 26th instant.

UNITED STATES LIGHT & HEATING CO. OF MAINE v. UNITED STATES LIGHT & HEATING CO. OF NEW YORK et al.

(Circuit Court, S. D. New York. June 21, 1910.)

1. CORPORATIONS (§ 49*)—INFRINGEMENT—KNOWLEDGE OF DEFENDANT.

In a suit by a Maine corporation to restrain the use by defendants of complainant's name, the fact that defendant did not know of the incorporation of the Maine company nor of its rights, is immaterial where the defendants were using the name of a New Jersey corporation from which the Maine company derived its rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

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

2. GOOD WILL (§ 6*)—ASSIGNMENT—USE OF NAME.
An assignee of the good will and business of a corporation may use the old name, with or without incorporation.
[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 4; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 661*)—NAME—SUIT FOR INFRINGEMENT—PERSONS ENTITLED TO SUE—FOREIGN CORPORATION.
A foreign corporation may sue to enjoin the use of its name by a domestic corporation.
[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 661.*]

4. CORPORATIONS (§ 661*)—FOREIGN CORPORATION—NAME—SUIT FOR INFRINGEMENT—DEFENSES—COMPLIANCE WITH LAW.
That a New Jersey corporation has failed to take out a license, as required by General Corporation Law of New York (Consol. Laws, c. 23) § 15, as a condition precedent to doing business in New York, does not incapacitate its successor in interest to sue to enjoin the use of its name by a New York corporation, which thereby prevents the successor from taking out the license, the New Jersey company having the right to the name regardless of its business done in New York in violation of law.
[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 661.*]

5. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE—FEDERAL COURTS.
That a New Jersey corporation has violated the New York law by doing business in New York without taking out a license does not deprive it of its rights to relief in the federal courts sitting in equity, in a case where the state statute, fixing the penalty for such a violation, leaves the state courts open to the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2566; Dec. Dig. § 661.*]

6. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE—COMPLIANCE WITH STATE LAW.
General Corporation Law of New York (Consol. Laws, c. 23) § 15, forbidding any foreign stock corporation from doing business in the state without a license, and providing that such a corporation may not sue on any contract made in the state, does not prevent a suit in the state courts to enjoin a wrongful use of the corporation's name.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2567; Dec. Dig. § 661.*]

7. CORPORATIONS (§ 661*)—FOREIGN CORPORATION—NAME—SUIT FOR INFRINGEMENT—DEFENSES.
The failure of a New Jersey corporation to pay its taxes in New Jersey does not disqualify it to sue to enjoin the use of its name by a corporation in New York.
[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 661.*]

In Equity. Suit by the United States Light & Heating Company of Maine against the United States Light & Heating Company of New York and another. Decree for complainant.

Dos Passos Bros., for complainant.
Alfred J. Talley, for defendants.

HAND, District Judge. Upon the merits I have no doubt that Moore's effort was either to embarrass the New Jersey company by preventing it from getting a New York license, or to set up a business which should divert or disarrange the complainant's business. The case is quite devoid of the usual excuses and defenses, and seems to me

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

to be a more impudent effort by a retiring or discharged employé to seize part of the business, than I have ever before met with. An especially flagrant fact is that Moore organized the company—which is the most obvious cover for himself alone—while he was yet in the employ of the New Jersey company. In short, he planned his dummy corporation to trade on the complainant's business while he was still taking the pay of the New Jersey company, and was pledged not only in law, but in good faith, to give it loyal service. It is a matter of no consequence whether or not Moore knew of the proposed incorporation of the Maine company and its rights, because the complainant stands in the right of the New Jersey company. The right to transfer the use of that name is not challenged, nor indeed could it be. Certainly an assignee of the good will and business may use the old name, either with or without an incorporation. The defendants raise two grounds of defense: First, that a foreign corporation may not prevent the use of the name of a domestic corporation; and, second, that both the complainant and the New Jersey company got no license to do business in New York, and that the New Jersey company failed to pay its taxes and lost its charter in New Jersey for that reason.

As to the first position, it is supported by Hazleton Boiler Co. v. Hazleton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339, and by some clearly obiter remarks in Continental Insurance Co. v. Continental Fire Association, 101 Fed. 255, 41 C. C. A. 326 (Circuit Court of Appeals, Fifth Circuit). However, a decision squarely in opposition is Peck Brothers Co. v. Peck Brothers Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81 (Circuit Court of Appeals, Seventh Circuit), and another is the decision of Judge Bradford in Philadelphia Trust, S. D. & I. Co. v. Philadelphia Trust Co. (C. C.) 123 Fed. 534, in which, however, the point was apparently not discussed. No one contends that a domestic corporation may not get an injunction against another domestic corporation forbidding the piracy of its own name, and this is true as well in the federal as in the state courts. The distinction made in the Illinois decision is that a foreign corporation, which comes into the state by sufferance, cannot prevent the state from naming its own corporations as it will. However, this proves too much, because a court is as much bound by the act of a state government in giving a corporate name, when complaint is made by a domestic corporation, as when by a foreign corporation. The question is not who complains. If it were true that, in giving a corporation a name, the executive of a state licensed it to use that name in any way it chose, of course no court would have power to interfere at all with the use of the name, and the charter would become a general license to use that name, whether or not the use proved tortious. The sounder view—and, indeed, the only possible view, which can justify the interference of courts in such cases between domestic corporations—is that the corporate name is given merely as the name which the entity may use so long as it acts in accordance with law. By that name so chosen it gets no license to commit what would otherwise be a tort. For example, suppose Moore had in this case, under section 440 of the Penal Law

of New York (Consol. Laws, c. 40) adopted the name which he gave the defendant corporation. No one would for a moment suppose that the license given by that statute upon filing a record in the county clerk's office was a defense. Indeed, it would be only an added evidence of the wanton character of his attempt, just as it is here, when the corporation is a mere blind. Clearly the statute in that case would not give him immunity. Yet the general statute authorizing the formation of corporations is in this respect no different; it merely authorizes the taking of a name when used lawfully.

If this be so, as no one denies, the power equally exists, whoever is the complainant, and I confess I cannot see why a foreign corporation should be obliged to submit to a tort which the state has not legalized, and which, if committed against a domestic corporation, or an alien individual, could be remedied. Of course the state might make a foreign corporation wholly an outlaw and exclude it from all tribunals, but, in so far as it has the general right to appear and complain of torts, it must be presumed to stand upon the same basis as to this kind of tort, as it does as to others. For these reasons, I shall hold that the complainant may sue.

There remains the defense of its misconduct in failing to take out a license in this state. Section 15 of the general corporation law of New York (Consol. Laws, c. 23) forbids any foreign stock corporation from doing business without a license, and then says that such a corporation may not sue on any contract made in the state. The New Jersey company never did take out a license, and the complainant is now unable to do so, because of the defendant's having first obtained registration of its name, a result which in my judgment is the real cause of its existence.

In the first place the name of the New Jersey company was assumed by law and there is no allegation or proof that the rights upon which the complainant depends was built up through violation of law. Therefore the case is not like Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, where the complainant was seeking to protect a right which was itself as piratical in origin as the piracy of the defendant. The name was here given by the incorporation of the New Jersey company and could be protected generally quite independently of that part of the good will arising from the business done in New York without license. So the Circuit Court of Appeals for the Third Circuit has held in a precisely similar case upon a trade-mark, and for the purpose of this case there can be no difference between a trade-name and a trade-mark. Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506.

I do not understand that even in trade-mark or trade-name cases, it is enough to show that the complainant has been guilty of some violation of law, to exclude him from a court of equity. I need not suggest extreme cases to show the reductio ad absurdum to which such a doctrine would be reduced were that the law. The maxim only applies when the wrongdoing has some association with the right on which the complainant depends, and the furthest that the courts have gone

is to disqualify a complainant in case there is deceit in the statements associated with the name or mark (Manhattan Medicine Co. v. Woods, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282), or in case, if that statement has been discontinued, that the mark or name actually grew up through disused misrepresentations, so that the resulting good will appear to be built up through a fraud (Seabury v. Grosvenor, 14 Blatchf. 262, Fed. Cas. No. 12,576). Merely to have once made a misstatement which was discontinued before it had time to affect the mark is not enough. C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165. Indeed, it has even been held by the New York Common Pleas in Curtis v. Bryan, 36 How. Prac. 33, that the misrepresentation must be a part of the mark itself, though that I cannot accept.

Now, as I have said, the violation of law in this case did not give the right to the name in whole or in part. The New Jersey company had that right regardless of their New York business, nor does it appear that their name was used only in New York business. That being so, the name is not the result of such violation of law, and it is in no way connected with that violation. Hence, upon the general principles appertaining to the subject, I do not see how the complainant can be disqualified.

There is another consideration here applicable. The defendant's theory is that because the complainant has violated the law, therefore it cannot sue in a court of equity. However, the state has fixed the penalty for that offense and has made it in the form of a prohibition in certain cases upon the corporation's right to sue in the state courts. That is to say, it has indicated in what cases it shall not be allowed to sue, if in default. If this be not such a case, the question becomes whether under the guise of applying the maxims of equity I am to deny to a corporation recourse to a federal court because of its violation of a statute of the state, in a case in which the state courts would be open. I cannot think that this is a debatable question, especially in view of the federal decisions that the expressly penal part of the statute does not apply to federal courts. N. Y. Breweries Co. v. Johnson (C. C.) 171 Fed. 582.

What, then, is the rule in the state courts? The statute is limited to contracts and is extremely penal in any case. The only case, I have found, where it was interposed upon a tort was at law, and it was there unsuccessful. American Typefounders Co. v. Coner, 6 Misc. Rep. 391, 26 N. Y. Supp. 742. In the only case I can find which arose in equity—a case on all fours with the case at bar (American Tartar Co. v. American Tartar Co., 57 App. Div. 411, 68 N. Y. Supp. 236)—the point was squarely before the Appellate Division for the First Department and they dismissed the complaint, but I am corroborated in my understanding of the law from the fact that, though squarely raised by the facts, the court passed upon the merits and did not mention this point. In Parmelee Co. v. Haas, 171 N. Y. 579, 64 N. E. 440, the Court of Appeals said that the objection was at most "one as to the character or capacity of the plaintiff to sue," and was

waived by general answer, if it appeared on the face of the complaint. As the defect did here appear on the bill of complaint, it could not have been taken by answer in the state court, a result which is not consistent with its being a disqualification under the maxim of equity regarding "clean hands."

As for the failure to pay taxes to New Jersey, I have yet to learn that a man's failure to pay his taxes disqualifies him from suing in a court of equity, and the rule must be the same as to corporations.

Let a decree pass, with costs, enjoining the defendant company from using the name it now uses, and the defendant Moore from colorably imitating the complainant's name. Moore must pay the costs.

THE OLYMPIA.

(District Court, S. D. Florida. 1909)

SALVAGE (§§ 15, 18*)—RIGHT TO COMPENSATION—JETTISON OF CARGO OF STRANDED VESSEL.

The Mexican steamship Olympia, with a cargo of coal, stranded on a Florida reef. She put out two anchors astern to act as kedges before the falling of the tide, and her master refused offers of assistance from libelants' vessels which arrived. Afterward the master of a pilot boat, in uniform, boarded the steamer, and as the evidence tended to show, claimed to the master, who knew very little English, that he was an officer with authority to assist the vessel and ordered men from libelants' vessels to jettison cargo, which they proceeded to do. Subsequently the Olympia broke one of her hawsers in attempting to pull off, and had to be assisted by a revenue cutter which appeared. *Held*, that there was no ground for the recovery by libelant of ordinary salvage compensation, but that as it appeared that the lightening of the vessel by reason of the coal jettisoned was of benefit and perhaps necessary in floating her, the men who did the work were individually entitled to recover reasonable compensation therefor.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 28, 31–43; Dec. Dig. §§ 15, 18.*]

In Admiralty. Suit by one Sawyer and others against the steamship Olympia. Decree for libelants.

Geo. W. Allen and L. W. Bethel, for libelants.

G. Browne Patterson, for respondent.

LOCKE, District Judge. It appears from the testimony in this case that the Mexican steamship Olympia, loaded with about 1,200 tons of coal from Norfolk to Vera Cruz, ran ashore on the Florida reef in March, 1908. The master immediately prepared to run his two anchors, one of about 2,000 and one of about 2,500 pounds, by slinging them from his large boats, and endeavoring to have them towed into deep water; but the wind being against him he found it difficult to make progress, and there being a launch of about 14 tons in sight, he signaled to it to come to his assistance, and having sounded and found a place where the water was sufficiently deep to let go the anchors, had his boats towed out and the anchors dropped, bringing the

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

hawser to the after chocks and carried to the winches of the steamer, and a heavy strain hove until the falling of the tide. In the meantime several schooners of the libelants arrived at the steamer, but upon application being made for permission to come aboard, were denied. Finally a pilot boat, with its master, Pierce, dressed in a uniform with brass buttons, four gilt stripes on his sleeves and a uniform cap with gilt letters "C. P.," came alongside, and he was permitted to come on board. From this time on the testimony is conflicting.

There is no question in my mind that the captain of the steamship considered and believed that the person in uniform was some official character, and no doubt the pilot endeavored by all means within his power to represent himself in that capacity. He admits he told the captain of the steamship that he was the "commodore of the port." The testimony of many witnesses is that he informed the captain that his duty was to protect and save vessels on the reef, and declared his right and powers, and insisted upon his authority to assist the vessel. This is not only testified to by the master and crew of the steamer, but also by the crew of the launch that carried out the anchors. The master of the steamer understood English but slightly—not well. There is no question in my mind that he told the pilot that he did not require any more assistance; that he had his anchors out and could get his vessel afloat by the next tide; but that Pierce insisted upon his being permitted to bring his men on board and lighten the steamer, and I am satisfied that he instructed them to come on board without permission of the master. It appears from the testimony of Pierce himself that he could not talk with the captain without an interpreter, and before he had any conversation that amounted to anything he states that he found one of the crew of one of the libelant vessels who was then on board, to act as interpreter. I am satisfied by this that this interpreter came on board with the rest of the men before Pierce had a conversation with the master through an interpreter. Pierce insisted on his right to jettison coal in order to float the vessel. Just the conversation that actually took place between the master and Pierce is very difficult to determine, and although Pierce states that his interpreter was an American belonging to one of the vessels engaged in the salvage service, he has not been produced or his name furnished to the court so that he might be found. After Pierce had ordered the crews of the wrecking boats to come on board, one Sawyer, master of one of the vessels, was directed by him to go to work and open the hatches and commence jettisoning cargo. He inquired of Pierce what agreement had been made, but the only answer he received was, "It's all right—go ahead." It is testified to by Sawyer that the second mate and some of the crew of the vessel assisted in opening the hatches. This the first and second mates both deny, and they state that everything they permitted to be done was permitted by reason of the orders of the officer in uniform. In the meantime about 16 man belonging to the libelants' vessels came on board and commenced to throw coal overboard. Sawyer continued the work; but he was not satisfied at that time that any arrangement or agreement had been made with the master, and continued to attempt to get some understanding with him about continuing work; but it does

not appear that he was given any instructions, but was told to go to the first mate. He has testified that the first mate instructed him to continue jettisoning coal, but the first mate denies that he did, but says that all the coal jettisoned was jettisoned by what he considered the authority of the man in uniform. At the next high tide, while heaving upon the anchors, the vessel was moved slightly, but the large hawser to one anchor parted and the other anchor dragged. The weather became rougher, and, on account of the vessel pounding and loosening the supports of the boilers, it became necessary to shut off the steam and draw the fires—when the jettison of coal continued until there had been about 50 to 75 tons thrown overboard, lightening the steamer somewhat. In the morning the revenue cutter, which had arrived, was called upon, and after towing from a half hour to an hour, according to the conflicting testimony, the steamer floated. While it is considered that the libelants who came on board by instructions of Pierce, the pilot, so came on board and went to work without the voluntary consent of the master, and were only permitted to do so by the mistaken belief of Pierce's authority, yet unquestionably they personally acted in good faith. Whether such services as they rendered were of any benefit to the property so as to entitle them to any compensation becomes the important question in the case. There was no contract or agreement, and the circumstances under which the work was commenced and carried on, some of which it is unnecessary to review here, precludes the idea of any ordinary salvage compensation; yet it is considered that if the property was benefited by their labor, they may in justice be entitled to a quantum meruit.

In determining whether their labor was of any such benefit, the changes which have taken place since their services were refused and before the vessel was floated, may be considered. At the time of refusal there were two large anchors laid out in good position, the steam power of the vessel was in good condition, and the master had good reason for refusing aid; but subsequently one hawser parted, the other anchor dragged, and on account of heavy pounding the steam power had to be given up and the fires drawn. It is therefore considered that although at the time the assistance was first declined there was no apparent need of further aid, the probability is that the amount which the jettison of cargo had lightened the vessel, very materially assisted the revenue cutter in floating her and probably saved a tide and perhaps the vessel; and that such probability is sufficient to allow the men who actually performed the labor a quantum meruit for such labor. There were about 20 men, rather less than more, and they worked from 8 to 10 hours, and it is considered that $100 will fairly compensate them. The large number of vessels, and men who were on board of them, named in the libel, rendered no service and were of no benefit whatever. None of the libelants were licensed wreckers of this district, and were under no obligations to assist property.

A decree will follow for $100 to the actual parties who rendered services.

KANSAS CITY SOUTHERN RY. CO. v. QUIGLEY et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. June 13, 1910.)

No. 200.

1. COURTS (§ 299*)—FEDERAL COURTS—FEDERAL QUESTION.

A bill by a railroad company to enjoin suits at law for damages or in equity to restrain its removal of a division point on the ground, among others, that the enforcement of an alleged contract to maintain the railroad's shops, roundhouses, etc., at the point in question would interfere with interstate commerce, and prevent complainant's compliance with Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), known as the "Hours of Service Law," did not show federal jurisdiction as involving a federal question, under the rule that to give the federal Circuit Court jurisdiction for that reason the federal question must appear necessarily in the statement of the cause of action, and not as mere allegations of a defense pleaded.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*

Jurisdiction in 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. EQUITY (§ 153*)—BILL—NATURE OF CASE.

Whether a bill states a cause of action for relief in equity is not to be determined merely from general allegations of equity cognizance or from conclusions of law and fact but from the alleged facts themselves, which, if true, make out a case of equity jurisdiction.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 153.*]

3. INJUNCTION (§ 26*)—EQUITABLE RELIEF—NATURE OF BILL—QUIA TIMET—CLOUD ON TITLE—BILL OF PEACE.

Where complainant railroad company was in quiet possession of all its property at M., and no one threatened to disturb such possession and enjoyment by suit or otherwise, nor to do anything to cloud complainant's title to such property or to interfere with the use thereof, but many property owners in M. opposed complainant's removal of its division point to a different location, as in violation of a contract previously made with complainant's predecessor, a bill by complainant seeking to restrain such property owners from instituting suits at law for damages or in equity for specific performance of such contract was not maintainable as a bill quia timet to remove a cloud on title or as a bill of peace.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

4. EQUITY (§ 42*)—JURISDICTION—DETERMINATION OF QUESTION.

Whether a bill states a case of equitable cognizance is jurisdictional, and the question may therefore be raised by the court of its own motion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. § 42.*]

5. COURTS (§ 371*)—FEDERAL COURTS—JURISDICTION—STATE STATUTES.

Since state legislation cannot enlarge the jurisdiction of the federal courts in equity, such legislation, if conflicting with the distinction observed in federal courts between law and equity, is unenforceable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*

Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

6. INJUNCTION (§ 26*)—EQUITY JURISDICTION—MULTIPLICITY OF SUITS.

Complainant's predecessor contracted to maintain its division point and railroad shops at M., and, after this had been done for 16 years, com-

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

plainant found that it was inconvenient to longer maintain them there and impossible to so maintain them and operate the road so as to comply with the hours of labor act of Congress (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]), and, having been threatened with suits to enforce such contract and to recover damages for its breach, filed a bill of equity to restrain such actions. *Held*, that the bill was not maintainable to avoid a multiplicity of suits either in equity or at law.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

7. SPECIFIC PERFORMANCE (§ 25*)—NATURE OF CONTRACT—LOCATION OF RAILROAD DIVISION POINT.

A suit for specific performance of a contract to locate and maintain a railroad division point at M. would be unsustainable in case it was shown that the continuance of such division point at M. would either impose a burden on interstate commerce creating a congestion of traffic and embarrass the service of the road and inflict irreparable loss on it or prevent its compliance with the federal hours of labor act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]).

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 25.*]

8. INJUNCTION (§ 26*)—RESTRAINING SUITS AT LAW—IRREPARABLE INJURY.

That the denial of an injunction restraining suits for breach of a railroad's alleged contract to maintain a division point at a certain place would result in many such suits for damages being instituted against a railroad company did not justify the issuance of such injunction on the theory that the railroad company would be thereby irreparably injured.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

9. INJUNCTION (§ 137*)—CROSS-BILL—PRELIMINARY INJUNCTION.

Where a bill by a railroad company to restrain property owners at M. from suing at law or in equity to restrain it from removing its division point to another place was without equity and unsustainable, and it appeared that defendants' right to prevent the removal was doubtful, a restraining order would not be granted on a cross-bill to prevent such removal on the denial of the injunction prayed for in the original bill.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 137.*]

In Equity. Suit by the Kansas City Southern Railway Company against R. M. Quigley and others, in which defendants file cross-bill for affirmative relief. Bill dismissed.

The complainant, a corporation organized and existing under the laws of the state of Missouri, and a citizen of that state, exhibited its bill of complaint against R. M. Quigley and 17 other defendants, each and all of them alleged to be citizens and residents of Polk county, in the state of Arkansas, and of the Ft. Smith Division of the Western District thereof. The prayer of the bill is: "That the rights of your orator and of the defendants herein and of the other owners of property in and adjoining the city of Mena, represented by the defendants herein, be declared and established, and that the claims of the defendants and of each and all of the persons represented by them be declared to be unfounded in law and in equity, and that your orator be decreed to have the right free from any claims of any kind of any of said defendants or other persons to remove its central division point from the city of Mena, and that the defendants and each of them, and each and all of the other owners of property in and adjoining the said city of Mena, be temporarily restrained and enjoined pending the determination of this cause, and at the final hearing hereof be permanently restrained and enjoined from instituting any suits at law or in equity founded upon the assertion of said claims or growing out of the facts and circumstances hereinbefore alleged or to prevent your orator for any reason from so removing its central division point from the said city of Mena or from instituting any suits for damages growing out of

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

such removal, and for such further and additional relief as your orator may be entitled to."

In substance the bill alleges:

(1) That it is authorized to do business in the state of Arkansas. That its railroad is engaged in state and interstate commerce, and that it operates such railroad in the states of Missouri, Kansas, Arkansas, Oklahoma, and Louisiana. That for many years it has owned and operated a line of railroad extending from Kansas City, in the state of Missouri, by continuous line of railroad to and through the city of Mena, in Polk county, state of Arkansas.

(2) It alleges: That this cause of action arises under the Constitution and laws of the United States. That it is a civil action, and involves a controversy between citizens of different states, and that the subject-matter in dispute, exclusive of interests and costs, exceeds $2,000.

(3) That the defendants are owners of real and personal property in and adjoining the city of Mena, Ark., and represent, as a class, the owners of real and personal property in and adjoining the city of Mena, and that the members of said class are so numerous that they cannot without manifest inconvenience and oppressive delay be made parties to the bill.

(4) That complainant's line of railroad within and through the states named has been divided into two principal divisions, each of which divisions has been, in turn, subdivided into operating or subdivisions. That now, and ever since the original construction of complainant's road, the central division has been located at Mena, where freight and passenger trains change engines and crews, and where a large number of complainant's employés have resided, and where complainant's roundhouses, shops, and terminal yards required at that division point are located. That "an act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employees thereon" enacted by Congress became effective on the 4th day of March, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]). That up to that time the maintenance of the division point at Mena was feasible and practicable. That since that time experience has demonstrated that the division point at Mena cannot be maintained without great congestion of traffic, impairment of service, and irreparable loss to complainant from unavoidable, constant, and continual violence of the act of Congress referred to, and subjecting the complainant to penalties on account thereof. That, to avoid the results stated, it is necessary to rearrange the location of both its central division point and the operation of its district and subdivision terminals, and to remove from the city of Mena to such points as may be fixed as division points the roundhouses, shops, and terminal yards now maintained at Mena.

(5) That complainant's railroad proper from a point approximately 20 miles south of Kansas City in the state of Missouri, through the states of Missouri, Kansas, Arkansas, and Oklahoma to and through the city of Mena, were formerly owned and operated by the Kansas City, Pittsburg & Gulf Railroad Company, and that so much of said line as extends to and through the city of Mena was constructed by the Arkansas Construction Company under a written contract with the Kansas City, Pittsburg & Gulf Railroad Company with the defendant and citizens and property owners in and adjoining the city of Mena claiming and asserting that at the time of said construction the Kansas City, Pittsburg & Gulf Railroad Company by certain printed matter represented that the central division point of the Kansas City, Pittsburg & Gulf Railroad Company and the division shops and yards would be maintained in the city of Mena, and that the town site of Mena was sold with the knowledge of the Kansas City, Pittsburg & Gulf Railroad Company to the defendants and the present owners of property in and adjoining the city of Mena, and their predecessors in title, upon the faith of such representation. That the defendants claim and assert that a binding and enforceable contract or obligation was thereby created in their favor and binding upon the complainant for the perpetual maintenance of said central division point and division shops and terminal yards at the city of Mena. The complainant specifically denies that such printed matter so used by it was binding upon the Kansas City, Pittsburg & Gulf Railroad Company, and denies that any such statements or representations were made by it. The bill then alleges that on April 1, 1899,

all the property and assets of the Kansas City, Pittsburg & Gulf Railroad Company were incumbered by a first mortgage or deed of trust to the State Trust Company as trustee, securing its funded debt, and subsequently, upon a bill of complaint filed by the said State Trust Company, such proceedings were had that the property and affairs of the Kansas City, Pittsburg & Gulf Railroad Company passed into the hands of a receiver appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, and that said action was brought to foreclose the mortgage securing the funded debt, and ancillary proceedings were later instituted by said trustee in this court; that thereafter a decree of foreclosure was passed and the property sold, and that the complainant became the purchaser thereof; that, by reason of such proceeding, the complainant became the owner of all the property and assets of the Kansas City, Pittsburg & Gulf Railroad Company, including its line of railroad into and through the city of Mena, discharged from any and all obligations, except such as it was required to assume under the said decree of foreclosure as being superior in equity to the lien of the said mortgage. The bill then alleges that, if the Kansas City, Pittsburg & Gulf Railroad Company had made the representations alleged, such representations were not binding upon the complainant, the same not having been imposed upon the complainant by the terms of said decree. The bill then alleges that notwithstanding the facts last stated that the defendant and others claim and assert that the complainant assumed the pretended obligations of the Kansas City, Pittsburg & Gulf Railroad Company hereinbefore referred to, which the complainant specifically denies. The bill then alleges that, if the Kansas City, Pittsburg & Gulf Railroad Company had obligated itself to perpetually maintain at the city of Mena its central division point, the claim of said defendant and others would be unfounded in law and equity for the reason that said pretended obligation is void because contrary to public policy and ultra vires, and, if it had assumed such obligation, the obligation itself has been fully satisfied by the maintenance of the central division point of the Gulf company at Mena for 16 years past.

(6) The bill alleges that the defendants claim that on the 16th of March, 1907, at the city of Mena that one L. F. Loree, chairman of complainant's executive committee and its principal executive officer at the city of Mena, in the presence of certain property owners and citizens of Mena, and of the said executive committee, composed of J. R. Davis and others, stated to a committee of said citizens that the central division point of the complainant's road would remain at Mena, and upon the strength of this statement the citizens of Mena and many of its citizens, including defendant, made large and valuable improvements, the value of which will be greatly diminished if said central division point is removed from Mena. The bill alleges that this claim is unfounded and untrue; that no such statement was made; that complainant claims that by reason of said alleged statement of the said Loree and the improvements made on the strength thereof the complainant is estopped from removing its central division point from Mena. The bill then alleges that by reason of the premises a restriction or servitude has been placed upon the use of its railroad, whereby it is required to maintain its central division point at Mena forever, and a similar servitude upon the use of complainant's property within the city of Mena; that the claims and assertions of defendants are unfounded in law and equity; that, if such statements had been made by the said Loree, they were not binding because without consideration and were not in writing, as required by the statute of frauds, and were not made by authority of the board of directors, or the executive committee, or any other person vested with authority to contract for the perpetual location of complainant's central division point, and were therefore ultra vires, void, and contrary to public policy.

(7) The bill then alleges that defendant and other owners of real and personal property in and adjoining the said city of Mena have threatened and are threatening to institute an injunction suit or injunction suits to restrain the complainant from the removal of its central division point from the city of Mena, and, as complainant is informed and believes and so charges, is preparing to institute said suit, and also to institute separate actions at law against complainant to recover damages for the removal of said central

division point from Mena whenever the same shall be done. The bill then alleges that said claims and threats are a cloud upon, or in the nature of a cloud upon, the title of complainant's properties, and an interference with their proper use and management; that said injunction suits and actions at law for damages will result in a multiplicity of suits which complainant will be required to defend; that the claims of said defendant and the owners of other property in like situation in and about Mena originate in a common source, and that there is a community of interest among all the defendants and all the other owners of real and personal property in and around the city of Mena represented by them; that there are questions of law and fact, the determination of which, unless settled by a suit in equity, will involve a multiplicity of suits; that the assertion of said claims and threats, are an interference with the prosecution of complainant's plan for the readjustment of its operating divisions in the manner and for the purpose alleged, and will result in irreparable loss, so that it would create an uncertainty as to complainant's road in the management of this property in the interest of itself and the public at large, the continuance of which is a burden or servitude upon its proper use and management, a burden upon interstate commerce, and will prevent the proper adjustment of its division terminals, the effect of which is detrimental to the safety of persons and property and to the employés of complainant, and tends to subject it to the penalty of the act of Congress commonly known as the "Hour of Service Law," and likewise to impair the value of the bonds and stocks which have been issued and sold in large amounts upon the faith of complainant's right to operate its property and maintain efficiency and with due regard to such laws as may be from time to time enacted by Congress in its regulation of interstate commerce carriers. Then follows the prayer for relief hereinbefore set out.

S. W. Moore and Read & McDonough, for complainant.

John A. Eaton, F. A. Youmans, Elmer J. Lundy, and J. I. Alley, for defendants.

ROGERS, District Judge (after stating the facts as above). In the view taken by the court, it is unnecessary to set out at length the other pleadings. The question of jurisdiction raised by the answer, growing out of the denial of diverse citizenship, need not be noticed now. To my mind it is clear that no jurisdiction in this case can be upheld on the ground of the alleged existence of a federal question. The principle governing that class of cases is stated in Devine v. Los Angeles, 202 U. S. 334, 26 Sup. Ct. 657, 50 L. Ed. 1046, as follows:

"It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper. The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving the defendant to set up in his answer what his defense is. * * * The cases hold that to give the Circuit Court jurisdiction the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon. Third Street Railway Company v. Lewis, 173 U. S. 457 [19 Sup. Ct. 451, 43 L. Ed. 766]."

Tested by this rule, the bill in this case falls far short of stating any facts upon which jurisdiction could attach because of the existence of a federal question.

But, assuming both diverse citizenship and the existence of a federal question, the jurisdiction in a court of equity does not necessarily follow. Federal questions are raised and decided in courts of law as well as courts of equity, and the question still remains, Has the complainant stated a case of equity cognizance? This question must be determined, not merely from general allegations of equity cognizance, or conclusions of law and fact, but from the alleged facts themselves which, if true, make out a case of equity cognizance. Copious references are given in the briefs of counsel bearing upon bills quia timet, or to remove a cloud upon the title to real estate, and upon bills of peace, as they are called. In Holland v. Challen, 110 U. S. 20, 3 Sup. Ct. 497, 28 L. Ed. 52, Mr. Justice Field said:

"A bill quia timet, or to remove a cloud upon the title of real estate, differed from a bill of peace, in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. Story's Equity, § 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession. Alexander v. Pendleton, 8 Cranch, 462 [3 L. Ed. 624]; Peirsoll v. Elliott, 6 Pet. 95 [8 L. Ed. 332]; Orton v. Smith, 18 How. 263 [15 L. Ed. 393]."

The bill in this case is neither a bill quia timet, or a bill to remove a cloud from the title upon real estate, or a bill of peace. The complainant owned and is in the quiet and undisturbed possession of all its properties at Mena. No one is threatening to disturb that possession and enjoyment by suit or otherwise. No one is doing anything or threatening to do anything to cloud complainant's title to its properties, or interfering with its uses. On the contrary, we learn from the bill that defendants claim and desire that complainant shall remain in the possession and continue the enjoyment and use of its said properties at Mena, in the future as in the past, unclouded and undisturbed by them. There is, therefore, no cloud to be removed, and there was no threatened litigation at the time this bill was filed, vexatious or otherwise, about it, and there were no causes of controversy as to its title to be removed in order to prevent future litigation. Nor can any general allegations as to what will follow if the restraining order is not granted, such is irreparable injury, or multiplicity of suits, be permitted to take the place of the substantive facts essential to give a court of equity jurisdiction.

Stripped to the skin, this is a bill which, if it stand at all, must stand on the principle that equity will take jurisdiction in order to avoid a threatened multiplicity of suits, said suits not about to be instituted by the same defendants, but by separate defendants, each of whom, in a certain event, may have a distinct cause of action in his own right. The question resolves itself to this: Does the avoidance of a multiplicity of suits under such circumstances, in the absence of any other distinctive ground or acknowledged head of equity cognizance, give jurisdiction in equity to the courts of the United States?

More briefly stated, the question is this: Is the subject-matter of this suit within the cognizance of a court of equity? This question I think is raised by the answer; but, if not, it is jurisdictional, and as held in Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black (U. S.) 550, 17 L. Ed. 333, may be raised by the court sua sponte.

Many of the states, Arkansas among the number, have enacted statutes conferring jurisdiction on their own courts of equity upon certain conditions not recognized in the courts of equity of the United States. The question of jurisdiction in this case finds no warrant in any such statute in force in Arkansas. Undoubtedly there are certain rights created by state statutes which United States courts of equity can and do enforce, but state legislation cannot enlarge the jurisdiction of the United States courts in equity, if such legislation conflicts with the distinction strictly observed in the federal courts between law and equity. Adoue et al. v. Strahan et al., 97 Fed. 691, and cases there cited, afford examples of that character. In that case this court said:

"Counsel for the plaintiffs insist that the case of Rich v. Braxton, 158 U. S. 405, 15 Sup. Ct. 1006, 39 L. Ed. 1022, is authority in support of the bill. The court thinks not. In that case the precise question was not presented at all. Counsel also cite Holland v. Challen, 110 U. S. 15, 26, 3 Sup. Ct. 495, 28 L. Ed. 52, to the effect that United States courts of equity will respect state statutes enlarging equitable remedies. Unquestionably that is true, but it is subject to the limitation that rights created by state statutes will not be administered if they conflict with the distinction strictly observed in said courts between law and equity, or if they contravene section 723 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 583), which provides that suits in equity shall not be sustained in either of the courts of the United States, where a plain, adequate, and complete remedy may be had at law, or if they violate the constitutional right of parties, in actions at law, of a trial by jury."

Nor are the decisions of state courts, if they were harmonious, necessarily decisive of the question to be considered. It may be conceded that there are state decisions sustaining this bill. They are not all in accord, as we shall see. Pomeroy, in his Equity Jurisprudence, §§ 268, 269, et seq. upholds the jurisdiction in such cases. One federal case cited by the author it is thought sustains the text, and only one—i. e., Osborn v. Railroad Company (C. C.) 43 Fed. 824—the opinion rendered by Mr. Justice Harlan at circuit. I think the facts in that case readily distinguish it from the case at bar. Crews et al. v. Burcham, 1 Black (U. S.) 352, 17 L. Ed. 91, is cited by Justice Harlan to sustain Osborn v. Railroad Company, supra, but that case is obviously distinguishable from Osborn v. Railroad Company, supra, and the one at bar also. But I need not consider that phase of the matter. It is taken care of later. In Tribette et al. v. Illinois Central Railroad Company, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the Supreme Court of Mississippi carefully considered and refused to follow Pomeroy or Osborn v. Railroad, supra. The opinion was written by Chief Justice Campbell, justly esteemed one of the ablest judges on the bench in this country. I quote from the opinion as follows:

"A number of owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the Cir-

cuit Court to recover of the appellee damages for the respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability as to it arose by reason of the fire, which arose, not from any negligence or wrong of it or its servants, but from the fault of others, for which it is not responsible, and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law, wherefore, to avoid multiplicity of suits, and the consequent harassment and vexation, all of the said several plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in and have the controversies settled in the one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved. The injunction sought was granted, and the defendants served with process, when they appeared and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The case was heard on motion to dissolve the injunction, and it was overruled, and an appeal was granted. The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them. The granting and maintaining the injunction are fully sustained by 1 Pom. Eq. Jur. § 225 et seq., and it is probable that any judge authorized would have granted the injunction upon the text cited. But we affirm, after a careful examination and full consideration, that Pomeroy is not sustained in his 'conclusions' stated in section 269 of his most valuable treatise, and that the cases he cited do not maintain the proposition that mere community of interest 'in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body,' is ground for the interposition of chancery to settle in one the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned to maintain a theory has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his views of the subject, to wit, joinder of parties and avoidance of multiplicity of suits. It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder where confessedly there could be no doubt that the matter was of equity cognizance. Every case he cited to support his text will be found to be either where each party might have resorted to chancery, or been proceeded against in that forum, and to rest on some other recognized ground of equity interference other than to avoid multiplicity of suits. The cases establish this proposition, viz., where each of several may proceed, or be proceeded against, in equity, their joinder as plaintiffs or defendants in one suit is not objectionable. But this is a very different question from that, whether merely because many actions at law arise out of the same transaction or occurrence, and depend upon the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved. Where each of several parties may proceed in equity separately, they are permitted to unite and make common cause against a common adversary, and one may implead in one suit in equity many who are his adversaries in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference in the subject-matter of the controversy, or common right or title involved, to warrant the joinder of all in one suit, or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there 'is a community of interest merely in the question of law or of fact involved,' etc., as stated by Pomeroy in section 268. Although he asserts that this early theory has long been abandoned, he fails

utterly to prove it. An examination of the cases he cited under section 256 et seq. will show this to be true. The opinion of the justice (Harlan) in Osborn v. Railroad Co. (C. C.) 43 Fed. 824, does support the text of Pomeroy, and cites 1 Pom. Eq. Jur. §§ 245, 255, 257, 268, 293, and Crews v. Burcham, 1 Black, 352-357, 17 L. Ed. 91. We are content with what has already been said as to the text of Pomeroy, and affirm that but one of his citations sustains his conclusion, and that the language of Harlan, J., in the case cited. Nor does Crews v. Burcham sustain the language of Justice Harlan. It belongs to the class of cases where each party might have brought his bill, and all who had a common cause were permitted to make common contest in chancery with their adversaries who were united by a common tie. The decision of the case in which Harlan, J., gives support to the doctrine of Pomeroy is not complained of, but the opinion is not justified by any case with which we have been made acquainted. The case was one in which each might have brought his separate bill to quiet title, and all concerned were permitted to unite in one bill against their common adversary; and so, it is believed, will be found all the cases on this subject. Certainly those relied on by Pomeroy are of this character."

Judge Campbell then takes up every case cited by Pomeroy, and shows that they all either fall within the rule cited by him, or that they are readily differentiated from the text of Pomeroy by the peculiar facts of the respective cases. Later, in summing up the discussion, on page 190, 70 Miss., on page 33, 12 South. (19 L. R. A. 660, 35 Am. St. Rep. 642), he says:

"And while judges have in various instances cited, and sometimes quoted, Pomeroy, in the language alone characterized as unsupported, in every instance, we think the case will not call for it, but to be resolvable independently of it upon other grounds of equitable interference; and in our opinion not one of the learned courts which have cited or quoted Pomeroy in the way mentioned would sustain this bill if it was before it for decision. There is danger that by frequent repetitions and piling up assertions judges citing and quoting text-books, and text-writers citing the cases thus referring to them, a false doctrine might acquire strength enough to dispute with the true; but we do not believe that any accumulation of dogmatic assertion and citations and quotations can ever establish the proposition that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them except that each suffered by the same act, may bring them all before a court of chancery in one suit, and deny them their right to prosecute their actions separately at law as begun by them. It has never been done. There is no precedent for it, and, while this is not conclusive against it, it is significant and suggestive. If it is true, as stated by Pomeroy, and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitations would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages instituted in a dozen different counties under our law as to venue of suits against railroad companies, in some of which executors or administrators or parent and children might sue for the death of a passenger, and in others claims would be for divers injuries. If Pomeroy's test be maintainable, all of these numerous plaintiffs, having a community of interest in the questions of law and fact, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid multiplicity of suits. But we forbear. Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible."

A similar question arose in Fellows et al. v. Spaulding, 141 Mass. 92, 6 N. E. 548. The opinion is short, and I quote the whole of it:

"Morton, C. J. This is a bill in equity to restrain the several defendants from proving their claims against an insolvent debtor in the court of insolvency. If, in any case, such a bill in the nature of a bill of peace can be maintained. where there are many creditors whose debts depend upon the same question, and who threaten, by separate appeals, to harass the assignee with a multiplicity of vexatious suits, which we need not decide, this bill does not state a case which calls for the interposition of a court of equity. Such a bill is addressed to the discretion of the court of equity, and will not be entertained unless it appears that there is a practical necessity for the interposition of the court to prevent vexatious litigation. The bill sets out that numerous creditors have presented their several debts for proof in insolvency, which have not been passed upon by the judge of insolvency, and that they are all controlled and owned by one of the defendants. The same questions of law are raised in each case, and there is no reason why one suit in the usual course of proceedings in insolvency, the other cases being continued to abide the result, should not settle all the cases. There is no allegation that the defendants threaten or intend to harass the plaintiffs by vexatious litigation, and practically the whole controversy can be conveniently settled in the forum to which it belongs. We see no reason for restraining the defendants by injunction from pursuing the remedy which the statutes provide for such cases. Bill dismissed."

The learned counsel for plaintiff have not cited a single binding or authoritative federal case which combats the principle laid down by these two eminent state courts which have considered this question purely from the standpoint of equity jurisdiction, unaffected by any state legislation. My own research has disclosed none. Surely it cannot be that, if the law is otherwise, there is no binding or authoritative case to support it. The cases are innumerable which border close along the line on which this bill is framed, and it is manifest that the pleader left no stone unturned to bring the framework of the bill within the scope of those decisions in so far as the facts warranted. Let us see.

In Boise Artesian Water Co. v. Boise City, 213 U. S. 279, 29 Sup. Ct. 427, 53 L. Ed. 796, Moody, J., said:

"The appellant, a West Virginia corporation, brought in the Circuit Court of the United States for the District of Idaho this bill in equity against Boise City, a municipal corporation. There was a demurrer to the bill, which, upon consideration of the merits of the case set forth therein, was sustained by the judge of the Circuit Court and the bill dismissed. The company appealed directly to this court. The facts set forth in the bill and exhibits and the relief and grounds of relief claimed so far as necessary to develop the point decided may be conveniently stated in narrative form. The company was incorporated for and is engaged in supplying the city and its inhabitants with water for municipal and domestic purposes. It had acquired the property, franchises, right, and privileges of certain individuals and corporations, who had been from time to time granted by ordinance of the city the privilege of laying and maintaining pipes in the streets and supplying through them water for municipal and domestic uses. The company conducted its business by virtue of these ordinances, and has invested large sums of money. The ordinances need not be set forth in detail, and it is enough to say that the company contends that they are franchises for a term of not less than 50 years, and constitute a contract inconsistent with the license fee or tax hereafter referred to, while the city contends that they are mere permissions, revocable at any time. The rates are fixed by commissioners, acting under the authority of a law of the state, and are to remain in force three years from the date of their establishment. After the fixing of the rates and before the expiration of the three years, on the 31st day of May, 1906, the city enacted an ordinance requiring that the company 'hereafter pay to said Boise

City, on the first day of each and every month, a monthly license of $300.00, for the privilege granted * * * to lay and repair water pipes in the streets and alleys of said city.' The ordinance then made a demand for the monthly payment of said license, and directed the city clerk to notify the company of the requirements of the ordinance."

I have quoted this statement of the case because of the striking similarity of the case as made by the bill to the one at bar so far as the reasons why the injunction should be granted are concerned. Now, on what ground did the pleader in that case invoke the power of a court of equity? The opinion answers the question. Justice Moody said:

"The main object of the bill is to obtain an injunction against the enforcement of this ordinance upon the grounds (1) that other corporations, associations, and individuals using the streets and alleys of the city for various purposes are not required to pay a license, and therefore there was by the ordinance a denial of the equal protection of the laws; (2) that the city, in pursuance of its claim that the ordinances grant only a revocable permission to occupy the streets, threatens and intends to impose further burdens and assessments, and threatens to remove the pipes and the works from the city; (3) that the city has presented monthly bills and has brought an action at law in the state court to recover the amount alleged to be due on account of the license fee imposed, and that there is therefore danger of a multiplicity of suits; (4) that the ordinance has cast a cloud upon the company's franchises and right to supply water to the city and its inhabitants, and thereby depreciated the value of the company's property, impaired its credit, embarrassed its business, and confiscated its property; (5) that the ordinance impairs the obligation of the contract made by the ordinances granting the rights, privileges, and franchises; (6) that the enforcement of the ordinance would deprive the company of its property without due process of law and abridge its privileges and immunities granted by the fourteenth amendment; (7) and that the ordinance violates the Constitution and laws of the state. A subordinate object of the bill is to recover from the city certain amounts due on account of water supplied to fire hydrants, which the city declines to pay, disputing its liability so to do."

The Circuit Court in that case dismissed the bill on the merits. The Supreme Court of the United States, in declining to consider the merits, said:

"We do not enter upon that subject, because there is a deeper question which seems to us decisive of the case. That question is whether the plaintiff is entitled, on the allegations of its bill, to relief in equity in the federal courts. * * *

"It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional, and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate, and complete remedy at law. This rule at an early date was crystallized into statute form by the sixteenth section of the judiciary act (Rev. St. § 723), which, if it has no other effect, emphasizes the rule and presses it upon the attention of courts. New York, etc., v. Memphis Water Co., 107 U. S. 205, 214 [2 Sup. Ct. 279, 27 L. Ed. 484]. It is so well settled, and has so often been acted upon, that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 11 [19 Sup. Ct. 77, 43 L. Ed. 341]."

In New York, etc., Co. v. Memphis Water Co., 107 U. S. 214, 2 Sup. Ct. 286, 27 L. Ed. 484, the Supreme Court said:

"In view of the early enactment by Congress in the sixteenth section of the judiciary act (Rev. St. § 723), 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,' the rule laid down in Hayward v. Andrews [106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271] is entitled to special consideration from the courts of the United States. This enactment certainly means something; and, if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."

Returning to Boise Water Co. v. Boise City, above, the court takes up and reviews a line of decisions of that court wherein equity was refused to take cognizance and grant injunctions solely upon the ground of the illegality or unconstitutionality of state legislation in the absence of facts disclosing some distinct head of equity cognizance. The line of cases reviewed are those in which federal courts have been asked to enjoin the collection of state taxes based upon illegal or unconstitutional state legislation. In Boise Water Co. v. Boise City, supra, it is said:

"It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

Then, in summing up the conclusions from the cases reviewed, the court said, at page 285, 213 U. S., at page 429, 29 Sup. Ct. (53 L. Ed. 796):

"It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction. These decisions make it clear that an injunction ought not to be granted unless the bill, besides alleging illegality and unconstitutionality of the ordinance imposing the license fee, sets forth other circumstances which bring the case within some acknowledged head of equity jurisdiction. The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises. But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city and to deny it the right to continue its business there would be clear reason for the interposition of a court of equity, for, if that were done illegally or unconstitutionally, an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties."

It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatever are alleged showing such a threat. The city does not speak except by its council, and nothing has been said or done by it in this direction. On the contrary, the imposition of the license

fee and the bringing of a suit for its recovery contemplate continuance and not restraint of the business of the company.

In 16 Cyc. p. 60b, it is said:

"It is frequently stated that equity will assume jurisdiction for the purpose of preventing a multiplicity of suits. But this statement in its broad form is somewhat misleading. The mere fact that one is threatened with a multiplicity of suits, and that he is likely to become involved in numerous proceedings, does not alone entitle him to the aid of equity to avoid such situation. He must in addition show that some legal or equitable right is invaded or threatened."

See, also, numerous cases cited in footnote on same and following page, including both state and federal decisions. On the following pages the subject is discussed by the author, and the confusion of the authorities admitted. At page 65 the author, after having cited the principles in such cases, says:

"Nevertheless bills have been sustained where there was no connection among the different claims other than that they all depended upon the same question of fact and law arising out of the same transaction."

It is a curious fact that the very danger referred to by Chief Justice Campbell in Tribette v. Illinois Central Railroad is verified by an examination of the cases cited in footnote 79 to sustain the text just quoted, for every case cited in that footnote either does not sustain the text, or is readily distinguishable from it, or relies on Pomeroy for authority. Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189, does not sustain it. Sang Lung v. Jackson (C. C.) 85 Fed. 502, does sustain it, and rests on Pomeroy. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, I think establishes the contrary when applied to the facts of this case, and is not authority which supports the text in any event. Tift v. Southern Railroad Co. (C. C.) 123 Fed. 789, does not support the text, and is readily distinguishable from the case at bar. The case of Hale v. Allinson, supra, has been found both instructive and profitable, and there is language in the nature of a dictum at the foot of page 78 tending to uphold the doctrine laid down by Pomeroy, at least in part, in some cases; but on the previous page the general rule as laid down by Pomeroy is distinctly repudiated. If it be conceded that this case falls within the rule stated in Tribette et al. v. Illinois Central Railroad Co., supra, because it appears from the bill that each of the defendants have a separate and distinct cause of action in equity to enjoin complainant from removing its central division from Mena, and therefore this suit will avoid a multiplicity of suits in equity against the complainant, the answer is found in the fact that if any such action is contemplated by the defendants, when suit is brought by any one of the defendants to enjoin the removal of the division from Mena, if maintainable at all, it will settle the whole question for all. No good, therefore, could come from repeated suits in equity to enjoin the removal, which had already been forbidden, and the court will indulge no such conclusion based upon mere threats "to institute an injunction or injunction suit." In Boise Artesian Water Co. v. Boise City, supra, the Supreme Court, at page 285, 213 U. S., at page 430, 29 Sup. Ct. (53 L. Ed. 796), said:

"Nor do we think that there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and, when it reaches judgment, it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pomeroy's Eq. Juris. (3d Ed.) § 254. Perhaps it might be necessary to await the final decision of one action at law (see for analogies Sharon v. Tucker, 144 U. S. 533 [12 Sup. Ct. 720, 36 L. Ed. 532]; Boston, etc., Mining Co. v. Montana Ore Co., 188 U. S. 632 [23 Sup. Ct. 434, 47 L. Ed. 626]), but that we need not decide."

Moreover, such a suit in equity could never be maintained by the defendants if on final hearing it was determined that to grant an injunction against the removal of complainant's central division from Mena would either impose a burden on interstate commerce, create a congestion of its traffic, impair its service or inflict irreparable loss upon it, or prevent the enforcement of the act of Congress above referred to known as the eighteen hour law. Such a suit to be maintainable at all on any ground implies the existence of an enforceable contract between complainant and defendants, not in contravention or violative of or illegally interfering with any of those things. Otherwise the contract itself would be violative of the commerce clause of the Constitution, or the act of Congress regulating interstate commerce enacted in pursuance thereof. Nor do I think on the whole record as now exhibited any such result as a multiplicity of injunction suits by defendants is to be reasonably apprehended. The reasonableness and the soundness of this conclusion is demonstrated by the course this case has taken, for the defendants when brought into court in this case united in a cross-bill the avowed purpose of which is to enjoin the removal of the complainant's central division from Mena, and, if the court should refuse to do that and determine to grant the relief sought by complainant, then it seeks to have the damages sustained by each of the defendants by reason of the alleged breach of the contract between the complainant and the defendants assessed in this very suit. If it be conceded as true that one suit in equity by any one or all the defendants would settle the whole controversy between the parties, but complainant is threatened with a multiplicity of suits at law for damages for a breach of the contract by reason of complainant's intended removal of its central division point from Mena, two answers are ready: (1) No injunction will lie in the federal court to enjoin a multiplicity of damage suits, although growing out of one transaction. Tribette v. Illinois Central Railroad Co., supra. (2) No such results, on the record before me, could be reasonably apprehended.

I have before me the very able opinion of Judge Sanborn in Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189, in which I find general passages which are broad enough perhaps to uphold the doctrine that courts of equity will always take jurisdiction to avoid a multiplicity of

suits, whether at law or in equity. It was Chief Justice Marshall who said 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." A mere glance at the facts of the case of Wyman v. Bowman, supra, discloses a radical difference between the facts of that case and the one at bar. That was a case in which a receiver of an insolvent life insurance company sued several subscribers to the stock of the company for an unpaid balance on the stock. Cases along that line are numerous. I have examined every federal case cited in that case by Judge Sanborn, whose industry and attainments are both proverbial, and there is not one which is not readily distinguished by the facts from this case, and not one which supports the jurisdiction in a case like the one at bar. The strongest of them is Bailey v. Tillinghast, 99 Fed. 801, 40 C. C. A. 93, and Louisville, N. A. & Chicago Railway Co. v. Ohio Valley Improvement & Contract Company (C. C.) 57 Fed. 42. The latter case was heard on demurrer, and decided by Judge Lurton at circuit. It was a suit by a railroad company to cancel for fraud and illegality its guaranty of certain bonds of another company. The suit was against the holders of the bonds. The case is readily distinguishable from the one at bar and the expressions which give countenance to jurisdiction in a case of this kind are found in the body of the opinion and are in the nature of dicta. Curious enough he relies in that case solely upon Pomeroy's Equity Jurisprudence. The former case was decided by the Circuit Court of Appeals, of which Justice Lurton was then a member, and the opinion was written by District Judge Severens. That was a bill in equity by a receiver of an insolvent national bank against the stockholders to enforce an assessment against them. It hardly admits of discussion that equity has jurisdiction in such cases. The doctrine is sustained by a long, unbroken line of authorities. I need not refer to them. Judge Severens used some general expressions tending to give countenance to jurisdiction in a case like this, citing Louisville, N. A. & Chicago Railway Co. v. Ohio Valley Improvement & Contract Co., supra, thus tracing the principle back to Pomeroy's Equity Jurisprudence. What he said was not necessary to the decision of the case, and the precise question now under consideration was not before him.

Nor does it appear that, if this bill should finally be dismissed, any irreparable injury within the meaning of that term as used in connection with the jurisdiction of courts of equity would follow. The worst that could follow would be the institution of suits at law by the several defendants to recover damages against complainant for a breach of contract, and the recovery of judgments therefor which might become liens on its property if not paid. But that result is occurring every day, in all sorts of litigation, in all courts both of law and equity. And if that result is a ground of equity jurisdiction, then courts of equity would have jurisdiction in all cases, because all judgments may create a lien, and to that extent cloud a title. There are no substantive facts alleged or fair inferences to be indulged, from what appears in the bill, showing any other or different multiplicity of suits, or irreparable in-

jury, than that stated. I do not understand that is sufficient to give a federal court of equity jurisdiction. There must appear some distinct ground of equity cognizance, such as fraud, trust, accounting, removing cloud from title to property, removing causes for future litigation, or facts showing irreparable injury, or a threatened danger or actual existence of a multiplicity of suits which can be, within equity principles, all settled in one suit, and wherein there is no plain, adequate, and complete remedy at law. Moreover, it should be said in this connection that there is no other community of interest among the defendants than their rights of action growing out of the alleged breach of the same contract. As among themselves there is no privity or community of interest whatever. Each has, if he have any cause of action at all, a separate and distinct cause of action, each depending necessarily in part at least on the facts of his own case. To the extent that there was or was not a contract all the cases may be the same, as to the law and facts, but as to the right to recover and how much shall be recovered must depend on the particular facts of each case—the one in no sense connected with the other.

The conclusion is that the complainant has failed to make out a case of equitable cognizance, and the injunction prayed for must be refused.

Cross-Bill. The defendants by their cross-bill seek a counter injunction restraining the removal of the complainant's central division from Mena; but it does not follow that because relief is denied the complainant defendants are entitled to affirmative relief on their cross-bill. In the city of Tyler et al. v. St. Louis & Southwestern Railway Company of Texas et al. (Tex. Civ. App.) 87 S. W. 238, the situation of the parties on the record was reversed. There the city brought suit against the railroad company to restrain it from the removal of the machine shops and general offices from Tyler to Texarkana. There was practically no dispute, as in this case, that there was a written contract between the parties that the shops and general offices should perpetually remain and be operated at Tyler. The court, after an exhaustive examination, in a well-considered and well-prepared opinion, held that the contract was not against public policy; but denied the injunction, and remitted the city to its suit at law for damages. In Texas & Pacific Railway v. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, it was held that a similar contract for a permanent location of the eastern terminus and Texas offices and machine and car works at Marshall, Tex., was satisfied by the location and maintenance for a period of eight years at that point, and that if the contract was to be construed to mean that the eastern terminus, shops, etc., should forever be maintained there, then the contract would not be enforced in equity, and that complainant's remedy was at law for a breach of the contract. The same principle is announced in Beasley v. Texas & Pacific Railway Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274, as applicable to a contract not to build a depot within three miles of another depot. The court in that case said:

"There are more specific obstacles in the way of the bill. Whether a railroad station shall be built in a certain place is a question involving public

interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of what event he likes. But he cannot secure to his contract the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand. Texas & Pacific Railway v. Marshall, 136 U. S. 393, 405 [10 Sup. Ct. 846, 34 L. Ed. 385]; Northern Pacific Railroad v. Territory of Washington, 142 U. S. 492, 509 [12 Sup. Ct. 283, 35 L. Ed. 1092]. See, further, Marsh v. Fairbury, Pontiac & Northwestern Ry., 64 Ill. 414 [16 Am. Rep. 564]; People v. Chicago & Alton Railroad, 130 Ill. 175, 184 [22 N. E. 857]; St. Joseph & Denver City Railroad v. Ryan, 11 Kan. 602 [15 Am. Rep. 357]; Pacific Railroad v. Seeley, 45 Mo. 212 [100 Am. Dec. 369]; Florida Central & Peninsular Railroad v. Florida, 31 Fla. 482, 508 [13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30]; Currie v. Natchez, Jackson & Columbus Railroad, 61 Miss. 725, 731; Holladay v. Patterson, 5 Or. 177; Texas & Pacific Ry. v. Scott [77 Fed. 726], 23 C. C. A. 424, 429 [37 L. R. A. 94]."

It is not necessary now to decide whether the cross-bill, if an original bill, could be maintained, and I purposely abstain from expressing any opinion on that question. I have cited the last three cases simply to show that if it should ultimately be determined that there was a contract between the parties to this suit, it does not necessarily follow that a restraining order should be granted. It is enough to say that on the record as now presented no restraining order should be granted, and it is refused.

IRVINE v. BANKARD.

(Circuit Court, D. Maryland. July 7, 1910.)

1. COURTS (§ 311*)—SUIT BY RECEIVER TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDER—JURISDICTION OF FEDERAL COURT.

Under Rev. St. Ohio 1908, § 3260d, which empowers the court in a creditor's suit against an insolvent corporation to adjudge the amount payable by each stockholder under the double liability provided for by the statute, and to appoint a receiver to collect the same with authority to maintain suits therefor against stockholders in other jurisdictions, such a receiver is in the position of a quasi assignee, representing all of the creditors, and may maintain an action in a federal court in another state, and his own citizenship, and not that of the creditors, affords the test of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311.*]

2. LIMITATION OF ACTIONS (§§ 58, 106*)—ACCRUAL OF RIGHT OF ACTION—SUIT BY RECEIVER TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS.

Under such statute limitation does not begin to run against an action to recover from a stockholder in another state until a decree is entered making an assessment and appointing a receiver for its collection, and, if an appeal is taken and perfected from such decree, the running of the

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

statute is suspended during its pendency, even though it is taken by creditors.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 327, 516; Dec. Dig. §§ 58, 106;* Corporations, Cent. Dig. §§ 1084–1093.]

3. LIMITATION OF ACTIONS (§ 13*)—ESTOPPEL TO RELY ON STATUTORY LIABILITY OF STOCKHOLDER—LIMITATIONS.

A receiver appointed in a creditor's suit against an insolvent corporation and authorized to bring actions against stockholders for the collection of assessments made against them is not estopped from asserting that the pendency of an appeal from the decree suspended the running of limitation against such an action, because during such pendency he settled and received payment of claims against other stockholders.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 13.*]

4. CORPORATIONS (§ 235*)—STATUTORY LIABILITY OF STOCKHOLDERS—REORGANIZATION.

In the reorganization of an Ohio railroad company, the new company assumed the debts of the old, and provided for an issue of first-lien bonds to be sold, and the proceeds used to pay such indebtedness. Under the statute of the state, the stockholders were subject to double liability, but such bonds contained a provision by which the holders waived the right to resort to such liability in consideration of the lien given. *Held*, that a stockholder of the old company who became a party to the reorganization and exchanged his stock for stock in the new company was subject to the additional liability for the debts of the old company so far as they were not discharged from the proceeds of the bonds sold.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 235.*]

Action by Ellsworth C. Irvine, receiver, appointed by certain decrees of the court of common pleas of Franklin county, Ohio, against Edgar H. Bankard. Judgment for plaintiff.

J. Morfit Mullen (W. Calvin Chesnut and Gans & Haman, on the brief), for plaintiff.

Joseph C. France, for defendant.

ROSE, District Judge. Seventeen years or more ago the defendant became the owner of 80 shares of the preferred and 25 shares of the common stock of the Columbus, Shawnee & Hocking Railroad Company. That corporation will be spoken of as the "Shawnee Company." In the summer of 1895 its stock had no market value. The defendant tried to sell his 105 shares for $400. No one would buy. He could not give up all hope of ever getting anything for them. He went into a reorganization scheme. He exchanged his 105 shares in the Shawnee Company for the same number of shares in the Columbus, Sandusky & Hocking Railroad Company, which will hereafter be called the Railroad Company. Receivers were appointed for the Railroad Company on June 2, 1897. On July 29, 1909, the present suit was brought. The plaintiff is a receiver appointed by the court of common pleas of Franklin county, Ohio. He seeks to make the defendant pay $2,625 principal as an assessment of 25 per cent. on the par value of the defendant's 105 shares. The plaintiff in addition asks for nearly $770 interest. These payments defendant does not want to make. He sets up various defenses. While some of these are substantial, others are technical. Whether technical or substantial they go to the right of the plaintiff now to re-

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

cover in any form of action. No objection is made to anything which could be cured by amendment.

The defenses are of four kinds: First. The plaintiff has no right to sue in this court. Second. Limitations. Third. The defendant is not liable as a stockholder because he became such conditionally and the condition has not been fulfilled. Fourth. The defendant if liable at all is liable for a portion only of the debts for the payment of which the assessment in suit was levied.

These defenses will be considered in the order in which they have been stated.

First. Has the plaintiff a right to sue in this court? The defendant says he has not, and that for two reasons: (a) Because the plaintiff is a mere receiver of a chancery court of another state than Maryland, and has himself no title as assignee or quasi assignee of the claims in right of which he sues. (b) If he be an assignee at all, he is the assignee of the rights of the creditors. As such he cannot maintain this suit in a Circuit Court of the United States on the ground of diversity of citizenship between himself and the defendant, unless every one of the creditors in whose right he sues was at the time the suit was brought a citizen of a different state from Maryland, of which the defendant was then and still is a citizen. The defendant says it affirmatively appears that at least one of such creditors was at the time suit was brought and is now a citizen of Maryland. Are these reasons, or either of them, sound?

(a) Can the plaintiff as receiver sue in a court of the United States for any district outside the state of Ohio? If he is such a receiver as brought the case of Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, he cannot. If he is such a receiver as was plaintiff in Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, he can. Which is he? The Constitution of Ohio made stockholders liable to the creditors of an insolvent corporation to an amount equal to the par value of their stock. The law attempted to provide the machinery to enforce this liability. By its terms a suit in equity is brought by a creditor or creditors against the corporation and its individual stockholders. In that suit the insolvency of the corporation is ascertained and the amount by which its liabilities exceed its assets. The court determines who are stockholders liable to assessment. This determination is final as to those persons who have been personally summoned, or who have appeared to the suit. It is provisional only as to those nonresidents of Ohio who have neither been summoned in Ohio, nor have voluntarily appeared in the cause. Inquiry is made as to which of the stockholders are solvent and which are not. The court is then able to calculate how large an assessment must be imposed upon each share of stock to raise from the solvent stockholders a sum sufficient to pay the debts of the corporation and the costs and expenses of the proceeding. It thereupon makes such assessment. It decrees in dollars and cents the amount to be paid by each stockholder who was made a party to the proceedings either by service, appearance, or publication. This decree is a final judgment against all those who were summoned, or without summons voluntarily appeared. Exe-

cution against such persons may issue upon it. It is not a personal judgment against those who were made parties by publication only. To bind them suits must be brought against them in some jurisdiction in which service of process can be had upon them.

The Minnesota statute of 1894, under which the receiver in Hale v. Allinson was appointed, made no specific provision for the collection of assessments from nonresident stockholders. The Minnesota courts held that, in the absence of any statutory authority, they had the right in the exercise of their general chancery jurisdiction to authorize a receiver appointed by them to sue in the courts outside of Minnesota. The Supreme Court in Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, said they had no such right. In the view of the Supreme Court that receiver took no title to the fund. No statute purported to vest any authority in him. He was the mere arm of the court, and nothing more. In the case at bar the Ohio courts acted under the authority given by section 3260d of the statutes of that state (Rev. St. 1908). It is there provided that the court may authorize and direct the receiver to prosecute such action in his own name as receiver as may be necessary in other jurisdictions to collect the amount found due from any officer or stockholder. In no other material respect is the Ohio law different from the Minnesota law of 1894 considered by the Supreme Court in Hale v. Allinson. Indeed, in large part the two statutes are even verbally identical. Defendant dwells on this identity. He points out many details in which the Ohio statute differs from the Minnesota act of 1899 which the Supreme Court held in Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, authorized a receiver appointed thereunder to sue in other jurisdictions. He says that the Supreme Court so held because in its view the Minnesota receiver there suing was a quasi assignee and representative of the creditors, and as such was vested with authority to maintain the action. He subjects the provisions of the Ohio law to a minute examination. He asserts that they do not either direct or make any assignment of title to the receiver. The answer is that neither does the Minnesota statute of 1899. One may ordinarily sue anywhere for the recovery of that to which he has title. Booth v. Clark, 17 How. 322, 15 L. Ed. 164. By the decree of December 22, 1906, the court of common pleas of Franklin county decreed that the receiver was thereby vested with the title and ownership of all and singular the goods, chattels, property, and assets, both real and personal, of the Columbus, Sandusky & Hocking Railroad Company wherever situated or held. Under the Minnesota act of 1899 and the Ohio law now before the court, the Legislature for the purpose of making available for creditors stockholders' liability provided for the appointment of a receiver. It empowered the court to authorize such receiver to sue in other jurisdictions. As I understand Bernheimer v. Converse, that receiver in virtue of such statutory appointment and judicial authorization thereunder is in the position of a quasi assignee and representative of the creditors. If he is such, he may sue.

Jurisdiction of a suit brought by this very receiver under the very decree sued on in this case has been upheld by the Circuit Court of the United States for the Southern District of California in Irvine v. Putnam, 167 Fed. 174, and in the case of Irvine v. Chicago, Wilmington & Vermillion Coal Co. by the Circuit Court of the United States for the Northern District of Illinois, a transcript of the record in which case has been furnished me. I do not know that it has been reported.[1] See, also, Howarth v. Lombard, 175 Mass. 577, 579, 56 N. E. 888, 49 L. R. A. 301; Howarth v. Angle, 162 N. Y. 185, 56 N. E. 489, 47 L. R. A. 725; Goss v. Carter (5th Circuit) 156 Fed. 746, 84 C. C. A. 402.

(b) The defendant says that the jurisdiction of this court is invoked on the ground of diversity of citizenship. He is a citizen of Maryland. If the plaintiff, a citizen of Ohio, sues as the assignee of the creditors, he must allege that every one of those creditors is a citizen of a state other than Maryland. That he has not done. The record affirmatively shows that among the creditors is at least one Maryland corporation, viz., the Baltimore & Ohio Railroad Company. The Ohio courts in considering the nature of the proceedings of a creditor under their law to enforce the individual liability of the stockholders have said that the order for the distribution of the fund is not a judgment in favor of creditors, but an order upon the receiver to distribute the fund in his hands, whatever that fund may be. Herrick v. Wardwell, 58 Ohio St. 306, 50 N. E. 903. The plaintiff in this case is not an assignee of the claims of the individual creditors. He is a quasi assignee of all of them, and is their representative. He sues in a representative capacity, and his citizenship, and not that of those whom he represents, affords the test of jurisdiction. The relation of the plaintiff to this cause is such that this case is ruled by Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. Ed. 629, and not by Glass v. Concordia Parish Police Jury, 176 U. S. 210, 20 Sup. Ct. 346, 44 L. Ed. 436, or by Sere v. Pitot, 6 Cranch, 332, 3 L. Ed. 240. Where a creditor is a citizen of another state from his debtor, he may file in a Circuit Court of the United States a creditor's bill, or a bill in the nature of a creditor's bill. This bill must be filed on behalf not only of the actual complainant, but of all other creditors. It is no objection to the jurisdiction that some or many of those other creditors may be citizens of the same state as the debtor. Such creditors may come into the case, participate in its conduct, and have all the benefit of its decrees.

Second. The defendant says that, if the plaintiff has the right to sue in this court, the suit he has brought is barred by limitations. The railroad company became insolvent June 2, 1897. The defendant asserts that under the law of Ohio no suit can be brought against him subsequent to six years from that date. In other words, he claims that the present action, if otherwise maintainable, should have been instituted not later than June 2, 1903. It was begun July 29, 1909. In Ohio stockholders must be made parties to the proceeding in which the assessment is made. No stockholder who is not made a party within six years of the insolvency of the corporation can

[1] No opinion filed.

be held liable. A stockholder resident in Ohio is not made a party until a summons is issued against him. Marriott v. Railway Co., 14 Ohio Dec. N. P. 597; Marriott v. C. S. & H. R. R. Co., 2 Ohio N. P. (N. S.) 231. None of the Ohio cases to which reference has been given me hold that such summons must actually be served upon the stockholder within the six years. It is enough if the plaintiff causes such summons to issue within that period. He has then done all he can do in the matter. If the summons be not served promptly, the fault may be that of the sheriff or that of the defendant. It is not that of the plaintiff. The same rule applies to nonresident defendants. The plaintiff must do all that he can to make them parties and to apprise them of the pendency of the action. He must name them in his bill. He must get and publish an order of publication against them. The defendant in the case at bar was so made a party, and was so published against. It is admitted that he received actual notice by mail of the filing of the bill, and that he was named as a party defendant in it. The defendant's failure to appear was not the fault of the plaintiff. The latter had within six years from the insolvency of the corporation done all that in his power lay to bring the defendant into the proceedings. In Ohio, as in Maryland, the statute of limitations does not begin to run until there is some one in existence qualified to sue. Hoiles v. Riddle, 74 Ohio St. 173–180, 78 N. E. 219, 113 Am. St. Rep. 946; Trustees of Greene Township v. Campbell, 16 Ohio St. 16; Rockwell v. Young, 60 Md. 563–566. Under the Ohio law, a receiver appointed by the court is the only person who is ever qualified to bring in any court outside of Ohio such a suit as that now pending. No receiver was appointed in Ohio until July 17, 1905. Before that date, the statute did not begin to run in favor of the defendant. Ordinarily in cases like that now in hand the period of limitations is counted from the date of the order or decree imposing the assessment. Bernheimer v. Converse, 206 U. S. 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; Goss v. Carter (5th Circuit) 156 Fed. 746, 84 C. C. A. 402. In Ohio this rule is modified to the extent of requiring the plaintiff in the original creditors' proceeding to do all in his power within six years of the insolvency of the corporation to make every stockholder he seeks to hold liable a party. I do not think that the difference between the Ohio law and that generally prevailing goes farther.

The contention that a claim against a nonresident stockholder is barred unless sued on within six years from the time at which the corporation became insolvent was made in the United States Circuit Court for the Southern District of California in a suit brought by the present plaintiff under the same decree of the court of common pleas of Franklin county, Ohio, as that sued on here. Judge Wellborn held the defense was not well taken. Irvine v. Putnam (C. C.) 167 Fed. 174. I am of the same opinion.

The defendant says that if it be true that limitations do not begin to run in his favor until the 17th day of July, 1905, when the court of common pleas made the assessment, they did begin to run then. He further contends that under the law of the forum—that is, the law of Maryland—an action to recover such assessment from a stockholder

must be brought within three years. In other words, that this suit should have been brought not later than July 17, 1908. As before stated, it was not brought until July 29, 1909, which was four years and twelve days after the decree of July 17, 1905. The plaintiff says that the operation of that decree was suspended by an appeal for a period of three years and nine months from the 11th of August, 1905, when it was perfected in the court of common pleas of Franklin county until the 11th of May, 1909, when it was finally dismissed by the Supreme Court of Ohio. If these three years and nine months be deducted from the four years and twelve days which elapsed between the decree of the court of common pleas and the bringing of the present action, there remains but three months and twelve days during which this suit could have been brought.

The plaintiff contends that the law is well settled that an appeal which suspends the operation of a judgment or a decree likewise suspends the running of the statute of limitations against such judgment or decree for the same length of time. If he be right, less than four months had run against him when his suit was brought. Defendant answers that the decree was passed July 17, 1905. The appeal was perfected August 9, 1905. During these 23 days the plaintiff might have sued. Nothing which happens after the statute begins to run has any effect upon it, he says. If the appeal when perfected operated to stay the judgment or decree, the general rule relied upon by the defendant has no application. In such case the time during which the stay lasted must be deducted from the aggregate time which elapsed between the entering of the judgment and the bringing of the suit upon it. Braun v. Sauerwein, 10 Wall. 223, 19 L. Ed. 895; Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 619; St. Paul, Minneapolis & Manitoba Railway Co. v. Olson, 87 Minn. 120, 91 N. W. 294, 94 Am. St. Rep. 693; Klumpp v. Thomas, 162 Fed. 854, 89 C. C. A. 543; 25 Cyc. 1280; 19 Am. & Eng. Enc. of Law (2d Ed.) 218–19. Moreover, common sense must not be altogether disregarded in applying any rule of law. In every case it takes some little time to perfect an appeal. If under the law of a particular state a judgment is unenforceable pending an appeal, the statute of limitations will not run against such judgment while the appeal is pending. Upon the defendant's contention, it would always so run unless the appeal was perfected on the day the judgment was entered. The Supreme Court did not in Montgomery v. Hernandez, 12 Wheat. 135, 6 L. Ed. 575, stop to inquire whether the appeal was perfected the day the decree was handed down or not. Doubtless the court thought it mattered naught whether such was or was not the case. I do not think that there is any question that under the law of Ohio a perfected appeal suspends pending the appeal the operation of the judgment appealed from. Bates' Ann. St. Ohio, 1908, § 5235; Jenney v. Walker, 80 Ohio St. 105, 88 N. E. 123. The plaintiff claims, and the defendant in his brief admits, that an invalid appeal when allowed must be respected until the appellate court has passed upon the question. It therefore seems to be immaterial that the Supreme Court of Ohio ultimately determined that in this case "no valid or lawful appeal

or proceeding in error was ever prosecuted, and that the attempted appeals from the court of common pleas to the Circuit Court should be dismissed and held for naught."

Defendant contends that the ordinary rule that pending such an appeal as stays the operation of a judgment the running of the statute of limitations is suspended has no application to this case. He says that the appeal was taken by creditors who were in privity with the present plaintiff. If they chose to suspend the proceedings, he argues, by taking an appeal which they had no right to take, they cannot complain if while they were engaged by the appeal in an attempt to get a larger judgment limitations ran against them and in effect took from them much of that for which they had already secured a decree. It is true that the plaintiff in this case is in one sense the representative of the creditors. What is recovered by him, if anything, will go to them. He is also an officer appointed by the court under the authority given to the court by the statutes of the state. He represents, not only the particular creditor or creditors who took the appeal, but all the creditors. I do not think that any of the authorities cited by the defendant will justify this court in holding that the plaintiff in this case is estopped to say that the judgment of July 17, 1905, was suspended by the appeal taken by some of the creditors.

It is said that the plaintiff in this case by receiving from some of the stockholders assessments during the pendency of the appeal, and by doing other acts which the record indicates he may have done, has (1) shown that he did not believe the judgment imposing the assessments was suspended during the pendency of the appeal; or (2) has estopped himself from now asserting as against this defendant that the appeal did suspend such judgment. There were many parties to the original proceeding. Their situation differed widely. It would be dangerous to assume that everything which was done in the case out of court as between the receiver and some of these parties was done in accordance with any fixed principle of law. In any event, it is of no legal importance what the plaintiff then thought the law was. His mistake as to what it was, if he made any, does not bar him or any one else who did not deal with him on the basis of such mistaken opinion. Nor do I see that anything which he has done, or which it may be more or less clearly inferred from the record he may have done, in anywise prejudiced the defendant. I do not think, therefore, that there is any reason to hold that the plaintiff is estopped to maintain this action. If I am right in the conclusions I have thus far reached, it will be unnecessary to consider the Ohio statute, which prescribes that an action to enforce a stockholder's liability shall be begun in eighteen months after the debt or obligation shall be enforceable against stockholders. In my view, this action against this defendant was brought in less than four months after the debt or obligation became enforceable against him.

For that reason, there is no occasion to decide whether the plaintiff is right in his contention that in Maryland such a suit as that at bar may be brought at any time within 12 years from the time at which the assessment was made. He points out that a creditor of a Maryland cor-

poration sued a stockholder to enforce the stockholder's liability for the judgment debt of the corporation. The Court of Appeals of Maryland held that in such an action a plea of the three-year statute of limitations was bad. It ruled that the suit against the stockholder was in effect a suit upon the judgment against the corporation. A suit on a judgment is in Maryland not barred until the judgment is above 12 years' standing. Weber v. Fickey, 47 Md. 196. In the somewhat earlier case of Garling v. Baechtel, 41 Md. 305, a similar conclusion was reached. In that case a stockholder was sued by a creditor who held a bond of the corporation. The defendant in his brief says that no suit was entered against the railroad company in the parent case. In this he is mistaken. Not only is the titling of the case Marriott v. Columbus, Sandusky & Hocking Railroad Co. & Others, defendants, but the bill of complaint expressly names that company as the first of the defendants. The decree ascertained the amount of the indebtedness of the corporation to each of its creditors. In every essential it would seem to be a judgment that the corporation owed each of those creditors the sum found to be due each of them, respectively. Section 3260d of the Ohio Statutes seems to speak of such a finding of indebtedness as was made in this case as a judgment.

The plaintiff contends that, if the present suit is not to be regarded as a suit on a judgment within the meaning given to such words by the Court of Appeals of Maryland in the cases above cited, it is a suit to enforce a statutory liability. He argues that, under the Maryland statute of limitations, such a suit can be brought at any time within 12 years after the cause of action accrues. As already stated, in view of the conclusions I have announced, I do not find it necessary to pass upon either of these contentions of the plaintiff.

Being of opinion that the plaintiff is entitled to sue the defendant in this court, and that his suit is not barred by limitations, attention will be given to defendant's third defense; that is, that he is not liable as a stockholder because he became such conditionally and the condition has not been fulfilled. It will be remembered that the defendant was originally a holder of 105 shares of the stock of the Shawnee Company. That company in December, 1893, was consolidated with the Sandusky & Columbus Short Line Railroad Company. The product of this consolidation was the Columbus, Sandusky & Hocking Railway Company. This last-mentioned company will be called the Railway Company. The defendant did not take any part in this consolidation, nor did he ever become a stockholder in it. By June, 1895, the Railway Company was hopelessly insolvent. Much of its subsequent history is stated fully and clearly in the Columbus, Sandusky & Hocking Railroad Company Appeals, 109 Fed. 177, 48 C. C. A. 275, the opinion in which case is delivered by then Judge, now Mr. Justice, Lurton. It will be unnecessary here to repeat that story. It suffices to say that a scheme of reorganization was proposed. By the terms of this reorganization the new Railroad Company was to assume and pay the floating debt of the old Railway Company whatever the same might be at the time of the transfer of the property. By the terms of this agreement 2,000,000 prior lien

bonds were to be issued and sold, and out of the proceeds of these bonds the floating debt was to be paid. The agreement was to become binding and effective whenever the holders of the majority of the first-mortgage bonds of the Railway Company and the Shawnee Company should have signed it. Of course, the lien bonds could not be sold until the agreement became effective. On the 10th of September, 1895, one Parrott, who was active in the reorganization, wrote to the defendant urging him to deposit his stock with George W. Sinks, the trustee named for the purpose, and to sign a proxy for a meeting of the stockholders of the Railroad Company to be held September 23, 1895. On the 12th of September the defendant answered that with the understanding that he was not incurring any obligation to pay an assessment Parrott was at liberty to deliver his Shawnee certificates, which he inclosed, to Sinks. He further said he would sign the proxy as soon as received. On the 16th of September, 1895, Parrott answered, quoting his letter and saying to him:

"You incur no obligation other than you now have, and if plan of reorganization goes through, as we expect, you will be relieved of the obligation you now have. * * * Of course, you will have liability to assessment on new stock as you would on any stock in Ohio held by you, but, of course, not until liability is incurred by the new company, and you can dispose of it and thus avoid any, if you like, before any is incurred."

On the 18th of September the reorganization certificates were sent by Sinks, the trustee, to the defendant and accepted by the latter. On the 19th of September, 1895, the defendant wrote Parrott acknowledging his favor of the 16th, and stating:

"Your explanation as to stock assessment is satisfactory. I inclose proxy which I will be glad to have handed to proper party."

The proxy authorized Sinks and others to vote the defendant's stock at the meeting of September 23, 1895. It was so voted. The defendant has offered testimony which has been admitted subject to exception that he was aware of the Ohio law imposing liability on stockholders, and would not have taken stock in the Railroad Company if he had supposed he was assuming any liability for the debts of the Railway Company. In point of fact not enough of the prior lien bonds could be sold to pay all the floating indebtedness of the Railway Company. About two-thirds of the $700,000, for which the stockholders of the Railroad Company have been held liable, represents old obligations of the Railway Company. All the letters above mentioned were offered by the defendant, and were admitted subject to exception. If the letters and the testimony of the defendant as to what he knew and was willing to do at the time he went into the reorganization scheme would, if admitted, have any effect upon his liability, they would appear to be relevant and competent. If they have none, it will do no harm to the plaintiff to admit them. I shall therefore overrule the plaintiff's motion to strike them out.

Giving them all the weight which can possibly be attributed to them, I am of opinion that the defendant became a stockholder in the Railroad Company and is liable as such. It is admitted that he

assented to the reorganization agreement and is bound by it as if he had actually signed it. That reorganization agreement contained an unqualified promise to assume and pay the debts of the Railway Company. It is true it also attempted to provide a method of providing the money with which to pay them. The bonds to be sold for that purpose contained a provision that their holders in consideration of being given a lien upon the company's property waived all right to claim that the stockholders were liable to them. If the bonds could have been sold for enough to pay the floating debt, there would therefore have been no stockholder's liability, direct or indirect, for that floating debt. Before becoming a party to the reorganization scheme, the defendant might have waited until he knew whether the prior lien bonds could be sold for enough to pay the debts or not. He did not do so. He must be held to have formed his own opinion as to the salability of those bonds, and to have assumed the risk that they would and could be sold for enough money, and that their proceeds would be properly applied. Much that is said by Judge Lurton in the Columbus, Sandusky & Hocking Railroad Company Appeals, 109 Fed. 191, 48 C. C. A. 275, is applicable to the defendant.

What has been said with reference to the third defense is sufficient to dispose of the fourth, viz., that the defendant, if liable at all, is liable for a portion only of the debts for the payment of which the assessment in suit was levied. It is said that Parrott was a creditor of the Railway Company, and that as such his estate will share in the proceeds of any recovery which may be had of the defendant. It is further alleged that Parrott and Sinks, the trustee, were partners, and that the correspondence between Parrott and the defendant must estop Parrott's estate from enforcing any liability against the defendant. It is, moreover, urged that the defendant was never a stockholder in the Railway Company. He was never liable for any of its debts; that no creditor of the Railway Company became such upon the faith of his name being upon the list of shareholders in the Railroad Company. The foreclosure sale of the Railway Company's property did not take place until after the defendant had assented to the reorganization scheme. The creditors of the Railway Company were entitled to assume that that sale did not interest them; that, under the reorganization agreement, they would be protected to the extent of the liability of those persons who had taken stock in the Railroad Company. There is no sufficient evidence in this case to show that Parrott or Sinks, or anybody else, perpetrated any fraud upon the defendant. It is, indeed, argued that the defendant is not responsible for any of the debts of the Railway Company. That contention has been answered.

No evidence has been offered tending to show that the holders of any particular debt or debts included in this total are estopped from sharing in any recovery which may be had from the defendant. It is unnecessary, therefore, to decide whether in any event such a defense could be made in this cause.

I therefore refuse all the six prayers of the defendant. I see no sufficient reason to refuse the plaintiff interest on his claim from 21st day

of August, 1905. I therefore will render a verdict for the plaintiff for $3,393.41. Since the rights of the creditors of the Railroad Company vested, the people of Ohio have amended their Constitution in such manner that stockholders are not now liable for debts contracted since the amendment was made. Doubtless experience has convinced them that such a right was worth far less to the creditors than it cost the stockholders. These debts have all been due for more than 13 years. The litigation necessary to collect the assessments made upon the stockholders is likely to continue for years to come. Necessarily a very large part of the sums recovered from the stockholders has been and will be expended in the costs and expenses of legal proceedings. I should have been glad to have rendered a different verdict from that which I have felt constrained to give. I see no way of escaping from the conclusions which I have reached consistent with adhering to what I believe to be the law on each disputed proposition in the cause.

I wish to thank counsel on both sides for the industry, candor, and ability with which their respective contentions have been supported.

In re RICE et al.

(Circuit Court, M. D. Alabama, N. D. Aug. 2, 1910.)

1. CONTEMPT (§ 27*)—CONDONATION.

Where a violation of orders of the court affects only the right litigated between parties to the suit, it may be condoned; but, where the disobedience evinces a deliberate purpose to contemn the authority of the court, the consequences reach beyond the private right, and a disobedience becomes an offense against the government which the court is bound to notice and punish.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 5; Dec. Dig. § 27.*]

2. CONTEMPT (§§ 3, 4*)—"CIVIL CONTEMPT"—"CRIMINAL CONTEMPT."

A "civil contempt" is one affecting only the rights of parties litigant, while a "criminal contempt" is one evincing a deliberate purpose to contemn the authority of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. §§ 3, 4.*

For other definitions, see Words and Phrases, vol. 2, p. 1194; vol. 2, pp. 1747, 1748.]

3. CONTEMPT (§ 54*)—PROCEEDINGS—OBJECTIONS—TIME.

An objection that a contempt proceeding was based on a rule issued on a complaint made on information and belief supported by an affidavit of the same character was too late, where it was not raised until after the alleged contemnor had admitted the act charged and had stated in defense, that the act was done in ignorance of the order.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 147; Dec. Dig. § 54.*]

4. INJUNCTION (§ 228*)—VIOLATION—LIABILITY OF AGENT.

Where an attorney at law, who is also his client's attorney in fact and legal adviser, acts in violation of an injunction in the name of his client carrying out the client's command and has knowledge of the injunction, he is guilty of contempt, though he is not a party to the suit in which the

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

injunction has been granted under the rule that an injunction, though not addressed to strangers, is an admonition and order to any one who acts in the assertion of the principal's right only, contrary to the terms of the injunction addressed to the principal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 484–495; Dec. Dig. § 228.*

Liability of attorneys for contempt, see note to Anderson v. Comptois, 48 C. C. A. 7.]

5. CONTEMPT (§ 61*)—TRIAL OF FACTS—INFERENCES.

Courts will not tolerate defiance or evasion of their commands by artifice or contrivance of any kind, but will look behind the form to the substance, and, sitting as trier of the facts as well as the law, in passing on contempts, will draw any inference a jury may legitimately draw from the circumstances.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188, 192; Dec. Dig. § 61.*]

6. CONTEMPT (§ 17*)—EVASION OF SERVICE.

Though one who anticipates a suit against him may absent himself from the jurisdiction and continue in hiding after return to avoid service of process to compel his appearance without being guilty of contempt, if the intent to evade service is put into execution after the suit is brought, not only to avoid process, but to frustrate any orders which may be issued to establish the proper status of an estate or right in the controversy, such conduct constitutes contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 48–50; Dec. Dig. § 17.*]

7. INJUNCTION (§ 213*)—NOTICE—SERVICE.

A party who had proper notice of an injunction is bound by it, though it is not served on him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 437; Dec. Dig. § 213.*]

8. INJUNCTION (§ 230*)—VIOLATION—FORM—DENIAL.

Where, in a contempt proceeding for alleged violation of an injunction not served on respondents, proof of their knowledge thereof was not clear, their sworn denial that they had knowledge of the injunction and intent to violate it would be given sufficient weight to relieve them from punishment for contempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 508; Dec. Dig. § 230.*]

9. INJUNCTION (§ 230*)—VIOLATION—KNOWLEDGE—EVIDENCE.

On a rule to show cause why respondent should not be punished for contempt in violating an injunction restraining sale of certain corporate stock to others than petitioners, evidence held insufficient to require a finding that respondents had knowledge of the injunction prior to a sale made in alleged violation thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 514; Dec. Dig. § 230.*]

Application by Doherty & Co. to punish Alex Rice and Fred S. Ball for contempt of court in violating an order restraining the sale of certain shares of stock owned by Rice in the Citizens' Light, Heat & Power Company and the Citizens' Light & Power Company. Respondents discharged.

Steiner, Crum & Weil and Tyson, Wilson & Martin, for the motion.

Ball & Samford, J. M. Chilton, Rushton & Williams, and Horace Stringfellow, opposed.

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

JONES, District Judge. Alex Rice, on May 13, 1910, entered into a contract, in New York, with Doherty & Co., for the sale of 800 shares of stock, owned or controlled by him, in the Citizens' Light, Heat & Power Company, and the Citizens' Light & Power Company, to be delivered on June 15th, upon performance, according to the terms of the contract, of their respective undertakings. On that day the attorneys of Doherty & Co. notified Rice they desired to consummate the contract, and Rice referred them to his attorney, Fred S. Ball, as his representative for that purpose. Differences arose over the construction of some of the provisions of the contract, and, no agreement having been reached, Doherty & Co.'s attorneys notified Ball they wished to make a tender, whereupon Ball replied, in substance, that he had no authority to receive the tender, and no longer represented Rice in that matter. Rice by advice of his counsel went that evening to Birmingham, beyond the jurisdiction of this court.

Doherty & Co. filed their bill in this court the next day, June 16th, praying for specific performance by Rice, making him, the Citizens' Light, Heat & Power Company, and the Citizens' Light & Power Company defendants to the bill, and on the evening of that day, about 6 o'clock, a restraining order issued forbidding Rice from transferring, assigning, or in any manner disposing of the shares of stock in the two corporations named, or the trustees' certificates representing such shares, and forbidding said corporations from making any transfers of said stock upon their books, until the further order of the court. The restraining order was served on Whiting, the secretary and general manager of the two corporations, about 7:20 that evening. Rice returned to the city a little before 7 o'clock of the same evening and went to the house of a friend so that he could not be found or served until the next day. In less than four hours after Rice's return to the city and the service of the order upon an officer of his two codefendants, the stock and trustees' certificates which he had contracted to sell to complainants had been sold and transferred to Tillis, in the very teeth of the terms of the restraining order. In answer to a rule, at the instance of complainants, to show cause why they should not be punished for contempt, Rice and Ball appeared, and, not denying the transfer of the stock and trustees' certificates, averred on oath that they had acted as they did without knowledge or notice, direct or indirect, of the issue of the restraining order, and thereupon a lengthy examination of witnesses was had before the court touching the issues thus raised.

As said by the Supreme Court in Re Debs, 158 U. S. 595, 15 Sup. Ct. 910, 39 L. Ed. 1092, quoting and approving the language of the Supreme Court of Mississippi:

"A court without power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it. The power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary attribute of a court, without which it could no more exist than without a judge."

A violation of the orders of a court may be of such a nature that it affects only the right litigated between the parties to the suit. A

party may condone such a disobedience, and the powers of the court are exerted to redress the wrong done the party. Where, however, the orders of the court are disobeyed, whether or not there be injury to a litigant, under circumstances which evince a deliberate purpose to contemn the authority of the tribunals set up for the administration of justice and defy their orders, the consequences reach far beyond the private right. The disobedience then becomes an offense against government and society, which the courts must notice and punish, since to leave the evil example unnoticed and unpunished would soon lead to the subversion of order, and the establishment of anarchy in its stead. The disobedience in the one instance is called a "civil contempt," and in the other a "criminal contempt."

The objection that the charge of a violation of the order upon which the rule issued was made on information and belief, supported only by an affidavit of the same character, comes too late, when the alleged contemnor, without raising that point, admits the act charged, and defends himself on the ground that the act was done in ignorance of the existence of the order. The exaction of positive allegations to support the rule to show cause is intended to protect the court from the improvident institution of contempt proceedings and useless investigation as to the breach of their orders which the proof may show were not violated. The reason of the rule ceases when the respondent answers, admitting the act charged, and the omission to make a positive charge in the beginning, is, therefore, not of the slightest consequence in the subsequent phases of the prosecution.

It is insisted that Ball is called to account for a breach of the injunction, an offense, which it is argued, although he acted as agent merely, he cannot commit, since he was not a party to the suit by name or designation, and that the charge against Rice is not sufficiently explicit, being merely that he had "notice of the injunction," wherefore the rule should be discharged as to both respondents, regardless of what the evidence proves.

Undoubtedly, the current of authority is to the effect that the commands and directions of an injunction are not addressed to or binding upon one who is not a party, either by name or designation, and in consequence that a person not so made a party is not subject to committal for a breach of the injunction, which, technically speaking, can be committed only by a party to it. Rice was a party to the suit, and of course could breach the injunction. Ball was Rice's attorney in fact, as well as legal adviser, asserting no right of his own, and acting only in the name of his principal and carrying out his commands. He knew, if he had knowledge of the injunction, that it forbade an agent to do for Rice that which it forbade Rice to do. On principle it would seem, whatever the holding of some of the authorities to the contrary, that the directions and commands of an injunction, though not addressed to strangers, are admonitions and orders to any one, although not named in any way in the suit, who acts in the assertion of the principal's right only, contrary to the terms of an injunction addressed to his principal, and that a mere agent may, in that way, be guilty of its breach, in the proper sense. He claims under one to whom the in-

junction speaks, acts for him only, and intentionally puts himself in privity with him, and in consequence is amenable to its commands.

It is not necessary in the posture of this case to decide whether the above objections are well taken. The acts charged against respondents concern the authority and dignity of the court, and a high sense of public duty would compel it to issue a new rule to cover any contempt if one be developed by the evidence, though the present proceeding were dismissed on purely technical grounds. The evidence has been gone into at length and the matter fully argued by counsel for respondents in all its phases. The court will therefore treat the present charge as sufficiently specific and broad to cover any contempt which may be proved, whether civil or criminal, and decide the case on its merits in either or both phases, and determine, according to the conclusion reached, whether it will discharge the present rule on its merits, or further try the matter on a new rule.

Courts will not tolerate defiance or evasions of their commands by artifice or contrivance of any kind. They look behind the form to the substance, and, sitting as trier of the facts as well as the law, in passing upon such contempts, will draw any inference a jury may legitimately draw from the circumstances. Jurisdiction of the person and subject-matter and to make the order being unquestioned, the only issue here is: Did the respondents, or either of them, disobey the commands of the injunction after knowledge or fair notice of its issuance?

Ordinarily, it is true that one who anticipates the bringing of a suit against him may absent himself from the jurisdiction, and continue in hiding after he returns, for the purpose of avoiding service of the usual process to compel his appearance when suit is brought, without offending the dignity of the court or invading the legal rights of the plaintiff. When, however, the intention so to evade service, formed before the suit is brought, is put into execution after suit brought, not only to avoid appearance in the tribunals of justice, but to frustrate any orders which may be issued to establish the proper status of an estate or right, pending a controversy, and to preserve it from invasion by a defendant who purposes to act and does act while in hiding, so that he may thwart any orders which may be issued to that end, whatever they may be, such conduct is both illegal and immoral, and the courts will compel submission to the jurisdiction and process by attachment against the recusant party, or sequestration of his property. It is hardly necessary to add that a party who has proper notice of an injunction is bound by it, though it is never served upon him, and when he claims to have had no knowledge or notice of its existence, and is called to account for acting contrary to its commands, the circumstances under which he avoided service is always a proper subject of inquiry in determining the bona fides of his avowal of want of knowledge or notice.

The acts made the basis of the motion against Rice were performed at Coosada and on his way from there to Montgomery some hours before the injunction issued. The contracts and papers prepared in that interval, and used by his attorney to make the transfer of the stock to

Tillis after the injunction actually issued, were delivered by Rice to his attorney, without any knowledge or notice of the issuance of the injunction, or for that matter of the suit which had not then been brought. When Rice returned to this city, he went to Whiting's house, where he remained all night; his whereabouts being kept from his own family, who lived in the city. Whiting had not then been served with the injunction, and did not return to his home that night. Rice did not visit his place of business or his home that night, for the deputy marshals were watching for him and visited both places to serve him and could not find him. Rice had been advised by his counsel to keep as far as possible out of touch with events and leave everything to his lawyer, and was faithfully conforming to that advice. He was not present when the transfer was made at the bank on the night of the 16th, and was not informed at the time. The only persons in Rice's councils who would be likely to give him information of an injunction, if they acquired it, were Whiting and Ball, and they were agreed on the policy of keeping Rice in complete ignorance. The only other persons from whom he would be likely to obtain information were the officers who endeavored to serve him and could not find him. Although Rice was at Whiting's house, awaiting directions from Ball, and laboring under a great mental strain, which, according to the evidence, absolutely unfitted him for business, and naturally very anxious to know the outcome, neither Ball nor Whiting, according to their testimony, had any communication with him that night. He swears that he had no information of the injunction until the next evening. Under the evidence, Rice cannot possibly be guilty, unless he entered into a conspiracy with Ball and Whiting, in anticipation of the injunction, to keep knowledge of it, if it should come to either, from the others, until the contract with Tillis was performed, and in pursuance of such conspiracy one of them, on being informed of the injunction, kept knowledge of it from the others engaged in the transaction at the bank. That aspect of the question is so bound up with the conduct of Ball and Whiting that it will be considered in connection with their explanations.

It is pressed upon the court: That Ball's conduct, in the light of the dealing with Tillis, and Ball's relations to it and to Rice, and his desire to defeat the prior sale, when tested by the common experience of mankind as to the directions in which the interests and feelings of men usually lead them in such situations, demonstrate very clearly that Ball had notice or knowledge of the injunction, and intended to violate it. That his scheme in substance was to have Rice arm Ball in advance of an anticipated, but not then issued, injunction, with all the necessary papers to consummate the transfer to Tillis, so that if it could not be completed before the injunction actually issued it could be done after its issuance, by Ball's acting under the prior power given him by Rice, without involving Rice in accountability to the court for his conduct. That for the purpose of remaining in ignorance himself, so that he could not be held liable for his own acts, after the injunction actually issued, Ball had Rice to secrete himself on the night of the 16th, and did not communicate with him, with the double pur-

pose of having Rice avoid service and of avoiding information from Rice if he were served, and to protect Rice from the charge of connivance in what Ball did after the injunction was served on Rice's co-defendants. That for the same reason, Whiting, who was a confidant of Ball and in close sympathy with Rice, presumably at Ball's suggestion, absented himself from his home where Rice was, and when an injunction was served on Whiting the latter, instead of informing Rice or telling Ball that an injunction had been served, said nothing to Rice and merely informed Ball that "a paper" had been served on him, purposely refraining from a more definite statement of its nature or bearing on the matter both of them had in hand. That Ball, in pursuance of his scheme to avoid all appearance of knowledge of what, under all the circumstances, he was bound to know was an injunction against the transfer of the stock, after he was notified of the service of the paper on Whiting, referred him to another lawyer for advice, with whom Ball had been consulting about the situation, in order to relieve Ball's conduct of the appearance of intentionally and willfully shunning information of the contents of a paper, which, under all the circumstances, he was fully conscious was an order forbidding the transfer to Tillis.

Ball was Rice's trusted representative in the conference which led up to the rupture with complainants about the sale of the stock to them. He was his personal counsel, and also his attorney in fact. He was the attorney of the two light companies. Rice, at Ball's suggestion, had given him full authority to trade with Tillis or to consummate the contract with complainants in his discretion, as circumstances dictated at the time. Ball and Rice had discussed the possibility of an injunction the day before it was issued, and the former had reached the conclusion and announced it, after examination of the question, that the contract with complainants could not be specifically enforced. For two weeks prior to that, Ball had endeavored to drive a bargain with Tillis for Rice, for the sale of the stock, which had already been sold to complainants. Whiting, with whom he was constantly counseling, had informed Tillis a short while before, at Atlantic City, that Rice was open to an offer for the sale of the stock to him. Both Ball and Whiting were apprehensive of the service of some paper or process which would prevent the consummation of the trade with Tillis, and were expecting some sort of litigation over the contract with complainants. Both of them, for some reason, desired to defeat the carrying out of the contract with complainants. Whiting, even after he was served with the injunction, as he says by advice of counsel, continued to co-operate with Ball, as though no injunction had been served on him. These facts and circumstances are pregnant with meaning. Standing alone they warrant and require a finding that respondents had notice or knowledge of the order and willfully violated it.

The guilt or innocence of Ball turns solely upon the just answer to the inquiry whether he had knowledge or fair notice of the injunction when he acted. If he had such knowledge or notice and acted notwithstanding, he is guilty. He could not be heard to say he did not intend

to defy the authority of the court when he transferred the stock in the face of the order, known to him, forbidding it. One is always held to intend the direct, natural, and probable consequences of acts intentionally done. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. Agnew v. United States, 165 U. S. 50, 51, 17 Sup. Ct. 235, 41 L. Ed. 624. Here, only one consequence, and that inevitable, could result from Ball's acts. They could not be intentionally performed, if he were informed of the existence of the order, without intending to nullify its commands and trample it under foot. In re Home Discount Co. (D. C.) 147 Fed. 555.

Divorced from the special features of the transaction, heretofore narrated, no one would contend, for a moment, that the bare statement to an attorney, by a person for whom he was not then acting, though such person was an officer of two corporations which the attorney generally represented, that "a paper" had been served on him, gives that attorney any notice that the paper issued in a suit against the client for whom he was then acting, much less that it forbade that client's making any disposition of certain property. The naked statement, standing alone, conveyed no intelligence as to the court from which the paper issued, or of the nature of the suit, or the persons who were made defendants, or that any injunction had issued against anybody. The paper might relate as well to a suit against other of Ball's clients as to a suit against the particular client, Rice. Either supposition would be equally reasonable. The strongest unfavorable deduction which can be drawn from the possession of the information is that it gave a clew, which, if followed up, would have led to knowledge that an injunction had issued against the particular client, Rice, for whom Ball was then acting. The case against Ball, however, cannot be made out by showing only that he might have had knowledge of the injunction. It is essential to his conviction, in a proceeding of this nature, to show beyond fair doubt that he did have knowledge or fair notice. In fixing a civil responsibility, the law generally treats a party as knowing that which on facts known to him he should have known, if inquiry would have developed it, and visits him with the consequences accordingly. But the failure of a person to make inquiry, after receiving information of a collateral fact, whereby he remains in actual ignorance of the main fact, which could have been ascertained by such inquiry, is never made the basis for fastening criminal responsibility upon him, for acts which are not offenses unless done with knowledge of the facts. Actual ignorance, though it result from negligence, or recklessly taking chances, without making inquiry, as to the happening of an event which may or may not occur, and of the happening of which the party then has no knowledge, cannot take the place of knowledge that the event had occurred. It cannot convert actual ignorance into knowledge, or substitute what a man ought to have known for what he did actually know, so as to convict him in a criminal proceeding for acts which have no criminality unless done with actual knowledge. Pettibone Case, 148 U. S. 197, 13 Sup. Ct.

542. 37 L. Ed. 419; In re Lennon, 166 U. S. 554, 17 Sup. Ct. 658, 41 L. Ed. 1110. The question, we repeat, turns at last on the inquiry: Do all the circumstances show that Ball had actual knowledge or notice?

Ball explains on oath: That he was not expecting any injunction against Rice. That he had reached the conclusion that specific performance of the contract with complainants could not be enforced, and therefore would not be attempted, by such a suit, much less that an injunction would be issued in aid of it. That he was convinced from the attitude of complainants they did not intend to perform the contract in good faith, and that their purpose was to insist that Rice was obliged to deliver the stock on June 15th, upon the payment of the agreed price per share, without simultaneous performance of complainants' undertaking to assume or to pay the debts of the companies, and that upon his refusal to assent to that construction of the contract would claim he had breached the contract and they were no longer bound to take the stock, and would thus be left free to hamper Rice by further litigation for breach of the contract. That he was confirmed in this opinion by their not making any examination of the books of the light companies, though they had from the 13th of May to the 15th of June to do so, regarding the outstanding indebtedness, the amount of which entered into the measure of their obligations to Rice. That there had been much litigation, which he had the best of reasons for knowing was directed by complainants against the light companies which he represented, for the purpose of driving them out of business, and efforts also to injure Rice's credit, and thus to force the sale of the stock to complainants on their own terms. That, governed by these considerations, he did not doubt that complainants would immediately bring an action at law against Rice for damages for breach of the contract, and seek by garnishments and other process to tie up his funds, including anything which might be contracted to be paid him by others for the sale of his stock. That such a suit at a time when the light companies were struggling with a large bonded and floating indebtedness, upon which Rice and other directors were indorsers for a large amount, upon paper then being carried in bank, and giving, as such a suit necessarily would, notice that Rice had contracted to sell the stock to the complainants and breached it, would enable complainants to ruin the value of the stock, and would result in disaster to these companies, involving Rice himself personally, and for these reasons he advised Rice as he did and to go away from Montgomery and leave matters to him, as Rice was in a nervous state which unfitted him to properly deal with the situation. That neither Whiting nor the two light companies had any contract with the complainants for the sale of any stock, and, when Whiting told him about the "service of a paper on him," he did not believe it was an injunction against Rice. That being then on his way to meet the representatives of Tillis, in the bank where they were waiting for him in the lower story of the building, to close up the details which he was anxious to complete, to get the money Tillis agreed to pay Rice, and to get it out of danger of garnishment, naturally he did not

stop to inquire further or think about the paper, which, for the reasons stated, he did not suppose had any bearing upon the transfer of the stock, and that he had no notice or knowledge of any injunction against Rice until next day.

The contending parties had long been engaged in lawsuits, two of which were brought in this court, and were and had been engaged in crimination and recrimination, and each distrusted the other. The designs Rice and his attorney imputed to complainants we have seen above. The complainants, who insist on their good faith, on the other hand, charge they had been deceived by Rice and his attorney, who, instead of being then engaged in getting matters in shape to carry out the contract, as his attorney stated to them, were then engaged in making a contract with Tillis, and made the false representations to gain time to consummate the trade with Tillis. That shortly after the making of the contract with complainants, Rice, then being president and executive head of the two corporations, caused a large amount of their available or quick assets to be collected or to be reduced to money, at a great sacrifice to them, and used the amount in paying off debts, so that Rice could claim a personal benefit by reducing the amount of the debt under a clause of the contract which bound the complainants to pay him the difference, if the debts amounted to less than $75,000.

It would not be proper on this hearing to express any opinion as to the truth of the issues thus raised between the contending parties. These things are alluded to here merely because the situation thus depicted throws light upon the mental status of the respondents, and aid in testing the reasonableness of their version of matters, and the sincerity of Ball's statement that he did not think the paper of the service of which Whiting informed him, was an injunction against Rice. The action of respondents in trying to make a bargain with Tillis for this same stock for two weeks before complainants disclosed any attitude as to the performance of the contract with Rice is inconsistent with the version that the sale to Tillis was forced by the acts of complainants, regarding the performance of the contract, on June 15th. Nor is it easy, on the other hand, to understand why, if there was not an earnest belief on the part of the respondents that the complainants did not intend to carry out the contract, and would sue them at law, they would make a contract with Tillis, which, on its face, at least, is considerably less to Rice's advantage than the contract with complainants.

It is not consistent with the evidence to find there was "a conspiracy of silence," to which Rice was a party. He left everything blindly to Ball, and it was quite unnecessary for Ball and Whiting to have had any understanding with Rice about his action in event an injunction was served on him. He was thought by them to be unfitted for business when he left the city, for which reason they aver they got him to leave, and then was the only opportunity they had to form such conspiracy. When he left no injunction had issued. The utmost that can be said of his conduct is that he entered into a conspiracy to evade service. If there had been any conspiracy between Ball and Whiting

about what the latter should say if an injunction were served on him, it must have been formed before the injunction was issued, for the evidence does not show they had any opportunity afterwards. If Whiting and Ball conspired about that matter, it seems most improbable that Whiting would have mentioned the paper at all. He would rather have maintained absolute silence as to it until Ball finished the transaction at the bank. A lawyer devising a conspiracy, as to that, would hardly have formed the design to have Whiting mention "the paper," and thereby give a clew to the existence of the injunction, information of which is the strongest circumstance here to show that Ball had knowledge of the injunction before the transfer of the stock. Moreover, both Ball and Whiting swear that what passed between them at the time Whiting mentioned the paper, whether it was at the time of the negotiations with the bank, as Whiting swears, or afterwards, as Ball states, was all that passed between them about the paper, until long after the transfer of the stock. It seems quite unnatural that respondents did not read the newspapers, the morning after the transaction, or that no member of their households mentioned the injunction, though both the morning and evening dailies printed conspicuous headlines and columns of matter concerning the injunction, and were shown to have been delivered at their residences. Whether or not information was thus derived is not material now, since these newspapers appeared after the transfer was made, save as it bears upon the credibility of the witnesses. Rice had been told to evade information, and Ball, who still had some details to attend to, and had been up late the night before, states that he hurried to his office, and did not read the newspapers until late that evening.

After much study of the facts and careful consideration of the elaborate oral and written arguments of counsel concerning this transaction, in which the main defendant, by evading service after two of his codefendants were served, managed, through his attorney who was not served, to effect the transfer of the stock in spite of the solemn order of this court, and with firm purpose to hold them to strict account if the facts permitted, the court cannot reach the conclusion that Ball's conduct, in view of his explanations, demonstrates that he violated a solemn order of the court with the consciousness that it had been made or with fair notice of its terms. This proceeding is highly punitive and criminal in its nature, and respondents are entitled to the benefit of the reasonable doubt. The criminal intent here turns upon the scienter, and there is denial on oath of knowledge or notice. Courts, while not treating such denials as conclusive, will generally give them sufficient weight to turn the scale, if the circumstances admit of fair doubt as to the existence of knowledge. Wilson v. North Carolina, 169 U. S. 600, 18 Sup. Ct. 435, 42 L. Ed. 865.

That case attracted wide attention for a long time in that state. The Governor removed Wilson from the office of railroad commissioner and appointed Caldwell in his stead. Wilson refused to deliver possession, and thereupon a quo warranto, on the relation of Caldwell, who had been appointed his successor, was brought against Wilson in the state court. The lower court having decided against him, Wilson appealed to the Supreme Court, which ruled the same way, and entered a judg-

ment of ouster against him. A few minutes after 7 o'clock on the evening of the entry of that order, Wilson was allowed a writ of error and supersedeas. Nevertheless Caldwell after this caused the sheriff to execute the writ of ouster and took possession of the office.

It seems quite as unnatural in that case as in this that there was no information of what proceedings had been taken in the case. The legal propositions asserted all throughout that case gave warning that Wilson would carry it to the Supreme Court of the United States, and procure a supersedeas as speedily as possible. Whatever steps he might take to that end would necessarily be taken in the state Supreme Court sitting at Raleigh, where Caldwell then was. Wilson brought Caldwell's conduct to the attention of the Supreme Court of the United States, averring that Caldwell, with "full knowledge of the writ of error and supersedeas, took possession of the office in disregard of the supersedeas," and thereupon moved to attach him for contempt. The Supreme Court discharged the rule, saying:

"Caldwell swears unequivocally that he was ignorant of the allowance of the writ or the filing of the supersedeas bond at the time he took possession of the room occupied by the commissioner, and that he was not informed of it until some time next day. We think this a sufficient answer. We see no evidence of intentional contempt on the part of the relator."

In an Ohio case, the court in an election contest made an order to preserve the ballots, which otherwise, under the statute, were to be destroyed after a certain time. The order was in writing, handed to the clerk, and marked filed by him. He afterwards destroyed the ballots. Being arraigned for contempt, he set up that in the rush of business he did not read the order, and did not know its contents. The lower court fined him for contempt, but the appellate court reversed the judgment. As it was not certain under the evidence that the clerk had knowledge of the order, and therefore had acted willfully, it gave him the benefit of the doubt, when he denied knowledge on oath. See, also, Slater v. Merritt, 75 N. Y. 268.

According to all the authorities, if a contempt consists of acts done or statements which are ambiguous in character, and which are capable of two constructions, one of which would amount to a contempt, and the other not, so that the intent of the party himself becomes the material question of inquiry, then a denial on oath by such a party of information of an ignored order and of any intent to show disrespect to the court is entitled to much weight. See authorities collated in note to O'Flinn v. Mississippi, 9 L. R. A. (N. S.) 1119. All that can be said after weighing all the facts and circumstances of this transaction is that Ball might have known of the order, and intended to defy it, or he might not have known of the order, and had no intention to disregard it. No one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it. To doubt is to be resolved in favor of respondent.

The acts of the defendants, though accomplished by what, under the circumstances, the court holds is not a criminal contempt, have nevertheless nullified the order of the court and changed the status of the parties as fixed by the terms of the restraining order. The stock, the subject-matter of the litigation, has passed out of Rice into the

hands of a stranger. It happened under circumstances which made this inquiry imperative. The necessity for it was occasioned solely by the acts of the respondents, done in repudiation of the rights of the complainants, as fixed by the order. It would be inequitable and unjust to tax complainants with the costs of the proceeding. The costs should be borne by the respondents, and upon their seasonable payment an order will be entered that the rule be discharged as to each of the respondents.

THE MANHATTAN. THE NORTH AMERICA. THE ALBANY.

(District Court, S. D. New York. July 21, 1910.)

1. COLLISION (§§ 63, 64*)—STEAMER AND MEETING TOW—MUTUAL FAULT—INSUFFICIENT LOOKOUT—UNLAWFUL TOW.

A tug with three barges in tow tandem, the first two on hawsers of 145 fathoms each and the third on one of 75 fathoms, was proceeding westward in Long Island Sound at night, when the steamer Manhattan, going eastward on a slightly converging course, came into collision with the second barge and sunk her. The Manhattan passed the tug starboard to starboard at a distance of 500 feet, but the tow was drifted more or less to the northward by a southerly wind. The barge was carrying proper lights, but they were not seen by the Manhattan, which ran into her at full speed. *Held*, that the Manhattan was clearly in fault for failure to keep an efficient lookout; that the tug and first two tows were also in fault for violation of the regulations made under Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 1100), which prohibit the use by tows of seagoing barges navigating inland waters of hawsers of greater length than 75 fathoms between each two vessels, and is equally obligatory on tows and towing vessels, and that the damages should be apportioned equally between the four vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 79, 81, 82; Dec. Dig. §§ 63, 64.*]

2. COLLISION (§ 146*)—SUIT FOR DAMAGES—PARTIES—APPORTIONMENT OF DAMAGES.

A libelant in a suit for collision, although suing only as owner of the injured vessel, nevertheless is a party personally, and subjects himself and all his property to the hazard of the litigation, and, if he was also the owner of one or more other vessels concerned in the collision and found chargeable with contributory fault, such vessels must be taken into account, although they have not been formally brought into the suit, and his recovery correspondingly reduced.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 298; Dec. Dig. § 146.*]

3. COLLISION (§ 146*)—APPORTIONMENT OF DAMAGES—DIFFERENT VESSELS OF SAME OWNER.

The barges Hawthorn, Albany, and Troy, the property of the same owner, were in tow of a tug in Long Island Sound at night when a collision occurred between the Albany and the steamship Manhattan, which caused a second collision between the Albany and Troy. The owner, as owner of the Albany and Troy, brought suit against the Manhattan and the tug to recover for the injury to such vessels. The owner of the Manhattan also brought suit against the tug and the Albany to recover damages for the same collision. The two suits were tried together and the court found that the Manhattan, the tug, the Hawthorn, and the Albany were all in fault. The Hawthorn had not been formally brought into either suit.

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

Held that, under the rule of apportioning the damages equally among the offending res, the original libelant was entitled to recover one-half his damages, one-fourth from the tug and one-fourth from the Manhattan, and the owner of the Manhattan was entitled to recover three-fourths of his damages, one-fourth from the tug and one-half from the original libelant, the two suits being treated as one and a single decree entered.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 298; Dec. Dig. § 146.*]

In Admiralty. Suit by the Hillside Coal & Iron Company, as owner of the barge Albany, against the steamship Manhattan and tug North America, and cross-libel by the Maine Steamship Company, claimant of the Manhattan, against the barge Albany and tug North America. Decree for libelant for part damages.

Mr. Green, for Hillside Coal & Iron Co. and The Albany.
Mr. Symmers, for The North America.
Mr. Burlingham, for The Manhattan.

HOUGH, District Judge. Shortly after 11 p. m. of April 13, 1909, a collision occurred south of New Haven and about the middle of the Sound, between the Manhattan and the Albany, the second of three barges in the tandem tow of the North America.

The Manhattan is a propeller 235 feet long, and was bound from New York to Maine ports. The North America is a sea-going tug and was towing from Boston to New York three light sail-carrying sea-going coal barges. The hawser from tug to leading barge (the Hawthorn) was of approximately 145 fathoms, that from Hawthorn to Albany was of the same length, and the after barge (the Troy) was connected with the Albany by a hawser of 75 fathoms. The Albany and Troy are each 176 feet long, have two masts, and were at and before the time of collision carrying sail thereon. The Hawthorn is 184 feet long, with three masts, and had sail up on two of them at the time in question. The night, though dark, with rain at intervals, was "good for seeing lights." The wind was blowing strongly (estimated at over 30 miles an hour) from the southward, with a choppy sea. The tow had stopped at Vineyard Haven, and had there been made up to go through the Sound. The master of the tug had given general orders that plenty of hawser should be paid out, as there was quite a "heavy roll" coming across from Martha's Vineyard to the Race. These general orders had been interpreted by the barge masters as justifying hawsers of the lengths above stated. Each barge towed on her own hawser, and each barge master paid out what he wanted. After the tow got fairly into Long Island Sound, the weather got worse, in that it became rainy and the wind increased, but the sea was not so heavy; and, indeed, I think it clear from the evidence that in the Sound the sea was not heavy at all. No change was made in the hawsers of the tow from the time it left Vineyard Haven until after collision. The lines of a tow such as this cannot be shortened while under way. In order to change, it is necessary to stop and heave in hawser on the barges with the steam winches provided for that purpose on each barge. The Troy's towline was shorter than the others because she was the last boat in tow,

and with nothing behind her there was less strain on her line. It is not said that weather had anything to do with the length of the Troy's line.

Tug and barge masters in this case are evidently men of intelligence and experience. The barge captains are old sailors acquainted with vessels of differing kinds, and their testimony was not only intelligent, but frank and manly. They all unite with their tugmaster in declaring that on such a night as that of April 13th it was not safe to navigate with shorter towlines than were used. There is to be sure no evidence as to the size or strength of the towing hawsers, their material, or the possibility of using more than one; nor are reasons, scientific or empirical, given for the danger said to attach to lines of less than the great lengths above stated. Yet it must be, and is, found that in the judgment of experienced men of unimpugned veracity the only safe course in respect of towing lines was pursued by the North America on the night in question. The evidence does however show the kind of danger against which the long hawser is a safeguard, viz, injury to the vessel in tow or loss of hawser by parting, if a heavy craft jerks or surges through a seaway or against a wind. The result feared, plus some common knowledge, fairly shows that the sudden changes of tension thus arising constitute the danger apprehended by towed and tower; for, unless the strain be taken up by a long hawser, they evidently believe that either the hawser itself will go, or the vessel in tow be strained. It is demonstrable that this is true, but it is equally true that, the heavier the tow, the more rapidly will its safety require long hawsers; so that with large and heavily laden vessels the navigators may easily consider lines of much over 100 fathoms necessary whenever they are not favored with smooth water and almost perfect calm.† When off New Haven the North America was steering by compass west by south half south. This gave her a beam wind, which admittedly had the effect of making her tow tail somewhat to leeward. The extent of this leeward or northerly drift is in my judgment considerably minimized by the tug's testimony. The captain of the Hawthorn states that in his endeavor to keep after his tug he had to steer (or try to) west southwest, and it is in evidence from some observers on the tug that as they looked back during the evening they could sometimes see both the red and green lights of their tow and sometimes only the green. From this

† NOTE.—This opinion has been written at Vineyard Haven, where in warm calm weather I have for more than two weeks observed the numerous tows passing and stopping. Few light tows and no loaded ones have been seen with hawsers of less than 100 fathoms (except on the after boat). It is impossible to avoid the conclusion that even in weather when a skiff can safely cross Vineyard Sound those in charge of tows such as the North America's think that their own safety usually requires such hawsers as the North America was using on the night of collision. This is entirely consonant with the view of the law stated on the witness stand by the tug master in this case. He said he was bound to use hawsers of 75 fathoms, except when he thought safety required a greater length. It has been interesting to observe the effect of this legal opinion at the time of year when navigation is easiest, safest, and most pleasant.

testimony and from the nature of things, it is inferred that the tail of the tow was much more to leeward than the 75 feet or so allowed by the North America's captain; but how much more cannot be stated with exactness. The Manhattan, when approaching the point of collision, was on a compass course of east half north. There is no method of comparing the compasses of the two vessels, and both are assumed as correct. Neither tug nor steamer had a lookout stationed forward from and before the time when each saw the other. Inasmuch, however, as each had the other fully in view for 20 minutes before passing, it is found that the only effect that lack of lookout had upon the matter was to render it more difficult for the Manhattan to see the lights on the tow than it probably would have been had her master not humanely called his lookout into the pilot house, instead of leaving him on the forward deck where he was getting wet with spray, though no waves were coming over the steamer's bow.

By an agreement of testimony between steamer and tug, these two vessels passed each other starboard to starboard about 500 feet apart. Their aggregate speed was approximately 17 miles per hour, and within so short a time after passing the North America that way could not be taken off the Manhattan that vessel crashed into the starboard bow of the Albany about 1,900 feet astern of the North America. Computation of the courses above given, with even a small allowance for leeward drift on the part of the tow, shows that a collision was sure to happen as and when it did, if the Manhattan persisted on an east by north course after passing the North America 500 feet to the northward.

The sole excuse for this accident is the assertion that the Albany did not have her green light visibly burning within the time that it should have been seen by the Manhattan. It is suggested either (1) that the light went out; or (2) that it was obscured by the sails of the Hawthorn. The second suggestion is impossible. The Albany's lanterns were in her forward shrouds. All her own sails were abaft her lights, and with the steamer on a compass course crossing that of the tug, and the wind blowing the tow further to the northward, I am unable to imagine how any observer on the Manhattan could have had his view of the Albany interfered with by the sails of any vessel. The claim that the Albany's starboard light went out at the critical moment is supported by the very positive testimony of men who say that they looked for a light; that they could have seen it if it had been burning, and they saw no light on the starboard side of the Albany either before or after collision. The value of this evidence is I think greatly impaired by the singular ignorance of Capt. Johnson of the Manhattan as to the meaning of the three towing lights which he saw on the North America. I am satisfied that he did not expect to find more than one barge in tow and he saw the Hawthorn's lights plainly. His pilot, Harding, is not much better in his knowledge of the lights required by statute on towboats, and I am in doubt whether he at the time really attached the proper significance to the three towing lights he also saw. The Manhat-

tan's lookout (who was in the pilot house) seems a bright boy, but he frankly admits that the towing lights meant nothing to him. The first mate, Steele, I thought an intelligent and straightforward witness, but his testimony in common with the evidence of all his shipmates if believed proves too much, for they all not only saw no green light on the Albany, but they never saw but one light, and that a red one, on either the Albany or the Troy. In the face, therefore, of ample testimony from the tug and tow that down to a very few minutes of collision all the lights on all the barges were set and brightly burning, I feel compelled to find that the Albany's lights were burning at and before collision and should have been seen by competent and attentive observers. It follows that the Manhattan is at fault, and responsible for collision with the Albany, as well as for damage to the Troy, caused by that barge overrunning the Albany as the latter stopped to sink.

It is, however, alleged that both tug and tow are at fault for towing with hawsers unlawful under section 14, Act May 28, 1908, c. 212, 35 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 1100), and the regulations duly promulgated in compliance therewith dated December 7, 1908. The act of Congress declares that such regulations "shall have the force of law." It is therefore law that "tows of sea-going barges navigating the inland waters of the United States are limited in length to four vessels including the towing vessel or vessels," nd "hawsers are limited in length to 75 fathoms measured from the tern of one vessel to the bow of the following vessel, and should in all cases be as much shorter as the weather or sea will permit." The language quoted constitutes (in effect) a general statutory requirement binding upon all persons engaged in navigating inland waters by or in tows, and is just as obligatory upon the towed as the tower. At Vineyard Haven and continuously thereafter the North America was in inland waters, and, unless therefore some exception is to be found in the statutory regulations, the hawsers of the Hawthorn and Albany were at all times unlawful. That of the Troy was not.

The only exception applicable to the waters traversed by this tow is as follows:

"(4) In case of necessity on account of wind or weather, hawsers of vessels navigating between Race Rock and Gay Head may be lengthened out in the discretion of the master of the towing vessel; but this paragraph shall not apply to Narragansett Bay north of Beavertail Light."

Language cannot more clearly limit the master's discretion. The moment a vessel with hawsers longer than 75 fathoms, bound as was the North America, passed Race Rock, her hawsers became unlawful. It is urged for the tow that to expect the barge master to hail the tug captain when arriving at the geographical limits of the latter's discretion and insist on a shorter hawser is absurd, and that whatever liability attaches to a transgression such as shown here must be that of the tug. In this there is force—up to a certain point. Doubtless a tug captain who violates the law against the will or pro-

test or both of the barge master will assume certainly for himself and probably for his ship and owner a liability that would otherwise be that of the barge. But the matter is wholly speculative and irrelevant in this case. The act of Congress referred to has laid a new and positive duty on vessels, whether towing or towed. All men who are free agents must obey or take the consequences, and in this case all the vessel masters united voluntarily, and in a mistaken view of what the law meant, to do an unlawful thing; i. e., tow through Long Island Sound with hawsers of over 75 fathoms. In that Sound, and all other unexcepted waters, it makes no difference what the sea or weather or both may be. It is immaterial what the danger to the tow may be. Hawsers must not be longer than 75 fathoms. If towing cannot be done on such hawsers with safety, it cannot be lawfully done at all. It is quite possible that a tow coming from the open sea or from some excepted inland waters into a region plainly within the statutory regulations might find obedience impossible and be compelled to go ahead, unable to stop or make a harbor. But he who sets up vis major must prove it; and it is obvious in this case that all on the North America and her barges continued with their long hawsers after reaching the Sound not because they had to, but because they preferred to.

The consequences of an unexcused violation of statutory regulations is a presumption of fault against the violator. In this case, not only is the presumption unrebutted, but it affirmatively appears that, had the hawsers of the Hawthorn and Albany been of statutory length, there could have been no collision.

It follows that the damages resulting from this collision were caused by the negligence of the Manhattan, the North America, the Hawthorn, and the Albany, and the losses will be distributed in accordance with the ruling in the E. F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600.

On Settlement of Final Decrees.

Some consideration of the effect of the decision in the Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600, upon these cases, seems proper. The suit in which the Hillside Coal & Iron Company is libelant is in legal framework identical with that of the Henry Dubois Sons Company, tried, appealed, and heard with The Moran. Both the Dubois Company and the Hillside Company owned two vessels which were in tow of a tug, and each one of said two vessels was at fault for violating a statutory regulation. Both companies, however, filed their libels only "as the owner" of the single faulty vessel injured, and did not in their libels mention ownership of the other craft.[1] This explains the language of Holmes, J., on

[1] The fact that the Hillside Company owned three vessels in tow of the North America (two of which were injured) does not render the above statement untrue. The Troy was not at fault, and while her presence increased damage because she was injured, it did not affect the number or identity of the vessels or persons responsible for that damage.

page 476, of 212 U. S., page 341 of 29 Sup. Ct., 53 L. Ed. 600, where he says:

"The fact that (scow) 18D is not a party to the (Dubois Company) suit does not matter so far as the question of partially exonerating those before the court is concerned."

The quoted words assume that the Dubois Company by filing its libel only as the owner of the 15D did not make the 18D a party to the suit, nor in form bring it into the litigation. The difficulty thus disposed of by Holmes, J., did not pass unnoticed when the Moran was tried in this court. It was then contended, inasmuch as the 18D had not been brought into the suit by proceedings under the fifty-ninth rule or otherwise, that, even if damages were to be apportioned strictly according to the number of res involved, the Dubois Company's recovery must be separated into thirds of which the libelant as the owner of the 15D (the only libelant's vessel injured) would bear one part and each of the two vessels libeled another part. The Lyndhurst (D. C.) 92 Fed. 681. Against this it was urged that a libelant voluntarily places himself before the court. He must sue as a person, for the personification of a vessel cannot extend so far as to make that vessel a libelant or appellant. Cf. The Steamboat Burns, 9 Wall. 237, 19 L. Ed. 620. Any person suing subjects himself and all his property to the exigency of the suit according to familiar principles. Therefore the Dubois Company in the action in which it was libelant had in a very real sense brought not only the 15D and the 18D, but all its property, into the litigation. It followed that as libelant sought to recover damages for injuries caused by four vessels, two of which were its own property, all the damages recoverable in that suit should be divided, so that one-fourth should fall upon each vessel, irrespective of ownership. This last view prevailed, though the course of reasoning is not set forth in the opinion of Holt, J., 143 Fed., at page 188. The decree entered pursuant to the opinion last cited having been affirmed in all courts, a similar decree must be entered in favor of the Hillside Coal & Iron Company, with the result that the damages computable in that case should be divided equally between the Hawthorn, Albany, Manhattan, and North America. This is equivalent to giving libelant a decree for half damages.

The suit in which the Maine Steamship Company as owner of the Manhattan is libelant is not exactly like either of the litigations before the Supreme Court in The Moran, supra. It differs from that case, in that only one of the offending vessels belonging to the Hillside Company has been proceeded against, and it therefore presents acutely the question whether it be necessary to libel in rem all the offending vessels of a single owner in order to arrive at that division of damages equally among the offending res of which the Supreme Court has now definitely approved. It would seem upon principles of admiralty procedure thought to be well settled that upon the seizure of a vessel in rem the owner or agent who appears and lays claim thereto is admitted to defend only pro interesse suo. He gives a bond or stipulation never greater than the value of that which he claims, and has at the hazard of the litigation, not all his property, but only that which was seized and claimed in due form. It must

therefore be admitted that although the Maine Steamship Company might have sued not only the North America and the Albany, but also the Hawthorn, by omitting the Hawthorn the number of res brought into the action has been limited to three. How, therefore, can the result laid down as lawful by the Supreme Court be reached when all the offending vessels are not brought in, but when the owners of them all are either as libelants or claimants before the court? This was done in the Dubois Company's Case by the language of Holmes, J., first above quoted, viz.: That the absence of one vessel did not matter "so far as the question of partially exonerating those before the court is concerned." There is certainly greater difficulty in taking into account the omitted vessel of a claimant than in considering the similarly omitted vessel of a libelant, for the libelant sues generally for his personal claim, while the claimant in strictness of law does no more than defend a thing in which he happens to have an interest, and cannot be heard beyond the interest which he has therein. But if, as we have now been informed, the crucial inquiry in distributing collision (and probably all admiralty) damages is not, against whom shall liability be decreed, but who is entitled to exoneration and to what extent, it can make no difference whether it be a libelant or a claimant who brings one vessel into an action when the proof shows him to be also the owner of other vessels which might have been brought in either by original process or under the fifty-ninth rule. The result in the case of the Maine Steamship Company's libel is that the Albany and North America are each entitled to be exonerated from three-fourths of the damage, and this is equally true of the Hawthorn and the Manhattan. Since exoneration of one-fourth is equivalent to recovery of three-fourths of any damage suffered, the Maine Steamship Company is entitled to recover the latter fraction of its damages, yet it can only do so by charging (in form) one-half thereof against the Albany. No other practice, however, is possible without either (1) disregarding the exoneration of the North America; or (2) causing the libelant to lose so much of its damage as would have fallen on the Hawthorn had that vessel been joined in the suit. It is difficult to see why this does not in effect make the Hawthorn a party to the Maine Steamship Company's suit, but Holmes, J., assumed that the 18D was not a party to The Dubois Company's action, and yet enforced a decree just as if it were, because her owner was before the court. The same result must follow here, for, if it be not reached, the exoneration to which the parties technically before the court are entitled cannot be enforced.

In these cases the formal difficulties above alluded to (and very repugnant to any careful practitioner) may be overcome by entering a single decree as in The Eleanora, 17 Blatchf. 88, 8 Fed. Cas. No. 4,335, at page 427. Here, as there, the causes arose out of a single collision, and were tried together upon the same testimony. If they be considered in effect as one case, then all the parties in interest are plainly before the court, and the Hillside Company is promoting the suit. Let one decree be entered and one reference ordered and the aggregate damage discovered. Of that damage the

Hillside Coal & Iron Company will bear one-half, the claimant of the Manhattan one-fourth, and the claimant of the North America the remaining one-fourth. Costs will be divided in like manner.

Note.—Since failure to recover is just as much a loss as is payment in cash to an opponent, the following tabulation will show the manner in which the damage falls:

Let X equal damage to Troy and Albany, and Y equal damage to Manhattan; then—

	Pays Loses	
Hillside Co.	$\frac{1}{2}Y + \frac{1}{2}X$	$= \frac{X+Y}{2}$
North America	$\frac{1}{4}X$	$= \frac{X+Y}{4}$
" "	$\frac{1}{4}Y$	
Manhattan	$\frac{1}{4}X + \frac{1}{4}Y$	$= \frac{X+Y}{4}$
	$\frac{1}{2}X + \frac{3}{4}Y + \frac{1}{2}X + \frac{1}{4}Y$	$= X+Y$

If this rule of exoneration be finally recognized, the result in cases where damage is done by the fault of a plurality of vessels owned by one person will be, to say the least, singular. It may well happen that, by the fault of all the vessels in a large tow, another craft (also in fault) is injured. Should the tow be owned by one man, a libel against one barge might result in the recovery of (say) $^{19}/_{20}$ of libelant's loss. This is grossly unjust, and the rule of proportionate allotment of damage must ultimately prevail. In this case the decree directed seems to me a fair "rusticum judicium."

THE MINNIE E. KELTON.

(District Court, D. Oregon. May 2, 1910.)

No. 5,007.

1. SALVAGE (§ 28*)—AMOUNT OF COMPENSATION—DERELICT.

The abandonment at sea by the master and crew of a vessel injured in a storm so that she was unmanageable, leaving her anchored a mile or two from shore in comparatively calm weather, and with the full intention on the part of the master to obtain a towing vessel and return, did not constitute her a derelict, and a salvor is not entitled to compensation on that basis.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 69, 71; Dec. Dig. § 28.*]

2. SALVAGE (§ 26*)—AMOUNT OF COMPENSATION—ELEMENTS OF AWARD.

The elements which usually go to influence the amount of a salvage award are the value of the property salved, the value of the property employed in the service and the hazard it undergoes, the risk and peril to the salvors, the labor expended, and the promptitude, skill, and energy brought to the service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–68; Dec. Dig. § 26.*]

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

3. SALVAGE (§ 22*)—AMOUNT OF COMPENSATION—NEGLIGENT OR UNSKILLFUL PERFORMANCE OF SERVICE.

Negligence or skill in the performance of a salvage service, irrespective of resulting damages, must always influence the award, and salvage may be reduced by lack of skill and energy displayed by the salvors; and, where it results in a distinguishable injury, there may not only be a forfeiture of all right to compensation, but an affirmative award may be imposed against the salving vessel.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 52; Dec. Dig. § 22.*]

4. SALVAGE (§ 27*)—AMOUNT OF COMPENSATION—PERIL AT SEA.

The steam schooner Kelton, with a cargo of lumber in part on deck and in part below, started from Grays Harbor to San Francisco, and shortly after leaving port encountered heavy weather. Two days later she was leaking badly, and her deck load was jettisoned, after which she became unmanageable and filled. She finally drifted within a mile or a mile and a half of the shore, where her anchors were dropped and held. The next day the sea was calm, and, in response to a distress signal, a life saving crew took the crew off and the master started to obtain a tug, but the Kelton was taken in tow by the steam schooner Washington, which found her deserted, and towed into the Columbia river and beached. The place where she was left was not well chosen, and a large amount was expended in getting her afloat and taking her to Portland. She should have been taken farther up the river, and, although the Washington claimed to be unable to do so, the assistance of a tug was offered her and refused. The salvage service was not attended with much danger, and the towing required 22 hours. *Held*, that the Kelton was not a derelict, and that the unskillful manner in which she was handled detracted from the value of the service; that the Washington should be awarded one-sixth of the salved value of vessel and cargo.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

5. SALVAGE (§ 1*)—NATURE.

Salvage is a reward for perilous service and skill, and not a quantum meruit for labor expended.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 1–4; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6312–6315; vol. 8, p. 7794.]

In Admiralty. Suit by the Washington Marine Company, owner, and H. C. Nason, master, of the steam schooner Washington against the steam schooner Minnie E. Kelton. Decree for libelants.

Snow & McCamant, for libelants.
Williams, Wood & Linthicum, for respondent.

WOLVERTON, District Judge. This is a libel to recover salvage for the rescue of the steam schooner Minnie E. Kelton by the schooner Washington.

The Kelton left Grays Harbor on her second trip to San Francisco about 10 o'clock on Thursday, the 30th day of April, 1908, with a mixed cargo of ordinary small lumber, shingles, lath, scantling, and boards, being laden about half on deck and half within the hold. The deck load was secured in the ordinary way, by chains running across from stanchions. Soon after leaving port, the schooner encountered

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

heavy weather, which increased in severity until she arrived off Yaquina Bay, where she shipped large quantities of water, and was found to be leaking in the bunkers. Both the bunkers and boiler were on the deck. The pumps were started, but were inadequate to keep the water down. This was on Saturday morning. Seeing that the boat was filling fast, the captain ordered the crew to start the deck load, so as to lighten her up; but, when the load went into the sea, she became unmanageable. Her course was immediately changed, with a view to working back to the Columbia. By noon she had filled with water, and was rolling heavily, when the mate was directed to hoist the lifeboat out, and, while doing so, the vessel shipped a sea, and the whole cabin, two lifeboats, and eleven of the crew went overboard. But one of these men survived. At that time the vessel was about seven miles off shore, with the wind southwest, and going inshore. A raft was rigged for use in case it was seen that the vessel was nearing the rocks. As she approached nearer shore, and it was thought that soundings were within reach, the starboard anchor was let go. This did not take hold. After she had drifted yet another half hour, the port anchor was also let go, which seemed to hold her fast. These anchors were operated with chains. Later the kedge anchor, attached to a new eight-inch manila hawser, was cast over the port bow. The vessel came to a stop about 4 o'clock in the afternoon, on Saturday, the 2d of May. The master estimates the distance from shore at the time at about a mile, Mortensen, the second officer, at a mile and a quarter, and Martin, the first officer, from a mile to a mile and a half. Martin is of the opinion that the boat drifted about four miles after the first anchor was let go. He and McKenna agree that from 60 to 75 fathoms of chain was loosened with the first anchor, and about 90 fathoms with the second; but Mortensen says that from 40 to 50 fathoms only was used. The kedge anchor was thrown over for additional protection after the ship came to rest. Soundings were taken then to discover the depth of water, and it was found to be 20 fathoms. McKenna says his remembrance is that it was 24 fathoms, but he would not be positive about it. A distress signal was displayed, which brought relief from the lifesaving station, and the men were taken off, eight in number, about 5 o'clock in the afternoon of the next day, being Sunday. These three officers from their observation, and from bearings taken, and soundings, all assert that from the time the second anchor was dropped and took hold there was no appreciable change in the position of the Kelton up to the time the remaining crew were taken off and put ashore. The sea became calmer on Saturday, and comparatively smooth on Sunday, with some swell running, and a moderate southwesterly breeze. Witnesses from the shore estimate that the Kelton was lying off shore from a mile and a quarter to a mile and a half, and that she did not change her position from the time she was first observed until she was taken in tow by the Washington. William Matthews, who went up with one of the life saving crew from Newport, testifies that he took bearings on Sunday evening from two different places, and took careful observation of the locality of the boat, that on the following morning he used these bearings for further observation, and that, so far as he could see, the boat had not changed

her position. Mr. Chatterton, also a witness for respondent, testifies to about the same state of facts. And these are corroborated by Andrew Wiesniewski and Charles Calkins. Matthews and others of these witnesses saw the Washington take the Kelton in tow, and at the time were about three miles away. They are all firmly of the view that the Kelton had not changed her position up to that time. Further than this, three of the life saving crew testify in effect that they took close observation touching the position of the Kelton from the evening of Sunday until the next morning, when she was taken in tow by the Washington, and that they could not observe that she shifted her position in the least. The coast within the vicinity of where the Kelton was lying is rock bound, and, if she had been farther inshore, she would have been in great danger of destruction. The witnesses for libelants who speak touching the subject testify that, when the Kelton was taken in tow by the Washington, she was from four to seven or eight miles off shore, and some of them say that she was drifting at the time, while others are not positive as to that. The captain and one or two of the officers also testify that the Kelton was in the course of the Washington when she was first discovered, which would take her out at sea from five to eight miles. When the Washington approached the Kelton, it was found that the cable which was attached to the kedge anchor had worn in two, and the end was hanging over the port bow, and it seemed to be the opinion of the men who went aboard the Kelton that the chains attached to the other anchors were hanging perpendicularly, and that, if either of them was holding at all, it was very slightly. These chains were cut before attempting to move off with the schooner in tow. After making fast to the Kelton, the Washington steered for the Columbia, some 80 or 90 miles distant, and was 22 hours in making the voyage. On arriving at the Columbia the tide was nearly at flood, and the Washington started in with her tow at once. The tow struck upon the bar while passing over, and one of the cables parted. Some trouble was experienced in getting another cable to her, which consumed an hour and a half or more, and, when on the inside, the Kelton was carried opposite Smith's Point, below Astoria and just above the mouth of Young's river, and there beached. She was considerably lower by the stern than at the bow, and was drawing from 18 to 22 feet of water. For the purpose of holding her in position, an anchor was carried inshore. From this position various efforts were made to raise the Kelton, and take her thence to Portland for the dry dock. The Washington left with the Kelton two of her crew for the purpose of holding possession. The captain of the Kelton arrived in Astoria on the 7th, but he did not obtain possession of the boat. After considerable effort had been made on the part of the Washington to raise the Kelton without success, she was turned over to the underwriters, who continued the effort to get her afloat. She was first moved by tugboats out toward the main channel 400 or 500 feet. This was done on May 23d, and, after much endeavor to get her in position so that she might be towed away, she on June 14th capsized, and lost her engines and boilers. Later on, about July 26th, when they had again gotten in position so that she could be taken away, she was floated off by the tide, and lost, being carried down against

the government jetty, from which position she was towed by the Tatoosh up to Astoria, and later to Portland.

The respondent charges the Washington with bad judgment in beaching the Kelton below Astoria, alleging that she was there subjected to cross-currents induced by the wash of Young's river and the Columbia, in connection with the tides, and also to the winds and the sea, to a much larger extent than she would have been if she had been carried to the docks at Astoria, or above the docks, or yet above Tongue Point. It should be said here that while the Kelton was being towed in over the bar the Wallula stood by for an hour, and offered assistance to aid the Washington in taking the Kelton to anchorage. This assistance was refused, and yet the master of the Washington says that he was unable to carry the tow up to Astoria because of the shipping that was in the harbor. But it is without doubt that by the aid of a tugboat she could have been taken above Astoria, or above Tongue Point, or any place other than where she was deposited. There is much evidence upon the question as to whether the place where she was beached was a proper one to have taken her. Many witnesses testify that it was not a proper place, that she was there subject to greater stress of weather than she would have been above Astoria, that the tide flats were of mud, and not of the character best suited for beaching a vessel; while, on the other hand, a number of witnesses seem to be of the opinion that the place was a suitable one for beaching the vessel. The evidence of some of the witnesses who worked upon the wreck tends to show that they were not interfered with materially by reason of the wind and weather. It was manifestly a very difficult place from which to remove the vessel after she had once been beached. This is shown by the efforts made to relieve her. There has been much testimony introduced touching the value of the schooner Kelton and the damages she sustained. The estimates of value range all the way from $30,000 to $60,000. It is shown that some $12,000 or $13,000 was expended in the endeavor to get her afloat before she went off with the tide, and was taken in tow by the tug. The estimates for her repairs run $6,000, $8,000, $10,000, to $20,000. All these are matters which must be considered in determining what the Washington is entitled to for her services in recovering the Kelton from her situation above Yaquina Head. Respondent claims that the Washington is entitled to no salvage because of her bad judgment exercised in towing the Kelton to the place where she was beached. It will now be necessary to consider the legal aspects of the controversy.

It is contended on the part of libelants that the Kelton was a derelict at the time she was taken in tow by the Washington, that she was in a position of great peril, and that the services rendered in her rescue were attended with great danger and hazard, for which service the Washington is entitled to the highest compensation. If, however, it is thought that the Kelton was not a derelict in strict legal contemplation, it is yet maintained that her position was one of such peril, and the risk and danger of her rescue so great that the salvor is entitled to a very high rate of salvage. Upon the other hand, it is insisted that the Kelton was not at the time a derelict, and that the service

rendered for bringing her into port was not of a hazardous or perilous character, and, furthermore, that the Washington forfeited whatever salvage she might have otherwise been entitled to through bad judgment in beaching the Kelton at an improper place, thereby necessitating very great labor and expense in raising her and sending her to dry dock. Mr. Justice Grier, in the case of The Island City, 1 Black, 121, 128, 17 L. Ed. 70, says:

"To constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libelant be entitled to the salvage as of a derelict."

The declaration of Mason, D. J., in Bean et al. v. The Grace Brown, Fed. Cas. No. 1,171, is in accord with this definition. He says:

"I regard the law as well settled that a mere abandonment of a ship on the high seas, with the bona fide intention of returning to her, when the impending peril shall have ceased, or the object of leaving her is attained, does not constitute the ship derelict."

Other discussion is had upon the subject by the learned judge, but it is not important to pursue it at the present time. The facts here put the question beyond further controversy. While it is true that no life remained upon the Kelton after the crew were taken off by the boatmen of the life saving service, Capt. McKenna had not abandoned hope of saving the vessel. Further, it would seem from the testimony that he fully intended to procure the assistance of a tug or some suitable vessel to take her to a place of safety. His own declarations on the subject are amply corroborated by witnesses Matthews, Calkins, and Wiesniewski. As soon as landed on Monday evening from the vessel, McKenna endeavored to secure passage for the night to take him to Newport, where he would be enabled to telegraph for assistance. Finding that owing to the condition of the road and tide he could not make the trip then, he availed himself of the earliest opportunity, which was early the next morning. And it was while he was on his way to Newport, with the purpose of summoning assistance, that the Washington took the Kelton in tow. Capt. McKenna, having observed the Washington steam away with his vessel, could do nothing further in the way of saving her himself. From his testimony and that of his officers it would seem that the Kelton was lying safely at anchor in a comparatively smooth sea, with a light breeze from the southwest, and that he had good reason to believe that, without further stress of weather, he could readily summon assistance from the Columbia, which would come in good time to save his ship either from destruction upon the rocks inshore or from being carried to sea and lost. He had taken down his distress signal, and had left no note or notice aboard the ship of his intentions regarding her. This may perhaps be taken as evidence of an abandonment, but this is adequately overcome by his declarations and acts clearly showing his purpose to rescue his vessel from her present peril. It may be reasonably predicated of the situation that the Washington was justified in taking the Kelton in tow with a view of salving her. This leads to a further inquiry touching the perils to which the Kelton was subjected, and the hazard and risk attending her recovery. The witnesses are fairly well

agreed as to the state of the weather and the sea at the time the Kelton was sighted and picked up by the Washington. There was a moderate southwesterly breeze, and the sea was undisturbed except by the ordinary swells. The stress of weather which rendered the Kelton helpless had abated, and the difficulties from that source of taking the Kelton in tow were not extraordinary or unusually hazardous.

Now, something as to her position with relation to the shore. The coast, as has been shown, along in that vicinity, is rocky and dangerous to shipping. The Kelton, however, was without question beyond danger from that source. That is, she was lying outside of the rocks and ledges that would render her position exceedingly perilous if farther inshore. That she was beyond the rocks and ledges and the dangers incident thereto is proven by the fact that, when the Washington came up, after signaling to ascertain if any person was aboard the Kelton, she circled around the Kelton at a safe distance once or twice before sending men to board her. This would not have been possible if the Kelton had been close inshore. The more serious question is whether the Kelton was drifting, and in peril of being carried beyond the discovery of craft that might have been sent to her relief. Upon this question the witnesses disagree widely. Libelants' witnesses uniformly assert that the Kelton was from four to five and eight miles off shore, and that persons and even houses and buildings on shore were indistinguishable with the naked eye, and nearly all of them say she was adrift; that is, not being held steadily by her anchors. Two of them were not so positive, but supposed her to be drifting. Respondent's proofs on the other side are as uniformly to the effect that she was not drifting, and was not more than from a mile to a mile and a half from shore. From a careful survey of the testimony, I am disposed to give the larger credence to the respondent's witnesses. Some of them took careful bearings, and from these careful observations from time to time to ascertain whether any change of position was taking place, and they could discover none. These were corroborated by others, who took casual observations and believed the vessel to remain stationary, as well as by the captain, officers, and crew from the Kelton, who were firmly of the belief that her anchors were holding her fast. It is perhaps difficult for one ashore or at sea, for that matter, to determine the exact distance of an object upon water. But it seems practicable and reasonable that the distance of this boat from shore should be approximated within a mile or so. If the Kelton had been eight miles from shore, no one could be so mistaken as to say she was within a mile or a mile and a half; and so, with scarcely less probability, if she was four miles from shore. It is difficult to account for such a discrepancy, unless by the interest libelants' witnesses have in the outcome of the litigation. Whatever may have influenced their testimony, however, I fully believe them to be in error. I am of the opinion that the Kelton was holding fast by her anchors, and that her position was approximately a mile to a mile and a half from shore. The difficulty and perils of getting hawsers to her for carrying her away were therefore not beyond the usual difficulties of picking up a boat helpless for navigation at the ordinary and prevailing condition of the sea

and weather. The voyage to the Columbia was unaccompanied with incident or hazard. It was made in about 22 hours. The Washington was carrying about one-third of her cargo capacity, and she pursued the route in which she was destined for the delivery of her cargo.

The more difficult phase of the controversy relates to the manner in which the Kelton was carried over the bar at the mouth of the Columbia, and the disposition made of her when within the river. While passing in, the Kelton bumped upon the bar, and parted one of her towlines, causing considerable delay before she was again secured. What damage, if any, the Kelton sustained by the incident, is problematical. The disposition made of her by beaching her on the sands above the junction of Young's river with the Columbia was evidently not prompted by the better judgment. A more appropriate disposition of her would have been to have taken her alongside the docks at Astoria, or to have beached her just below or above Tongue Point. It was feasible to have taken her to either of these places; perhaps not with the power and equipment of the Washington alone, but it could have been safely done with the aid of the Wallula, which stood ready, while the Kelton was delayed on the bar, to render such service as was requested or necessary. The captain of the Washington and her other officers assert that they were without knowledge as to the best place to bring the Kelton to anchor, and therefore they chose the place below Astoria. These officers were in a position to have obtained the advice of the pilot of the Wallula, which would have directed them to the docks at Astoria, or above the city, not below. The great difficulty experienced in extricating the Kelton from the position in which she was placed is strong evidence that it was not the most appropriate place under all the circumstances to beach her. I will not attempt, therefore, to discuss in detail the evidence touching the particular inquiry.

Naturally enough, a salvor's compensation depends upon the degree of forethought, skill, and discernment with which a vessel is brought to a place of safety, as well as upon the perils and hazards undergone in rescuing her from her first position. If he renders a high service, so that the very least injury will ensue from her rescue, it is but reasonable that the award should be graded accordingly. If, however, the service is of an indifferent order, the salvor looking rather to his award than to as complete a restoration of the property as is reasonably possible, he will deserve, and, of course, will be entitled to, much less compensation. The allowance of salvage is based upon two considerations—one, of public policy, which suggests a liberal bounty to induce vessels and water craft to turn aside from their regular course and endure the hardships and perils of removing dangerous wrecks from the pathway of commerce, and the other, to restore the wreck or disabled vessel to the owner, and the service which is adequately commensurate with the successful performance of the undertaking is accounted of high merit, and the award therefor is measured accordingly. The elements which usually go to influence the amount of the award are the value of the property salved, the value of the property employed in the service

and the hazard it undergoes, the risk and peril to the salvors, the labor expended, and the promptitude, skill, and energy brought to the service. The Blackwall, 10 Wall. 1, 19 L. Ed. 870; The Shawmut (D. C.) 155 Fed. 476. "The rule of diligence obligatory on salvors," says the court, in Serviss v. Ferguson, 84 Fed. 202, 28 C. C. A. 327, "is that of ordinary care, such as persons of reasonable prudence would naturally be expected to exercise for the preservation of their own property from loss or injury under like circumstances." This rule is as well applicable where a vessel is taken in tow and is being carried to a place of safety. Negligence or skill, however, irrespective of resulting damages, must always influence the award, and salvage may be reduced by lack of skill and energy displayed by the salvors, and even forfeited by their misconduct or gross negligence. The Katie Collins (D. C.) 21 Fed. 409; The Henry Steers, Jr. (D. C.) 110 Fed. 578; The Bremen (D. C.) 111 Fed. 228. And, where a distinguishable injury has resulted from the negligence of one undertaking a salvage service, there may not only be a forfeiture of all right to compensation, but an affirmative award may be imposed against the salving vessel. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384.

Capt. Nason did not think his boat, with the arrangement of its equipment, could safely tow the Kelton past the shipping lying at Astoria so as to get her above, leaving the inference that but for the shipping he would have taken her up there. He had at his call, however, the tug Wallula, which could have readily and safely done the service, and I think he should have availed himself both of the advice of the pilot on the tug and of the service of the tug in getting his tow to a place of greater safety and of superior advantages for putting her in suitable condition to take her to the dry dock. I do not consider that Capt. Nason is guilty of negligence so gross as to entail an affirmative judgment against his vessel nor to forfeit his entire award for salvage; but I do think his conduct is censurable to the extent of lessening his award. Undoubtedly the expense of getting the Kelton to dry dock was very largely increased by reason of her being beached as the Washington left her. Salvage being not a quantum meruit for labor expended, but a reward for perilous service and skill, and promptitude in its rendering, it is very apparent that the salvors here are not entitled to an award which would attend the highest service. The services were yet of some merit in salving the property, and compensation should be allowed above a mere quantum meruit. The rule seems fairly well established by which the salvor of a derelict will be allowed compensation equal in value to one-third to one-half of the value of the property salved. In other cases the amount of the reward is very largely within the discretion of the court; all the circumstances involved by the controversy being considered. Various estimates have been made of the value of the Kelton. The one I am disposed to adopt is that made by Capt. McKenna, which is $45,000 when she left out of Grays Harbor. She sustained large damage at sea. To repair that damage, together with such as she sustained on the beach, would approximate $20,000. This is the testimony of Capt. Gener-

eaux, who is a competent marine surveyor, and has had very large experience in raising vessels. He testifies further that from $12,000 to $13,000 was expended in his attempt to extricate the Kelton from her position on the beach at Smith's Point. There was aboard the Kelton about 300,000 feet of lumber, worth probably $12 per thousand. The combined cost of raising the vessel, taking the lesser estimate, and of her repair, should be deducted from her sound value, and I allow for the salvage services of the Washington one-sixth of the balance, or $2,766.66, with legal interest from May 5, 1908.

Such will be the decree of the court.

BROWN v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court, W. D. Tennessee, W. D. January 29, 1909.)

No. 3,932.

1. COURTS (§ 347*)—PROCEDURE IN FEDERAL COURTS—CONFORMITY STATUTE.
The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) applies especially to the form and order of pleading, which in actions at law must conform to the requirements of the state statutes and practice.

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

Conformity of practice in common law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Ins. Co. v. Hall, 27 C. C. A. 392.]

2. PLEADING (§ 201*)—DEMURRER—SUFFICIENCY IN FORM.
Under Shannon's Code Tenn. § 4655, providing that "all demurrers shall state the objection relied on" a general demurrer to a pleading as "insufficient in law," is defective in form and insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 473–479; Dec. Dig. § 201.*]

3. LIMITATION OF ACTIONS (§ 35*)—ACTION FOR PENALTY—TENNESSEE STATUTE.
An action against a telephone company under Acts Tenn. 1885, c. 66, § 11, to recover the penalty imposed thereby of $100 per day for discriminating against an applicant for telephone service, is one to recover a "statutory penalty" required by Shannon's Code Tenn. § 4469, to be brought within one year after the cause of action accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 35.*]

Action by Roscoe G. Brown against the Cumberland Telephone & Telegraph Company. On demurrer to plea. Overruled.

This is a suit brought by the plaintiff to recover as damages a penalty of $100 a day from the defendant telephone company for an alleged discrimination in failing and refusing to install a telephone in the plaintiff's residence, in violation of Acts Tenn. 1885, p. 122, c. 66, § 11, which provides as follows: "Every telephone company doing business within this state, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in

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

like situations, nor such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused." The defendant pleaded, among other defenses, that the alleged right of action for the injuries set forth in the declaration accrued more than one year prior to the commencement of the action, and was barred by the statute of limitations. The plaintiff demurred to this plea of the statute of limitations, "for the reason that the same is insufficient in law."

Bell, Terry, Anderson & Bell, for plaintiff.
Wright & Wright, for defendant.

SANFORD, District Judge. I am of the opinion that the demurrer to the plea of the statute of limitations should be overruled for the following reasons:

1. This is a general demurrer, based solely upon the ground that the plea "is insufficient in law," and is therefore defective in form under section 2934 of the Tennessee Code (Shannon, 4655), which provides that "all demurrers shall state the objection relied on," and the requirement of the federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) that:

"The practice, pleadings and forms and modes of proceedings 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 and District Courts are held."

Under this act, the Circuit Courts of the United States follow the practice of the courts of the state in regard to the form and order of pleading. Southern Pac. Co. v. Denton, 146 U. S. 202–209, 13 Sup. Ct. 44, 36 L. Ed. 942.

In 1 Rose's Code of Federal Procedure, § 903, p. 844, it is said that:

"The conformity requirement of Rev. St. § 914 [U. S. Comp. St. 1901, p. 684] applies with special force to the forms and modes of pleadings, and uniformity in that respect was one of the chief objects of the enactment of the present law."

In construing the federal conformity statute it has been held that it applies to the pleadings in common-law cases and includes the form and order of pleading, and such matters, for example, as the scope of a general demurrer, the necessity of specially averring the defense of contributory negligence, and the like. 1 Rose's Code, § 903a, p. 845, and cases cited. Clearly, it includes conformity to the state statute in reference to the form of the demurrer. And as the demurrer in question does not state the objection relied on as required by the state statute, as construed in many decisions of the Supreme Court of Tennessee holding that under this statute general demurrers for substance are abolished and the demurrer for substance must be special (Shannon's Code of Tennessee, 4659, note 3, and cases cited), it follows that the demurrer is likewise defective in form under the requirements of the federal conformity statute, and should be for that reason overruled.

2. The demurrer is likewise defective in substance. Under the declaration plaintiff sues to recover the sum of $100 a day as a penalty provided by the Tennessee statute for an alleged discrimination on the part of the defendant in refusing to furnish plaintiff a telephone. The plea of the statute of limitations, which is in proper form, avers that the alleged right of action "accrued more than one year prior to the commencement of this action," and pleads in bar the statute of limitations. The demurrer to this plea, as above stated, merely sets forth that it is "insufficient in law." No brief has been filed in support of this demurrer, and opposing counsel and the court are left to surmise the real ground of the objection. Apparently the demurrer proceeds upon the idea that the statute of limitations of one year does not apply to a suit of this character. I think it clear, however, that the plea is good under section 2772 of the Tennessee Code (Shannon's, § 4469), providing that actions for libel, etc., "and statutory penalties" shall be brought "within one year after cause of action accrued," and that this suit, which, under the express terms of the declaration, is brought "to recover of the defendant the sum of $100.00 per day as a penalty provided by said statutes," comes within the aforesaid statute of limitations, especially in view of the language used by the Supreme Court of Tennessee in Woodward v. Alston, 12 Heisk, 581, 585, in which it was said:

"The statutory penalty may be defined as a penalty fixed by statute as a punishment for violation of some provision of law. Bouvier, Law Dict. * * * The penalties are recovered by a proceeding in the nature of a civil action, and differs in this from a criminal prosecution."

It follows that both for defects in form and in substance the demurrer should be overruled.

An order will be entered accordingly.

GRUETTER v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court, W. D. Tennessee, W. D. September 13, 1909.)

No. 3,578.

1. REMOVAL OF CAUSES (§ 4*)—SUITS REMOVABLE—ACTION FOR PENALTY.

Since Act Tenn. 1885, c. 66, § 11, prescribing a penalty against telephone companies for discrimination in service, creates no criminal offense, and provides for no criminal procedure or remedy for any public wrong, and merely for punitive damages for the breach of a common-law obligation or private wrong, a suit brought by an individual to recover the penalty is removable as a civil action, under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509) correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11–20; Dec. Dig. § 4.*]

2. REMOVAL OF CAUSES (§ 4*)—SUITS REMOVABLE—DETERMINATION—"CIVIL NATURE."

In determining whether a suit to enforce a penalty provided by a state statute is one "of a civil nature" which is removable under section 2, Act

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

Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470, the question is not whether the state statute is to be considered as remedial or penal for the purpose of the application of the rule of strict construction, but whether the action brought to enforce the penalty provided by the statute is essentially civil in its nature, as distinct from one which is criminal, or quasi criminal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11–20; Dec. Dig. § 4.*]

3. ACTION (§ 18*)—"CIVIL ACTION."

A civil action is one brought to recover some civil right or to redress some wrong not a crime or a misdemeanor; and at common law is an action to recover private or civil rights or compensation for their infraction.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 95–104; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 2, pp. 1183–1193; vol. 8, p. 7603.]

4. REMOVAL OF CAUSES (§ 26*)—NONRESIDENT PARTIES.

A suit commenced in a state court in a federal district in which neither the plaintiff nor the defendant resides cannot be removed to the Circuit Court of the United States of such district by a nonresident defendant on the ground of diversity of citizenship, as such court would have had no jurisdiction of the same as an original suit under Act March 3, 1887, c. 373, 24 Stat. 552 as amended by Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), and, where the objection to the jurisdiction of such Circuit Court has not been waived by the defendant, the suit must be remanded to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63; Dec. Dig. § 26.*]

5. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS TO REMAND—RESIDENCE OF PARTIES—EVIDENCE.

On plaintiff's motion to remand the cause to the state court, his residence within the district was sufficiently shown by a recital in a declaration filed by him the same day that the petition to remove was filed, describing himself as a citizen of a county within the district.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 225–234; Dec. Dig. § 107.*]

6. WORDS AND PHRASES—"CITIZEN."

A phrase describing one as "a citizen of Franklin county, Tennessee," sufficiently describes him as a citizen of the state and a resident of the county.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 1164–1174; vol. 8, pp. 7602–7603.]

7. REMOVAL OF CAUSES (§ 92*)—RECORD—SUFFICIENCY.

While facts necessary to give the federal court jurisdiction must affirmatively appear on removal of a cause, no precise and technical form is required; it being sufficient that the necessary facts appear in the record.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 190; Dec. Dig. § 92.*]

8. EVIDENCE (§ 10*)—JUDICIAL NOTICE—COUNTIES.

The federal Circuit Court takes judicial notice that a particular county is within the district.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9–14; Dec. Dig. § 10.*]

9. REMOVAL OF CAUSES (§ 86*)—PRAYER—SUFFICIENCY.

A prayer "that said surety and bond may be accepted that his suit may be removed into the next circuit court of the United States" is sufficient

as a prayer for a removal; a semicolon after the word "accepted" being obviously inadvertently omitted.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 166–179; Dec. Dig. § 86.*]

Action by John W. Gruetter against the Cumberland Telephone & Telegraph Company. On plaintiff's motion to remand. Motion overruled.

Crownover & Crabtree, for plaintiff.
W. L. Granbery, for defendant.

SANFORD, District Judge. After careful consideration, I have reached the conclusion that the plaintiff's motion to remand this suit to the state court from which it was removed by the defendant is not well taken.

1. The first ground of the motion is that this is a suit to recover a penalty, and not an action of a civil nature that can be removed to the federal court on the ground of diverse citizenship. While I held in January of this year in the case of Brown v. Cumberland Telephone Company, 181 Fed. 246, at Memphis, that a suit of this character brought against a telephone company under Act Tenn. 1885, c. 66, § 11, is an action for "statute penalties," which, under section 2772 of the Tennessee Code (Shannon's Code, § 4469), is barred within one year after the cause of action accrues, I am nevertheless of opinion that, although a suit for penalties, it is "a suit of a civil nature at law," which is removable to the federal court under section 2, Act Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509). The Tennessee statute provides that every telephone company doing business within the state shall supply all applicants for telephones and telephone facilities without discrimination or partiality, and shall not impose any condition or restriction upon any such applicant not imposed impartially upon all persons or companies in like situations, "under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities, * * * to be recovered by the applicant whose application is so neglected or refused." It was held by the Circuit Court of Appeals for this circuit in Cumberland Telephone Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, that this statute is directed only against discriminations in telephone service, and is merely declaratory of the common-law obligation of telephone companies not to discriminate, giving a new remedy and enforcing the common-law obligation by severe penalties. The statute is therefore in its essence one which merely declares and enforces a common-law obligation of a civil nature. It does not create any criminal offense, or provide for any criminal prosecution. It imposes no fine or penalty which may be recovered by the state. It provides for no qui tam action by which any injury to the public may be punished by fine. It simply, in its last analysis, recognizes the common-law obligation of telephone companies to furnish undiscriminating service, and enforces this obligation by a severe penalty, in the nature of punitive damages, recoverable

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

in a civil action brought by the person against whom there has been a wrongful discrimination.

In determining whether a suit to enforce a penalty provided by a state statute is one "of a civil nature" which is removable under section 2, Act Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470, the question is not whether the state statute is to be considered as remedial or penal for the purpose of the application of the rule of strict construction, but whether the action brought to enforce the penalty provided by the statute is essentially civil in its nature, as distinct from one which is criminal, or quasi criminal, in its nature. While the precise question here involved appears never to have been adjudged, I think a just rule fairly deducible from the trend of authority, and based upon sound reason, is this: That where the statute does not create any criminal offense or provide for any criminal prosecution or for the recovery by the state of any fine or penalty for any public wrong, but merely provides a money penalty for a private wrong, recoverable by the aggrieved party for his own benefit, a suit brought to recover such penalty is in its essence one of a civil nature, even though the penalty imposed by the statute amounts to punitive damages, and is hence removable to the federal court. "A civil action is an action brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor." Burrell's Law Dict. 294. "An action is 'civil' when it lies to enforce a private right, or redress a private wrong. It is 'criminal' when instituted on behalf of the sovereign or commonwealth in order to vindicate the law by the punishment of a public offense." Rapalje & Lawrence's Law Dict. 21. A civil action at common law is "an action which has for its object the recovery of private or civil rights or compensation for their infraction." Bouvier's Law Dict. (15th Ed.) 317. In Huntington v. Attrill, 146 U. S. 657, 667, 673, 676, 13 Sup. Ct. 224, 36 L. Ed. 1123, in which it was held that a state statute, making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts, was "in no sense a criminal or quasi criminal law," and not a penal law in the international sense so that it could not be enforced in the courts of another state, Mr. Justice Gray, delivering the opinion of the court, said:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. The action of an owner of property against the hundred to recover damages caused by a mob was said by Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' Hyde v. Cogan, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. Bones v. Booth, 2 W. Bl. 1226; Brandon v. Pate, 2 H. Bl. 308; Grace v. McElroy, 1 Allen (Mass.) 563; Read v. Stewart, 129 Mass. 407, 410; Cole v. Groves, 134 Mass. 471. As said by Mr. Justice Amhurst in the King's Bench and repeated

by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts: 'It has been held in many instances that, where a statute gives accumulative damages to a party grieved, it is not a penal action.' Woodgate v. Knatchbull, 2 T. R. 148, 154; Read v. Chelmsford, 16 Pick. (Mass.) 128, 132. Thus a statute giving to a tenant ousted without notice double the yearly value of the premises against the landlord has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' Lake v. Smith, 1 Bos. & Pul. (N. R.) 174, 179, 180, 181; Wilkinson v. Colley, 5 Burrow, 2694, 2698. So in an action given by a statute to a traveler injured through a defect in a highway for double damages against the town it was held unnecessary to aver that the facts constituted an offense, or to conclude against the form of the statute, because, as Chief Justice Shaw said: 'The action is purely remedial, and has none of the characteristics of a penal prosecution. * * * Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity.' Reed v. Northfield, 13 Pick. (Mass.) 94, 100, 101, 23 Am. Dec. 662. The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. According to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species—private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries. The latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors.' 3 Bl. Com. 2. The question whether a statute of one state which in some aspects may be called penal is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether the purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

In State v. Chicago, B. & Q. R. Co. (C. C.) 37 Fed. 497, 3 L. R. A. 554, in which it was held that an action brought by the state to recover a forfeiture for an offense declared to be a misdemeanor was, though civil in form, one of a criminal nature which was not removable to the federal court, Mr. Justice Brewer, then Circuit Judge, after citing various authorities stating the distinction between matters of a civil and a criminal nature, including the definitions from the law dictionaries above quoted, said:

"That a case may partake something of the nature of both is as might be expected, and naturally it is not always clear which element predominates. Thus in a civil action for damages for a tort punitive damages are sometimes awarded. There is therefore present the double element of a redress of a private injury and the punishment of a public wrong; but, inasmuch as the full recovery goes to the injured party, as he controls the whole proceeding, and the form of the action is civil, it may well be inferred that the civil element predominates, and the action be considered one of a civil nature."

And in Black's Dillon on Removal of Causes, § 24, p. 33, the first rule given for distinguishing between actions essentially penal in their character and those of a civil nature is that:

"When the money to be recovered in the action, though denominated a 'fine,' 'penalty,' or 'forfeiture,' is really for the benefit of a private party who has suffered loss or detriment, the action is civil and not penal"—citing Robertson v. Kottell, 64 N. H. 430, 14 Atl. 78.

The cases relied on by the plaintiff are not, I think, in substantial conflict with this rule. Thus, to refer to the principal cases so relied

on, in State v. Chicago, B. & Q. R. Co., supra, the suit was held not to be removable on the specific ground that the penalty provided by the statute went entirely to the state, which controlled the litigation and received all the proceeds, and that the aim of the statute was to punish for a violation of the criminal laws of the state; and a similar decision in State v. Alleghany Oil Co. (C. C.) 85 Fed. 870, was based on the ground that the penalty was due to the state and was inflicted for a violation of the state statute enacted to secure public and not private rights. In both State v. Grand Trunk Ry. (C. C.) 3 Fed. 887, and Lyman v. Boston & A. R. Co. (C. C.) 70 Fed. 409, the suits which were held to be not removable to the federal courts were brought under indictments in the state courts, under statutes providing for fines against railway companies causing the death of persons by negligence, which should go to the family of the deceased. In the first of these cases the state court had previously held that a proceeding under the statute was a criminal proceeding for an infraction of the law of the state, which construction was followed by the federal court; and in the second the statute specifically provided that the suit should be prosecuted by indictment, and both the decisions of the state court that actions under the statute were for a penalty and the nature of the prescribed procedure were among the grounds upon which the court concluded that the suit was an action to recover a penalty under a state law, to be exacted partly, if not exclusively, as an act of public law and in defense of the public justice of the state, and hence not removable. In the case of Hamilton v. Brewing Co. (C. C.) 100 Fed. 675, the recovery of money paid for intoxicating liquor sold in violation of the state statute evidently was not provided as compensation for any loss or detriment to the buyer or as damages for any private wrong, but solely as a punishment for a violation of the public law in reference to the sale of intoxicating liquors. And in State v. Land & Cattle Co. (C. C.) 41 Fed. 228, while it was held that under a state statute making it unlawful to graze cattle on public lands unless leased from proper authority, and providing that a violation of the act should be a misdemeanor punishable by fine, a suit brought by the state to recover such fine was one to enforce the criminal law of the state, which was not removable to the federal court, it was also said that it seemed that a suit brought by the state under another section of the same act providing that the owner of cattle should be liable to the state in a fixed sum per year for each 640 acres used contrary to the act, to be recovered in a civil action, "was by the law and in fact a suit of a civil nature, to wit, a suit for trespass, in which the damages were liquidated by the statute," and hence removable. See, also, State v. Cattle Company (C. C.) 49 Fed. 593. The cases involving a decision of the question whether or not a given statute is remedial or penal for the purpose of the application of the rule of strict construction likewise have in my opinion no direct application to the question under consideration.

Therefore, after careful consideration of the important question involved, and with great regret that I am unable to concur in the opinion of the learned circuit judge of the state court, I am constrained to conclude that as the Tennessee statute in question creates no crim-

inal offense, and provides for no criminal procedure or remedy for any public wrong, but merely for punitive damages for the breach of a common-law obligation or private wrong, a suit brought by the injured person to recover the penalty thereby imposed is essentially civil in its nature and removable to the federal court. I am strengthened in this view by the fact under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), prohibiting interstate carriers from confining live stock in cars longer than 28 consecutive hours without unloading for rest, water, and feed, and imposing penalties for a violation of the act, recoverable in a civil action in the name of the United States, it has been held that, although the statute is penal, an action to recover the penalty is in effect a civil action for debt, and the government is entitled to have a judgment therein reviewed upon writ of error. United States v. Baltimore & O. S. W. R. Co. (6th Circuit) 159 Fed. 33, 38, 86 C. C. A. 223; Montana Cent. Ry. v. United States (9th Circuit) 164 Fed. 400, 90 C. C. A. 388; United States v. New York, C. & St. L. R. Co. (2d Circuit) 168 Fed. 699, 94 C. C. A. 76. Likewise an action brought by the United States against a railroad company under the safety appliance act (Act March 3, 1893, c. 196, § 6, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3175]), providing a penalty for each violation, recoverable in a suit brought by the United States attorney, is a civil action in which the judgment is reviewable at the instance of the government on writ of error. United States v. Louisville & N. R. Co., 167 Fed. 306, 93 C. C. A. 58; United States v. Illinois C. R. Co. (6th Circuit) 170 Fed. 542, 95 C. C. A. 628; Chicago, B. & Q. R. Co. v. United States (8th Circuit) 170 Fed. 556, 95 C. C. A. 642.

In United States v. Illinois C. R. Co., supra, Severens, Circuit Judge, delivering the opinion of the court, said:

"Probably in all the systems of law in the state and federal governments there are instances where to civil liabilities there attached penalties, there being something wanton or gross or otherwise peculiar to the liability. Yet such penalties are enforced in civil actions."

And in Chicago, B. & Q. R. Co. v. United States, supra, Adams, Circuit Judge, delivering the opinion, said:

"This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain specified regulations made to promote the safety of passengers and freight carried in interstate commerce and to protect employés engaged in that service. * * * The act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly. * * * A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed that liability not as a punishment for a criminal offense, but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which in the opinion of Congress the public weal demanded should be performed by railroad companies."

If an action to enforce a money penalty recoverable by the government in its sovereign capacity for breach of a public duty imposed by statute is a civil action for debt, it follows, a fortiori, that an action to recover a money penalty brought by the party injured by a violation

of a common-law obligation and a private wrong, and for his sole benefit, is also a civil action.

The view that a suit to recover the penalties imposed by the Tennessee statute is one of a civil nature within the jurisdiction of a Circuit Court of the United States, furthermore, finds strong confirmation in the fact that in the case of Cumberland Telephone Company v. Kelly, above cited, the Circuit Court of Appeals for this circuit entertained and decided on the merits a writ of error in an action brought against the telephone company in the Circuit Court of the United States for the Western District of Tennessee to recover penalties under this statute and remanded the case for a new trial in the Circuit Court, instead of directing that the case be dismissed, as it would have done on its own motion had it been of opinion that the Circuit Court had no jurisdiction of the case. Such action on the part of the Circuit Court of Appeals, without doubting the jurisdiction of the Circuit Court, is significant as indicating its view that a suit to recover such statutory penalties was one within the jurisdiction of the federal courts. Huntington v. Attrill, 146 U. S. 657, 680, 13 Sup. Ct. 224, 36 L. Ed. 1123; United States v. Baltimore & O. S. W. Co. (6th Circuit) 159 Fed. 33, 39, 86 C. C. A. 223.

2. The second ground of the motion to remand, that the petition for removal and the record do not show that this suit is sought to be removed to the Circuit Court of the United States in the district in which either the plaintiff or defendant resides, is not well taken. It is true that a suit commenced in a state court in a federal district in which neither the plaintiff nor the defendant resides cannot be removed to the Circuit Court of the United States of such district by a nonresident defendant on the ground of diversity of citizenship, as such court would have had no jurisdiction of the same as an original suit under the Acts of 1887–1888, and, where the objection to the jurisdiction of such circuit court has not been waived by the defendant, the suit must be remanded to the state court. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; Western Loan & Savings Co. v. Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Louisville & N. R. Co. v. Fisher (6th Circuit) 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. (N. S.) 926.

I am of opinion, however, that the fact that the plaintiff was a resident of the Middle District of Tennessee at the time the petition for removal was filed affirmatively appears from the declaration which he filed in the state court on the same day, December 17, 1908, in which he is described as "a citizen of Franklin county, Tenn.," a phrase which, in my opinion, giving to the words their natural and obvious meaning, sufficiently describes the plaintiff as a citizen of Tennessee and a resident of Franklin county. To describe a person as being of a certain county can only mean, as words are ordinarily used, that he is a resident of that county. See Grand Trunk Ry. v. Twitchel (1st Circuit) 59 Fed. 727, 8 C. C. A. 237, in which this is apparently implied. While it is true that the facts necessary to give the federal court jurisdiction must affirmatively appear, no precise and technical form of words is required, and it is sufficient if the necessary facts appear in

the record, although stated inartificially and not in technical language. See 1 Street's Fed. Pract. § 331, p. 192.

While, therefore, it would have removed all possible doubt on this point if the defendant's petition for removal had shown the plaintiff's residence in accordance with the form given in 2 Loveland's Forms of Fed. Pract. 1573, which, since the decision in Ex parte Wisner, might well be supplemented by averring in terms a residence within the district to whose circuit court the removal is sought, I am yet constrained to hold that, as the plaintiff was described in his own declaration filed on the same day as being a citizen of a county which the court judicially knows to be within such district, it therefore sufficiently appears from the record that the case was removed to the Circuit Court of the United States for the district in which the plaintiff then resided, and that the second ground of the motion to remand must be accordingly overruled.

3. The third ground of the motion to remand, that "the defendant does not specifically pray a removal of this cause to the Circuit Court of the United States," is likewise not well taken. The defendant in the last paragraph of the petition for removal specifically prays "that said surety and bond may be accepted that his suit may be removed into the next Circuit Court of the United States," etc. The meaning of this prayer is unmistakable, and its effect is not destroyed by the obviously inadvertent omission of a semicolon after the word "accepted."

An order will accordingly be entered overruling the motion to remand.

NOTE.—A petition for writ of mandamus in this case was dismissed by the Supreme Court.—Ex parte Gruetter, 217 U. S. 586, 30 Sup. Ct. 690, 54 L. Ed. —.

TRAUFFLER v. DETROIT & CLEVELAND NAVIGATION CO. et al. McCLURE v. SAME. NORBURY v. DETROIT & CLEVELAND NAVIGATION CO.

(District Court, W. D. New York. July 19, 1910.)

1. TOWAGE (§ 18*)—STEAMER AND TOWING TUG—EXCESSIVE SPEED—LOSS OF TUG.

A collision occurred in Buffalo river near the South Pier in the daytime between the steamer Western States, which had entered the river to go to her dock farther up, and the tug Princeton, which was waiting to take her in tow. The evidence showed that the steamer approached at a speed of not less than eight miles an hour, and that the tug proceeded ahead and took a line from her when 30 feet ahead of her and about 15 feet on her port side, but the steamer overtook and ran into the tug causing her to sink immediately; three persons on board being drowned. *Held*, that the steamer was in fault for navigating in the river at such speed in violation of the federal statute, which forbids a greater speed than six miles an hour; that the tug was also in fault for not

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

keeping farther away and for taking the line while the steamer was going at such excessive speed, which was contrary to custom and dangerous.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 40; Dec. Dig. § 18.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

2. ADMIRALTY (§ 21*)—ENFORCEMENT OF STATE LAWS—ACTION FOR WRONGFUL DEATH.

The statutory law of a state authorizing recovery for wrongful death may be enforced in a court of admiralty where the death occurred in a collision in the waters of the state.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 219; Dec. Dig. § 21.*]

3. COLLISION (§ 139*)—ACTIONS FOR WRONGFUL DEATH—LIABILITY OF VESSELS IN COLLISON.

Where both vessels were in fault for a collision in the waters of a state, an action may be maintained under a state statute against the owners of both to recover for the death of members of one of the crews caused by such collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 139.*]

4. NEGLIGENCE (§ 89*)—IMPUTED NEGLIGENCE—FELLOW SERVANTS—MASTER AND CREW OF VESSEL.

The master of a vessel and members of his crew are not fellow servants in such sense that his negligence in the navigation of the vessel is imputable to them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 134; Dec. Dig. § 89.*

Who are fellow servants, see note to Flippin v. Kimball, 31 C. C. A. 286.]

5. DEATH (§ 21*)—ACTION FOR WRONGFUL DEATH—DEFENSES.

It is no defense to an action for wrongful death that another was also in fault for the tortious act.

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

6. MASTER AND SERVANT (§ 182*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEW YORK STATUTE—"WHOSE SOLE OR PRINCIPAL DUTY IS THAT OF SUPERINTENDENCE."

The master of a vessel who has sole charge of its navigation is one "whose sole or principal duty is that of superintendence" within the meaning of the New York employer's liability act (Laws 1902, c. 600), and, under such act, the shipowner is liable for the negligence of the master causing an injury to a member of the crew under him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 182.*]

7. COLLISION (§ 139*)—ACTION FOR WRONGFUL DEATH—DEFENSES.

The fact that a person killed in a collision, for which both vessels were in fault, was on board one of them without right and without the knowledge of her officers at the time of collision, is no defense to an action for his death against the owner of the other vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 139.*]

In Admiralty. Actions by Mary Trauffler, administratrix of the estate of Frank M. Trauffler, deceased, and by Alice A. McClure, administratrix of the estate of William A. McClure, deceased, against the Detroit & Cleveland Navigation Company, as owner of the steamer Western States, and the Hand & Johnson Tug Line, as owner of the tug Princeton. Also by Charles Norbury, administrator of the estate of Raymond E. Norbury, deceased, against the Detroit & Cleve-

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

land Navigation Company, as owner of the steamer Western States. Decree for libelant in each case.

Hamilton Ward, for libelants.

Hoyt, Dustin, Kelley, McKeehan & Andrews and Rogers, Locke & Babcock, for Detroit & Cleveland Navigation Company.

Brown, Ely & Richards, for Hand & Johnson Tug Line.

HAZEL, District Judge. These are libels filed in personam by the administratrices of Frank M. Trauffler, deceased, and William A. McClure, deceased, against the Detroit & Cleveland Navigation Company, a corporation of the state of Michigan, and owner of the steamer Western States, and the Hand & Johnson Tug Line, a corporation of the state of New York, and owner of the steam tug Princeton, and by the administrator of Raymond E. Norbury, against the Detroit & Cleveland Navigation Company alone. The actions arose out of the same subject-matter and were tried together; it being agreed by the parties that the evidence taken so far as applicable should be considered in each case. The libelants demanded trial by jury under section 566 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 461), and thereupon petitions for limitation of liability were filed by claimants under admiralty rule 54, which it was contended prevented such trial by jury, but, before this question was ruled upon, the said demand was withdrawn and the hearing had before the court.

The material facts show that in the daytime on May 24, 1909, a collision occurred in Buffalo river near the South Pier, within the limits of the city of Buffalo, between the steam tug Princeton and the large passenger steamer Western States, in consequence of which Trauffler and McClure, engineer and fireman, respectively, of the tug, and Norbury, who was aboard the tug without the knowledge of her owner or master, were drowned, and the steam tug sunk. The libels charge joint liability, in that both vessels were negligently navigated, the steamer for proceeding at a rate of speed prohibited by the United States statutes prescribing a rate of speed in Buffalo river not exceeding six miles an hour and for violating the ordinances of the city of Buffalo limiting her speed to three miles an hour, and the tug for navigating in too close proximity to the steamer. The answer interposed by the Western States denies negligence on her part, and alleges that the Princeton negligently sheered across her bow which alone was the cause of the collision. The Western States is a side-wheel steamer, 366 feet over all, and 89 feet wide from the extremities of her paddles and paddle boxes. At the time of the collision, she was on her return trip from Detroit to Buffalo, and bound for her pier about one-half mile from the entrance to the river. It was her custom to be towed to her berth by a tug belonging to the Hand & Johnson Tug Line from a point opposite the South Pier near the entrance to the channel or river. The Princeton was 70 feet long, and had a crew of four, consisting of master, engineer, fireman, and deck hand. On the morning in question her master navigated the tug to a customary position on the South Pier to await the approach of the Western States, intending to take her bow line when she came alongside. When the steamer rounded the outer breakwater about 2,400 feet from the point where he was waiting,

the tug proceeded ahead slowly to the middle of the river, and then stopped her headway. She waited until the steamer came about 200 feet of her stern, and then went ahead slowly, accelerating her speed to her capacity as the steamer gained on her. The heaving line was cast by the steamer's lookout as she came alongside the tug, which was about 30 feet ahead of the steamer and 15 feet off her port side. The fireman and the deck hand pulled the line aboard. The steamer gained on the steam tug, and with the bluff of her bow struck or shoved on her starboard quarter. The Princeton thereupon rapidly hard astarboarded, a proper maneuver under the circumstances, but she nevertheless deviated from her course, crossed the bow of the steamer, and rolled over to port and sunk. The crew and Norbury leaped into the water, but the master and deck hand only were saved from being drowned. The Western States continued ahead a few moments while the men were swimming in the water, then slackened her speed, and reversed her engines. There is conflict in the evidence as to the rate of speed at which the steamer navigated in the river. Seventeen witnesses for the libelants, some of whom were either relatives or friends of the decedents or fellow employés, while others were impartial and disinterested by any ties and well qualified, testified in substance that the steamer was going at the rate of 8, 10, or 12 miles an hour at the time of the accident. The master and wheelsman of the steamer Gargantua, which was moored to the dock close by, testified that they noticed that the Western States entered the mouth of the river at such a rapid rate of speed that they put out additional mooring lines. The steam tug Mason was astern of the steamboat, and, though she intended to take her stern line to assist in towing her, she was unable to do so on account of her excessive speed. Capt. Farrell, a skilled and trained harbor pilot, testified that in his estimation the Western States exceeded nine miles an hour in the river; that, to keep up astern, he was obliged to maintain the speed of the Mason at 10 or 11 miles an hour to the South Pier and after entering the river at 9 miles. His observations are corroborated by his engineer and deck hand. There is other credible testimony, notably that of Capt. Massey and Hollingshead, who were on a naptha launch which also followed in the wake of the steamer, tending to show that she was slow to reduce her speed after rounding the breakwater, and in their opinion she was moving through the water at the South Pier at a rate of 9 miles an hour. The testimony of Capt. Madigan is entitled to careful consideration. He was aboard his vessel moored in the river alongside of the Lackawanna Pier close to the place of collision. He swore that the steamer and tug, when 150 feet distant from where he stood, navigated parallel with each other. The steamer was going "a good strong 8 miles an hour," and the tug "about holding her own," and the "bluff of the bow of the Western States caught the fan tail of the tug and rolled her over to port," and in five seconds the tug was out of sight. Two passengers on the Western States testified that their attention was drawn to her unusually fast speed after she was in the river. Reference to the proof for the Western States indicates that her master, the engineer, first and second mates, wheelsman, lookout, and others of the crew substantially swore that she was running at the

rate of 18 miles an hour as she approached the outer breakwater; that her speed per hour as she rounded the outer breakwater was 10 or 12 miles; that she checked, and at the South Pier at the point of collision she did not exceed 4 or 5 miles an hour.

The Nicholson log, a patented contrivance for recording the speed and movements of vessels on a chart, was received in evidence, and indicates on its face by red lines that the vessel's speed was approximately five miles an hour. If the Nicholson log was properly adjusted and operative at the time of the collision, its showing would undoubtedly be decisive, and the rejection of the contra oral testimony would be imperatively required. But such a conclusion would necessarily depend upon the credibility of the testimony that the chart correctly scheduled the rate of speed, that the instrument was operative, properly adjusted, and in actual use. But, however useful the device, its probative value is weakened by the fact that it concededly fails to accurately show when the stoppage of the steamer occurred. Mr. Nicholson on this point substantially testified that, "if a boat came to a sudden stop, the line would keep on going down until it got to zero." If the vessel had stopped at a speed of seven or eight miles an hour, the only indication would have been that the pointer would have continued to go down, and, "if the steamer had stopped at five or eight or ten miles an hour, theoretically there is a difference in the line, but practically you cannot see it. You wouldn't notice it." I am left unpersuaded as to the corroborative value of the log in question, and have therefore disregarded it.

There are, it is true, discrepancies in the affirmative showing as to the speed of the steamer, and as to the asserted collision between her and the tug before she rolled to port, but such discrepancies are not of a substantial nature. It substantially appears by a preponderance of the evidence that the Western States was navigated at a rate of speed approximating eight miles an hour; that she violated the United States statute which forbids navigation in the entrance channel of Buffalo river between the United States breakwater light station and the junction of the Buffalo river with the City Ship Canal at a greater rate of speed than six miles an hour. And, moreover, because of her excessive speed, it is not improbable that she ran into the Princeton, to whom she had thrown a tow line, causing her to sink and the decedents to drown.

But the steamer was not solely to blame. The facts and circumstances also show that the master of the tug was delinquent, and that he negligently navigated the tug. The fault of both vessels was the proximate cause of the accident, and each contributed thereto in such a manner that, if it had not been for their joint concurrent negligence, there would have been no collision or drownage. The Princeton was bound to keep out of the way of the steamer which she contracted to tow to her berth. It was negligence to take the heaving line at the speed the steamer was navigating or to run alongside or close to her when concededly the safety of the tug was endangered. Indeed, the proofs show that it was customary for a tug to refuse to take the line from a steamer under headway if her speed was excessive, and to blow a signal requesting her to reduce her headway. This rule or custom was not obeyed by the tug. According to her master, both ves-

sels were running at a dangerous rate of speed, and he realized the unusual speed at which the steamer was approaching the point where he was awaiting her, and in his estimation she was going eight miles an hour at the time of the impact. His explanation that he believed the steamer would diminish her speed so as to make it safe or proper for him to take the tow line does not excuse his lack of care or exonerate the tug, which must be held guilty of contributory negligence and in equal fault with the steamer.

As to the law of the cases, proctors for the Western States contend that, if the court holds both the steamer and tug in fault, there can be no recovery against either claimant, and that, as the decedents were joint actors in a common enterprise, the negligence of the Princeton or her master is imputable to them. Neither of these propositions are sound. Both sides concede that the rights of recovery herein by the libelants in their representative capacity are not enforceable by the ordinary maritime rules where contributory negligence bars recovery, and that the law of the state is controlling. Robinson v. Detroit & C. Steam Nav. Co., 73 Fed. 883, 20 C. C. A. 86; The City of Norwalk (D. C.) 55 Fed. 98; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, affirming In re Old Dominion S. S. Co. (D. C.) 134 Fed. 95; The Hamilton (D. C.) 139 Fed. 906; Id., 146 Fed. 724, 77 C. C. A. 150. It is well settled that joint tort-feasors are not permitted to escape responsibility against them by proving that the other wrongdoer was also in fault for the tortious act. Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; The Hamilton, 146 Fed. 724, 77 C. C. A. 150. In The Hamilton, supra, the colliding vessels were held in fault. Various members of the crew of the Saginaw libeled the Hamilton, which contended that, as the Saginaw was negligent, the decedents were fellow servants with her master who negligently managed the vessel, and therefore the Hamilton could not be held. But the Circuit Court of Appeals, speaking by Judge Coxe in answer to this contention, said:

"No case with which we are familiar has gone to the extent of holding that the captain of a vessel is a fellow servant with the cook, the stewardess, and the other inferior members of the crew. A better illustration of the doctrine of alter ego can hardly be imagined. Goslee, the chief officer, was not negligent. What he did was under the direction of the master, and it would be a dangerous doctrine to hold a subordinate guilty of fault for obeying the orders of his superior. But, assuming that the rule as to the negligence of a co-servant can be invoked where the action is against another vessel, it would seem that the common-law rule that the negligence of a co-servant does not defeat the action unless such negligence is the sole cause of the disaster is also applicable. No matter how much such negligence may contribute, the defendant is not relieved if he himself be at fault."

The language quoted may fittingly be used to answer similar contentions in this case. There is nothing in the record to prove that the engineer, Trauffler, or the fireman, McClure, were personally negligent. True enough some testimony was given to the effect that the engineer sometimes increased or lessened the speed of the tug without receiving specific instructions to do so from her master, and that he and the fireman were in a position on the tug where they could observe the speed of the steamer, yet the master was in absolute control of the

management of the tug, and, under the circumstances, it was the duty of the subordinates to obey his instructions or commands. Certainly the engineer and fireman could have been no more negligent than was Goslee, the chief officer of the Saginaw. In The Hamilton, supra, the Supreme Court of the United States, distinguishing the case from The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, held that the contractual relations between the seamen and the vessel could not affect the liability of another vessel which was in fault for injuries received. It may be doubted whether the master, the engineer, and the fireman were fellow servants, but, assuming that in the occupation of towing the steamer to her dock such relationship in admiralty or at common law existed, we must, as already pointed out, in this case look to the law of the state to guide us in our determination. By the employer's liability act of the state of New York (chapter 600, Laws 1902), it is expressly provided that an employé or his representatives shall not be deprived of their remedies against the employer where the negligent act was committed by any person in the service of the employer intrusted with the duty of superintendence or whose sole or principal duty was that of superintendence. By analogy a master who has sole charge of the navigation of a tug peculiarly exercises the principal duties of superintendence, and I think it may therefore be held that the libelants have a right of recovery against the Princeton, and, moreover, that both the tug and the steamer may be held. Hayward v. Key, 138 Fed. 34, 70 C. C. A. 402; Sweet v. Perkins, 196 N. Y. 482, 90 N. E. 50; The Hamilton, supra.

The next question relates to the liability of the Western States for the death of Norbury. It is claimed that, as he was not one of the crew of the Princeton, he was a trespasser, and had no right whatever aboard her and therefore there can be no recovery against the steamer by his representatives. It is not improbable that this question might be more effectively urged against the liability of the tug, but as to the negligence of the Western States it is not entitled to weight. She undoubtedly owed to him the duty of careful navigation as she did to the crew of the tug, and, as it is not shown that he contributed to the injury or had anything to do with the navigation of the tug, it is difficult, in view of what has been stated hereinbefore, to see why his representatives should be denied recovery.

Evidence was taken at the trial to enable the court to determine the amount of damages without reference to a master. It is shown that Trauffler was 35 years old, a widower, with four children, aged, respectively, 4, 7, 10, and 13 years, who were entirely dependent upon him for support. He was a competent tug engineer, receiving $130 per month for about eight months of the year, or the period of navigation, and about $15 per week during the winter months. He was a man of good habits and physically sound. His children are now in the custody of their grandmother, the libelant, and cared for by her. I think the sum of $7,500 would reasonably compensate the children for their pecuniary loss.

The claim of the libelant for the death of McClure is allowed at $3,000. He was 25 years old, unmarried, a fireman earning about $600 per year. He contributed to the support of his widowed mother,

who is 64 years old, and somewhat to the support of the minor children of a deceased sister.

The claim for the death of Norbury, which is against the Western States alone, is allowed at $2,000. He was 20 years old, unmarried, and contributed to the support of his father, who is 43 years old. His earning capacity as a fireman was about $500 or $600 per annum. He lived at home with his parents, who, however, were not dependent upon him for support.

There will be a decree for libelants, with costs, in each of the above-entitled cases, in accordance with the views hereinbefore expressed.

THE DIANA.

(District Court, E. D. New York. August 11, 1910.)

COLLISION (§ 45*)—STEAM AND SAILING VESSELS—NEGLIGENT NAVIGATION OF STEAMER.

A collision at sea at night between a steamer and a bark meeting on slightly converging courses *held* due solely to the fault of the steamer in changing her course when she was apparently upon and crossing the course of the bark, whose lights were both seen, under the erroneous assumption that the bark was also changing her course; it having been the duty of the steamer to stop and reverse if in doubt as to the course of the bark, whereas she continued at full speed.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 45.*]

In Admiralty. Suit by William Hansen, as owner of the steamship Diana, against Daniel Emery and others, owners of the bark Boylston, and cross-libel by the owners of the Boylston against the Diana. Decree against the Diana.

Wheeler, Cortis & Haight (Charles S. Haight and Clarence Bishop Smith, of counsel), for the Diana.

Wing, Putnam & Burlingham (James Forrester and Robinson Leech, of counsel), for the Boylston.

CHATFIELD, District Judge. On the evening of November 19, 1909, the steamer Diana was proceeding in the Atlantic Ocean off Barnegat, upon a course shown exactly by her compass readings as S. S. W. ½ W. At about 11 o'clock p. m., when the weather was perfectly clear and the stars shining, the lookout upon the bow of the vessel discerned what he calls the loom of the sails of a bark, the Boylston, "right ahead." He called this to the attention of the officer upon the bridge, who observed the bark through his glasses. The distance of the bark from the steamer is estimated by these witnesses at different amounts from one-half a mile to two miles; but, under the circumstances and in the darkness, it would seem that the smaller estimate was more nearly the correct one, at least at a time when the situation of the boats had any effect upon their actions.

The officer in charge testifies that he observed the sails, and shortly after made out both lights of this vessel; the red light being less distinct than the green. He had the steamer's helm put to port, the

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

wheel being thrown about half over, while he observed the bark through his glasses. Under this wheel the ship continued her course at a speed of some 9 knots, covering about 900 feet per minute, and turning to the starboard or toward the west. The bark was sailing directly before the wind and was making about 5 knots an hour upon a compass course shown by the testimony to be exactly N. E. As the officer of the steamer observed the lights of the bark and looked at them through his glasses, the red light disappeared, from which he concluded that the bark had changed her course and was turning to port.

The boats then being comparatively near, the officer of the steamer, assuming that there was not time nor space to change back to starboard, gave the order hard aport, in an endeavor to keep away from what he supposed was a turn in the same direction on the part of the bark. The steamer, under this helm, swung around some 8 points from her original course, and at the time of the collision was heading approximately N. W. The captain of the bark testified that the bow of the steamer struck the bark on the anchor-stock, which was hanging over the port side in the usual position, and that the stem of the steamer then scraped along the bowsprit of the bark and injured the rigging. But the testimony of the other witnesses and the injuries to the vessels would indicate that the bark and the steamer swung together in such position that the bowsprit of the bark came in contact with the funnel rigging of the steamer; that, as the force of the blow swung the bark to port, her anchor-stock came in contact with the side of the steamer, a little aft of amidships, and there indented several plates, the vessels then scraping along until they cleared one another, when the steamer continued on a circle toward the north and finally came back to the bark. The captain of the bark then hailed the steamer and demanded that she stand by, and understood the captain of the steamer to give him the name "Arondale." After some discussion both vessels proceeded, the steamer standing by till daylight, when the captain observed that the name of the steamer was "Diana," and port was made without further accident.

From the standpoint of the bark the story of the collision is that the steamer was seen for a distance of some three miles, approaching on a course which would cross the bow of the bark; that the steamer continuously showed her green light until she reached a position two or three points upon the starboard bow, when the steamer suddenly changed her course to starboard and headed for the bark. In this dangerous position, the captain of the bark and the mate testify that she was swung sharply to port in an endeavor to avoid the blow, and that it was impossible to keep out of the way of the steamer; the captain on the stand testifying that the bark had hardly begun to change her course when the blow came.

The captain of the bark is unable to explain how the steamer could have made such an abrupt change of course in such a short distance, and he testified that the only blow struck by the steamer was with her stem against the anchor-stock of his vessel. But it is evident that a blow such as he describes would have caused more injury, and that the contact of the vessels was as has been described, and on more

nearly parallel courses than it seemed to him in the excitement of the moment. The officer of the steamer who gave the orders fixes the position of the bark at the time of giving the order hard aport as one point on the port bow of the steamer. It is evident that if, after sighting the bark dead ahead and upwards of half a mile away, the steamer continued upon a course even 1½ points across the path of the bark, and if this officer, thinking to pass the bark to port, had his helm ported, the speed of the vessel and the curve described under the port helm would still carry the steamer to a point where the bark would be to starboard but upon the port bow as the steamer swung around. Such a movement would shut in the red light of the bark, and it seems to have given rise to the erroneous supposition on the part of this officer that the bark was at the same time changing its course to port.

It is difficult to see why the officer, if he considered that the bark was close at hand and that its lights had not been discovered in sufficient time to avoid danger, and if he felt that there was not time to ascertain exactly what the movements of the bark might be, did not stop the progress of the steamer rather than to proceed on the new course at full speed. If the steamer was in this position, and her officer mistook the movements of the bark because of the steamer's own change of position, then the steamer must be held responsible. If the boats were in such position that there was not time to correctly ascertain what course the bark was holding, and to estimate whether the steamer could go to port or should proceed across the bark's bows, then the steamer should have been stopped and reversed so as to lessen the danger of the position. If the steamer intentionally proceeded to make a turn such as is described by the officers of the bark, she should not only be held responsible, but such maneuver on her part would be a deliberate attempt to run down the bark and is inconceivable.

The officers of the steamer testify that, when the loom of the sails of the bark was first seen, the bark was dead ahead. If, at the same time, the officers of the steamer could see both lights, the vessels must have been on substantially the same course, and a turn to starboard, in order to pass port to port, was the proper maneuver. But the compass courses of the vessels show that they could not have been upon the same course. The Diana, upon the compass course indicated, at a distance of half a mile, would have been in a position where she could have seen the Boylston dead ahead, and in the space of a few seconds crossed the course of the Boylston so that both lights would then be visible. If the steamer's helm were then ported, the speed of the steamer would be sufficient to shut out the Boylston's red light; but no collision would have been possible, if the Diana had either held her course or turned to port instead of to starboard. The speed of the steamer was greater than that of the bark. She covered substantially twice as much ground as the bark before the collision happened, and even then made a turn of eight points to starboard and nearly cleared the Boylston, whose bowsprit first came in contact with the funnel stays of the steamer.

On the other hand, if the Boylston was not exactly dead ahead, but if the compass courses were as shown by the testimony, and if the

Diana saw both lights of the Boylston at the time of ordering a change of helm, the situation must have been such that the Diana immediately passed across the bows of the Boylston to starboard, and no collision could have resulted if the Diana had not turned back under her port helm.

From the standpoint of the positions of the boats, as understood by the first officer of the Diana, the movements of the Boylston and the testimony of her witnesses are so contradictory and extraordinary as to justify a reference to those cases in which the testimony of a deliberate change of course, in order to cross the bows of the injured vessel, has been held incredible. From the standpoint of the Boylston, the testimony of the witnesses for the Diana is incapable of being reconciled with what the Boylston's crew claim they observed, and the whole situation, as well as the testimony of all the witnesses, must be weighed together in determining the precise facts.

The Boylston has charged the Diana with fault and filed a libel for the damage she sustained. The Diana has alleged that the Boylston was wholly at fault and has also libeled that vessel for the damages of the Diana. The burden of proof, therefore, is upon each party to prove the charges it makes, and the cross-allegations put the court under the necessity of determining the facts from the stories of both parties, rather than to see if either one has sustained the burden of proof. Under these circumstances, it must be held that the officer of the Diana, who mistook the movements of the Boylston, was responsible for the collision; and, as the vessels were not in extremis, his mistake must be held negligence, and the Diana held responsible for the damages to the bark.

But before resting upon the question of negligent seamanship, one or two other points must be considered. The steamer alleges that the bark was at fault in having poor lights and in having them placed on davits at the extreme stern, instead of at the point of greatest beam of the hull of the vessel.

The statute requires the lights to be placed at or near the greatest width of the ship. But upon a bark the sails would not interfere with the lights at the stern. These lights are there in less danger, more easily observable from the deck, and the davits are in fact the widest part of the bark. It would not seem, therefore, that the placing of the lights at the stern is of itself a ground for criticism. The lamps themselves were constructed according to the custom of ordinary usage, met the requirements of the statute, and, while so situated that from a position dead ahead the cordage and rigging of the vessel obstructed in daylight a view of the lamp, nevertheless it would seem that, when lighted, their beams would be thrown straight ahead in such a manner as to comply with the requirements in that regard.

It only remains to consider the fact that the lights of the Boylston were not observed at anything like the distance of 5 miles, which the witnesses testify such lights would usually be visible. It may be that the lamps were not kept in condition, or that they did not burn as brightly as possible; but nothing is shown except that they were not seen by the lookout or the officers of the steamer. Later that night they were observed at a distance of 1½ miles, but were said to be dim.

If the accident were attributable solely to difficulty in observing these lights, responsibility for their not having been seen would have to be determined; but the court cannot see how the steamer can be free from blame under the findings which have been made, when the collision was caused by negligence of its officers after they did discover the lights, there being no reason or necessity for the collision if the vessels had held their course, or if the steamer had not assumed that the bark was turning to port when her red light was shut out of view.

The libelant Emery may have a decree, and the libel of the owners of the Diana will be dismissed.

HALE v. O'CONNOR COAL & SUPPLY CO., Inc., et al.

(Circuit Court, D. Connecticut. June 15, 1908.)

No. 591.

MONOPOLIES (§ 28*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.

The complaint, in an action under Sherman Anti-Trust Act July 2, 1890, § 7, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover damages for injuries to plaintiff's business caused by an alleged combination and conspiracy between defendants in restraint of interstate trade and commerce and to monopolize such commerce, considered, and *held* sufficient on demurrer.

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

Action by Charles R. Hale against the O'Connor Coal & Supply Company, the Hatch & North Coal Company, the Hartford Coal Company, W. C. Mason & Co., Incorporated, the Robert Price Company, the Tunnel Coal Company, William H. Foster, William W. Frayer, and Mary E. Frayer, copartners as Frayer & Foster, Reinhold Hakewessell and Grant U. Kierstead, copartners as the City Coal Company, Albert D. Goldberg, Harris I. Sack, and John Sack, copartners as the North End Coal & Feed Company, George W. W. Newton, and Charles W. Newton, copartners as George W. Newton & Son, Don O'Connor, Albert P. Day, Frederick S. Belden, Holman Goldberg, Isidore E. Goldberg, and William E. Miller. On demurrer to complaint. Overruled.

The following is the substantial part of the complaint:

First Count.

(1) Since the month of October, 1903, the plaintiff has been, and still is, engaged in interstate commerce as a retail coal dealer in said city of Hartford; his business consisting of buying coal mined in states other than the state of Connecticut, causing said coal to be brought to said state of Connecticut, and selling said coal at retail in said city of Hartford.

(2) During the whole of said time the defendants the Hatch & North Coal Company, the Hartford Coal Company, the Tunnel Coal Company, Incorporated, William H. Foster, Mary E. Frayer, Reinhold Hakewessell, Grant U. Kierstead, Abraham D. Goldberg, Harris I. Sack, John Sack, George W. Newton, Charles W. Newton, Holman Goldberg, Isidore E. Goldberg, and William

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

H. Miller, and each of them, have been engaged in the business of buying coal mined in states other than Connecticut, causing said coal to be brought to the state of Connecticut, and selling said coal at retail in said city of Hartford.

(3) Said the Robert Price Coal Company, Incorporated, has been engaged in said business since about the month of April, 1904, said the O'Connor Coal & Supply Company, Incorporated, since October, 1904, said W. C. Mason & Company, Incorporated, since January, 1906, and said William W. Frayer since about the month of January, 1906.

(4) Said William W. Frayer was engaged in said business from October, 1903, until about the month of January, 1906, as agent and manager for said William H. Foster and Mary E. Frayer.

(5) Said Robert Price was engaged in said business from October, 1903, until about the month of April, 1904, and since that time has been, and still is, the president of said the Robert Price Coal Company, Incorporated.

(6) Said Don O'Connor, since October, 1904, has been, and still is, engaged in said business as president of said the O'Connor Coal & Supply Company, Incorporated.

(7) Since October, 1903, said Albert P. Day has been, and still is, engaged in said business as president of said the Hatch & North Coal Company, and said Frederick S. Belden, as president of said the Hartford Coal Company.

(8) At all times since the month of May, 1904, until the date of this complaint, such of the defendants as were engaged in the retail coal business as above set forth have wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, combined and conspired in restraint of trade and commerce among the several states with the purpose and intent of preventing and restraining the plaintiff from purchasing coal mined in states other than Connecticut, from causing coal to be brought to said state of Connecticut, and from selling coal in said city of Hartford.

(9) In pursuance of said combination and conspiracy, said defendants, personally and through their agents, have endeavored, and still endeavor, to cause wholesale dealers in coal in Connecticut and other states to refuse to sell and deliver coal to said plaintiff. Among said wholesale dealers are the Benedict & Pardee Company, Benedict, Downs & Co., Incorporated, and Williams, Wells & Co., all of New Haven, in the state of Connecticut, Percy Heilner & Son, Madeira, Hill & Co., and Peale, Peacock & Kerr, all of the city and state of New York, Weston, Dodson & Co. of Bethlehem in the state of Pennsylvania, and the Connecticut Coal Company and Frank Miller & Co., both of Bridgeport in the state of Connecticut.

(10) By the said efforts of the defendants many of said wholesale coal dealers were induced to refuse, and did refuse, to sell coal to the plaintiff, including all the wholesale coal dealers above named except said Frank Miller & Co.

(11) By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times unable to secure coal to sell to his customers in said Hartford, and has thereby been prevented from making sales to said customers, and has wholly lost the profits which would otherwise have accrued from such sales.

(12) By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times delayed in securing coal, and has thereby been prevented from making sales to his said customers and has wholly lost the profits which would otherwise have accrued from such sales.

(13) By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times delayed in securing coal, and has by reason of said delay been obliged to pay for said coal a price higher than he would otherwise have paid, to his great loss and damage.

(14) By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been put to great expense and has been compelled to spend much time in securing coal to sell to his said customers in said city of Hartford.

(15) In pursuance of said combination and conspiracy, said defendants, personally and through their agents, have circulated in said city of Hartford

false and malicious reports with regard to the financial condition of the plaintiff, with regard to his ability to deliver coal to his said customers, and with regard to the quality of the coal sold by him.

(16) In consequence of the wrongful acts of the defendants above set forth, the plaintiff has lost many of his said customers and much of his trade and business and suffered great injury in his business.

(17) By reason of the said combination and conspiracy and the acts of the defendants above set forth, the rights of the general public in said city of Hartford and elsewhere have been injuriously affected and interstate commerce impeded and prevented.

(18) By reason of the said combination and conspiracy and the wrongful acts of the defendants above set forth, the plaintiff has suffered loss and damage to the amount of $12,000.

Second Count.

(1) Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the first count are hereby made part of this count.

(2) At all times since the month of May, 1904, such of said defendants as were engaged in the retail coal business as above set forth, wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, have combined and conspired to monopolize the trade and commerce in said city of Hartford in coal mined in states other than the state of Connecticut.

(3) Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the first count are hereby made part of this count.

Third Count.

(1) Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the first count are hereby made part of this count.

(2) At all times since the month of May, 1904, such of the defendants as were engaged in the retail coal business as above set forth have maintained an organization known as the Hartford Coal Dealers' Exchange for the purpose of establishing and maintaining the prices for coal in said Hartford, and, because the plaintiff would not maintain the prices of coal charged by him to his customers in accordance with the scale of prices established as aforesaid, said defendants wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, combined and conspired in restraint of trade and commerce among the several states with the purpose and intent of preventing and restraining the plaintiff from purchasing coal mined in states other than Connecticut, from causing coal to be brought to said state of Connecticut, and from selling coal in said city of Hartford.

(3) Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the first count are hereby made part of this count.

The plaintiff claims $36,000 damages by force of the act of Congress in such case made and provided, the same being threefold the damage by him sustained, together with the costs of suit and a reasonable attorney's fee.

Defendants filed the following demurrer:

(1) It does not appear in the first count of the complaint that the plaintiff at any of the times referred to in said first count was or is engaged in interstate commerce.

(2) It does appear from the first count of the complaint that a large part of the plaintiff's business consisted in the sale of coal at retail in the city of Hartford and the purchase of coal from the wholesale dealers in the state of Connecticut; and it does not appear that the plaintiff's transactions with wholesale dealers in other states, if any, constituted any substantial or material portion of the plaintiff's business.

(3) It is not alleged in said first count that the plaintiff ever had any dealings with wholesale dealers in states other than the state of Connecticut.

(4) It does not appear from said first count what was the character of the plaintiff's transactions with dealers in other states, if any; so that it can be determined whether said transactions were or were not operations in interstate commerce so far as the plaintiff is concerned.

(5) It does not appear from said first count that the combination and conspiracy therein alleged was a combination and conspiracy in restraint of trade and commerce among the several states or with foreign nations.

(6) The above-named defendants demur to paragraph 9 of the first count of the complaint because it does not appear that the acts of the defendants therein alleged were in pursuance of a combination and conspiracy in restraint of interstate commerce.

(7) Defendants demur to paragraph 10 of the first count of the complaint because it is not alleged and does not appear from the complaint that the alleged refusal of said wholesale coal dealers to sell coal to the plaintiff was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(8) The above-named defendants demur to paragraph 11 of the first count of the complaint because it is not alleged therein and does not appear from the complaint that plaintiff's alleged inability to secure coal to sell to his customers in Hartford was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(9) The above-named defendants demur to paragraphs 12 and 13, and each of them, because it is not alleged therein and does not appear from the complaint that the alleged delay in securing coal was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(10) Paragraph 14 of the first count of the complaint is demurred to because it is not alleged therein and does not appear from the complaint that the alleged expense and expenditure of time were the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(11) Paragraph 15 of the first count of the complaint is demurred to because it does not appear from the complaint that the alleged false and malicious reports were made in pursuance of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(12) Paragraph 16 of the first count of the complaint is demurred to because it does not appear from the complaint that plaintiff's alleged loss of trade and injury were the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

(13) Paragraph 17 of the first count of the complaint is demurred to because it is not alleged therein and does not appear from the complaint how the rights of the general public in said city of Hartford have been injuriously affected, or how and in what measure interstate commerce has been impeded and prevented.

(14) Paragraph 18 of the first count of the complaint is demurred to because it does not appear from the complaint that the plaintiff's alleged loss and damage is the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

Demurrer to Second Count.

(1) All the paragraphs of the demurrer to the first count are hereby made part of the demurrer to the second count.

(2) The above-named defendants demur to the second count of the complaint because it appears therefrom that the alleged combination and conspiracy to monopolize trade and commerce is a conspiracy to monopolize trade and commerce in the city of Hartford, and is not a conspiracy to monopolize any part of the trade or commerce among the several states or with foreign nations.

Demurrer to Third Count.

(1) All the paragraphs of the demurrer to the first count are hereby made part of the demurrer to this count.

(2) The above-named defendants demur to the third count of the complaint because it does not appear therefrom that the combination and conspiracy alleged therein was or is a combination and conspiracy in restraint of trade and commerce among the several states.

J. H. Peck and R. M. Grant, for plaintiff.

J. Gilbert Calhoun, Hyde, Joslyn, Gilman & Hungerford, Robinson & Robinson, Bill & Tuttle, and John J. Dwyer, for defendants.

PLATT, District Judge. Starting with the decision of the Circuit Court of Appeals for the Sixth Circuit in City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721, as the foundation, this complaint has been examined at leisure and with due care. If any doubt could have been entertained after reading the words of the distinguished writer in that case, it has, to my mind, been dissipated by the later expressions delivered by the higher federal courts.

As things now stand, it would be flying in the face of the higher powers, with a vengeance, to accept as valid any of the criticisms launched against the complaint. If the facts therein alleged can be sustained by proof, a case will be presented which will invoke the aid of a federal, rather than a state, court. The situation is so absolutely one-sided as to satisfy me that no good purpose would be subserved by an extended discussion and citation of authorities.

Let the demurrers, one and all, be overruled.

J. T. MORGAN LUMBER CO. v. WEST KENTUCKY COAL CO.

(District Court, W. D. Kentucky. May 20, 1910.)

1. TOWAGE (§ 4*)—RELATION AND DUTIES OF TUG TO TOW—LOSS OR INJURY TO TOW.

One undertaking a towage contract is not a common carrier nor liable as such, but his obligation is to perform the service with the reasonable care and skill which a prudent and experienced person should use under similar circumstances, and beyond this he is not responsible.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. TOWAGE (§ 15*)—ACTIONS—DIVISION OF DAMAGES.

The rule in admiralty for the division of damages is not limited to cases of collision, but may be applied in any case where a loss results from the fault or negligence of both parties, and without regard to the issues raised by the pleadings, if it appears from the record to be required to meet the ends of justice.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 38; Dec. Dig. § 15.*]

3. TOWAGE (§ 12*)—BREAKING OF LOG RAFT IN TOW—LIABILITY—FAULT OF BOTH PARTIES.

Libelant company had a raft of logs moored in the Tennessee river near its mouth, which became endangered by a rise in the river, and libelant employed respondent to tow it to libelant's lumber mills located on the Illinois side of the Ohio. Two tugs were used which safely took the raft across the Ohio, and proceeded down toward the mills. It was necessary from the position of the raft on that side of the river to pass around some piling before reaching the mills, and the tugmasters deemed it dangerous at that time, owing to a strong wind from the Illinois side, and proposed to tie up the raft until the wind abated, but to this libelant's president, who was on board, refused to consent, and insisted on landing at the mills, promising to supply the necessary lines. He fur-

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

nished wire cables, and, owing to their inelasticity and the force of the wind, the raft was broken in landing, and some of the logs were lost. *Held*, under the evidence, that the tugs were not negligent in the manner of handling the tow, but were in fault for not tying the tow up in accordance with the judgment of the masters, notwithstanding the objection of libelant's president; that libelant was also in fault because of its interference through its president and the improper ropes furnished, which acts were the proximate cause of the loss; and that the damages should be divided.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24–26, 29; Dec. Dig. § 12.*]

In Admiralty. Suit by the J. T. Morgan Lumber Company against the West Kentucky Coal Company. Decree for libelant for half damages.

Bagby & Martin and Campbell & Campbell, for libelant.
Wheeler & Hughes, for respondent.

EVANS, District Judge. The court finds the facts in this case to be as follows: The libelant, which manufactures and sells lumber, had a large raft of logs moored in the Tennessee river not far from its junction with the Ohio. A very rapid rise in the Tennessee put the raft in peril, and made it necessary that it should be promptly removed, and on February 20, 1909, the libelant contracted with the respondent to make the removal with its steamer Harth at the usual price of $2.50 per hour for the time consumed in the work. Though the libelant asserts to the contrary, there was in fact no agreement that the raft should be divided and removed half at a time. The contract was to tow the raft to Brookport, Ill., and there to land it. The Harth attached itself to the raft, and, the difficulties proving to be considerable, the steamer Kuttawa was engaged to assist the Harth, and the Kuttawa also attached itself to the raft. Both steamers fastened themselves very close to the raft and behind it; the idea of the master of the Harth, who was in command, being to push the raft in front of the steamers, instead of placing the steamers in front of the raft and pulling it by means of tow-lines. The Ohio river between Paducah and Brookport is divided by an island known as the Towhead; the main channel being on the Kentucky shore. The waters of the Tennessee are naturally turned to the left by those of the Ohio when they meet, and are thus forced westward along the Kentucky shore. Owing to the rapid rise of the Tennessee, there was on the Kentucky shore a great accumulation of water, and the master of the Harth deemed it wiser to avoid the mass of water thus forced upon that shore by steering from the Tennessee directly out into the Ohio, and by passing to the right, instead of the left, of Towhead Island to get into the minor channel on the Illinois shore, and in that way proceed towards Brookport, Ill., where the libelant's mills were situated. Brookport is a place about a mile and a half below the city of Paducah, and the river between them is quite wide. The steamers with the raft in tow got safely into the quieter waters of the minor channel on the Illinois side of the river, and which does not appear to have been then much

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

affected by the water from the Tennessee. Just above the landing at Brookport, the Illinois Central Railroad Company has extensive piles extending out into the river which constitute a material part of its large ferry and traffic facilities for transferring its business from the north side of the Ohio to Paducah, Ky., and points south, and vice versa. The landing at Brookport was almost immediately below those piles. When the Harth and the Kuttawa, with the raft in their front, approached the piles, the captains of the two boats united in informing J. A. Morgan, the president of the libelant, who was on the Harth, and accompanying the tow, that as the wind was blowing hard from the Illinois shore, and as it was late in the day, it would not be safe on that day to attempt to make a landing at Brookport below the piles, but that it would be better and safer to put into the Illinois shore in the "pocket" above the piles where the raft would be safe for the night, and insisted that this course should be pursued. The president of the libelant refused to agree to this, and, stating that he would take the responsibility, directed the landing to be made at Brookport on that day, saying that he would get on libelant's gasoline launch, which was then approaching from Brookport, and would go ahead and make all necessary arrangements for cables and ropes, of which he declared there was an abundant supply at libelant's mills at Brookport. Morgan, the president, soon afterwards boarded the launch which had come for him. Acting under these directions of the president of the libelant, the steamers undertook to land the tow at Brookport, but were unable to do so, owing largely to the wind that blew from the Illinois shore. However, they came close enough in for very long ropes furnished and brought out by the libelant to be attached by its men to the raft, but, as the ropes were wire and would not "give," they pulled the raft apart, and a large proportion of the logs which composed it were lost. The libelant expended $150 for ropes in its subsequent efforts to save the logs, and in the course of those efforts it used the steamer Morgan, one of its own boats, and a derrick boat which it hired, for a period of 18 days, and in that way saved a large proportion of the logs which had been cast away when the raft was broken up. The value of the services of this steamer and derrick boat for 18 days, though not very satisfactorily proved, the court finds was $35 per day, a total of $630, which sum the court finds was the reasonable value of the services of the boat and crew for that period, and this sum, added to $150 paid out for ropes, makes a total of $780 expended by the libelant in its efforts to save the logs. The logs which made up the raft were cut from libelant's lands located up the Tennessee river, and no very satisfactory testimony was offered as to their value there or as to the cost of getting them to Paducah. They were in large measure oak logs, but the testimony shows that a considerable proportion—about one-third to one-half—of such rafts must be of light and cheaper timber (such as gum, poplar, etc.) to enable the raft to float at all; a raft made up exclusively of heavy timber like oak being certain not to float very long. In the raft were 1,604 logs. Of that number 1,122 were saved, and 482 were lost. Those lost contained 96,400 feet, and we find, all things considered, that the value of it was $15 per thousand feet, or a total value of $1,446, which,

added to the expense of the salvage, namely, $780, makes a total loss of $2,226. The libelant claims that the logs lost were worth more than $15 per thousand feet, but the court does not so find from the testimony.

The libelant bases its claim to recover the loss from the respondent upon the assertion that the latter was negligent, first, in not dividing the raft into two parts before undertaking to remove it; second, in attaching the steamers to the rear of the raft; third, in not attaching the raft to the steamers by tow lines of considerable length, so as to permit the floating of the raft at a safe distance from the sterns of the steamers; fourth, in not taking the Kentucky shore after getting into the Ohio river; and, fifth, in not using due care in making the landing at Brookport. In cases like this negligence is the failure to use the reasonable care and skill which a prudent and experienced person should use under similar circumstances. The respondent, when it undertook the towage of the raft, became bound to transport it to Brookport, and safely to land it there, if by the use of all reasonable care and skill it could do so, though it did not become bound to land the raft on February 20, 1909. But, although the libel avers and the answer admits that the respondent was a common carrier, that as matter of law was not true, nor are the liabilities of a common carrier those which were incurred by the respondent under the towage contract in this case. The policy of the law forbids the conclusion that a contract for towage imposes the obligations of a common carrier or makes the person engaging to do the towing an insurer of the safety of the thing towed. This was definitely settled by the Supreme Court in the cases of The Syracuse, 12 Wall. 176, 20 L. Ed. 382, and The Margaret, 94 U. S. 496–7, 24 L. Ed. 146. Many other cases have followed this ruling. Would a prudent and skillful person have divided the raft before starting on the voyage when the Tennessee river was rapidly rising, is a question upon which the testimony is conflicting. It might depend upon whether the flood in the river made immediate removal imperative. Should the steamers have preceded the raft, towing it by long lines attached thereto, or was it better to lash the boats and the raft close together, the latter in front, so that it could be pushed towards the Illinois shore, are also questions upon which the expert witnesses radically differed. The captain of the Harth thought the latter was the better course under the circumstances—that is to say, better to get behind the raft and push it across the Ohio and directly up to the landing at Brookport, and, when that landing was approached from above, to allow the steamers again to put their sterns towards the middle of the stream when they got opposite the landing, and then to flank the raft in to the landing—and several experts testified in support of the wisdom of the course pursued by the steamers. Probably a greater number of the experts testified that the other course would have been better, and but for the immense flow of water out of the Tennessee river at the time and when it was rapidly rising we should say that probably it would have been better seamanship to have adopted the other course, namely, to have put the steamers in front with towlines of some length attached to the raft, and to have followed the Kentucky shore until the steamers could have proceeded directly across the Ohio

to the Illinois side to a point which would put them below Brookport, and then to have effected a landing there by heading upstream, and allowing the current to float the raft in to the shore by the time the steamers got to the landing. But the wisdom of this course may have depended upon the conditions on the Kentucky shore at the time, and it may be that the flood there produced by the sudden oncoming of the water from the Tennessee might have rendered that course less wise than the one actually pursued by the captain of the Harth who was an old and experienced steamboat man, and thoroughly acquainted with the rivers near Paducah, alike in their ordinary and in their extraordinary stages of water.

But we think these matters need not be very especially considered, because, in fact, the steamers towed the raft in perfect safety past the Towhead Island and near to the Illinois shore and near to Brookport. However towed, the raft was perfectly safe until the attempt was made to land it, and it is what occurred on the Illinois side of the river that has claimed the very careful consideration of the court. Without going into details, we think the steamers were in fault in trying to land on that day instead of taking the raft into the pocket or eddy above the piles, and there awaiting the return of daylight and a change or a cessation of the heavy wind that was blowing off the Illinois shore. The respondent, through its agents, had supreme control of that much of the situation (Transportation Line v. Hope, 95 U. S. 300, 24 L. Ed. 477), and it was hardly the exercise of due care and skill not to have controlled it even in the face of libelant's directions. And it may possibly be that the steamers were in fault also in remaining too close to the Illinois shore after passing Towhead Island and the piles instead of taking more sea room and thus be enabled to approach the landing head on. On the other hand, we are clear in the opinion that the owner of the raft was in even more fault when, through its president, who accompanied the tow, it interfered and directed the steamers to make the landing that afternoon at Brookport, and when later on it of its own volition so attached wire ropes to the raft as to break it to pieces. These acts upon the libelant's part appear to have been the proximate causes of the disaster, without which it might not have happened, and were less excusable if, as some of the testimony tended to show, the raft was in bad condition when in the Tennessee.

However, as both parties were in some fault (the comparative degrees of which we need not consider), the only remaining inquiry is whether this is a case for dividing the loss. True this question is not in terms raised in the pleadings, but as it can cause no surprise in the legal sense, in view of the cases we shall cite below, in the language of the Supreme Court in The Syracuse, 12 Wall. 173 (20 L. Ed. 382), "it is the duty of the court to extract the real case from the whole record and decide accordingly." The liberal rules of practice in admiralty cases allow this. For a long time almost every important case where such a division was adjudged was the simple one of collision, but in The Max Morris, 137 U. S. 1, and especially in what was said on page 14 of the report (11 Sup. Ct. 29, 34 L. Ed. 586), the Supreme Court so broadened the rule as clearly to make it applicable to this case. Since that decision the courts have applied the rule in many cases other than

those of collision, for example it was so applied in The Frank and Willie (D. C.) 45 Fed. 494; The Nathan Hale (D. C.) 48 Fed. 698; The Julia Fowler (D. C.) 49 Fed. 277; The Serapis (D. C.) 49 Fed. 393; The J. & J. McCarthy (D. C.) 55 Fed. 85; The Cyprus (D. C.) 55 Fed. 332; Vessel Owners v. Wilson, 63 Fed. 626, 11 C. C. A. 366; Smith v. City of Shakopee, 103 Fed. 240, 44 C. C. A. 1; The S. C. Hart (D. C.) 132 Fed. 536.

We therefore conclude that the libelant is entitled to recover from the respondent one-half of the loss, namely, $1,112, with interest from this date until paid. The costs of the action are also adjudged to the libelant.

LATCHTIMACKER v. JACKSONVILLE TOWING & WRECKING CO.

(Circuit Court, S. D. Florida. April 29, 1910.)

1. COURTS (§ 353*)—APPEAL AND ERROR (§ 977*)—FEDERAL COURTS—PROCEDURE—MOTION FOR NEW TRIAL.

   In the federal courts, the ruling of the trial court on a motion for new trial is a matter of discretion, not affected by the conformity statute nor the state practice, and not reviewable.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. § 353;* Appeal and Error, Cent. Dig. § 3860; Dec. Dig. § 977.*]

2. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVE VERDICT.

   A verdict for $10,000 to a plaintiff, 27 years old, with an earning capacity of $20 per month and an expectancy of 37 years, for a personal injury necessitating the amputation of one arm and one leg, *held* excessive, and a remittitur reducing it to $4,826 required to avoid a new trial.

   [Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

At Law. Action by Edward Latchtimacker against the Jacksonville Towing & Wrecking Company. On motion by defendant for a new trial. Motion granted conditionally.

This is an action for personal injuries sustained by the plaintiff, Latchtimacker, a seaman, engaged aboard the American barkentine Josephine. The declaration contained two counts with slight variation, alleging that the defendant, the Jacksonville Towing & Wrecking Company, so negligently performed the towage service rendered the barkentine as to cause his injuries. The alleged negligence consisted in suddenly veering and pulling the tow at right angles, causing the chock through which the hawser passed to part, allowing the hawser to slip from the chock and catch the plaintiff Latchtimacker between the hawser and the cathead, felling him and breaking a leg and arm resulting in the amputation of both limbs. Defendant to this declaration pleaded the general issue and contributory negligence. The size and sufficiency of the chock for all ordinary use both as to its resistance to the hawser used and size for a vessel of the tonnage of the Josephine, was claimed for the vessel.

The plaintiff at the time of the injury was 27 years old, and had signed aboard as an A. B. seaman, but it was in fact his first voyage at sea. His previous experience consisted of two years' work on coal barges in and about Norfolk and Baltimore. The highest wages he had commanded was $20 per month. His life expectancy was shown to be 37 years. The plaintiff at the time of the accident was standing forward of the hawser and chock, coiling jib sheets under orders of the chief mate. He had put one foot across the hawser to go aft, when looking to the starboard side he perceived the tug at

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

right angles to the vessel. Just at that moment the hawser parted the chock, and caught him about the legs and he remembered no more.

The defendant's witnesses, all shipmasters and experts testified that the position occupied by the plaintiff around the hawser while the vessel was under tow was very dangerous; that experienced seamen would not expose themselves to danger so imminently liable from a parting hawser; that there was no necessity for coiling jib sheets or down hauls until the vessel was placed at the dock; that, when the pilot came aboard, he took charge, to the exclusion of the master, of all matters pertaining to the navigation of the vessel. It was shown that the plaintiff was engaged at the time and place of the accident under orders from the mate.

The surgeons who attended the plaintiff testified to the necessity of the amputations and plaintiff's condition at the time. It was shown that the plaintiff had been able to earn scarcely anything since his injuries. The only evidence of suffering since leaving the hospital, where he remained for six months, was the plaintiff's own statement that he "suffered more or less still, and, when he walked too much, he could not sleep at night." Defendants produced several witnesses, shipmasters, to show that there was nothing unusual in the manner of towing the vessel at the place, and that it was sometimes necessary in order to turn the tow about to go at right angles in the manner described. The pilot on board the vessel at the time the plaintiff was injured testified that he had warned the men, including the plaintiff, to get back and away as soon as the hawser was made fast. This, however, was contradicted by the plaintiff's witnesses. The captain of the tug testified that he had used his best skill in towing the barkentine into port; that there was nothing unusual in the manner of bringing the vessel around; that he knew nothing of the accident to the plaintiff until he reached May port, but had slackened up for a moment when informed that the hawser had slipped, to allow the crew to replace it in the chock.

John E. Hartridge, for plaintiff.
N. P. Bryan, for defendant.

SHEPPARD, District Judge (after stating the facts as above). This cause was tried to a jury on the 19th of April, and a verdict was rendered in favor of the plaintiff assessing his damages at $10,000. A motion for a new trial was entered, two grounds only of which I deem it necessary to consider, viz.: (1) That the verdict was contrary to the evidence; (2) that the verdict was excessive.

I have carefully reviewed the testimony and have considered the case at some length. In federal practice such motions are addressed to the sound discretion of the court, and are considered and disposed of independent of any state statute or prevailing practice in the courts of the state where the trial was had. The exercise of a judicial discretion on such motions is not reviewable in federal practice. The exercise of the court's discretion is a rule of law established by the Supreme Court of the United States and is not controlled by the "conformity act," not affected by any state statute on the subject. Fishburn v. Chicago, M. & St. Paul Ry., 137 U. S. 61, 11 Sup. Ct. 8, 34 L. Ed. 585; Indianapolis Ry. Co. v. Horst, 93 U. S. 301, 23 L. Ed. 898. Naturally all courts are reluctant to grant new trials, and for good reasons will not grant them unless it is reasonably clear that prejudicial error has crept into the record, and only after a review of the entire record the court is satisfied that there is error, or that there must have been in the minds of the jury some other element than the evidence, or that the jury misconceived the testimony, and made a mistake. In either event, the responsibility of curing the mistake rests

upon the trial court, and, taking such view of it, the duty of the court is plain to see that justice does not miscarry. While I was not at all clear at the trial that the plaintiff's own negligence in remaining in a place of known danger when it was apparent that the hawser might part, and that just such an accident as happened might occur at any moment, was not such contributory negligence as to preclude recovery, the conflict in the testimony as to plaintiff's position and movements preceding and concurring with the accident reduces the question of negligence to one of fact, which was proper to be determined by a jury. In this class of cases negligence only becomes a question of law to be taken from the jury, when the facts are such that fair-minded men could only draw from them the inference that there was no negligence. When because of conflicting testimony reasonable men might draw different inferences as to the negligence charged it is a question of fact for the determination of a jury. Having submitted then the question of negligence to the jury, their verdict as to the first ground of the motion is conclusive.

The only remaining ground of the motion necessary to be considered is whether the verdict is excessive. The serious importance of this question to the defendant appears when it is seen that, if a mistake has been made by the jury, it is susceptible of correction in no other way than by the court that tried the case on a motion for a new trial. The Supreme Court in more than one case has said:

"Whether the verdict was excessive is not our province to determine on writ of error. The correction of that error, if any were committed, must be in the court below on motion for a new trial. The granting or refusal to grant a new trial is not assignable for error here."

Precedents are numerous for granting new trials in personal injury cases where excessive verdicts have been given. Railroad Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71.

I have considered the testimony in view of the verdict rendered, and do not find that the evidence warranted a verdict for $10,000. Plaintiff's earning capacity was shown to be $20 per month, or $240 per year. The plaintiff's life expectancy was shown to be 37 years. The court instructed the jury, in connection with plaintiff's requested instructions for estimating damages, the rule established by the Supreme Court of this state for estimating plaintiff's prospective losses in the future during his life expectancy for his diminished earning capacity, that such future damages should be reduced to their present value, and the present value thereof only should be included in their verdict. Tested by this rule, the income necessary to produce an annuity of $240 per year for 37 years, plaintiff's life expectancy, would be $2,826.04. The sum allowed by the verdict placed at 8 per cent. which is the current rate in the vicinity of the trial, would yield $800 per annum, and this sum would exceed plaintiff's annuity based on his established earning capacity by $560 per year. There was no showing that the plaintiff incurred by reason of his injury any expense on account of board, nurse hire, or medical treatment, neither was there shown any wantonness or reckless negligence on the part of the defendant for which exemplary damages might have been awarded. The only other element of compensatory damages which

the jury was authorized to estimate damages for would be for physical pain and mental suffering, which were inseparable from the injury, and which would necessarily and inevitably flow from it.

Mental pain which is separable from physical suffering, such as future pain or mortification from a crippled condition, have been held to be too remote and intangible to constitute an element for which the jury could allow damages. While it might be difficult to estimate the plaintiff's physical and mental pain, and while a wide latitude is allowed the jury in estimating for this element, it should nevertheless be confined within reasonable limits, and not left to arbitrary adjustment. The estimate of $2,000 for mental pain and physical suffering consequent upon and inevitable as a result of the injury would under the circumstances have been a reasonable and liberal allowance. Therefore, after due consideration of the case, I have reached the conclusion that a verdict for $4,826 should not be set aside. Plaintiff therefore will be given the right to elect whether he will enter a remittitur for the excess of this amount or take chances on another trial.

It will be ordered accordingly that if the plaintiff enters a remittitur in this case by the 1st day of June, A. D. 1910, in the sum of $5,174, judgment will be entered in his favor for the sum of $4,826 and all costs in his behalf expended to be taxed by the clerk of this court.

FRETTS v. SHRIVER et al.

(Circuit Court, N. D. West Virginia. July 28, 1910.)

COURTS (§ 367*)—FEDERAL COURTS—FOLLOWING STATE DECISION—RULE OF PROPERTY.

A unanimous decision of the highest court of a state construing a writing relating to the sale of a vein of coal underlying land in that state, and holding it to be an option and not a contract of sale, establishes a rule of property, and will be followed by a federal court in construing another contract relating also to property in that state and identical in terms.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*

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.]

In Equity. Suit by A. E. Fretts against Lee R. Shriver and others. On demurrer to bill. Demurrer sustained.

Goodwin & Reay and W. G. Bennett, for plaintiff.
Blue & Dayton and S. F. Glasscock, for defendants.

DAYTON, District Judge. Complainants on June 4, 1909, filed their original bill in this court, asking specific performance of what they allege to have been a contract of sale to them by defendants of the Pittsburg or River vein of coal underlying a tract of 230 acres of land in Monongalia county, W. Va. Jurisdiction is not questioned by reason of diverse citizenship, but defendants have interposed a de-

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

murrer to the bill, alleging, among other things, the contract in controversy to have been an option and not a contract of sale, and that the terms of the option were not complied with by plaintiffs, whereby it became void. The material part of the contract is as follows:

"The said coal to be paid for as follows, at the rate of twenty-five ($25.00) dollars per acre: One dollar on the signing of this agreement and the balance on payments as the party of the first part (the landowner) elects. The deed to be made for the above described tract of coal by the party of the first part, their heirs or assigns on 15 days notice in writing by the party of the second part, his heirs or assigns. A good deed with general warranty to be made whenever the unpaid purchase money is secured by bond with mortgage on the premises. A failure of the party of the second part to make the first payment within thirty days from the above date shall render this agreement null and void. The full amount for the above described coal is to be paid when deed is made as above stated."

This demurrer was very ably and exhaustively argued both orally and in briefs filed by counsel on March 23, 1910. By reference to the case of Tennant's Heirs v. Fretts et al. (W. Va.) 68 S. E. 387, it appears that Peter Tennant on the same day that the contract here bears date executed to Fretts a contract identical in terms with those above quoted, touching the same vein of coal underlying his farm of 163 acres situate in the same county; that subsequently his heirs instituted suit in the circuit court of Monongalia county against the two plaintiffs in this cause, asking that such contract be declared void and the cloud thereof be removed from the title. To this bill, Fretts, one of the plaintiffs here, appeared, demurred, and filed a cross-bill asking specific performance of the contract. On May 19, 1908, the circuit court of Monongalia county granted the relief to Tennant's heirs prayed for in their bill, and sustained a demurrer to the cross-bill of Fretts, and Fretts appealed. It is this appeal, determined by the Supreme Court of Appeals of the state, decided June 11, 1910, to which we have referred, supra. In the opinion the Supreme Court of Appeals, speaking through Williams, Judge, after quoting the terms of the contract as hereinbefore set forth, says:

"It is impossible to construe the agreement so as to give effect to all of its provisions. Some of them irreconcilably conflict with others. It first says, after reciting that $1 is to be paid at the signing of the agreement, that the balance is to be paid as Tennant may elect. Relying on this clause, counsel for appellant insists that Fretts was not bound to make any payment, or tender of payment, until Tennant should elect how much, and when, it should be paid. But it also contains the further provision that Tennant was to make deed upon 15 days' notice in writing by Fretts, or his assignee, and that deed was to be made whenever the unpaid purchase money was secured by bond with mortgage on the premises. A mortgage, of course, could not be executed until Fretts, who was to become the mortgagor, had obtained title, and title was not to be conveyed until after Fretts had given 15 days' notice to Tennant. No notice was ever given, and nothing was ever paid, except the $1. The foregoing provisions contradict each other, and both cannot be given effect. But the clause providing for a forfeiture of the contract in the event Fretts did not make the cash payment within 30 days from its date we think clearly indicates that the writing was considered by the parties as an option, and not as a sale, and that Fretts had 30 days in which to elect whether or not he would accept. It is true the writing does not specify the amount of the cash payment to be made in 30 days. The cash payment cannot refer to the $1, because that was expressly provided to be paid at the signing of the agreement. It must therefore necessarily refer either to a

certain portion of the purchase money, the amount of which was agreed on by the parties, but not expressed in writing, or it must refer to, and include, the whole purchase price. It is unnecessary for the purpose of this case for us to decide whether it referred to the whole, or only a part of the price, because it follows that the failure of Fretts to make a tender of it, whether it was all or a part, within the 30 days, rendered the contract void. If no certain amount in fact was agreed on to be paid within 30 days, Fretts should have elected to pay the whole purchase price, if he would avoid the effect of this forfeiture clause; and, not having done so, all his rights under the agreement ended. Courts of equity do not as a rule enforce a forfeiture, where there has been a vested right. But this rule does not apply to a case where the contract itself, under which the parties claim, contains an express provision forfeiting a right upon the happening of a certain contingency. Carney v. Barnes, 56 W. Va. 581, 49 S. E. 423.

"After this suit was brought, Allison assigned back to Fretts a one-half interest in the aforesaid agreement. Fretts appeared to the suit by counsel and demurred to the bill. Allison made no appearance. The demurrer was overruled, and Fretts filed an answer in the nature of a cross-bill, praying for specific execution of the contract. Plaintiff demurred to the cross-bill, and the court sustained it. This is right. It is evident that Fretts could not obtain relief without making Allison a party, even assuming that his cross-bill was meritorious. The cross-bill, on its face, showed that Fretts and Allison were jointly interested in whatever rights were conferred by the contract, and Allison should have joined in the application to the court for specific execution, or, if he refused to join, he should have been made party defendant. In a suit to enforce a contract, all persons interested in it should generally be made parties. Waterman on Specif. Perf. § 55; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; Woodward v. Clark, 15 Mich. 104. It was also proper to sustain the demurrer to the cross-bill, because its averments did not entitle defendant to any relief."

From this it clearly appears that the state court of last resort has determined that this contract must be construed to be an option and not an executory one for the sale of the coal. That being such option, the obligation was upon Fretts to comply with its conditions and to tender the purchase price or such part of it as had been agreed upon within 30 days, and, not having done so, the option became null and void. The conditions here are identical with those existing in the Tennant Case. This bill expressly charges that no part of the purchase price, save and except the $1 paid when the contract was signed, had ever been tendered or paid, because it is alleged the Shrivers "failed and refused to elect as to the time when the balance of said purchase money should be paid to them and the amounts of such payments." It cannot therefore be questioned that this decision in the Tennant Case establishes in the state of West Virginia "a rule governing the transfer and sale and affecting the title to and possession of property" as defined by Mr. Justice Miller in Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, which decision federal courts under ordinary circumstances ought to follow as held in many cases collated in Kuhn v. Fairmont Coal Co. (C. C.) 152 Fed. 1013. It is true that the federal courts are not absolutely bound to follow a single decision of the state court of last resort, especially when such state decision has been rendered since institution of suit in the federal court, as held by the Supreme Court in this same Kuhn Case in answering questions certified by the Circuit Court of Appeals to which the case had been appealed (215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. ——), but it is there distinctly held:

"Even in questions in which the federal court exercises its own judgment, the federal court should, for the sake of comity and to avoid confusion, lean to agreement with the state court if the question is balanced with doubt."

That the question here "is balanced with doubt" cannot be denied. The best evidence of this is the ability and sincerity with which able counsel have contended for different and antagonistic constructions of this contract. As Judge Williams justly says, "It is impossible to construe the agreement so as to give effect to all of its provisions." The fact, however, remains that the five judges of this state court of last resort have reached the unanimous conclusion that this contract was an option, and not one of absolute sale, and that a demurrer to a cross-bill containing substantially the same allegations and seeking the same relief as the bill here does was properly sustained by the state circuit judge. I can see no reason why I should disagree with the judgment of these six learned judges and assert an independent judgment, calculated only to create confusion, inequality, and uncertainty as to property rights.

Let the demurrer be sustained, and, unless good cause be shown for amendment, the bill be dismissed, with costs.

CENTRAL TRUST CO. OF NEW YORK v. THIRD AVE. R. CO. et al.

(Circuit Court, S. D. New York. September 1, 1910.)

STREET RAILROADS (§ 58*)—RECEIVERS—ACCOUNTING.

A petition for an order directing the receiver for an insolvent street railroad company to turn over to petitioners, who were the trustees under a mortgage given by another company, and the purchaser of the property under such mortgage, certain notes and claims held by the receiver against third parties, claimed to be covered by the mortgage, denied to await the result of an accounting between the receiver and the debtors, and also an accounting between the receiver and the trustee petitioner.

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

In Equity. Suit by the Central Trust Company of New York against the Third Avenue Railroad Company and others. On petition for an order against William W. Ladd, receiver of the New York City Railway Company. Petition denied.

See, also, 175 Fed. 154.

Bowers & Sands, for complainant.
Byrne & Cutcheon, for Pennsylvania Steel Co.
Evarts, Choate & Sherman, for receiver.
Bronson Winthrop, for Morton Trust.
Masten & Nichols, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. This is a petition by the trustee under the mortgage of the Third Avenue Railroad, which has been foreclosed, decree entered, and the property sold to purchasers, the deed approved and delivered. Petitioner asks that certain promissory notes and claims held by the receiver of the New York City Railway Compa-

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

ny be turned over to petitioner. The situation will best be presented by stating the facts in connection with the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company. When receivers were appointed for the New York City Railway Company, they found in its possession a promissory note payable to its order on demand for $893,433.30, made by the Forty-Second Street Company and also an open account upon the books against the last-named company for $112,523.91. These receivers filed and their successor Ladd, as receiver, prosecuted a claim against the Forty-Second Street Company on the note and the open account. This company set up certain countercharges. The master before whom these claims were prosecuted held that certain items of interest which figured in them should not be credited to the New York City Company, and that if these items of interest were deducted, there would be no balance of the claims in excess of the countercharges, and therefore he dismissed the claims. The case being carried to the Circuit Court of Appeals, that court held that the New York City Company was entitled to the accruing interest as income, and that this indebtedness was not subject to the lien of the mortgage of which petitioner is trustee, and that during the period which elapsed from the date when the receivers of the New York City Company took possession until January 12, 1908, when the Forty-Second Street property was turned over to the receiver of the Third Avenue Railroad, the former receivers were entitled as officers of the court to claim any balance of open account in their own right, without any obligation to account therefor to the mortgagee (petitioner here), because they were not bound by the covenant of the mortgagor. The cause was remanded to the master for final disposition—and the taking of further proof if required—in conformity with the decision, the Court of Appeals expressing the opinion that the claims might be disposed of without the necessity of another independent proceeding.

That court also held that the New York City Company and its receivers were "bound to account to the mortgagee" for the note and for the balance of open account down to September 24, 1907, when such receivers were appointed and took possession, the sole right of the mortgagee (the Central Trust Company, now petitioner) "being to enforce the covenant contained in the mortgage as to indebtedness of the controlled companies," of which the Forty-Second Street Company was one. This holding petitioner contends is equivalent to a direction that the note and the claim should be turned over to the petitioner (or its successor in interest) or to the receiver of the Third Avenue Railroad Company. I do not so understand the opinions of the Court of Appeals. All that is held is that supplemental to the accounting between the New York City receiver and the Forty-Second Street Company, which will determine what proceeds, if any, shall be realized by the former, there shall be an accounting of said receiver with the mortgagee to determine what amount of said proceeds represents items which should under the covenants of the mortgage be accounted for to the mortgagee. Of course, on such later accounting whatever defenses, if any, the New York City Company or its receiver might have to a claim founded on such covenants could be proved and availed of, and the various creditors of the New York City Railway Company and

of the Metropolitan Company could have their day in court. It is conceivable that no proceeds whatever may come to the hands of the New York City receiver from the Forty-Second Street Company, which is itself in the hands of a receiver and about to be sold under foreclosure. If there are no proceeds realized, there will be nothing to account for.

The petitioners Wallace and others bought the property of the Third Avenue Railroad Company at sale under foreclosure of the mortgage under which petitioner is trustee. They contend that such purchase included this note and balance of open account, that they own the same, and they pray that possession thereof be delivered to them. Neither the note nor the balance on open account is mentioned or described in the bill of foreclosure, or in the amended or supplemental bill, or in the decree of foreclosure and sale. The special master's deed, however, purports to convey "any and all rights, titles, lien or interest which the trustee (under the mortgage) has in and to" the promissory note made by the Forty-Second Street Company for $893,433.30 and "all right, title, lien or interest of said trustee in and to any book accounts and claims which may exist against said last-mentioned company in favor of the New York City Railway Company or its receivers or receiver." Without now expressing an opinion as to the effect of failure to include these items of property specifically in the bill and decree, the court is satisfied that the purchasers are entitled to appear and be heard on the accounting between the Forty-Second Street Company and New York City Railway receiver, so that they may submit whatever they may be advised in the way of evidence or argument to induce the master to find a balance in favor of such receiver so that their "interest" therein, if any, may become of some real value.

Further details as to the situation here presented will be found in decisions of this court (Barber Asphalt Paving Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., 170 Fed. 1022; Id., 175 Fed. 154) and the Circuit Court of Appeals.

This petition includes a prayer for relief similar to that asked for in the case of the Forty-Second Street Company in respect to notes of the following companies: Dry Dock East Broadway & Battery, Union Railway, Kingsbridge, Westchester Electric, and Yonkers—and also in respect to claims against said last-named companies and against the Southern Boulevard and the Tarrytown, White Plains & Mamaroneck Companies. In the case of none of these companies have proceedings before the special master been carried so far, and in some, apparently, they have not been begun; but it is understood, at least the record now submitted shows nothing to the contrary, that the situation and the questions of fact and law which will arise thereon are substantially the same as in the case of the Forty-Second Street Company. A similar disposition should therefore be made of the petition as to these other notes and claims.

The prayer of the petition to turn over these notes and book accounts to the trustee under the Third avenue mortgage, or to the purchasers at foreclosure sale, or to the receiver of the Third Avenue Railroad is denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. August 24, 1910.)

Nos. 2-9, 2-33, 2-149, 3-37.

STREET RAILROADS (§ 58*)—CREDITORS' SUITS—INTERVENTION BY STOCKHOLDERS.

Where the assets of an insolvent street railroad company are being administered by a court of equity in creditors' suits, and a committee of minority stockholders has been permitted to intervene on behalf of the stockholders represented and all others who may choose to join, to warrant the subsequent granting of leave to intervene to a second committee representing other minority stockholders whose interests are the same, some substantial reason should be shown why they are not, or cannot be, properly and adequately represented by the committee and counsel already in the case.

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

In Equity.

Suits by the Pennsylvania Steel Company and another against the New York City Railway Company and others, the Morton Trust Company against the Metropolitan Street Railway Company and others, the Guaranty Trust Company against the Metropolitan Street Railway Company, and the Morton Trust Company against the Metropolitan Street Railway Company and others. On petition for leave to intervene. Petition denied.

Byrne & Cutcheon, for Pennsylvania Steel Co.
Davies, Stone & Auerbach, for Guaranty Trust Co.
James L. Quackenbush, for New York City Ry. Co.
J. Parker Kirlin, for Metropolitan St. Ry. Co.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Dexter, Osborn & Fleming, for receivers of New York City Ry. Co.
Bronson Winthrop, for Morton Trust Co.

LACOMBE, Circuit Judge. This is a petition by George L. Degener and four others as a committee under an agreement signed by certain minority stockholders of the Metropolitan Street Railway Company to secure mutual benefits, relief, and protection. The agreement was entered into on December 16, 1907, and has been signed by 40 different holders, owning upwards of 5,000 shares of stock. No prior application to intervene in these suits has been made by these petitioners. It is nowhere stated that the agreement permits other stockholders to come in and unite with the present signers, but it may be assumed that such is the case. The Metropolitan Company opposes the application, but since the interests of individual stockholders are not always the same as those of a corporation, which may be dominated by some majority owner, such opposition is not persuasive. In this case the Interborough-Metropolitan Company owns a large majority of the stock. An affidavit has been filed on behalf of the committee of minority stockholders, known as the "Waterbury Committee," in which it is stated that such committee makes no objection to this petition. All the parties to these four actions have received notice of this application, but no one appears to oppose except the Farmers' Loan & Trust Company. That circumstance, however, is by no means determinative of this motion. The matter of intervention was considered nearly 2½ years ago. At that time application was made by an individual and by two different groups of persons, all stockholders of the Metropolitan Street Railway Company, and all asking to be

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

allowed to intervene in the litigation. In disposing of these applications it was then said:

"It is not the practice in this court to allow individual intervention where there are many persons whose interests are identical. If the man with 500 shares were allowed to intervene, it would be difficult to find an excuse for refusing a like privilege to the man with 300 while his neighbor with 600 would have to be let in, and there would soon be a multitude of counsel all on the same side. Where, however, application is made on behalf of a group, relatively large, in numbers and holdings, and which offers to take in all others having like interests, the application is usually granted." Pennsylvania Steel Company v. New York City Railway, 160 Fed. 222.

Individual application was therefore denied, but a stockholders' protective committee (Waterbury committee) representing at the time nearly 18,000 shares was allowed to intervene, upon its assurance that it would take in all others similarly situated. How many have since joined does not appear, but the majority owner has not. The court further said:

"Counsel for the first-named petitioner objects to joining this committee on the ground that he does not think it will efficiently represent the interests of the stockholders, although no evidence warranting such conclusion is presented. If a group of stockholders shall hereafter appear relatively large in numbers and amount of holdings, and shall show that the committee now admitted is not efficiently attending to the interests of stockholders, or that its policy and action in specified particulars are not in accord with the views of a substantial minority of the stockholders, the propriety of admitting a second committee of Metropolitan stockholders will be considered."

This petition wholly fails to meet the requirements specified in this quotation. It is asserted that the petitioning stockholders have an interest in and claim to the proceeds of the fund recently realized by the receiver of the New York City Railway Company through settlement of two actions against the Metropolitan Securities Company and others "in some respects different from those of the stockholders of the Metropolitan Street Railway Company represented by Waterbury committee." But nowhere is there any statement of what the difference is. The proposition that some stockholders have "interests and claims" different from other stockholders similarly situated is so extraordinary that its mere assertion without giving particulars amounts to nothing. It is stated on information and belief that the Waterbury committee acquiesce in the view that the stockholders are fully represented by the company and its receivers. No proof of this is offered, and, in the absence of proof, the creation and intervention of that committee shows the contrary. So, too, mere vague statements that the policy of the one committee is different from that of the other, without disclosing in what respects they differ conveys no information.

The single fact which is set forth definitely as a ground for granting the relief is the following: When the court heard all the persons interested (whether parties or not) on the question whether or not the receiver of the New York City Railway Company should accept the offer to compromise the two actions above referred to, the petitioning committee appeared by counsel, and asked that all questions relating to the proceeds of the compromise be reserved, and that stockholders of the Metropolitan have an opportunity to be heard as to the disposition of such proceeds. The request was wholly unnecessary,

no question as to disposition of the proceeds was under discussion. no one was asking for any order which would in the slightest degree affect any one's claim or interests, and the order proposed expressly reserved the rights of all parties to the causes, which, of course, included the stockholders, since they have intervened by a committee which offers to take in any one who chooses to come. The word "stockholders" was inserted by the court at request of counsel for petitioners, for the reason that it was harmless, although wholly superfluous. The circumstance that counsel for the Waterbury committee did not on that occasion make a similar unnecessary request cannot be held sufficient proof of such a "different policy" as would require the injection of a second committee of minority stockholders into these litigations.

It is further contended that the Waterbury committee's view of its own position is that it represents only its depositing stockholders, and does not feel called upon to protect the rights of other shareholders. There is nothing to show that such is the "view" of that existing committee of minority stockholders; moreover, their "views," whatever they are, are unimportant. They cannot "protect" their own rights without protecting the rights of other shareholders. When the cause is once in a court of equity, the race of diligence between persons similarly situated ceases. Whatever advantage the action or the arguments of this committee may secure for its depositing stockholders will inure equally to the benefit of all other stockholders similarly situated.

Upon the record now before the court, the petition is denied.

THE TENNESSEE.

(District Court, D. Rhode Island. July 9, 1910.)

No. 1,227.

COLLISION (§ 69*)—STEAMER AND ANCHORED BARGE—FAULT OF MOVING VESSEL.

A collision at night between a steamer entering the port of Providence, R. I., and a coal barge anchored in the upper harbor near the west side of the dredged channel in a customary and proper place, *held* due solely to the fault of the steamer in being too near the west side of the channel and going at too great a speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.*]

In Admiralty. Suit by the Staples Coal Company, as owner of the coal barge Norton, against the steamship Tennessee. Decree for libelant.

Frank Healy, for libelant.
Bassett & Raymond, for claimant.

BROWN, District Judge. The libelant's coal barge Norton, 163 feet long, while anchored in the upper harbor of Providence, R. I., at about 5:50 or 5:55 o'clock on the morning of December 29, 1909, was

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

struck by the steamship Tennessee, 245 feet long, coming in on her regular trip from New York.

The barge was anchored, according to the libelant's contention 250 to 300 feet, and according to the claimant's contention 300 to 350 feet, southeasterly from the City Dock, so called. According to the preponderance of testimony she was heading northeast or east-northeast, and tailing well over toward the westerly side of the channel or dredged basin. This westerly side of the channel or dredged basin is a customary anchorage for coal barges, having been designated by the harbor master of the port of Providence for the anchorage of barges, and being well known as the customary place of anchorage to those in charge of the Tennessee.

That the Norton was anchored in a proper location, and as close as practicable to the westerly line of the dredged channel or basin, is well established by the testimony of several well-known towboat captains, by the harbor master, who testifies to locating the anchorage of the barge by ranges some two hours after the collision, and by other entirely reliable witnesses.

The Norton was struck on her starboard quarter, 10 or 15 feet from her stern, and her deck was cut into about 15 feet, and she received other injuries, all indicating a considerable speed on the part of the Tennessee at the time of collision.

According to the testimony of the officers of the Tennessee, just before the impact her helm was put hard to starboard in an attempt to pass the stern of the barge.

It is apparent that the Tennessee was much farther over to the westerly side of the channel than was necessary. There was abundant room for her in mid-channel, or to the easterly side of the channel. It is contended for the claimants that the collision was the result of inevitable accident and that the Tennessee could not have avoided the accident because of a fog or haze. That there was some haze at the time is quite probable; but it is very questionable whether it was sufficient to have prevented a timely discovery of the barge, had there been due diligence in maintaining a lookout. But, assuming that the fog was thick, this but emphasizes the negligence of the Tennessee in proceeding to lay a course from Sassafras Point so close to the westerly edge of the dredged channel and so close to the usual location of barges at anchor.

The testimony from the Tennessee as to her speed is far from satisfactory. Her master testifies that she was not making more than three knots just before the collision, but upon the entire testimony I am unable to find that the Tennessee had varied the ordinary speed with which she goes to her dock on clear mornings.

I am of the opinion that the Norton was entirely without fault in the matter, and that the collision was due entirely to the negligence of the Tennessee.

A decree may be entered for the libelant.

HAYES v. CANADA, ATLANTIC & PLANT S. S. CO., Limited.

(Circuit Court of Appeals, First Circuit. August 30, 1910.)

No. 868.

1. CORPORATIONS (§ 308*)—OFFICERS—RIGHT TO SALARY.
By the common law relating to corporations, neither the president nor any director is entitled to any salary unless there is an authoritative vote granting it and establishing the amount of the same.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334–1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 298*)—MEETINGS OF DIRECTORS AND COMMITTEES—NOTICE.
In the absence of any statute, by-law, or practice of a corporation fixing the time or method of calling meetings of the executive committee or board of directors, a reasonable notice is necessary to the validity of such meetings; and two members of an executive committee calling at the office of the third and stating that there would be a meeting of the committee, and calling it to order at once, does not constitute such notice, unless there was some emergency which justified such action.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1296–1299; Dec. Dig. § 298.*]

3. CORPORATIONS (§ 299*)—MANAGEMENT BY OFFICERS—POWERS OF EXECUTIVE COMMITTEE—CONSTRUCTION OF BY-LAW—"FULL POWERS."
The Canadian joint-stock companies act provides that the affairs of a corporation shall be managed by a board of directors, who, in the absence of other provisions in a special act or in by-laws, shall elect the president. It also provides for by-laws regulating the number of directors, etc., and the appointment, functions, duties, and removal of all agents, officers, and servants, and their remuneration. The charter of a corporation organized thereunder provided for the appointment by the directors from among their number of an executive committee with such powers as the by-laws should define, and a by-law provided that the directors should annually appoint from their number two directors, "who with the president shall form an executive committee, and said committee shall have full powers of the board of directors when said board is not in session." *Held*, that such "full powers" were limited to the conducting of the ordinary business operations of the corporation and did not include the general powers of the board of directors under the statute to amend the by-laws, change the number of members of the committee, remove a member by a majority vote, or to appoint or remove officers and fix their salaries.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1333; Dec. Dig. § 299.*]

4. CORPORATIONS (§ 298*)—MEETINGS OF DIRECTORS—SUFFICIENCY OF NOTICE.
Notice of a meeting of the directors of a corporation, which was held on the next day after the notice was served, at a place 24 hours distant by rail from the place of service on a director, *held* insufficient, and the action at such meeting inimical to the interests of such director, who was a large stockholder, illegal and not binding.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1296–1299; Dec. Dig. § 298.*]

5. CORPORATIONS (§ 308*)— COMPENSATION OF OFFICERS—MODE OF FIXING.
A corporation authorized by statute to adopt by-laws fixing the compensation of its officers cannot fix such compensation by a mere resolution of its directors.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1338; Dec. Dig. § 308.*]

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

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

Action by the Canada, Atlantic & Plant Steamship Company, Limited, against Alfred S. Hayes. Judgment for plaintiff, and defendant brings error. Affirmed.

Hurlburt, Jones & Cabot, for plaintiff in error.

William M. Richardson, for defendant in error.

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

PUTNAM, Circuit Judge. In this case the Canada, Atlantic & Plant Steamship Company, Limited, called herein the "plaintiff," brought suit in the Circuit Court against Hayes, called herein the "defendant." The plaintiff is a Canadian corporation. Hayes was a director in the corporation and president thereof. Claiming a salary as such president, he secured payment thereof, and this suit was brought to recover the same on the ground that no salary was legally established. The corporation also sued to recover $506.33, paid Hayes for rent of a room at Boston. The purpose of the room is not stated. The corporation secured a verdict and a judgment for both sums, and Hayes sued out this writ of error. The case turns on the propositions that an executive committee of the directors first attempted ineffectually to fix the salary and to direct the payment of the $506.33, and that thereafterwards some of the directors undertook ineffectually to ratify the action of the executive committee. As to the $506.33, the judgment was that neither the notices for the alleged meetings of the executive committee nor that for the alleged meeting of the directors were sufficient in law, and that, therefore, both meetings were invalid. The executive committee consisted of Hayes, Director Perry, who objected to the proceedings, and another director who acted throughout with Hayes. The court submitted the question of the sufficiency of notice of the first meeting of the executive committee to the jury, under instructions which we will describe. So far as the meeting of the directors was concerned, the court ruled as a matter of law that it was not legally called.

Also with reference to the salary in question, the court appears to have held that it could only have been fixed by the by-laws; and, finding that there was no formal "by-law," it to that extent, for that reason, also, directed verdict for the corporation. The defendant claimed that any vote in the usual form answered for the word "by-law"; but we think that the salary of the president could not have been in any way established except by the board of directors, and that, as no meeting of that board was legally called, it follows that no salary could have been legally fixed.

We should say at the outset that there was no evidence that there was any practice of the corporation, or any by-law, or statute, fixing the time or method of calling meetings of either the executive committee or directors; neither was there any evidence that the common law of the domicile of the corporation is different from the common law as known in the United States.

We should here observe, for the general purposes of this opinion, that, so far as appears in this record, the law of the domicile of the cor-

poration is the common law established alike in the United States and in England, in that neither the president nor any director of a corporation is entitled to any salary unless there is an authoritative vote granting it and establishing the amount of the same.

We also should observe here that we perceive nothing in the record which exhibits any claim on the part of Hayes that he was entitled to recover the $506.33, or any part thereof, on quantum meruit. Certainly, so far as the case has been brought to us, he relies entirely both for this and his salary on the alleged action of the executive committee and that of the board of directors.

There were two alleged meetings of the executive committee; one on June 6, 1904, and one on June 24, 1904. The court instructed the jury with reference to that of June 6, 1904, that the notice must be reasonable; and it ruled further as a matter of law, as was claimed by the corporation, that it was not such a reasonable notice that, under the circumstances of this case, two members of the committee came into the office of the third and said: "We are going to have a meeting right away, and the meeting will come to order!" There was evidence sufficient to go to the jury on the proposition whether this claim was a just one. On the other hand, there was some evidence offered by Hayes that there had been a day's notice of the proposed meeting. The court instructed the jury that, if a day's notice was given, it was sufficient. The jury found in favor of the corporation on these rulings. The rulings were correct; and there was sufficient evidence pro and con to disenable us from interfering with the jury's finding of fact on this issue. Of course, there may be circumstances involving an emergency where a notice for an immediate meeting might be justified; but there was no emergency of that nature here. So far as the executive committee is concerned, there was, therefore, no legal meeting on June 4th.

It seems hardly necessary to cite authorities to sustain the rulings of the Circuit Court on the questions of law involved in reference to notifying for the meetings of the executive committee. The analogy is to be found in the rules with reference to notifying for meetings of directors. The most noticeable exception in favor of usages dispensing with notice is in regard to meetings of directors of banks of discount held in regular business hours, of which an example is found in American Exchange Bank v. First National Bank, 82 Fed. 961, 974, 27 C. C. A. 274, decided by the United States Circuit Court of Appeals for the Ninth Circuit on October 4, 1897. Convenient collections of authorities showing that a notice for a reasonable length of time is ordinarily required are found in 7 Thompson on Corporations, 7130 and sequence, and 3 Cook on Corporations (6th Ed.) 2253.

The action of the executive committee at the alleged meeting of June 4th was intended to be reaffirmed at another alleged meeting of the committee on June 24th; but June 4th Hayes and Gale undertook unlawfully to remove Perry from the executive committee, and to reduce the number of the committee to two, although it had been fixed by the corporation by-laws at three. Consequently, it is admitted by Hayes that Perry received no notice whatever of the meeting of June 24th. Therefore that meeting needs no further consideration.

We might leave the case here, but it is perhaps better to open the record in some respects quite fully. The charter provides as follows:

"(2) The directors may annually appoint from among themselves an executive committee, for such purposes and with such powers and duties as the directors or by-laws determine; and the president shall be ex officio a member of such executive committee."

The formal by-laws of the corporation provides as follows:

"Sec. 8. The directors shall annually appoint from among themselves two directors, who, with the president, shall form an executive committee, and said committee shall have full powers of the board of directors when said board is not in session."

Section 8 is expressed literally in very broad terms, in that it purports to vest the committee with the "full powers" of the board of directors. Hayes maintains that this expression "full powers" has no limitation whatever, while a true construction limits it to the ordinary business operations of the corporation. It must be so limited, as we will see on further examination of the charter and by-laws. Also, although Perry had a majority interest, absolute or contingent, and was the treasurer of the corporation, and although it appears that the proceedings attempted at the alleged meetings of the executive committee, and of the directors, were hostile to his interests in a fundamental way, and to such an extent as to deprive him of the treasurership, and although also it is said that all this does not bear directly on the case, nevertheless we should exhibit what was attempted to be done by Hayes and Gale, for the purpose of showing in a concrete way that it is not tolerable that the by-law in question should have the construction which Hayes claims for it.

The Canadian joint-stock companies act (32–33 Victoria, chapter 12) directs that the affairs of a corporation shall be managed by a board of directors, and that, in the absence of other provisions in a special act or in the by-laws of the company, the directors shall elect the president and shall regulate the allotment of stock, and the forfeiture of stock for nonpayment, and the transfer of stock. It also provides, among other things, for by-laws regulating the number of the directors, their term of service, the amount of their stock qualification, and their remuneration, if any, and "the appointment, functions, duties and removal of all agents, officers and servants of the company, the security to be given by them to the company and their remuneration." In addition to the above we have already quoted the by-law under which the executive committee was constituted, in effect that the directors should annually appoint from among themselves two directors who with the president should constitute such committee.

Hayes and Gale, at the alleged meeting held on June 6, 1904, undertook to transact the following matters: They removed Perry from his office of treasurer and appointed Gale in his place. They directed payment to Hayes of the salary, and of the $506.33, in dispute, although his salary had never before been fixed or authorized. They fixed an annual salary for Gale as managing director at $1,854.20. They amended the by-laws so that special meetings of the shareholders could be called only by the president. They amended, as we have said, the by-law establishing the executive committee so that the committee

should consist of only one director besides the president; and they amended the by-law providing for meetings of the directors so that they could be called only by the president.

It is not worth while to follow all through the meeting of the executive committee held June 24, 1904. A crucial matter which we need in this connection is that all the proceedings were in the pecuniary interests of Hayes and Gale, and they were the only persons who were voting in relation thereto. These two persons, when they undertook to amend the by-law by virtue of which they were constituted a committee, so tied up the corporation that no special meeting of the stockholders or directors could be called except by one of themselves; that is, the president. In other words, they proceeded in such a way that, if their action had been effectual, the two men, acting in their own pecuniary interests, would have absorbed the entire powers of the corporation for an indefinite period. The two also assumed by implication the power of issuing stock, thus shutting out, if they saw fit, the possibility of the existing shareholders obtaining control of the stock at any meeting thereof which any of them might find some legal method of calling. It is certainly intolerable to maintain that the words "full powers," in the provision for the appointment of the executive committee, practically divested the directors of all their functions, and built up a new foundation for it in lieu of that formally established. Such an assumed absorption of the powers of the creator by the created is too absurd to receive the approbation of any court of law. We recite these facts because they exhibit in a concrete way, by illustration, the impossibility of giving force to the words "full powers" in the by-law referred to except with limitations restricting them to the ordinary business transactions of the corporation. Having in mind that neither the president nor any director of a corporation is entitled to compensation for his services without some special provision of statute, or some action of the stockholders or other directors, and having in view the limitations necessarily implied for the reasons we have stated, we must hold that the matter of such compensation was specifically retained for the personal action of the directors by the particular enumeration thereof, notwithstanding that there were other powers, of a general nature, which might well have vested in the executive committee, which would fully satisfy the call of the words "full powers."

The general offices of the corporation, including that of the treasurer, were at Boston. Perry, Hayes, and Gale all resided there. Perry also had a summer residence at Rockland, about an hour and a half distant from Boston by rail. The time by rail from Boston to Halifax was approximately 24 hours, provided all connections were made and there were no delays. On Thursday, June 30th, Hayes, as president, called a meeting of the directors to be held at Halifax at 11 o'clock on Saturday, July 2d. Perry did not attend this meeting, but a quorum did. It was there voted to confirm the alleged proceedings of the executive committee. Then the meeting adjourned to Monday, July 4th, at 11 o'clock. At that meeting the record of July 2d was read and confirmed. There was thus only one meeting of the directors, notwithstanding Hayes says there were two, one on July 2d and one on July 4th. Hayes testifies that, on June 30th, he prepared a notice to Perry

of the meeting of the directors on Saturday, July 2d, and to himself leaving Boston at 7 o'clock p. m. on Thursday, June 30th. The train was due at Halifax at 8:45 p. m. the next evening. It also was possible by leaving Boston at 8 o'clock on Friday, July 1st, to reach Halifax at 5 minutes past 9 on Saturday morning, two hours before the meeting was to be held. Hayes left the notice with his own clerk, as he says, to deliver it next morning, July 1st. The clerk testifies that the notice was called to his attention on July 1st, between 10 and 11 o'clock in the morning, that he called up Mr. Perry's office several times without finding him, and then sent a messenger to his residence at Rockland with a copy of the notice. On this statement, it seems impossible that, by any method of transportation, Perry could have reached Halifax in season for the meeting on Saturday, July 2d. Hayes, not finding Perry on the train en route to Halifax, undertook to adjourn the meeting from Saturday to Monday, and telegraphed a notice to Perry to that effect; yet there were not two meetings, but only one. If the notice for the 2d day of July, when the important business was transacted, was insufficient, that insufficiency could not be cured in the way attempted. The court held that the notice was invalid, and that, therefore, the meeting was invalid, and clearly that ruling was correct, as there was no emergency. The result would have been the same even if the gathering of July 4th should be regarded as a new meeting.

With reference to all these proceedings, however, Hayes claims that there was a waiver by Perry, alleging: First, that he was present at the first meeting of the executive committee, and allowed things to go along until they concerned him, and then he withdrew; and, second, that, on the rule of Browne v. La Trinidad, 37 Ch. D. 1, decided October, 1887, Perry waived the lack of formal notice because he did not instantly protest in reference thereto.

Browne v. La Trinidad is far from reaching this case. It is easily supported on the common rule that, in running back to find a basis for transactions, we finally reach a point where what occurs must be accepted as de facto sufficient, or as involving a mere irregularity too remote to be considered. The irregularity in Browne v. La Trinidad was not in the fact that no notice was given of the meeting at which business was transacted, but the lack of notice related only to the preliminary meeting at which the meeting of importance was called. The State of Wyoming Syndicate, L. R. [1901] 2 Ch. Div. 431, 437, points out this peculiarity, where it says in substance that, except for this, the learned judge might apply the principle of Browne v. La Trinidad. Therefore we can lay that decision aside so far as the irregularity of the notice was concerned.

However, as we have said, Hayes makes a second proposition, namely, that, applying the further rule of Browne v. La Trinidad, Perry waived the shortness of the notice because he did not immediately protest against it before going into the meeting, and because he in fact sat in the meeting at its opening. These propositions involved questions of fact for the jury, and were to be raised by Hayes in avoidance of the other fact that the meeting was not properly notified. If he relied on these propositions, it was his duty to request the court to frame an issue for the jury with regard to them. By this we do not mean a

formal issue; but he should have asked the court to submit them to the jury, and to sum up in reference to them. This he did not do, so that no exception in reference thereto raises any question which we are called on to consider. Therefore there is no answer to the fact that neither the meetings of the executive committee nor that of the directors involved here were valid.

Nevertheless, Hayes still insists upon certain expressions used by us in the case of this same Corporation v. Flanders, 145 Fed. 875, 877, 76 C. C. A. 1. That case related to a contract with Flanders as general agent. Hayes relies on what we said on page 177 about the vote of the board of directors on August 10, 1904, as follows:

"On motion of Mr. H. McInnes, seconded by Mr. W. H. Fulton, it was resolved that all acts and resolutions passed by Messrs. Hayes and Gale as an executive committee, as per minutes submitted, said executive committee meetings' minutes dated April 28th, June 6th, and June 24th be rescinded, and the attempted confirmation of the same by the directors, at meetings held July 2d and 4th, be also rescinded."

Hayes asked the court to rule "as a matter of law" that this vote had the effect of validating the proceedings in dispute here. With nothing on the record except this vote, the request left no opportunity for any investigation whatever in regard to it. All the circumstances were shut out of the view of the jury whatever they might be; indeed, from the consideration of the court. A request of that kind, of course, could not be granted by the court. In the previous case we had no record before us as shown here, and the questions now involved were not at all pertinent there. The case assumed that the proceedings were regular except that only two of the executive committee were present at a meeting thereof. We reached the same conclusion on the proposition that it was not necessary that all the executive committee should be present which the Supreme Court lately reached, and fully explained, in reference to the appraisal of certain waterworks in Omaha v. Water Company (decided May 31, 1910) 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. ——. However, the matter seems to be of no particular consequence, because the vote of August 10th, in regard to what was done at the directors' meeting, was qualified by the word "attempted"; and certainly it cannot be said positively that the proceedings of the executive committee in a matter which was entirely beyond their jurisdiction could necessarily be held to have been affirmed by a vote merely rescinding them. All this illustrates that the ruling asked for was too arbitrary.

We have thus shown, and we think satisfactorily, that there has been no valid action of the corporation with reference to the two different sums in dispute, on the ground that there was no legal meeting in regard thereto of either the executive committee or of the directors, and on the further ground that in no event had the executive committee any jurisdiction as to the question of salary. We have so far not noticed particularly the claim of the corporation that the question of salary could be covered only by a "by-law"; with the adverse claim by Hayes that there is no distinction in law between a by-law and an ordinary resolution or ordinary vote of the corporation or of the directors. For this Hayes relies upon Faulkner v. Grand Junction Railway Co., 4

Ontario, 350. Whatever effect this decision may have in Ontario, it is not conclusive through the Dominion, and the statutes relating to the corporation considered here were Dominion statutes. Whether we are right or not in these observations, the law neither of Ontario nor the Dominion has been proven to us; therefore the case cited by Hayes simply stands as an authority for whatever it may be worth, and the established authorities beginning with Blackstone and coming down through all the text-writers, including especially Angell & Ames, Thompson, and Cook, are so overwhelming that we would not be relieved of conforming even if our own judicial instinct did not also conform. Angell & Ames, § 110, recites that by-laws are considered as private statutes for the government of the corporate body. 2 Blackstone, 475, describes them in the same way. Cook, 6th edition, speaks of them as "a permanent rule of action." Thompson, §§ 935, 936, 937, broadly distinguishes them from resolutions and regulations. Bouvier's definition runs throughout in the same line. In no way can they be held to be analogous to the hasty proceedings of the executive committee or of the directors which have been laid before us.

Especially in this case the distinction is a particularly suitable one. Having due regard to the proposition that neither the directors nor a fraction of the directors should be permitted by snap proceedings to adjust their own compensation in their own way, as illustrated by the fact that, in the present case, the action of Hayes and Gale looked entirely to their own pecuniary interest, and so, according to the best legal authorities, was prohibited, the necessity of regular proceedings by virtue of proper by-laws is irresistibly evident; and the presumption that Perry would waive any guards which a regular course of proceedings would give him is quite incredible. However, we are not disposed to rest the case entirely on these considerations. Even without their support, the judgment of the Circuit Court was correct.

The judgment of the Circuit Court is affirmed, with interest; and the defendant in error recovers its costs of appeal.

W. F. CORBIN & CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,018.

1. EVIDENCE (§ 129*)—COMPETENCY—QUALITY OF MANUFACTURED PRODUCT—PRODUCT MADE UNDER SIMILAR CONDITIONS.

In a proceeding by the United States under Rev. St. § 3455 (U. S. Comp. St. 1901, p. 2279), for the forfeiture of whisky contained in the distiller's original barrels, but alleged to be other than that contained in such barrels when they were branded and marked by the gauger, it was competent for the government to introduce in evidence tabulated analyses of samples of the whisky in such barrels showing the per cent. of its congeneric properties and for comparison similar analyses of whisky taken from a large number of barrels produced by the same distillery under the same process, out of material in the same proportions and of substantially the same grade, placed in barrels of the same character of wood, treated in the same manner, and stored in the same warehouse under practically

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

the same conditions as to moisture and temperature, much of such whisky having been made in the same year, some in different years and a portion on the same day as some of the seized whisky, and the testimony being given by expert chemists who made the analyses.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.*]

2. EVIDENCE (§ 76*)—SUFFICIENCY—PRESUMPTION FROM FAILURE TO PRODUCE EVIDENCE.

The silence of a party as to a matter of which he has knowledge cannot authorize a finding against him on an issue upon which the other party has the burden of proof, where there is a total lack of affirmative proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 96; Dec. Dig. § 76.*]

3. EVIDENCE (§ 67*)—PRESUMPTIONS—EXISTENCE OF CONDITION PRIOR TO TIME SHOWN.

While a given condition, shown to exist at a given time, may be presumed to have continued, there is not, on the other hand, any presumption that it existed previous to the time shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 88; Dec. Dig. § 67.*]

4. INTERNAL REVENUE (§ 46*)—PROCEEDING FOR FORFEITURE—RECEIVING SUBSTITUTED STAMPED PACKAGES.

In a proceeding by the United States under Rev. St. § 3455 (U. S. Comp. St. 1901, p. 2279), for the forfeiture of whisky contained in the original distiller's barrels, but in which it is alleged that the whisky is other than that contained in the barrels when they were branded and marked by the gauger and that the claimants in whose possession the barrels were found received the same in such substituted condition with intent to defraud, the burden rests on the government to prove that they were in that condition when so received, and such fact cannot be inferred from the fact that they were in such condition when seized.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 46.*]

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

Proceeding by the United States against Nine Barrels of Whisky, W. F. Corbin & Co., claimants. Judgment for plaintiff, and claimants bring error. Reversed.

A. J. Freiberg, for plaintiffs in error.

Sherman T. McPherson, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. This is a proceeding in error to reverse a judgment of forfeiture entered in the District Court of the United States for the Western Division of the Southern District of Ohio.

The information filed on behalf of the United States contains two counts.

The first is under Rev. St. § 3455 (U. S. Comp. St. 1901, p. 2279), and the second under Rev. St. § 3326 (p. 2169).

The court directed a verdict of not guilty as to the second count, and submitted to the jury the question of guilt as to the first count, which resulted in a verdict for the government. Upon this verdict the lower court pronounced judgment, and the claimants prosecute a writ of error to this court.

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

There are 56 errors assigned. At the hearing, and on the brief, counsel for claimants condenses the errors assigned, and treats them under two general heads.

(1) The court erred in not excluding the testimony offered by the government, comparing the analysis of the samples of the seized whisky with the analysis of the samples of whisky taken from the bonded warehouse.

(2) There is no proof tending to establish the allegation that claimants received the whisky in the substituted condition.

Section 3455, Rev. St., provides as follows:

"Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeit, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envelope being empty, or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked, by an officer of the revenue, he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. And every person who makes, manufactures, or produces any box, barrel, bag, vessel, package, wrapper, cover, or envelope, stamped, branded or marked as above described, or stamps, brands, or marks the same as hereinbefore recited, shall be liable to penalty as before provided in this section. And every person who violates the foregoing provisions of this section, with intent to defraud the revenue, or to defraud any person, shall be liable to a fine of not less than one thousand nor more than five thousand dollars, or to imprisonment for not less than six months nor more than five years, or to both, at the discretion of the court. And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section and all their contents shall be forfeited to the United States."

The information charges claimants with receiving and having in their possession, with intent to defraud, certain nine distillers' original packages (barrels) of whisky, which packages did contain distilled spirits other than the contents which were therein when said packages (barrels) were lawfully stamped, branded, and marked by a duly appointed officer of the revenue.

We are satisfied that, under the evidence, the jury was warranted in finding that the nine barrels in question contained distilled spirits other than the contents which were in them when they were lawfully stamped, branded, and marked; that is, when they were taken from the bonded warehouse, if the testimony offered by the government in support of the charge is competent, and to the admission of which claimants' counsel duly excepted. It would unduly lengthen this opinion to recite in detail the proceedings incident to the manufacture of whisky from the selection of the raw material until it is barreled and placed in a bonded warehouse, further than to say that it is the purpose of the distiller to produce as near as possible a uniform grade of whisky, and to this end great care is taken in the selection of the raw material and its treatment, from the time it is received on the premises through all the different stages, until converted into whisky, barreled and stored in the warehouse. Each

day's product is the same as every other day's product, just as near as human skill can make it. The evidence upon which the government relied for a conviction below, and to which the claimant objected on the trial, was of an expert character.

The nine barrels of whisky which were seized were distilled by N. P. Squibb & Co. Expert chemists took from each of these barrels a small portion, and analyzed it, to ascertain its congeneric properties. They also took from the warehouse of Squibb & Co. small portions from 43 barrels of whisky and analyzed each of them to ascertain their congeneric properties. The whisky in these 43 barrels was made in the years, as follows: Five barrels in 1900; nine in 1901; five in 1902; five in 1903; five in 1904; five in 1905; two in 1907; and seven in 1908. The whisky in six of the seized barrels was made in 1901; two in 1902; and one in 1904. This last barrel and five barrels from which samples were taken from the warehouse for the purpose of comparison were made on the same day, from the same mash, and stored in the same warehouse, under same conditions as to temperature and moisture.

The results of these analyses were tabulated and introduced in evidence at the trial. We have neither time nor inclination to review this table, nor is it necessary. It discloses a marked and uniform difference in the congeneric properties between the whisky seized and the samples taken from the warehouse for the purpose of comparison, while there was only a very slight difference in the proof. To illustrate: Take the analysis of the barrel of seized whisky that was made in 1904 and five barrels taken for comparison which were made on the same day, out of the same run, and we find that the sum of the congeneric properties, acids, esters, aldehydes, furfurol, and fusel oil, of the seized barrel to be 101.1, and that of the barrels taken for comparison range from 291.3 to 337.1, while the proof of the seized barrel is 105, and that of the other ranges from 104 to 105. This table discloses that relatively the same differences exist between the barrels of the seized whisky, the product of a given year, and the barrels taken for comparison, the product of the same year, and of different years. If this evidence is competent, it is sufficient to sustain the verdict of the jury. Counsel for the claimants stoutly insists that it is incompetent, and that it should not have been admitted. It is conceded that for commercial purposes the product of the Squibb Distillery is practically the same, but it is insisted, that chemically it is not.

It is contended that these whiskies are manufactured in different years, at different seasons of the year, out of material necessarily different in many particulars, although of the same character, and in the same proportion, and that it is not possible to produce from day to day, or from year to year, whiskies that are chemically the same. It is urged by counsel for claimants that it was the duty of the government to have proven affirmatively, before going to the jury with the comparison of chemical analysis, that the whiskies, at the time of their manufacture, up to the time of the seizure of the whisky in question, contained the same chemical constituents and properties, and that they must have proved this with such degree of

particularity as reasonably to exclude all rational hypotheses to the contrary. Many authorities are cited on the brief of claimants' counsel, tending to support this proposition. Wigmore on Evidence, 442; Lake Erie Ry. v. Mugg, 132 Ind. 168, 31 N. E. 564; Emerson v. Lowell Gas Co., 3 Allen (Mass.) 410; Klanowski v. Grand Trunk, 64 Mich. 279, 31 N. W. 275. Especially is Albany Company v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982, relied upon. That was a case growing out of a breach of contract made in 1880. Lundberg sold to the Albany Company pig iron to be in accordance with an analysis furnished by the seller. This analysis showed in the first brand .03, and in the two other brands .024 of 1 per cent. of phosphorus. The iron, when delivered at the buyer's works and analyzed, showed in the three brands, respectively, .047, .042, and .049 of 1 per cent. of phosphorus. It was refused and returned to the seller, who afterwards sold it for less than the contract price, and sued to recover the difference.

The depositions of Anderson, Fernguist, Dillner, and Cassel were taken and offered in evidence by Lundberg on the trial, and admitted over the objections of the defendant. Fernguist, a chemist, testified to the analysis made by him of pig iron from the Pershytte furnace in 1878; this furnace being the same at which one of the brands of iron in question was manufactured. The other three witnesses for the most part stated what they had heard as to the analyses of the iron in question, etc. In holding this testimony incompetent, the court said:

"The admission of this testimony in the depositions was duly excepted to, and we are of the opinion that it was incompetent. Much of it, and especially Anderson's remark that this iron was found to be good in the manufacture of steel and iron by Siemens & Martin, was mere hearsay. All the statements of the deponents as to the proportion of phosphorus in the iron in question were based on analyses by other persons of pig iron made in previous years, none of which were produced or their contents proved, with the single exception of Fernguist's analysis of iron from the Pershytte furnace two years before. It is not shown, and cannot be presumed, that a difference of one or two hundredths of 1 per cent. in the amount of phosphorus in pig iron could be detected by observation of the ore or by inspection of the manufacture of the pig iron. Under these circumstances, evidence of the amount of phosphorus in iron made in previous years was wholly irrelevant to the question of the amount of phosphorus in iron made in 1880; and the general expressions of opinions as to the excellence of the pig iron and the care taken in its manufacture did not render that evidence competent, but rather tended to divert the attention of the jury from the real issue which was whether the particular iron tendered by the plaintiff to the defendant conformed to the express warranty in the contract between them."

The question in the Lundberg Case was, as we see, Did the iron tendered meet the requirements of the terms of sale? The evidence of that fact was readily ascertainable by an analysis of the iron delivered, and evidence as to what per cent. of phosphorus was present in other iron was clearly incompetent.

The other case relied upon by claimants—United States v. Graf, 208 U. S. 198, 28 Sup. Ct. 264, 52 L. Ed. 452—holds that:

"The sale of a barrel of whisky, stamped, branded and marked so as to show that the contents have been duly inspected, and the tax thereon paid, into which a nontaxable substance has been introduced after such stamping,

branding and marking by an officer of the revenue, does not authorize a seizure and forfeiture thereof to the United States under the provisions of section 3455, Rev. St."

That case does not decide that evidence that a barrel of whisky contains a nontaxable substance, such as caramel, is not competent evidence to be considered, together with other competent evidence, in determining whether or not a taxable substance has been introduced into a barrel of whisky in violation of section 3455, Rev. St. It is there decided that it is not a violation of section 3455, Rev. St., to introduce into a barrel of whisky a nontaxable substance, and therefore whisky so treated is not subject to seizure for that cause.

We are of opinion that the Graf Case has no application to, and that the Lundberg Case is clearly distinguishable from, the case at bar. Here we have whiskies seized and analyzed. The analysis discloses certain per cent. of congeneric properties. An analysis is made of the whisky used for comparison, produced by the same distillery, under the same process, out of material in the same proportions, and of substantially the same grade, placed in barrels of the same character of wood, treated in the same manner, and then stored in the same warehouse, under practically the same conditions as to moisture and temperature. Much of this whisky was made in the same year, some of it in different years, and a portion of it on the same day as some of the seized whisky. The same chemists analyzed the seized whisky and also the whisky used for comparison. These chemists went upon the witness stand, with their analyses, and with the samples in court, and testified as to the difference in the analyses of each of the seized packages and each of the packages used for comparison. This comparison discloses a marked difference in the congeneric properties, both as to each particular package and as a class.

The rule insisted upon by claimants' counsel is highly theoretical. It requires a condition that is well-nigh impossible of performance. The rule does not require that the conditions incident to the production of the article under consideration shall be exactly the same as that used for comparison, but substantially similar. "The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a substantial similarity; i. e., a similarity in such circumstances or conditions as might supposedly affect the result in question." 1 Wigmore on Evidence, § 442.

Again:

"Accordingly our test would be whether the evidential instances occurred under substantially similar (not identically the same) conditions; i. e., so that the supposed conclusion is at least the more probable, though not the only possible explanation." 1 Wigmore on Evidence, § 442.

"The evidence of experiment is not admissible unless conditions are practically the same or substantially similar. * * * The conditions need not be precisely the same in all cases, and the courts are not all in accord as to just how nearly identical or similar the conditions must be." 2 Elliott on Evidence, § 1252.

In Ames v. Quimby, 106 U. S. 343, 1 Sup. Ct. 116 (27 L. Ed. 100), it was held that:

"The plaintiff, where the quality of goods which he furnished at a given time to the defendant is in question, may show the good quality of like arti-

cles furnished at the same time by him to another party, if he further shows that shoes he furnished to each party were of the same kind and quality."

In Byers v. Railroad, 94 Tenn. 353, 29 S. W. 130, in which the court held to be competent evidence similar to that now before us, the court said:

"The authorities in other states are conflicting upon the admissibility of such evidence, and we have been cited to many cases, all of which we have examined. In our own state it has been held that the evidence of an expert is not incompetent because of an ex parte examination, investigation, or experiment made by him. Nor is such evidence inadmissible because the experiments are made after the suit and trial has begun, and with a view to being used as testimony in the case. The objection in such cases goes not to the competency or admissibility of the testimony, which is a matter for the court to determine, but to its weight and sufficiency before the jury, and especially is this the case where the experiment is made ex parte, and is such that it lies wholly within the power of one party and wholly beyond the power of another party to make such experiment. We have been cited to quite a number of authorities to sustain the contention that such evidence is incompetent and inadmissible in cases where the experiment is not equally within the reach of both parties, but we have not been able to find this doctrine sustained. We do find cases, however, holding that where the experiment is made ex parte it affects its weight; that it was not made after due notice to the opposing party and giving such party opportunity to be present and see the test applied. It is uniformly held that in all such tests, to make them competent, the conditions under which the tests were made must be the same as near as practicable."

We conclude that the conditions under which the contents of the seized barrels and the contents of the barrels taken for comparison were produced and handled were sufficiently similar to justify the admission of the evidence objected to. Burg v. Chicago, etc., R. Co., 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419; Nosler v. Chicago, etc., R. Co., 73 Iowa, 268, 34 N. W. 850; Wilson v. State (Tex. Cr. App.) 36 S. W. 587; People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; Elgin, etc., R. Co. v. Reese, 70 Ill. App. 464; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Davis v. State, 51 Neb. 301, 70 N. W. 984; Byers v. Railroad, 94 Tenn. 345, 29 S. W. 128.

We come now to consider the second general assignment as arranged on claimants' brief, viz., there is no proof as to when the substitution was made and as to the fact that claimants received the goods in the substituted condition. This question is raised under the forty-ninth specific error assigned, viz.:

"That the court erred in overruling the claimants' motion made at the close of all the evidence to direct the jury to return a verdict in each case for claimants."

In support of this motion, it is insisted that the government has at most only proven that the barrels of whisky in question were in a substituted condition when seized by the government, and that this is not sufficient, but the government must go further and prove that the whisky was in the substituted condition when received by the claimants, and this it has wholly failed to do.

This assignment of error brings before the court for review the entire evidence, in order that we may determine whether or not there

was any substantial evidence which warranted the jury in finding a verdict for the government.

As we have seen, section 3455, Rev. St., under which this action is brought, provides:

"Whenever any person sells, gives, purchases, or receives any box, barrel, etc., of any kind, stamped, branded or marked * * * to show that the contents * * * have been duly inspected, or that the tax thereon has been paid * * * said box, barrel, etc., * * * being empty or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked, etc., * * * he shall be liable to a penalty of not less than fifty dollars or more than five hundred dollars. And all articles sold, purchased, received * * * in violation of this section shall be forfeited to the United States."

The information charges that the claimants received and had in their possession, with intent to defraud, the nine distiller's original packages of whisky, which contained distilled spirits other than the contents which were therein when said packages were lawfully stamped, branded, and marked by the duly appointed officer of the revenue.

In their answer filed to the information, claimants aver that:

"Answering the allegations contained in the first article of the said information, the said claimants deny that they did then and there or at any time or ever or at all receive and have in their possession the said nine distiller's original packages (barrels) with intent to defraud, and deny that the said packages (barrels) did then and there or at any time or ever or at all contain distilled spirits other than those which were therein when said packages (barrels) were lawfully stamped, marked, and branded by a duly appointed officer of the revenue."

The answer denies every material allegation in the information, except the fact of the seizure and the ownership of the barrels of whisky in question.

The offense for which it is sought to condemn and have forfeited to the United States the nine barrels of whisky is that they contained distilled spirits other than the contents which were therein when they were lawfully stamped, branded, etc., by a duly appointed officer of the revenue, and that they were received by the claimant in the substituted condition. Under the allegation in the information, it is just as necessary for the government to prove that the claimants received the barrels of whisky in a substituted condition as it is to prove that they were in a substituted condition in the first instance.

Neither of the parties composing the firm of W. F. Corbin & Co., the claimants, was introduced as a witness at the trial, nor did they offer any evidence of any character touching the question as to whether the substitution was made before or after the whisky was received by them.

An attentive examination of the record discloses no direct evidence tending to prove that the barrels were in a substituted condition when received by the claimants, nor are there, in our opinion, such facts and circumstances proven from which it might be reasonably presumed that the claimants received the packages in a substituted condition, unless it be assumed that the conduct of the claimants in remaining silent and offering no evidence tending to prove that the substitution was made after they received the packages, or, for that

matter, offering any explanation as to when the substitution was made, can be used as a basis for the presumption that the barrels were in a substituted condition when they received them. If the verdict of guilty be predicated upon the assumption that the jury found from the evidence that the barrels of whisky were in a substituted condition when they were received by claimants, it must have been based upon the presumption that the whiskies, having been in that condition when seized, were therefore in that condition when received by claimants.

The only basis for such a presumption disclosed in the record is the silence of the claimants themselves, and the total absence of any explanatory evidence touching the time when the substitution was made. But can such a presumption be indulged?

There is a line of cases which hold that when a party to an action has in his exclusive possession a knowledge of facts which would, if disclosed, tend to throw light upon the transaction which is the subject of controversy, his failure to offer them in evidence may afford a presumption against him. Clifton v. U. S., 4 How. 242, 11 L. Ed. 957; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Commonwealth v. Webster, 5 Cush. (Mass.) 316, 52 Am. Dec. 711; Quantity of Distilled Spirits, Fed. Cas. No. 11,494; The Silver Moon, Fed. Cas. No. 12,856; United States v. Chaffee, Fed. Cas. No. 14,774; United States v. Mathoit, Fed. Cas. No. 15,740. These cases hold that the silence of a party to an action may be the basis of a presumption against him to the extent of strengthening other evidence so as to warrant a finding against him, which, in itself, is not sufficient to warrant such a finding, but they do not go to the extent of holding that, where there is a total lack of evidence tending to show guilt, mere silence of the party proceeded against may be the basis of a presumption of his guilt.

Independent of this, however, we do not understand the rule of presumptive evidence to be that if and when the existence of a given condition is proven there is a presumption that it had existed previous to that time. Inhabitants of Hingham v. Inhabitants of South Scituate, 7 Gray (Mass.) 232; Dixon v. Dixon, 24 N. J. Eq. 134; Blank v. Township of Livonia, 79 Mich. 5, 44 N. W. 157; Manning v. Insurance Co., 100 U. S. 697, 25 L. Ed. 761.

In Inhabitants of Hingham v. Inhabitants of South Scituate, supra, Bigelow, J., speaking for the court, said:

> "The law presumes that a fact, continuous in its nature and character, like domicil, possession, or seisin, when once established by proof, continues; and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence. But we know of no rule of law which permits us to reason in an inverse order, and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously."

Dixon v. Dixon, supra, is a case wherein the husband made a settlement by deed upon the wife in 1869. The husband thereafter filed a bill to set aside the deed, upon the ground that before the deed was made the wife had been guilty of adultery, and this was unknown and unsuspected by him when the deed was made.

The court said:

"That she afterwards lived in adultery with the man charged to have been her paramour before the making of the conveyance is too clear for doubt; but her subsequent bad life cannot authorize the inference of her prior guilt, without additional proof, and such proof by no means appears."

In Blank v. Township of Livonia, supra, the court said:

"It seems to have been assumed that because the stringer broke from dry rot in May, 1888, it was equally defective from that cause in October, 1887. But there is no such presumption. A state of facts once existing is sometimes and usually presumed to continue, but they are not presumed to have always existed. Because the condition of the stringer in May, 1888, was that of a piece of timber in which the center was decayed or rotten, did not authorize the presumption that it was always rotten from the time it was placed in the bridge. On the contrary, it being sound then, it would be presumed to remain sound for such length of time as such timber usually remains sound when exposed as that was."

In the case at bar, there is no evidence as to when the substitution was made prior to the time when the whisky in question was seized and analyzed, and under the authorities cited the jury would not be permitted to presume that the substitution had existed prior to the date of the reception of the whisky by claimants.

It may be said further in respect to indulging a presumption for or against the packages of whisky in suit, that count 1 having been drawn under section 3455, and count 2 under section 3326, of the Revised Statutes, and the government having sought in both counts to have the packages condemned and forfeited, that section 3455 alone authorizes a forfeiture, and section 3326 does not. Now, if the silence of the claimants is to be used as the basis of a presumption, may not the presumption of innocence under the second count run in favor of the packages quite as certainly as a presumption of guilt should under section 3455? In other words, there is uncertainty as to whether the substitution was made before or after claimants' receipt of the whisky. If it was made before, then the packages are guilty and forfeiture must result. If it was made after claimants' receipt of the packages, the packages are innocent of any offense of forfeiture, for no such offense is defined by section 3326.

Taking another view of the case, if a presumption is to be indulged under the facts of this case, might not there be a presumption of innocence as well as of guilt? If so, the rule that, where a presumption is equally as consistent with innocence as with guilt, it should be resolved in favor of innocence.

In Union Pacific Coal Co. v. United States, 173 Fed. 740, 97 C. C. A. 581, Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, says:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and, where all substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction."

There having been no evidence tending to show when the substitution was made prior to the seizure, we do not think it permissible to presume that the claimants were guilty of having received the whisky in the substituted condition from the mere fact that the whisky was found in that condition in their possession, unexplained, when that fact is as consistent with innocence as with guilt.

Again, if the verdict of guilty be predicated upon the assumption that the jury found from the evidence that the whisky when seized was in the possession of the claimant in the substituted condition, and, therefore, it was subject to forfeiture, then, in that event, the verdict was erroneous.

The information alleged that the claimants "did receive and have in their possession" the packages in question. The phrase "and have in their possession" is not found in section 3455, Rev. St., and will be treated as mere surplusage. The learned trial judge more than once in the charge to the jury said, in substance, that, if they should find that there was a substitution of one whisky for another, then that would justify a verdict in favor of the government under the first count in the information. So, from the wording of the information, together with the charge of the court, the jury might, with reason, have become impressed with the idea that, with the substitution proven, and the ownership of the goods at the time of the seizure admitted, a case in favor of the government was made, and so found.

But the government is seeking to work a forfeiture of the whisky seized, upon the ground alone, as stated in the first count of the information, that claimants received it in a substituted condition with intent to defraud. The property could not, therefore, be forfeited in this proceeding simply because it was in a substituted condition, nor if claimants made the substitution, but only if it was received by claimants in a substituted condition with intent to defraud.

The result is that whether the verdict of the jury be based upon the presumption of guilt, arising from the established facts of substitution and the silence of claimants, though the goods were found in their possession in the substituted condition, or whether it be based upon the proven fact of claimants having in their possession the goods in a substituted condition, it was erroneous and not warranted under the evidence and the law of the case. It results that this case must be reversed and remanded with direction that a new trial be awarded. It is unnecessary to discuss other errors assigned, since they may not arise on a new trial.

The conclusion reached in this case is controlling in No. 2,013; the two cases having been heard together.

In re FRAZIN & OPPENHEIM.

(Circuit Court of Appeals, Second Circuit. August 16, 1910.)

No. 303.

1. BANKRUPTCY (§ 263*)—SALE OF ASSETS—PURCHASE BY APPRAISER—STATUTES.

Neither an appraiser of a bankrupt nor his attorney for his benefit may purchase the bankrupt's assets at a public sale thereof, both because by public policy he is as a matter of law incapable of purchasing and under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70b, providing that all real and personal property belonging to bankrupts' estates shall be appraised by three "disinterested" appraisers to be appointed by and to report to the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 366; Dec. Dig. § 263.*]

2. BANKRUPTCY (§ 269*)—INVALID SALE—VACATION.

Where, after an invalid sale of a bankrupt's assets to an appraiser, the property was sold to a corporation in which the bankrupts' wives and the appraiser had the controlling interests, the sale would be set aside and the trustee invested with the title to the business and stock on hand, though some of the stock had been sold in the usual course of business and new stock purchased to take its place; the purchasers being restored to their original situation as nearly as possible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

3. BANKRUPTCY (§ 269*)—SALE OF ASSETS—INTEREST OF TRUSTEE—EVIDENCE.

Evidence *held* to warrant a finding that a bankrupt's trustee had no individual interest in the sale of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

4. BANKRUPTCY (§ 365*)—TRUSTEE—ACCOUNTING.

A bankrupt's trustee was not bound to account for profits made by a corporation in which he was a stockholder on goods sold by the corporation to the receivers of the bankrupt's estate, of which he was one, in the ordinary course of business and in good faith, with the approval of the co-receiver.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 565; Dec. Dig. § 365.*]

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

In the matter of bankruptcy proceedings of Louis Frazin and Abraham Morton Oppenheim, as partners. On petition of Robert C. Morris, trustee, to review an order of the District Court of the Southern District of New York, confirming a sale of the bankrupt's assets. Reversed and remanded for further proceedings.

See, also, 174 Fed. 713.

No finding of facts appears in the record. The facts hereafter stated, however, are not disputed, and formed the basis of the action of the District Court which is sought to be reviewed in this proceeding.

Early in September, 1909, John Hoerle, Clifford Ludvich, and I. V. Rosenbach were appointed appraisers of the bankrupt estate of the firm of Frazin & Oppenheim. On September 25, 1909, the appraisers signed an appraisal of

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

the contents of one of the stores belonging to the estate, located at Sixth avenue and Twenty-Second street, New York City, as follows:

Stock	$10,662 20
Fixtures	1,295 30
Total	$11,957 50

On September 28, 1909, said appraisers signed an appraisal of the leases of said store, fixing the value thereof at $4,400. On October 1, 1909, said appraisals were filed with the referee in bankruptcy. On September 28, 1909, said John Hoerle—one of the appraisers—entered into an agreement in writing with Sallye Frazin and Rose Oppenheim, the wives of the bankrupts, for the purchase from the trustee of said estate of the stock, fixtures, and leases of said store, wherein said Hoerle agreed, in substance, to produce a purchaser for said property at the trustee's sale thereof advertised to be held on September 30, 1909, provided the same could be secured at a price not exceeding $40,000, and also provided said wives of the bankrupts would repurchase from such purchaser at a price 10 per centum in advance of the price paid to the trustee, and wherein said wives agreed to repurchase at the advanced price stated and to pay the same within six months from the date of the trustee's sale. The agreement also contained provisions concerning the formation of a corporation which might repurchase, instead of the wives of the bankrupts, the control of such corporation by Hoerle pending the payment of the price with interest, the employment of one of the bankrupts as manager, the furnishing of collateral, etc. The parties had negotiated for several days at least regarding this agreement—which was most elaborate in its provisions—before it was signed.

Hoerle arranged with one Struse, a lawyer, to bid for the property at the trustee's sale which was to be by auction. Accordingly at the sale—held on September 30, 1909—Struse bid $28,350 for said property, and his bid was accepted and the sale subsequently confirmed. The testimony is not entirely clear regarding Struse's interest in the transaction. He testifies that he was equal partner with Hoerle. Hoerle testifies that Struse acquired no interest in the matter until after he had made the purchase; that he got Struse to do the bidding because he was a lawyer, and because he considered it improper for him (Hoerle) to bid because he was an official appraiser.

Of the purchase price at the sale $5,000 was obtained from the wives of the bankrupts on account of their agreement, and the remainder was supplied by Hoerle, who obtained $12,937.50 thereof from Joseph H. Wichert, the trustee of the bankrupt estate, in payment, to the extent of $12,900, of an alleged loan from Hoerle to Wichert. The amount obtained from Wichert was just one-half the balance required after deducting the $5,000 payment from the purchase price plus an item of rent falling due at that time.

An application was made to the District Court to set aside the aforesaid sale, upon the ground, among others, that it was invalidated by the fact that Hoerle was an official appraiser of the estate. The District Court denied the motion. This petition is brought for the revision of the aforesaid action of the District Court, and also for the revision of its action in other matters affecting said bankrupt estate. The facts relating to such other claims for relief are considered so far as necessary in the opinion.

Seldon Bacon and Guthrie B. Plante, for petitioner.
Montague Lessler, for respondents Frazin et al.
J. T. Smith, for respondents Wichert et al.
James C. Church, for respondents Struse & Hoerle.
Augustus H. Skillin, pro se and for receivers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The question of primary importance in this case is whether an official ap-

praiser of a bankrupt estate may, prior to the filing of the appraisal, purchase property of the estate. The District Judge held that he has a perfect right to become a purchaser, and the correctness of this ruling is presented as a question of law upon this petition for revision.

It is a long-established principle of equity jurisprudence that a trustee cannot become a purchaser of the trust estate. And not only trustees, strictly speaking, but agents, attorneys, and all persons acting in behalf of other persons and obtaining confidential information concerning their affairs, cannot purchase their property, except under certain restraints not necessary to be considered here. Lord St. Leonards thus stated these elementary principles in his treatise on Vendors and Purchasers (Sugden on Vend. and Purch. [2d Am. Ed. from 5th London Ed.] p. 422), and his statement has many times been quoted with approval by judges and text-writers:

"It may be laid down as a general proposition that trustees, unless they are nominally so, as trustees to perserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned; for, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. 'Emptor emit quam minimo potest, venditor vendit quam maximo potest.'"

The application of these principles is not dependent upon the engagement of one person by another in a confidential capacity. There need be no contract of employment at all. There need be no formal relation of trust. The disability grows out of the duty. In our opinion the rule of equity should be so broadly applied as to embrace all persons who have a duty to perform with respect to the property of others and with the proper performance of whose duty the character of a purchaser of such property may be in any degree inconsistent.

In King v. Remington, 36 Minn. 15, 26, 29 N. W. 352, 358, the Supreme Court of Minnesota said:

"Nor is the application of the rule confined to a particular class of persons as guardians, solicitors, attorneys, etc. It applies universally to all who come within its principle, which principle is that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

See, also, Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Tracy v. Colby, 55 Cal. 67; York Buildings Associations v. Mackenzie, 3 Paton, 378; Ex parte Hughes, 6 Ves. 617; Ex parte James, 8 Ves. 337; Oliver v. Court, 8 Prince, 127; Ex parte Burnell, 7 Jur. 116; Poillon v. Martin, 1 Sandf. Ch. (N. Y.) 569.

But there are other considerations underlying these equitable principles where the question is presented whether an officer of a court who has duties to perform with respect to property in the custody of the

court can buy it for his own benefit. These are considerations of public policy. And no consideration of public policy is deeper grounded upon fundamental principles—upon principles which reach the very foundations of judicial authority—than that courts and court officers must be disinterested in the management of estates committed to their charge. It cannot be permitted that officers appointed by courts to perform duties regarding property in custody of the law should speculate therein. It cannot be permitted that court officials should use their official positions for personal profit. The question is not one of fraud or good faith, of gain or loss to the estate, in a particular instance. The rule goes far deeper than that. It is applicable in every case in order to secure and maintain the impartial administration of justice.

Upon no courts is the obligation to enforce these principles of public policy greater than upon the courts of bankruptcy of the United States. The object of Congress in enacting the bankruptcy laws was to secure the efficient and fair administration of estates. The one thing, perhaps more than all others, which creditors and bankrupt alike have the right to expect from those having official duties to perform relating to the property of the estate, is disinterestedness in its disposition and liquidation.

The requirement of disinterestedness appears in the very section of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), relating to the appointment and duties of appraisers. Section 70b provides:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

An appraiser must be primarily a disinterested person. He must report to the court. In certain contingencies the amount of the appraisal determines the validity of the sale. In all cases the values are of the utmost importance in determining the question of the confirmation of the sale.

The nature of the position of an appraiser is such that he necessarily obtains confidential information concerning the cost of the property to be appraised and concerning many other matters affecting its value and the price to be obtained for it. His duty is to appraise it at a fair and reasonable value, for, if it is sold not subject to the approval of the court, only such an appraisal will afford protection to the estate. But a report of the value of property to be sold, made by a prospective bidder for it, could hardly be considered a reliable guide for the action of the court. Would an appraisal be implicitly relied upon in which the appraiser reported that the property was of the value of $16,000, but that he had entered into an agreement to bid $40,000 for it?

In our opinion both the principles of equity and the considerations of public policy, which we have examined, apply in the case of an appraiser of a bankrupt estate. The former apply because the duties which he is required to perform in relation to the property of the es-

tate are inconsistent with the character of purchaser upon his own account. The latter apply because he is an officer of the court, and cannot be permitted to assume a position where he might profit from the abuse of office.

Whether an appraiser after filing his report might be regarded as so far functus officio that he could become the purchaser of the property of the estate need not be determined here. For manifest reasons, there would be less objection to such a purchase than to one made while the duties of the appraiser were uncompleted. On the other hand, it may be that the underlying principles of public policy go so far as to disable an official appraiser from purchasing from the estate at any time property which he has valued. In the present case the property was actually purchased in behalf of the appraiser before the appraisal was filed with the referee. The date of the appraisal of the lease is the date of the elaborate agreement between the appraiser and the bankrupts' wives for purchasing and reselling the property. It is admitted that there were earlier negotiations and the date of the appraisal of the stock and fixtures is only three days before the date of such agreement. We are fully satisfied from the record that the appraiser was negotiating with respect to the purchase of the property before he signed the appraisals.

Upon these facts, we are of the opinion that the appraiser, Hoerle, was as a matter of law incapable of purchasing the property in question at the trustee's sale.

The fact that the purchase was made through Struse is not of importance if he were Hoerle's agent—which seems to have been the real situation—or if, as he himself claims, he was interested jointly with Hoerle in the transaction. In either case he was affected equally with Hoerle by the disability attaching to the latter. Tracy v. Colby, supra; Michoud v. Girod, supra; Gardner v. Ogden, supra; 2 Pom. Eq. Jur. § 958.

Nor is it of importance whether the price paid at the sale was adequate. As already indicated, the application of the rules of equity and consideration of public policy which we have examined is not dependent upon the question of fairness or unfairness in price. See Michoud v. Girod, supra, and other cases just cited. Moreover, we are not altogether convinced of the fairness of the price paid by Hoerle—$28,350. It did, indeed, largely exceed the valuation which he in the capacity of appraiser placed upon the property, but it fell far short of the $40,000 which he, in the capacity of prospective purchaser, entered into the agreement with the bankrupts' wives to bid for it.

We reach, then, the conclusion that the sale of the property, both with respect to Hoerle and Struse, was invalid. And, while the bankrupts' wives have acquired interests in such property under their contract with Hoerle, we are clearly of the opinion that the sale was invalid as to them also. The bankrupts had knowledge of Hoerle's position as appraiser. They acted as their wives' agents in the transaction with him, and their wives are chargeable with their knowledge.

The sale of the property being invalid, the next question relates to the relief to be afforded. Here we are met with a practical difficulty. The sale took place on September 30, 1909. The purchasers have carried on business since that time; have sold stock then on hand; have purchased new stock; and have so changed the situation that, in case the sale be set aside, it will be difficult to restore the parties to their original situation. But these conditions would undoubtedly arise in any case where an officer should unlawfully purchase a stock of merchandise and carry on business pending protracted legal proceedings. And, if the fact that the purchaser by his own acts has brought about a complicated situation is to lead to a denial of full relief, the right to petition this court to review the validity of a completed sale is of little value. We think it our duty to set aside the sale in question and to leave it to the District Court to restore the parties, so far as practicable, to their original situation. Manifestly the lease, fixtures, and unsold stock must be restored to the trustee. So the trustee is entitled to the value of the stock which has been disposed of. On the other hand, upon restoring and accounting for the property, the respondents would be entitled to the return of the purchase money. But what the precise situation is which now exists does not appear upon the record, and we expressly refrain from going into details, and leave the matter of adjustment—at least in the first instance—to the District Court.

The remaining substantial contentions of the petitioner relate to the relations of the trustee Wichert to the bankrupt estate.

It is contended in the first place that Wichert should, together with the other respondents, be held to make good any loss arising from the sale to Hoerle. The petitioner is justified in contending that there are suspicious circumstances tending to connect Wichert with this sale. The fact that Hoerle obtained a part of the purchase money from him is not explained entirely satisfactorily by the testimony. The District Judge, however, has found in effect that Wichert acted in entire good faith, and had no interest in the purchase. Upon this petition for revision, we cannot question this finding of fact, and must deny this measure of relief asked for against the respondent Wichert.

It is next contended that said Wichert should be held to account for the profits of the corporation of Wichert and Gardner upon shoes sold to the receivers of said bankrupt estate—he being at the time of such transactions one of the receivers.

The purchases in question were made in good faith with the approval of Mr. Merrill, the co-receiver, and we know of no principle upon which a receiver, under such circumstances, is obliged to account for profits made by a corporation in which he is a stockholder.

Objection is also made to the compensation awarded Wichert as receiver; and it is further claimed that he, together with the other respondents, should be punished for contempt of court. It is sufficient to say, with respect to these contentions, that we think no question of law is presented regarding them, and nothing else can be determined upon this petition for revision.

The order of the District Court in so far as it denied the motion to set aside the aforesaid sale is reversed with costs, and the cause remanded for further proceedings in accordance with this opinion.

WONG YOU et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 328.

1. STATUTES (§ 162*)—REPEAL—IMPLIED REPEAL OF PARTICULAR ACT BY GENERAL STATUTE.

A later general statute, which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provisions of the particular act.

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

Repeal of statutes by implication, see note to First Nat. Bank v. Weidenbeck, 38 C. C. A. 136.]

2. ALIENS (§ 21*)—DEPORTATION OF CHINESE LABORERS—STATUTE GOVERNING.

Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1909, p. 459), providing for the deportation of aliens found to be unlawfully in the country, does not affect the previous special provisions of Chinese Exclusion Act Sept. 13, 1888, c. 1015, §§ 7, 13, 25 Stat. 477, 479 (U. S. Comp. St. 1901, pp. 1314, 1317), for deporting Chinese laborers, especially since section 43 of the immigration act provides that the act should not affect existing laws relating to Chinese exclusion, and the Chinese exclusion act furnishes an exclusive remedy for deporting Chinese laborers.

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

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

Petition by Wong You and others for a writ of habeas corpus. From orders of the District Court (176 Fed. 933) dismissing the writs and remanding petitioners, they appeal. Reversed and remanded.

Appeal from orders dismissing writs of habeas corpus and remanding the petitioners, Wong You, Wong Chun, Hom Chee, Wong Yip, and Ju Fong. The petitioners are Chinese persons, who in October and November, 1909, were taken into custody under warrants issued by the Department of Commerce and Labor charging them with being aliens unlawfully in the United States, in that they entered in violation of the provisions of the immigration act of February 20, 1907. The petitioners were given hearings before the Chinese and immigrant inspector at Malone, N. Y., and that official reported that they were alien subjects of China who had entered the United States surreptitiously, without examination under the immigration laws, at places not designated as ports of entry under such laws, and that they were in the United States in violation of law.

Upon the report of the inspector the Acting Secretary of Commerce and Labor, after finding that all the petitioners, with the exception of the petitioner Hom Chee, were in the United States in violation of said immigration act, in that they entered without inspection and that three years after their entering had not elapsed, ordered their deportation to China, and issued warrants of deportation. The Secretary of Commerce and Labor has not yet

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

determined the status of the petitioner Hom Chee, and he is still held under the departmental warrant of arrest. The other petitioners are held under the warrants of deportation. It appeared with sufficient clearness at the hearing before the inspector that the petitioners were laborers. Four of them were laundrymen, and the fifth had previously been excluded from admission to this country.

The especially relevant provisions of the statutes relating to the admission and exclusion of Chinese and of the immigration act of 1907 are printed in the footnote. [1]

R. M. Moore and B. W. Berry, for appellants.

Harry E. Owen, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). "Generalia specialibus non derogant" is an elementary rule governing the interpretation of statutes. A later general statute, which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not

[1] The Chinese exclusion law (Act May 6, 1882, c. 126, 22 Stat. p. 58 [U. S. Comp. St. 1901, p. 1305] as extended by Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1909, p. 473] and Act April 27, 1904, c. 1630, 33 Stat 428 [U. S. Comp. St. Supp. 1909, p. 473]) provides that: "* * * It shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain in the United States."

Section 12 of said act as amended in 1884 (Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1305]) provides: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper Chinese inspector the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States. * * *"

Section 7 of the Chinese act of 1888 (Act Sept. 13, 1888, c. 1015, 25 Stat. 477 [U. S. Comp. St. 1901, p. 1314]) provides: "And no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required. A Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of Commerce and Labor."

Section 13 of said act of 1888 provides: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court returnable before any justice, judge or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

Section 20 of the immigration act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 904 [U. S. Comp. St. Supp. 1909, p. 459]) provides: "That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Section 21 of the act provides: "That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any laws of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section nineteen of this act."

Section 43 of said act is in part as follows: "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

within the provisions of the particular act. "The general statute is read as silently excluding from its operation the cases which have been provided for by the special one." Endlich on the Interpretation of Statutes, § 223.

The application of this rule of interpretation is decisive of the present case. The Chinese exclusion acts deal with the removal of Chinese laborers unlawfully in this country and prescribe the procedure to be followed in deporting them. These statutes constitute comprehensive particular legislation with respect to that subject. It follows, then, under the rule of interpretation, that the immigration act—the later general statute—although in its terms including all aliens, applies only to those Chinese aliens who are not subject to removal by the particular Chinese enactments. And this is a case especially for the application of the rule, because the immigration act expressly provides that it shall not be construed as repealing, altering, or amending the existing laws relating to the exclusion of Chinese persons.

It appears from the meager record that these petitioners are Chinese laborers and—if the government's contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions of the statutes relating to the Chinese. As we understand it, the government contends that the petitioners may be deported under either the Chinese act or the immigration act, not that the former is inapplicable.

If this contention of the government be well founded, we have two statutes in force prescribing different methods of procedure for the deportation of alien Chinese laborers. And the immigration act—if the government choose to act under it—would supersede the Chinese statute, because it is evident that no alien Chinese laborer could come into this country unless he enter surreptitiously and without inspection. But any such interpretation of the statutes would conflict with the rule which we have considered, under which both statutes do not apply to the same thing, but the later applies to those cases within its general language not within the provisions of the earlier; that is, as already pointed out, the Chinese statutes prescribe the procedure to be followed in removing alien Chinese laborers, while the immigration act states the procedure for the deportation of all other aliens unlawfully in this country including Chinese other than laborers. We think that these petitioners, being subject to removal according to the provisions of the Chinese exclusion laws, are not subject to removal in accordance with the procedure of the immigration act.

This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese act. All other Chinese persons, not being excluded by that act, are subject to the provisions of the immigration act. A Chinese laborer, with or without a loathsome disease, cannot enter at all. The Chinese act governs the case. A Chinese merchant would not be excluded by that act, but would be excluded by the immigration act if he had a loathsome disease or other disability prescribed in such enactment.

We fully approve the decision in Ex parte Lee Sher Wing (D. C.)

164 Fed. 506, that the provisions of the immigration act excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. The distinction upon which the application of that act depends lies in the difference in Chinese persons; between those who are, and those who are not, subject to the Chinese exclusion laws. And we find no case in which the conclusions, as distinguished, perhaps, from general references to Chinese persons in the opinions, are inconsistent with this distinction.

For these reasons, we hold that, as these petitioners appear to be subject to deportation in accordance with the enactments particularly relating to Chinese, they are not subject to removal under the provisions of the immigration act, and consequently are unlawfully held by process—either of arrest or deportation—issued under such act. If, however, proceedings should be instituted under the Chinese statutes, and it should be made to appear that the petitioners are not subject to deportation thereunder, this opinion and the discharge of the petitioners in the present proceeding will not prejudice the institution of another proceeding under the immigration act.

The orders of the District Court are reversed, and the causes remanded, with instructions to enter orders in due form discharging the petitioners from custody.

WICKWIRE STEEL CO. et al. v. NEW YORK CENT. & H. R. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 329.

1. CARRIERS (§ 34*)—INTERSTATE FREIGHT RATES—REMEDIES.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 13, 15, 24 Stat. 383, 384 (U. S. Comp. St. 1901, pp. 3164, 3165), authorizing complaints to the Interstate Commerce Commission against unjust freight rates fixed by a carrier, and under section 16, authorizing awards of damages by the Commission, and empowering the federal Circuit Court to enforce the Commission's orders by injunction or other proper process, the Circuit Court has no jurisdiction of a suit to enjoin an advance in freight rates on a commodity pursuant to a conspiracy to discriminate against complaints, though section 9 provides that one claiming to be damaged by a carrier may elect to complain to the Commission or sue in the federal courts, though section 22 provides that the act shall not alter existing remedies, and though section 23 gives the Circuit and District Courts jurisdiction in case of violations by carriers of certain provisions of the act to issue mandamus to compel conformity.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 91, 92; Dec. Dig. § 34.*]

2. CARRIERS (§ 34*)—INTERSTATE FREIGHT RATES—CHANGES—WHEN EFFECTIVE—JURISDICTION TO RESTRAIN.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), requiring carriers to file freight rate schedules with the Interstate Commerce Commission and to post them in railway stations, and providing that changes in rates shall not take effect until after 30 days' notice to the Commission and to the public in the

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

same way, a rate filed with the Commission is put in force, though not so posted, as affecting the Circuit Court's jurisdiction to enjoin it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 34.*]

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

Bill by the Wickwire Steel Company and others against the New York Central & Hudson River Railroad Company and others. From a decree for complainants, defendants appeal. Reversed, with directions to dismiss the bill.

George Stuart Patterson, Wm. Ainsworth Parker, Frank Rumsey, Hoyt & Spratt, Harris, Havens, Beach & Harris, and Moot, Sprague, Brownell & Marcy, for appellants.

Rogers, Locke & Babcock, for appellee Lackawanna Steel Co.

Love & Keating, for appellee New York State Steel Co.

Kenefick, Cooke, Mitchell & Bass, for appellee Tonawanda Iron & Steel Co.

Robert C. Palmer, for appellee Wickwire Steel Co.

Robert F. Schelling, for appellee Buffalo Union Furnace Co.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The complainants, producers of iron and steel in or near the city of Buffalo, get their furnace coke from the Connellsville region in Western Pennsylvania in car load lots, which the defendant railroad companies transport under joint arrangements for through rates. February 28, 1910, the complainants presented the bill in this cause to the judge of the Circuit Court of the United States for the Western District of New York alleging that the defendants threatened to advance the rates on coke from $1.65 to $1.85 a ton; that the rate of $1.65 was adequate and remunerative; that the advance was the result of a combination and conspiracy between the defendants for the purpose of discriminating against the complainants in favor of producers of iron and steel in the Gary and Pittsburg districts; that the proposed increase would cause the complainants irreparable damage; and they prayed for an injunction and a restraining order in the meantime enjoining and restraining the defendants from filing or enforcing the threatened tariff.

Upon this bill and affidavits in support thereof the judge granted a temporary order restraining the defendants from promulgating the proposed schedule through the Interstate Commerce Commission, and from putting it into effect pending the determination of the reasonableness of the rate by the Interstate Commerce Commission, together with an order upon the defendants to show cause March 8th why the restraining order should not continue until final hearing. Upon the return day the defendants submitted affidavits to the effect that they had actually forwarded the tariffs to the Interstate Commerce Commission at Washington February 25th, to become effective April 1st, except in the case of the Baltimore & Ohio Railroad Company, which filed its tariff February 28th, but without knowledge of

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

the granting of the restraining order. March 12th the judge of the Circuit Court continued the injunction until the further order of the court, and required the defendants to continue to transport the coke at the old rate upon condition that the complainants should file a bond to indemnify them for any loss in case the Commission found the rate to be reasonable, and that the complainants should within 10 days file their complaint with the Interstate Commerce Commission, both of which things have been done.

The defendants, without answering the charge that the rate is unreasonable, discriminatory, and the result of a conspiracy, stand flatly upon the proposition that the court had no jurisdiction of the subject-matter. This is the question to be determined.

Section 9 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]) provides that any person claiming to be damaged by any carrier subject to the provisions of the act may elect whether to complain to the Commission or to bring a suit in any District or Circuit Court of the United States of competent jurisdiction. Section 22 provides that nothing in the act contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 23 gives the Circuit and District Courts of the United States jurisdiction in the case of violations by a common carrier of certain provisions of the act to issue a writ or writs of mandamus against said common carrier requiring it to conform to the act; these remedies being cumulative.

These broad provisions would apparently justify the exercise by the court of any of its inherent powers in behalf of persons complaining of any violations by carriers of the act; but the Supreme Court has held, in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, that they are to be construed with reference to and limited by the powers conferred by Congress upon the Interstate Commerce Commission, for the purpose of insuring and enforcing the establishment and maintenance of reasonable and uniform rates. In other words, they are to be construed as intended to redress wrongs that need not be complained of in the first instance to the Interstate Commerce Commission. Mr. Justice White concluded his opinion with these words:

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief, if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

Conceding this, it is argued that the Circuit Court may exercise its inherent powers to prevent threatened injury where the rates have not been actually fixed in accordance with the provisions of the statute. In other words, if the carrier simply threatens to fix a rate, or has not fixed the rate effectively, the court may restrain the carrier from so doing, if it regards the rate as unreasonable or likely to cause

irreparable damage. The effect of this would be to prevent the carrier from ever fixing or changing its rates in accordance with the law. Be this as it may, we think the rate was fixed. Section 6 of the act requires the carrier to file with the Commission and keep open to public inspection, by posting in every depot, station, or office where passengers or freight are received for transportation, schedules showing its rates between different points. Changes in rates are not to go into effect until after 30 days' notice to the Commission and to the public has been given in the same way. It is argued that, because the affidavits state that the schedules have been filed, but not that they have been posted, nothing has been done, because they cannot become effective 30 days after filing only. But the Supreme Court, in the case of Texas & Pacific Ry. v. Cisco, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562, has held that a tariff is established, even if it has not been posted or properly posted. Mr. Justice White said:

"The filing of the schedule with the Commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary."

See, also, Kiel Wooden Ware Co. v. Chicago, Milwaukee & St. Paul Ry. Co., opinion No. 1,233, Interstate Commerce Commission.

It is true that there is no evidence in this case that the schedule had been furnished to the freight offices of the defendants; but all the same the rate mentioned has been established and put in force, and we think the jurisdiction of the Circuit Court is no different from or other than it would be if the rate had been posted.

Section 13 authorizes any person complaining to apply to the Commission, which shall institute an investigation. Section 15 authorizes the Commission to pass upon the complaint. Section 16 authorizes it to make an award of damages, and provides a method by which the Circuit Court of the United States may enforce the payment of the damages, or, if the order is for anything other than the payment of money, may enforce obedience to it by injunction or other proper process. These provisions indicate that the intention of Congress is that the carrier shall have the right to fix its rates in the first place; that the Interstate Commerce Commission may, upon investigation, determine them to be unreasonable; and that the Circuit Court of the United States may then, either at law or in equity, enforce the orders of the Commission. In this way a uniform system can be maintained, and inconsistent rulings as to reasonableness between courts and the Commission, or between different courts, avoided.

The judge of the Circuit Court, however, following the decision of the majority of the Circuit Court of Appeals for the Ninth Circuit in Northern Pacific Ry. Co. v. Pacific Coast Line Manufacturers Association, 165 Fed. 1, 91 C. C. A. 39 (in which case the rate complained of had been filed and published, but had not gone into effect), held that the interstate commerce act did not impair the inherent equitable powers of the Circuit Court to prevent threatened injury. The conclusion was largely grounded upon a single sentence of Justice

McKenna in the case of Southern Ry. Co. v. Tift, 206 U. S. 428, 437, 27 Sup. Ct. 709, 711, 51 L. Ed. 1124:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions, in view of our decision in Texas & Pacific Railroad Company v. Abilene Cotton Oil Company, 204 U. S. 426 [27 Sup. Ct. 350, 51 L. Ed. 553], upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates, which have been exacted in accordance with the schedule of rates as filed, is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates."

Mr. Justice White, in the subsequent case of Baltimore & Ohio R. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 500, 30 Sup. Ct. 164, 171, 54 L. Ed. ——, explained this language of Mr. Justice McKenna:

"Nor is there anything in the contention that the decision in Southern Ry. Co. v. Tift, 206 U. S. 428 [27 Sup. Ct. 709, 51 L. Ed. 1124], qualifies the ruling in the Abilene Case, and is an authority supporting the right to resort to the courts in advance of action by the Commission for relief against unreasonable rates or unjust discriminatory practices, which, from their nature, primarily require action by the Commission. While it is true that the original bill in the Tift Case sought relief from alleged unreasonable rates before action by the Commission, yet, as said by this court (page 437 [206 U. S., page 711, 27 Sup. Ct., 51 L. Ed. 1124]): 'The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered.' "

The dissenting opinion of Mr. Justice Harlan in Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. ——, shows that he understood the law to be settled in the same way:

"The plaintiffs in error, citizens of Georgia, brought this suit in equity in the Circuit Court of the United States for the Southern District of Georgia against the defendants in error, corporations of several different states other than Georgia. The relief sought was a decree enjoining those corporations from putting in force and maintaining in Georgia certain rates established by agreement among themselves. It seems to me that this case could have been disposed of upon the authority of Baltimore & Ohio Railroad Co. v. Pitcairn Coal Company, recently decided, 215 U. S. 481 [30 Sup. Ct. 164, 54 L. Ed. ——], in which the court held in substance that shippers, who complain of rates adopted by interstate carriers, cannot obtain relief by an original suit brought in any court, federal or state, but must make application, at the outset, to the Interstate Commerce Commission. This, I think, is all that need have been said; for, whatever interpretation was given to the judiciary act of 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), the Circuit Court would have been required, under the case just cited, to decline jurisdiction. But the court, in its wisdom, does not refer to this view of the case, and deems it necessary to determine whether the plaintiffs, citizens of Georgia, may, under the judiciary act of 1888, considered alone, invoke the jurisdiction of the Circuit Court, held in that state, against the defendant corporations of other states."

What we have said is consistent also with the views expressed by the Circuit Court of Appeals for the Fifth Circuit in the Macon

Grocery Co. Case, 166 Fed. 206, as well as with those of the Circuit Court for the Southern District of West Virginia in Columbus Iron & Coal Co. v. Kanawha Ry. Co., 171 Fed. 713, which we are informed has been affirmed by the Circuit Court of Appeals for the Fourth Circuit in an opinion not yet reported (178 Fed. 261).

The order is reversed, with directions to the court below to vacate the injunction and dismiss the bill without prejudice and with costs to the defendants.

NOYES, Circuit Judge (concurring). The primary purpose of the act to regulate commerce is the prevention of unjust discrimination by common carriers. The Interstate Commerce Commission exists as an instrumentality for the accomplishment of such purpose. But the power of the Commission under the act to afford relief is narrower than the rights guaranteed by the act. The act prohibits discriminatory rates and practices, but the Commission can only stop them after they have become effective and have, perhaps, done irreparable injury. A shipper, entitled under the act to freedom from discriminations, may yet be ruined by discriminations before the Commission can take action if the courts are powerless to intervene and grant some measure of injunctive relief.

In the present case the complainant shippers alleged that the defendant carrriers had entered into a combination for the purpose of making discriminatory rates which threatened irreparable injury. The Circuit Court granted an injunction preserving the existing situation until the Interstate Commerce Commission should have opportunity to act, and required security for the protection of the defendants.

Upon principle it would seem to me that the Circuit Court in affording this measure of relief was not encroaching upon the field of the Interstate Commerce Commission, but rather was acting as an aid of the Commission for the furtherance of the objects of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). If the question were an open one I should regard the existence of power in the courts to grant relief of this nature as consistent with, and as supplementing only, the authority conferred upon the Commission. In view, however, of the decision of the Supreme Court in Baltimore & Ohio R. R. Co. v. Pitcairn, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. ——, I agree that this court is not at liberty to adopt the conclusion which would follow from these views. I am unable to follow the judge of the Circuit Court in the opinion that that decision is not controlling. I cannot interpret it in any other way than as broadly holding that shippers can never resort to the courts for relief in advance of action by the Interstate Commerce Commission. Perhaps the Supreme Court would make an exception to this rule—would say that it does not apply to mere provisional injunctions against threatened irreparable injury. But in view of the language of the opinion, I think that this court would not

be warranted in drawing such a distinction. Consequently I feel constrained to concur in the opinion that the Circuit Court had no jurisdiction to make the order appealed from and that it should be reversed.

HEINZE v. UNITED STATES.

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

No. 311.

1. OBSTRUCTING JUSTICE (§ 4*)—SUBPŒNAS—RETURN—EVIDENCE.
That a grand jury subpœna was indorsed by the marshal as of a particular day showing inability to find the witnesses does not show that the subpœna was returned that day, and hence that it had become functus officio the next day, when accused is charged to have impeded administration of justice by inducing a witness to flee.
[Ed. Note.—For other cases, see Obstructing Justice, Dec. Dig. § 4.*]

2. OBSTRUCTING JUSTICE (§ 14*)—SUBPŒNAS—RETURN—EVIDENCE.
In a prosecution for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna, any presumption that an indorsement on the subpœna showing inability to find witnesses was a record of all the serving officer's doing is rebutted by testimony that he subsequently tried to find the witnesses.
[Ed. Note.—For other cases, see Obstructing Justice, Dec. Dig. § 14.*]

3. OBSTRUCTING JUSTICE (§ 15*)—EVIDENCE—ADMISSIBILITY.
In a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna, it was not reversible error to admit a telegram objecting to sending witness any more money though accused's responsibility for the telegram was not clearly established, accused having advanced expense money to witness; nor was it reversible error to admit a showing that witness evaded service before accused's intervention.
[Ed. Note.—For other cases, see Obstructing Justice, Dec. Dig. § 15.*]

4. CRIMINAL LAW (§ 400*)—EVIDENCE—SECONDARY EVIDENCE—CIPHER TELEGRAMS.
In a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna, it was proper to admit secondary evidence of the contents of a cipher telegram from the fugitive witness, where there was evidence that the telegram came into accused's possession.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879–886; Dec. Dig. § 400.*]

5. OBSTRUCTING JUSTICE (§ 15*)—EVIDENCE—ADMISSIBILITY.
In a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna, it was proper to admit testimony showing witness' presence within the jurisdiction when service was attempted and the efforts made.
[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 31; Dec. Dig. § 15.*]

6. OBSTRUCTING JUSTICE (§ 15*)—EVIDENCE—ADMISSIBILITY.
In a trial for obstructing service of a subpœna in a grand jury investigation by inducing a witness to leave, testimony, concerning the removal of a company's books and occurrences in the company's office before issuance of the subpœna and involved in the investigation was admissible to show accused's knowledge of the investigation and of that which the witness could testify to as a motive for inducing him to leave, and it was

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

proper to show that in accused's presence his brother, the person investigated, asked witness if he had a good memory.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 31; Dec. Dig. § 15.*]

7. CRIMINAL LAW (§ 1053*)—REVIEW—EXCEPTIONS—NECESSITY FOR.
On review of a conviction conduct of the trial judge not excepted to cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2261, 2265; Dec. Dig. § 1053.*]

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

Arthur P. Heinze was convicted of endeavoring to impede the administration of justice, and he brings error. Affirmed.

Writ of error to review a judgment convicting the plaintiff in error (hereinafter called the defendant) of a violation of section 5399 of the Revised Statutes (U. S. Comp. St. 1901, p. 3656), which reads as follows:

"Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

The indictment contains three counts, but the defendant was convicted upon the third count only. This count states, in substance, that there was pending before the grand jury of the Circuit Court for the Southern District of New York, at the May Term, 1909, an inquiry into charges against Fritz Augustus Heinze for a violation of the national banking act; that on May 21, 1909, a writ of subpœna was duly issued directed to Tracy S. Buckingham commanding him to appear before the grand jury on May 24, 1909, to testify in regard to said matter; that said writ was placed in the hands of a deputy marshal—Joseph J. Kumb—for service; that said Buckingham was then within the jurisdiction; and that the deputy marshal endeavored to serve the writ. The indictment then charges that the defendant, well knowing of the issuance of said writ, "unlawfully and corruptly did endeavor to impede the due administration of justice in the said court by then and there, and before the said Joseph J. Kumb had an opportunity to find and see the said Tracy S. Buckingham and serve the said writ upon him, knowingly, willfully, and corruptly advising and directing the said Tracy S. Buckingham to secure and conceal himself from and avoid the said Joseph J. Kumb and evade the service of the said writ upon him, and to depart from the said district in order to evade such service, all of which the said Tracy S. Buckingham, in pursuance of the said advice and direction of the said Arthur P. Heinze, immediately did—and by furnishing a sum of money, to wit, one hundred dollars, to the said Tracy S. Buckingham to assist and enable him to depart from the said district and go to the said foreign country."

The writ of subpœna which was duly introduced in evidence bore the following indorsement:

"I hereby certify that the within subpœna was served as follows: John Williams P. S., after due and diligent search I have been unable to find Tracy S. Buckingham, Frederick Eckstein and Geo. Baglin in my District.

"William Henkel, U. S. Marshal, S. D. N. Y.

"May 21/09."

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

Other material facts are stated in the opinion.

William Rand, Jr., for plaintiff in error.

Henry A. Wise, U. S. Atty., and Felix Frankfurter, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The defendant's principal contention is that the evidence failed to show that he impeded the administration of justice because:

(a) He did not act in the premises until after the writ of subpœna had been returned by the marshal and had thereby become functus officio.

(b) After the return of the writ there was nothing to obstruct or impede.

This contention is based wholly upon the fact that the subpœna which was issued upon May 21, 1909, and required the attendance of Buckingham upon May 24th, bore the indorsement shown in the foregoing statement of facts. The defendant contends that this indorsement established that the subpœna was returned to the clerk of the court upon May 21st—the day of its date—and consequently had become functus officio on May 22d—the day when, according to the testimony, the defendant induced Buckingham to leave the country.

We perceive no warrant for the defendant's contention. There was no proof whatever that the subpœna was ever returned to the clerk. The indorsement was merely the record of the doings of the officer upon a particular day—the 21st—and any presumption which might arise that it constituted a record of all his doings with respect to the subpœna is rebutted by the testimony of the deputy marshal that upon the following day—the 22d—he again tried to serve it. The indorsement, in and of itself, in no way affected the validity of the subpœna.

There was therefore no error in denying the motion to dismiss the indictment on account of the absence of proof that the writ of subpœna was outstanding at the time of the defendant's acts; and certainly there was no error in denying such motion upon the ground that the offense charged was not established in other respects. The testimony, not objected to and not contradicted, showed beyond the slightest doubt that the defendant had sent Buckingham out of the country and had furnished him money with which to go out and stay out; had in the most flagrant manner attempted to obstruct and impede, and had obstructed and impeded, the administration of justice in a Circuit Court of the United States. The sentence which the trial court saw fit to impose does not indicate the serious nature of the offense.

In this state of the proof it is unnecessary to examine at very great length the alleged errors in the admission of testimony. If there were technical errors, the defendant could not have been prejudiced thereby. Thus, with positive and uncontroverted evidence that the defendant had induced Buckingham to go to Canada and had given him money for his expenses, there was no practical injustice in receiving a telegram objecting to sending more money, even if the defendant's responsibility for such telegram were not clearly established. So, with the defend-

ant's own acts clearly shown, he was not harmed by the admission of evidence indicating that prior to his intervention Buckingham had himself evaded service. And the same is true with respect to the admission of other testimony to which objection is made.

But, while in case there were any technical errors in admitting testimony, we could hardly regard them as prejudicial, we are not at all satisfied that there were any such errors.

There was evidence to warrant the trial judge in finding that the cipher telegram came into the defendant's possession and secondary evidence of its contents was properly received. The telegram which Buckingham received was obviously a reply to the message which he sent, and we think it the better view that it was properly admitted as a reply telegram.

The testimony as to what took place when the deputy marshal attempted to serve the subpœna on May 21st was properly received. It showed Buckingham's presence within the jurisdiction at the time and the efforts made to serve the subpœna. We think that the trial court properly limited the scope and effect of this testimony.

The testimony concerning the removal of the books of the United Copper Company and the occurrences at the United Copper Company's office prior to the issuance of the subpœna tended to show the knowledge on the part of the defendant of the proceedings before the grand jury and of that which Buckingham could testify to if called as a witness and furnished the motive for sending him out of the jurisdiction. This testimony was properly received as well as the question of F. A. Heinze to Buckingham in the presence of the defendant: "Have you a good memory?"

Finally the defendant complains of the attitude of the trial court toward him. We are, however, unable to see that the defendant was substantially prejudiced by any act of the court, and anyway, as there are no exceptions in this regard, nothing is presented for us to determine.

The judgment of the Circuit Court is affirmed.

PENNSYLVANIA STEEL CO. v. LAKKONEN.

(Circuit Court of Appeals, Second Circuit. August 1, 1910.)

No. 308.

1. MASTER AND SERVANT (§ 182*)—DEATH OF SERVANT—EMPLOYER'S LIABILITY ACT—"SUPERINTENDENCE."

The person in charge of a particular piece of work as a subforeman or pusher is a person engaged in superintendence within the New York employer's liability act (Laws 1902, c. 600), making the master liable for injuries to servants caused by the negligence of a superintendent or a person exercising superintendence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*

For other definitions, see Words and Phrases, vol. 7, pp. 6791–6792.]

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

2. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—NEGLIGENCE OF SUPERINTENDENT—QUESTION FOR JURY.

In an action for the death of a servant by being struck by a falling iron saucer used in the erection of bridge beams, whether the subforeman in charge of the work was negligent in pulling out the pin attached to the fall before the saucer had been taken off *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032–1035; Dec. Dig. § 286.*]

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

Where the sufficiency of the notice of a servant's injury served on the master depended on the construction to be given to the New York employer's liability act (N. Y. Laws 1902, c. 600), pursuant to which the notice was served, that construction of the statute approved by the New York court of last resort would be followed in the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–968; Dec. Dig. § 366.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

4. MASTER AND SERVANT (§ 252*)—EMPLOYER'S LIABILITY ACT—NOTICE.

New York Employer's Liability Act (N. Y. Laws 1902, c. 600) § 2, provides that an action thereunder for injuries to a servant cannot be maintained unless notice of the time, place, and cause of the injury is given to the employer within 120 days. *Held*, that where a notice gave the time and place of decedent's injury, and stated that the cause was his being struck by a large piece of iron which fell on him from above the place where he was working while performing his duties pursuant to directions by reason of the negligence of the superintendent or person acting as superintendent in failing to exercise reasonable care, diligence, and prudence in the premises, it was sufficient, though it also stated that the superintendent was negligent in furnishing deceased with an improper and unsafe appliance, tool, and instrument about his work, and directing the use of it, which assignment was thereafter abandoned.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

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

Action by Hilta Lakkonen, as administratrix of the goods and chattels of Alexander Lakkonen, deceased, against the Pennsylvania Steel Company, to recover damages resulting from the death of her husband, alleged to have been caused by defendant's negligence. From a judgment for plaintiff, defendant brings error. Affirmed.

Battle & Marshall (H. S. Marshall, of counsel), for plaintiff in error.

H. Powell and Jacob C. Brand (John B. Stanchfield and M. Spencer Bevins, of counsel), for defendant in error.

LACOMBE, Circuit Judge. The action is brought under the employer's liability act of the state of New York (Laws 1902, c. 600). Decedent was on the day in question in the employ of the steel company, which was erecting the Blackwell's Island bridge and was working under the charge of a subforeman or "pusher" named Drummond. He was working at the bottom of a post constructed of plates riveted together with lacings on the sides. These posts would be put in place by putting a pin through a hole at one end, connecting the tackle of a

derrick with the pin and lifting the post to a proper position. This post had thus been put in place and the next step was to remove the lifting pin, which was still in the post and attached to the block and fall. The pin was 14 to 16 inches in diameter about 3½ feet long, and was held in place with a washer or saucer on each end of it. The washer weighs 40 to 60 pounds, is fastened on to a bolt or rod which runs through pin and washer and projects beyond the washer, the latter being kept in place by a nut which is screwed on the end of the bolt. To remove the pin, it was necessary first to unscrew the nut and take off the washer. In removing the pin from the post, the washer was permitted to fall to the ground a distance of about 40 feet. It struck Lakkonen and killed him. James Headrich was the general foreman of the work in question, having under him Drummond and other pushers. The state courts have held that a pusher such as Drummond is a superintendent within the meaning of the act. Drummond told two of the men under him, Peterson and Davis, to go up the post and get the pin out. He went up with them himself, and was at the top of the post when the accident happened. His narrative of what took place there is as follows:

"The pin was already fastened to the fall as it hadn't been disturbed from the day the post was connected; and, it being there was a strain on the fall, I had him (apparently the winchman) slacken off to release the strain—I had to pull the pin a little one side to drop it on the bolt that went through the center. There was play enough to allow two inches (of side movement). By so doing it would leave a space big enough for a man to get both hands in—for two men to get each one hand in to hold the saucer. I gave a signal to go ahead on the fall—intending to stop him when he got the weight of the pin so that I could move it either way. The engine went ahead. The first time he went ahead so far that I had to make him lower again. He lowered so much that I had to make him go ahead again; and between the time I had given the signal and got the answer to my signal the nut was taken off, and when the strain came on the fall the pin floated south and the saucer fell. I had not seen Davis take this nut off—I looked over the side before I gave the signal to go ahead with the fall and the nut was out—I saw the nut and the saucer—Davis was leaning sideways. His hands were straight in towards the column or ought to be. I couldn't see just where they were, and I didn't know whether he had hold of the nut or not. I couldn't say."

The defendant contends that there is not sufficient proof of negligence on Drummond's part and that the accident was plainly due to the negligence of Davis, who was a fellow servant with deceased. The plaintiff contends that Drummond was negligent because he had given directions to Davis to remove the nut, and ought to have realized that between the time when he gave such directions and the time when he moved the pin it was to be expected that Davis would have unscrewed the nut; also, that it was the usual practice to begin operations for removing the pin by unscrewing the nut, and, if Drummond wished on this occasion first to shift the pin far enough to clear the bolt, he should have cautioned Davis not to take off the nut until he gave further orders. It is evident that some little time elapsed while Drummond was signaling to the engine man and trying to shift the pin, so as to bring the bolt into the hole. The following excerpts from the testimony are relied upon, Drummond testified:

"In the doing of my work it was always customary before I started to remove the pin to have the nut taken off—to take off the nut before I moved the pin providing the pin was in good condition that I could take the nut and saucer off safely; but, being in this case it wasn't in a safe condition, it was my place to move the pin first. I went up to take the pin out. When I went up there I told Davis it would be his job to take the nut off, but I didn't mention the time."

Davis testifies:

"It was our intention to work the pin out through the hole far enough so that we could lash on to the center of it, so that, when we lowered the pin down, it wouldn't slip through the cling. Well, we worked it out through the hole far enough so that the washer came up against the outside of the post, and then it was necessary to take the nut off in order to get the washer off, or to get the pin out through the hole any further, and Drummond said to me, 'We will take the nut off,' and I took the nut off and laid it down on the separator that is right at the top of the post; and I was straightening up to reach around to get hold of the saucer, expecting somebody to help me get it when the pin went out through the hole. I didn't have time to catch it. Q. When did Drummond tell you to take the nut off? Did he say to you to take it off, or that it would be your business to take the nut off? A. I believe he said, 'We will take the nut off now,' meaning for me to take it off."

Peterson testified:

"Q. Was it customary to start to pull this pin out before the saucer or washer had been taken off? A. Well, the washer was supposed to be taken off before we started. That was the way they had conducted the business before. In other words, the first of all they take off the nut, and then the washers, and then start the traveler moving. While I was on the column with Davis and Drummond, I heard Drummond say to Davis, 'Take the nut off.'"

Upon the testimony as it stood at the close of the trial plaintiff was entitled to go to the jury on the question whether any negligence on the part of Drummond was a cause of the accident.

Section 2 of the statute under which the action is brought provides that such action cannot be maintained unless "notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days." The notice in this case which was duly signed and served reads as follows:

"Please take notice: That I have a claim against you for damages sustained by me as administratrix of the goods, chattels, and credits of Alexander Lakkonen, deceased, for the death of said decedent, caused by reason of your carelessness and negligence while in your employ on or about the 22nd day of July, 1907, at about 8:50 a. m., at about and between the foot of E. 59th street and the foot of E. 60th street, in the Borough of Manhattan, city of New York.

"That such injuries and resulting death were caused by said decedent being struck by a large piece of iron which fell upon him from above the place where he was working, while he was performing his duties upon and about the new Blackwell's Island bridge, at the place above mentioned, pursuant to your directions.

"Such occurrence was caused:

"1st. By reason of your negligence, and the negligence of a person in your service and intrusted with and exercising superintendence, and by reason of the negligence of a person with your authority and consent acting as superintendent in the absence of such superintendent, in furnishing to said deceased an improper and unsafe appliance, tool and implement in and about his work at the above named place, and in directing the said deceased to use the same.

"2d. By reason of your negligence, and the negligence of a person in your service and intrusted with and exercising superintendence and by reason of a person with your authority and consent acting as superintendent in the absence of such superintendent, in failing to exercise reasonable diligence, care, and prudence in the premises."

As was said in a recent decision of the New York Court of Appeals (Logerto v. Central Building Co., 198 N. Y. 390, 91 N. E. 783):

"The statute contemplates that notice be given by the party injured or by some one on his behalf. Therefore the statement of the accident should not be required to conform to any higher standard than that which might be expected from an illiterate person."

The same court has also held that, by this provision, "the Legislature intended that the notice in stating the cause of the injury should with reasonable definiteness and completeness, in however informal and inartistic a manner, indicate the negligent or wrongful misconduct of the employer really claimed to have been the cause of the accident and really relied on as the basis of the complaint against him, and this manifestly that he might by virtue of said seasonable notice investigate and prepare to defend against the charge thereafter actually to be prosecuted." Finnigan v. N. Y. Contracting Co., 194 N. Y. 244, 87 N. E. 424, 21 L. R. A. (N. S.) 233.

The notice above quoted gives the time and place, and states that the cause of the injury was being struck by a large piece of iron which fell upon deceased from above the place where he was working, while performing his duties, pursuant to directions, the fall being occasioned by reason of the negligence of a superintendent or a person acting as superintendent in failing to exercise reasonable diligence, care, and prudence in the premises. This certainly states the cause of the injury, to wit, the fall of the large piece of iron from above at the place where he was put to work, and indicates that the cause of the accident was the negligence of a superintendent or an acting superintendent. With such a notice as this there certainly should be no difficulty in investigating the charge and preparing to defend against it. The notice does indeed state that the negligence was that of a "superintendent" or of an "acting superintendent," but it would be wholly unreasonable to require the injured employé to state with absolute accuracy the particular position in the employer's service of the superior through whose lack of reasonable care and prudence an operation has been negligently carried on. So, too, the notice states an alternative cause of the occurence, viz., furnishing the deceased with an unsafe tool, a claim since abandoned. But in the very case on which defendant mainly relies (Finnigan v. N. Y. Contracting Co., supra) the New York Court of Appeals says:

"A claimant at the time of serving notice might justifiably believe that there was a cause of the accident, which however, on the trial he might fail to establish, and the notice should not be held invalid because it contained a statement of plural causes—really believed to exist even though some one was not established."

This language exactly describes the notice here, which is very different from the one condemned in the Finnigan Case, where the cause was alleged to be failure to furnish safe place, failure to furnish suitable

tools, failure to inspect guard and protect the place, failure to furnish competent foreman, failure to furnish competent employés, and failure to promulgate and enforce proper rules.

Since the sufficiency of the notice depends upon the construction to be given to a state statute, the federal courts will follow the construction of that statute approved by the state court of last resort. We find nothing in the decisions of that tribunal which would require the rejection of this notice as not conforming to the requirements of the act. It is necessary to cite only the causes found on the briefs. The Finnigan Case has already been referred to. In Bertolami v. United Engineering Co., 198 N. Y. 71, 91 N. E. 267, it was held of a notice not materially different in those particulars from the one before us that it "does state beyond substantial criticism what did actually cause the injuries—and that the specifications of defendants legal agency in causing the accident—are apt and applicable." The latest deliverance of the Court of Appeals is in Logerto v. Central Building Co. (April 26th, 1910) 198 N. Y. 390, 91 N. E. 782. In that case the only statement of the cause of the injury was that "certain earth, stone and material was caused and permitted to fall upon and seriously injure" the plaintiff. This was held insufficient; the court, by Cullen, C. J., saying:

"Whether the plaintiff was injured by the caving of the bank, by earth falling from the boxes in which the material excavated was removed, by accident to the derricks which elevated the boxes, suffering the material to fall, or by the foundation walls, which were being constructed, falling on him, the notice gives no intimation whatever. The most illiterate person would not have stated to another the occurrence of this accident and injury to the plaintiff in the bald terms of the notice. He would have told to some extent how the occurrence happened. It might be in the most terse language that a bank in which the plaintiff was digging fell down upon him; that material which was being taken out of the excavation had been suffered to fall on him; that a wall had given way and injured him. This much, at least, should be specified in the statutory notice, and it is imposing no unreasonable burden on the employé to require it."

The notice in the case at bar seems to be in reasonable conformity to the statute as interpreted by the state court.

EXCHANGE MUT. FIRE INS. CO. v. WARSAW-WILKINSON CO.

(Circuit Court of Appeals, Third Circuit. September 12, 1910.)

INSURANCE (§ 173*)—CONSTRUCTION OF POLICY—AMOUNT OF INSURANCE.

A fire insurance policy issued by a mutual company on deposit by the insured of a sum by way of premium to be subject to assessments contained the following provision: "If the deposit made by the insured at the time this policy is issued should be less than the premium which would be payable on the property hereby insured for the amount of insurance above named, at the rate charged by the majority of the stock companies engaged in fire insurance business in the locality in which this risk is situated, then it is understood and agreed that the amount of insurance contracted for herein and all claims for losses hereon shall be reduced pro rata on the several and separate items thereof." *Held*, that the purpose of the provision was to put the insurance on a stock company basis; the criterion being the average rate which would be

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

charged by such companies "on the property hereby insured" and was to be determined by taking the stock company rate there in vogue on the same kind of property and not the average on all classes without regard to the nature of the risk.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 173.*]

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

Action by the Warsaw-Wilkinson Company against the Exchange Mutual Fire Insurance Company. Judgment for plaintiff for want of a sufficient affidavit of defense, and defendant brings error. Reversed.

H. B. Gill, for plaintiff in error.

R. M. Schick, for defendant in error.

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

ARCHBALD, District Judge. This was an action on a fire insurance policy for $7,500. The value of the property insured was $33,000, and the loss was $12,000, distributed in various amounts over the building and its contents; the total insurance being some $19,800, and the defendant's share, on the basis that the policy held good for the face of it, being $2,505.58, for which amount suit was brought. The defendant disputes its liability for this amount, and contends that it is only liable for $1,721.72; there being a clause in the policy by which the amount for which it was written was to be reduced under certain circumstances, which clause it is claimed is operative here, and reduces the policy to $5,158, instead of $7,500, with a corresponding reduction in the amount due on it. The company is a mutual company, and the insurance was effected by the deposit of $102.73, by way of premium, and the agreement on the part of the insured to pay such charges as might be levied by the directors against it. And the clause having evidently been inserted in the policy for the protection of the company against too low a rate, the question here is the construction to be given to it, and whether a case is made out within it.

The clause of the policy reads as follows:

"If the deposit made by the insured at the time this policy is issued should be less than the premium which would be payable on the property hereby insured for the amount of insurance above named, at the rate charged by the majority of the stock companies engaged in fire insurance business in the locality in which this risk is situated, then it is understood and agreed that the amount of insurance contracted for herein and all claims for losses hereon shall be reduced pro rata on the several and separate items thereof."

The defendant filed an affidavit of defense, which embodied its contentions and tendered judgment for $1,721.72. But the plaintiff, not satisfied with that, and conceiving that no defense was shown to the whole amount claimed, took a rule for judgment for want of a sufficient affidavit of defense, which the court made absolute; the views entertained with regard to it being expressed as follows:

"The plaintiff contends that the word 'charged,' used in the provision of the policy above set forth, should be construed to have reference only to rates charged by stock companies in insuring the same property as that covered

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

by the policy sued on. Indeed, the plaintiff goes further and insists that, unless the plaintiff's property was actually insured by a majority of the stock companies engaged in fire insurance business in Warsaw, the place where the plaintiff's property was located, the quoted provision of the policy is wholly inapplicable to the present case. But I think the fair meaning of the language is that if $102.73 was, when the plaintiff's policy was issued, less than the premium then charged by the majority of stock companies then engaged in fire insurance business in the locality where the plaintiff's property was situated for insuring property in that locality, the maximum indemnity of $7,500 mentioned in the policy sued on should be correspondingly reduced. The defendant, however, is not satisfied with either of these constructions. Its contention is that the language means that the maximum indemnity of the policy shall be reduced if the $102.73 was, when the plaintiff's policy was issued, less than the premium then charged by the majority of stock companies then engaged in fire insurance business in the locality where the plaintiff's property was situated, for insuring property like or similar to that of the plaintiff. Such, evidently, is the construction on which the affidavit of defense rests. But what right has the court thus to limit the meaning of the words of the policy? If, when the plaintiff's policy was issued, much the larger part of the property insured in Warsaw by the majority of the stock companies engaged in fire insurance business there was limited to a class of better risks than the plaintiff's property, and therefore was insured at low rates, has not the defendant bound itself to take those low rates into consideration in estimating the maximum indemnity of the policy sued on? Would it be permitted, in such case, to consider only the higher rates for risks like or similar to the risk of the policy sued on? There is nothing in the policy that permits the defendant to take only a particular class of property insured in Warsaw as the basis on which to estimate the maximum indemnity. As I read the policy, the only way of ascertaining 'the rate charged by the majority of the stock companies engaged in fire insurance business in the locality in which this risk is situated' is by getting the names of all the stock companies which, at the date of the issue of the plaintiff's policy, had outstanding fire insurance in Warsaw, learning the rates charged by those companies for such outstanding insurance, regardless of the nature of the risks, and then determining the question from the data thus obtained. It may be that such a rule is an unbusinesslike one for an insurance company to establish. But, in my judgment, it is the rule the defendant has made. Certainly, there is no authority for the court to read into the policy the words of limitation which are found in the affidavit of defense. When policies of insurance are obscure they are invariably construed most strongly against the company issuing them. Much less, then, may an insurance company insert into the plain language of a policy issued by it words limiting its liability."

The opinion which is thus expressed does not in our judgment give proper effect to the provisions of the policy or the defense set up by the affidavit under it. The clause in controversy in terms provides for a reduction of liability from the amount for which the policy is written upon certain specified conditions; these conditions in substance being that, if the deposit made by the insured by way of premium, at the time of taking out the insurance, is less than would be payable on the property insured, for the amount of insurance named in the policy, at the rate charged by a majority of the stock companies engaged in business, in the locality of the risk, then the amount of insurance contracted for is to be reduced proportionately. The insurance, in other words, is to be put on a stock company basis, as determined by the rate charged by a majority of such companies doing business in the vicinity. The criterion of this is the stock company rate there in vogue, on the same kind of property, and not the average on all classes without regard to the nature of the risk, as held by the court below, which is a

clear departure from the terms of the policy. It is only by taking the stock company rates on similar property in the neighborhood that it can be determined what the stock company rate would be on the property insured, which rate by comparison is to decide the extent of liability on the policy; the agreement being that, if the deposit made by way of premium is less than this, there shall be a corresponding reduction. Expressed briefly, the deposit made was to pay for the same amount of insurance that it would have bought on the property insured from the majority of the stock companies having risks in that locality, and no more than that, notwithstanding the amount for which it was written. And this could only be judged by the rates charged by such companies on the same kind of property. There is no ambiguity in this, nor does it read into the policy limitations not found in it. It is simply taking the policy as it stands, and giving it its natural, not to say unavoidable, construction. And by contrast the construction given it in the court below, by which it was held that, in order to determine how much insurance the deposit made would buy at the rates charged by a majority of the stock companies doing business in the locality, all the outstanding insurance of those companies there must be taken, regardless of the nature of the risks, imported into the policy something not found in it, nor entitled by any authorized implication to be brought into it.

This being so, the affidavit of defense was sufficient, and judgment could not rightly be given in the face of it for more than was there admitted. Pursuing the terms of the policy, it was there expressly averred, that:

"The deposit of $102.73 made by the plaintiff was less than the premium which would be payable on the property insured by the policy sued on for the amount of insurance named therein at the rate charged by the majority of the stock companies engaged in fire insurance business in the locality in which the risk was situated."

Not stopping with this, it was further averred that the $102.73 deposited by the plaintiff was at the rate of $1.29 per $100 of insurance on the buildings, and $1.42 on the contents, and that the rates charged by a majority of the stock companies engaged in the fire insurance business, in that locality, when the policy was issued, was $1.84 per $100 for like insurance on such buildings, and $2.09 on the contents; these, as it is said, being the rates charged by such companies for similar insurance upon the risk expressed in the policy in suit, which reduced accordingly the amount of insurance contracted for, the total amount of insurance upon this basis for which the defendant was liable being $5,158, and its proportionate amount of the loss incurred being $1,721.12, which sum it was at all times willing to pay, constituting as it did the amount for which alone it was liable. The defendant in these averments brought itself squarely within the clause of the policy invoked, by which, as we construe it, it was protected from any larger liability than it admitted, and it was error therefore to give judgment for more than that.

There are other contentions made by counsel for the plaintiff in order to sustain the judgment, but it is not necessary to notice them.

The judgment is reversed, and a procedendo awarded.

NEWCOMB et al. v. BURBANK et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 228.

1. COURTS (§ 279*)—FEDERAL COURTS—JURISDICTION—RECORD.
Since federal courts exercise but a limited jurisdiction, conferred by the federal Constitution and laws, there is no presumption in favor of their jurisdiction which must affirmatively appear of record.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816, 817; Dec. Dig. § 279.*]

2. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION—DISMISSAL.
It is the duty of a federal court to dismiss of its own motion, if jurisdiction does not affirmatively appear.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816, 818; Dec. Dig. § 280.*]

3. APPEAL AND ERROR (§ 1166*)—FEDERAL APPELLATE COURT—WANT OF JURISDICTION OF COURT BELOW—REVERSAL.
Where, on appeal to a federal appellate court, jurisdiction of the court below does not affirmatively appear, it is incumbent on the court of its own motion to reverse, without reviewing the merits.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4527–4530; Dec. Dig. § 1166.*
Jurisdiction of Circuit Court of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

4. COURTS (§ 322*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—DOMICILE.
Where, in an action in which federal jurisdiction depended solely on diversity of citizenship, there was nothing in the record to show that either plaintiff or defendant was a citizen of any state, but the complaint alleged that plaintiffs were residents and inhabitants of Kentucky, but did not state the residence of the defendants, and there was nothing to show the domicile of the parties, as distinguished from residence, jurisdiction was not shown.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–878; Dec. Dig. § 322.*]

5. COURTS (§ 356*)—REVERSAL—REMAND—AMENDMENT.
Where, on a writ of error, the record failed to show federal jurisdiction, necessitating a reversal, plaintiff, on remand, might be permitted in the trial court to amend, so as to correct the defect.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 356.*]

6. COSTS (§ 238*)—COSTS ON APPEAL—REVERSAL—JURISDICTIONAL DEFECT.
Where the record on a writ of error failed to show federal jurisdiction, necessitating a reversal, but defendants in error did not raise the jurisdictional question, either in the trial court or in the Circuit Court of Appeals, the judgment would be reversed without costs of the appeal, and in the absence of amendment in the Circuit Court the cause would be dismissed without costs in that court.
[Ed. Note.—For other cases, see Costs, Cent. Dig. § 912; Dec. Dig. § 238.*]

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

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

Action by Caleb A. Burbank and another, individually and as executors, etc., against David B. Newcomb and Mary E. Newcomb, as executors, etc. Judgment for plaintiffs, and defendants bring error. Reversed, with instructions.

See, also, 146 Fed. 400; 159 Fed. 568, 569.

F. B. Woodruff, for plaintiffs in error.

E. D. Hawkins, for defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The courts of the United States exercise only the limited jurisdiction conferred upon them by the federal Constitution and laws. There is no presumption in favor of their jurisdiction. On the contrary, the rule is inflexible that the facts upon which jurisdiction depends must appear affirmatively upon the record. If they do not so appear, it is the duty of every court of the United States of its own volition to deny its own jurisdiction. And it is incumbent upon an appellate tribunal to go further and deny the jurisdiction of the court whose acts it is reviewing, unless the jurisdiction of that court is affirmatively shown. As said by Mr. Justice Matthews in Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer of itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

See, also, Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419; Grace v. American Central Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Puget Sound Navigation Co. v. Lavendar, 156 Fed. 361, 84 C. C. A. 259.

Turning, now, to the present record, we find an action of which the Circuit Court had jurisdiction only in case the parties plaintiff and defendant were citizens of different states. Jurisdiction was wholly dependent upon diverse citizenship being affirmatively shown. And yet it is not alleged in the record from beginning to end that any party to the suit was a citizen of any state. The complaint alleges that the plaintiffs were residents and inhabitants of the state of Kentucky, but fails to state even the residence of the defendants. All that appears concerning them is the admission of their counsel at the opening of the trial that at the commencement of the action they were residents of the city of New York. It is impossible to find by looking through the whole record for the purpose of curing the defective averment even diverse domicile—as distinguished from residence—from which diverse citizenship might as a matter of law be inferred. Sun Printing, etc., Co. v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027.

But allegations of residence are not allegations of citizenship. A person may be a resident of a state of which he is not a citizen. That such allegations are wholly insufficient to show jurisdiction in the Circuit Court based upon diverse citizenship has been repeatedly decided. Mexican Central R. R. Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47

L. Ed. 715; Wolfe v. Hartford Life, etc., Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 874, 30 L. Ed. 914; East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Grace v. American Central Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; McCaskill v. Dickson, 159 Fed. 704, 86 C. C. A. 572; International Bank, etc., Co. v. Scott, 159 Fed. 58, 86 C. C. A. 248; Crosby v. Cuba R. Co. (C. C.) 158 Fed. 144; Koike v. Atchison, etc., R. Co. (C. C.) 157 Fed. 623; Stockwell v. Boston, etc., R. Co. (C. C.) 131 Fed. 152; Tug River Coal, etc., Co. v. Brigel, 67 Fed. 625, 14 C. C. A. 577; Pacific Postal Tel. Cable Co. v. Irvine (C. C.) 49 Fed. 113.

In the opinion of a majority of the court, it follows from the application of these well-settled principles that the facts necessary to give jurisdiction to the Circuit Court over this controversy do not appear upon the record, and, consequently, that the cause as it stands must be remanded to that court for dismissal for want of jurisdiction. It is possible, however, that the requisite diversity of citizenship might be shown by amendment to the complaint. Such amendment, of course, could not be made here; but the Circuit Court may allow it, when the case gets back. Mexican Central R. R. Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715; East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 874, 30 L. Ed. 914; Tug River Coal & Salt Co. v. Brigel, 67 Fed. 625, 14 C. C. A. 577. See, also, Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; Morgan v. Gay, 19 Wall. 81, 22 L. Ed. 100; Puget Sound Nav. Co. v. Lavendar, 156 Fed. 361, 84 C. C. A. 259; Crosby v. Cuba R. Co. (C. C.) 158 Fed. 144; Koike v. Atchison, etc., R. Co. (C. C.) 157 Fed. 623.

With respect to costs: As the original fault rested with the plaintiffs—it being their duty to make the jurisdiction appear—there is much reason why reversal should be at their cost in this court. And yet the defendants did not raise the jurisdictional question in the court below—in which case this writ of error might not have been brought—nor have they raised it in this court. Under all the circumstances, we think that no costs should be allowed to either party in this court, and that if the complaint is not amended it should be dismissed without costs in the Circuit Court.

As it is not certain that there will be a new trial of the cause, and as, in case there is a new trial, the questions raised upon the assignments of error may not arise again or be presented in the same form, we do not feel that any special circumstances exist which call upon us to decide the merits of these questions or depart from the practice indicated as proper by the Supreme Court in Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057:

"Since the record shows no cause of which the Circuit Court had jurisdiction, we do not feel at liberty upon this writ of error to determine any point affecting the merits of the litigation."

See, also, Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510,

28 L. Ed. 462. Compare Grace v. American Central Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932.

The judgment of the Circuit Court is reversed, without costs, and the cause is remanded to that court, with instructions to dismiss the complaint for want of jurisdiction, without costs, unless the plaintiffs within a reasonable time obtain from that court leave to amend the complaint, and do amend it so as to present a cause within the jurisdiction of that court.

In re STRASCHNOW et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 305.

1. USURY (§ 115*)—PAROL EVIDENCE—WRITTEN CONTRACT—VALIDITY.

Where a contract evidencing a loan of money and the employment of the lender was attacked for usury, parol testimony of the conversations of the parties prior to the execution of the contract was not objectionable on the ground that all prior negotiations must be deemed merged in the written contract.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 326; Dec. Dig. § 115;* Evidence, Cent. Dig. § 2029.]

2. BANKRUPTCY (§ 467*)—REVIEW OF EVIDENCE.

The Circuit Court of Appeals, on an appeal in bankruptcy proceedings, is not required to weigh testimony on the printed record, where the questions of fact are doubtful, and it is desirable that the facts be first passed on by the District Court or a referee.

[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.]

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

In the matter of Ralph Straschnow and another, bankrupts. From an order confirming the report of a referee, directing the payment of dividends on the claim of Henry L. Ketcham, assignee of Eli Bernays, William H. Roberts appeals. Reversed and remanded.

The bankrupts carried on business in New York City under the name of "International Electrical and Engineering Company" and said Bernays was the father-in-law of the bankrupt Wiener. About April, 1908, the bankrupts borrowed of said Bernays the sum of $10,000 and executed an agreement, a copy of which is printed in the margin.†

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

† This agreement made and entered into the 1st day of April, 1908, by and between Ely Bernays, residing in the city of New York, borough of Manhattan, state of New York, party of the first part, and Ralph Straschnow and Felix F. Wiener doing business under the firm name and style of International Electric & Engineering Company, in the city of New York, borough of Manhattan, N. Y., parties of the second part, witnesseth:

First: The party of the first part agrees to loan to the parties of the second part at once the sum of $10,000 and the parties of the second part agree that said sum shall be repaid to the party of the first part on the 1st day of October, 1910.

Second: The parties of the second part agree to pay to the party of the first part interest on said sum of $10,000 at the rate of 6% per annum, such interest to be paid every three months.

Third: The parties of the second part engage the services of the party of the first part from the 1st day of April, 1908, to the 1st day of October, 1910, and the party of the first part agrees to serve said parties of the second part, the general nature of such services being general advice and assistance to be given by the party of the first part

The claim presented against the bankrupt estate by the assignee of Bernays was based upon this written agreement. The trustee moved to expunge the claim upon the ground, among others, that the agreement was invalid because it reserved a usurious rate of interest, and the question presented to the trustee was, as stated by him in his report, "whether the loan made by Eli Bernays to the bankrupts was tainted with usury, and whether, therefore, the claim of Henry L. Ketcham, the assignee of the claim, must be stricken out on motion of the trustee."

Upon the hearing before the referee that official first excluded proof of any conversations between the bankrupt and Bernays before the execution of said agreement, but finally permitted the trustee to show such conversations. In his report, however—which was confirmed upon the law and the facts by the District Court—the referee said: "I think it was error to have admitted evidence of conversations between the bankrupts and Bernays before the agreement was signed, and that all such conversations must be held to have been merged in the agreement."

The referee found that the evidence did not, in his judgment, establish the fact that the agreement was usurious. The statutes of New York, which determine the validity of the agreement, provide that the lawful rate of interest is 6 per cent., and that no person shall, directly or indirectly, take or receive a greater rate, and that all agreements reserving a greater rate shall be void.

Benno Loewy and Leon A. Malkiel, for appellant.

J. Garfield Moses and M. S. & I. S. Isaacs, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The statement of the referee in his report that conversations between the bankrupts and Bernays before the agreement was signed "must be held to have been merged in the agreement," and that they had been improperly admitted in evidence, was manifestly erroneous. Of course, as a rule of interpretation, parol evidence is not received to contradict or vary the terms of a written instrument; but, when the question is whether the instrument has any validity at all, such evidence is always received. The courts never permit form to shield illegality.

in the business conducted by the parties of the second part, by attending at their place of business from time to time and whenever necessary or requested and assistance with his knowledge and experience in the conduct of the business.

Fourth: The parties of the second part agree to pay to said party of the first part for such services one-third part of the net profits of the business conducted by them and which may be realized from April 1, 1908, and up to October 1, 1910, such one-third of the net profits however to be ascertained only after Mr. Ralph Straschnow and Felix F. Wiener have each received an allowance of $3,800 per annum and the further sum of $1,400 has been credited to their respective accounts on the books of the parties of the second part. The said payment is to be made to the party of the first part within eight weeks after October 1st, of each year, at which time a balance sheet is to be prepared by said parties of the second part.

Fifth: This agreement shall not be deemed to create a copartnership, or to vest in the party of the first part any proprietary rights in the assets of the business of the parties of the second part; he shall be deemed only a creditor and employee.

Sixth: In case the present term of partnership existing between Ralph Straschnow and Felix F. Wiener is continued from and after October 1, 1910, then and in that event the party of the first part is to have the option of continuing the said loan of $10,000 to the said copartnership under the same terms and conditions as are hereinbefore set out and for such period of time as the party of the first part may decide.

Seventh: Any differences which may arise between the two parties, or any misunderstanding arising out of the misconstruction of this agreement, shall be settled by an arbitration committee, of three members to be chosen as follows:

The party of the first part shall select one arbitrator, the parties of the second part shall select one arbitrator, and the two arbitrators thus selected shall agree upon a third arbitrator.

In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of April, 1908.

R. Straschnow. [L. S.]
Felix F. Wiener. [L. S.]

Witness: Curt Heinzmann.

Statutes cannot be evaded by shams and pretenses. Testimony concerning the conversations of the parties to a written agreement prior to its execution might be the best and most persuasive evidence to show that, instead of being what it purports to be, it is merely a cover for a usurious transaction.

It is true that, notwithstanding his erroneous view of the law, the referee stated in his report some of the testimony concerning conversations between the bankrupts and Bernays, and that he reached the conclusion that the agreement was not usurious. But it is impossible to say that the error of the referee was not prejudicial to the appellant. It was the duty of the referee to give careful consideration to the testimony concerning the antecedent conversations—that testimony was probably the most important in the case as showing the real transaction between the parties—and how can it be said that he gave it such consideration when he was of the opinion that it had been erroneously received and could not alter the written agreement?

The error of the referee calls for a reversal of the order, unless we are satisfied, from our own examination of the evidence as shown upon the record, that the ultimate conclusion reached by the referee was right. But, as already pointed out, the question in this case is whether the agreement was what it purports to be—in part a contract of employment—or was in fact intended as a cover for obtaining unlawful interest upon money loaned. The character of the transaction depends upon the intention of the parties, and the question of intent is one which, in ordinary actions, must be determined by the jury, and which, in a proceeding in bankruptcy, should be determined by a court or official having opportunity to see the witnesses and determine the weight to be given to their testimony. There is testimony in this case which, if credited, would warrant a jury—or other trier of the facts—in finding that the alleged contract of employment was an afterthought, intended to cover an agreement to pay a share of the profits of the business in addition to the legal rate solely for the loan of the money. On the other hand, we cannot say that the evidence is such as would have required a jury to reach such conclusion. Much would depend upon the credibility of the witnesses.

In some cases this court is required to weigh testimony upon the mere printed record; but it is obvious that we cannot do so to advantage, and that we should not do so unless necessary or unless the cases are entirely clear. In the present case the questions of fact seem doubtful, and we do not feel called upon to determine them. We think it much more desirable for all concerned that the District Court should, by itself or through a reference to a special master or to another referee, ascertain the intention of the parties to this agreement in the light of all proper evidence and determine its legality.

The order of the District Court is reversed, with costs, and the matter remanded for further proceedings in accordance with this opinion.

JACKSON CUSHION SPRING CO. v. D'ARCY.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1910.)

No. 2,023.

PATENTS (§ 328*)—INFRINGEMENT—SPRING STRUCTURES.

The D'Arcy patent, No. 785,410, for an improvement in spring structures, claim 2, which covers a wire clip for securing spiral springs to a wire frame in spring structures in upholstery constructions, consisting of a wire bent into a double loop with a central and two end arms, each of which is clamped around both the frame wire and spring, while valid, is not of a broad and primary character in view of the prior art, but for a secondary improvement only, and must be limited to the precise construction shown and described in the specification and drawings, with the respective functions of the arms and bases as therein shown, and to a correspondingly narrow range of equivalents. As so construed *held* not infringed.

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

Suit in equity by Frank P. D'Arcy against the Jackson Cushion Spring Company. Decree for complainant, and defendant appeals. Reversed.

Louther V. Moulton, for appellant.

Fred L. Chappell, for appellee.

Before SEVERENS and WARRINGTON, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This is an appeal by the Jackson Cushion Spring Company, the defendant below, from an interlocutory decree adjudging that claim 2 of letters patent No. 785,410, issued March 21, 1905, to Frank P. D'Arcy, the complainant below, on improvements in springs, is a good and valid claim, and is infringed by the defendant, and enjoining further infringement. The defenses relied on are the invalidity of D'Arcy's patent for want of invention, and noninfringement.

The invention claimed by D'Arcy relates to a wire clip or fastening device for securing spiral springs to a wire frame in spring structures in upholstery constructions. This fastening device is described in claim 2 of his patent as follows:

"2. In a spring structure the combination of a wire frame, spiral springs arranged in said frame, so that portions thereof and of said frame overlap, and fasteners for securing said springs in position in said frame consisting of pieces of wire formed into double loops having comparatively wide bases, the arms of said fasteners being clamped about the frame and springs, for the purpose specified."

The following reproduction of a portion of Figure 1 in the drawings accompanying the specifications, giving "a plan view" of the entire spring structure, shows the method of attaching the spiral springs to

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

the frame wires by the fastening device in question, which is lettered C:

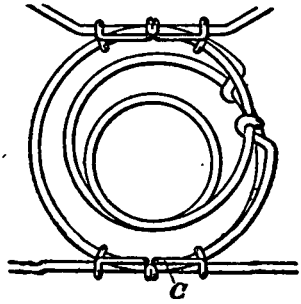


Figure 3 in the drawings giving "a plan view of the fastening device C," and showing its "double loop" form, is reproduced below, except that in the reproduction the letters, b and b, are added to designate the bases of the double loop referred to in the claim:

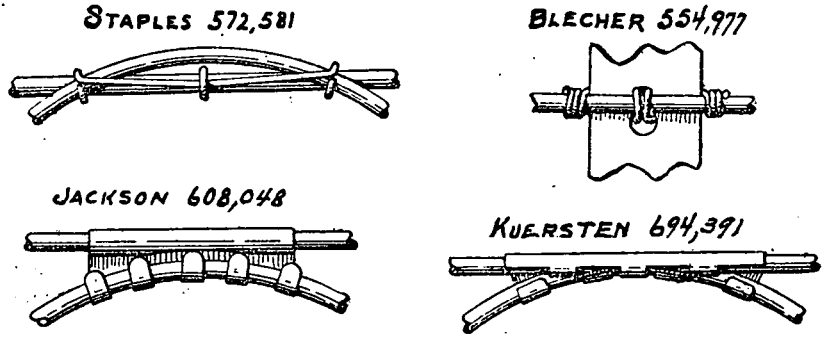
The specifications refer to this fastening device as follows:

"The several parts are secured together by the fastening device C, preferably made of wire formed in a double loop, as clearly appears in Fig. 3. The parts are placed together in proper relation and the fastener C clamped upon the same by bending the central arm, c, and the end arms, c' c', about the parts to be united. This fastening arranged in this way prevents any rolling action between the parts and holds them securely in position. I am aware that parts in springs have been united by a wire fastener having two arms, as c' c'; but such structures have proved unsatisfactory in that the parts slip and roll upon each other and the spring when used soon gets out of shape. My improved structure, however, by making use of three or more connected wires, unites the parts securely, and they may be subjected to the most severe usage without displacing the parts."

It is clear that the term "double loop," as used in the specifications and claim, refers to the form of the wire fastener shown in Figure 3 before its arms are bent so as to clasp together the wire frame and springs, it then being in the form of a double U with flattened bases, the doubled portion of the wire in the center forming the central arm of the fastener, c, the bent portions of the wire at each end forming the outer arms, c' and c', and the three arms being connected by the bases, b and b, of the double loop; this double loop fastener being then used to attach the spring to the frame wire by clamping each of its three arms around both the spring and frame wire as shown in Figure 1.

In D'Arcy's original specifications the first claim referred broadly to "fasteners, C, having three or more arms for securing the several parts together, as specified," and the second to "fastening devices, C, having arms, c, c', c', adapted to clasp the parts to be joined, substantially as described"; but neither of the claims referred specifically to the double loop feature of the fastening device.

These claims were rejected by the examiner on reference to various prior patents, including Staples, No. 572,581, Blecher, No. 554,977, Jackson, No. 608,048, and Kuersten, No. 694,391. The fastening devices in these four prior patents are shown by the following illustration:



In the Staples device, which is for improvements in upholstering, the wire clip is not made in a double loop with a central arm, as in the D'Arcy device, but in a straight piece with two end arms, each of which is clamped about the spring and frame wire. The spring and frame wire are not clamped together in the center; and there is a second circular wire clip which embraces the first clip and the frame wire. In the Blecher patent, which does not relate to spring structures, but is a device for clamping fence slats to longitudinal wire strands, the wire fastener shows a double loop, as in the D'Arcy patent. However, none of the arms of this double loop are clamped around both the fence wire and the slat, the central arm being clamped around the fence wire alone, and the end arms twisted around the fence wire alone; and the slat, which is placed vertically to the fence wire with a hole through which the central arm of the loop may pass, is not clamped by any of the arms of the loop, but is held in place between the fence wire and the bases and side arms of the loop. Both the Jackson and Kuersten patents, which are spring structures, show sheet metal clips with multiplied extensions, which correspond in a sense to the arms of the loop in D'Arcy's device. However, in each of these devices the projections corresponding to the arms of D'Arcy's clip do not clamp together the spring and wire frame as in D'Arcy's device, but enfold the spring only, the frame wire being held by an extension of the sheet metal clip itself in the opposite direction to the extensions holding the spring, and the spring and frame wire being held together by the intervening body of the metal clip itself.

After the rejection of the original claims by the examiner on account of the foregoing and other references, D'Arcy made several successive amendments to his claim, as a result of which claim 2 was finally stated as above set forth, embodying specifically his claim for fasteners to secure the springs in position in the frame "consisting of pieces of wire formed into double loops having comparatively wide bases, the arms of said fasteners being clamped about the frame and springs, for the

purpose specified." Thus stated, the examiners in chief, on appeal, reversed the decision of the examiner, saying:

"None of the patents cited by the examiner shows the exact structure covered by the appeal claims, in which the double loops of the fasteners are the real locking means. The patents to Kuersten and Jackson show sheet metal fastening devices, and the remaining patents show wire fastening devices for the parts of wire articles. In each of the revealed constructions, however, the loops are, as will be seen, not the real clamping means for the members which are secured together."

The wire fastener manufactured and sold by the Jackson Cushion Spring Company, which the court below held to be an infringement of D'Arcy's device, is also used for securing the frame wire and springs in a spring structure in upholstering construction. Its form and use are shown by the following illustration:

In this fastener the "double loop" of D'Arcy's device appears, and as in D'Arcy's device the central arm composed of the double fold of wire, incloses, though in a slightly less degree, both the frame wire and the spring. This device shows, however, this difference from D'Arcy's device, namely, that the outer arms of the double loop do not inclose both the frame wire and the spring, but clamp only the frame wire, the spring being embraced and held in position against the frame wire solely by the bases of the two loops, which are curved over so as to encircle the spring wire.

Our conclusions are as follows:

1. In the prior state of the art, as disclosed in the earlier patents above referred to, and those to Bates, No. 701,461 and Gail, No. 639,225, to which detailed reference need not be made, the use in spring structures of a wire fastener having bent arms to secure the frame wire and spring, was not new; and the Blecher patent had disclosed in the kindred art of wire fencing the use of a wire fastener made in the form of a double loop. D'Arcy's claim, however, in its application to spring structures, differs from all earlier devices in the use of an integrally made fastener, consisting of a wire bent into a double loop as shown in Figure 3, with three arms, each of which directly and of itself performs the office of clamping or locking the spring and the frame wire together, and in which the wide bases of the loop serve as spacing members that keep apart the points of connection made by the clamping arms. This "double loop" fastener, with the respective functions of its bases as spacing members and its arms as clamping members, unites the spring and frame wires securely and gives stability to the structure. It was this form of a "double loop" fastener, with "comparatively wide bases" and with three arms clamping both the frame and the springs, which was claimed as new in D'Arcy's patent; and it was the "exact structure" of this device which was referred to by the examiners in chief in stating that "the double loop of the fasteners are the real locking means" distinguishing it from prior devices. However, in view of the prior state of the art, in which D'Arcy was not a pioneer in inventing a wire fastener to secure the parts of spring structures to-

gether, but merely devised a new form to accomplish this result, and in view of the express language of his claim and the description in his specifications, we are of the opinion that his invention did not extend broadly to the use of a wire fastener made in the form of a double loop, without regard to the functions of its several parts—a double loop wire fastener having previously appeared in the Blecher wire fence device—but was restricted to the form shown and described by him in his specifications and drawings, with the respective functions of the arms and bases of the double loop as therein shown, and must be limited to the structure therein disclosed. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Burns v. Meyer, 100 U. S. 671, 25 L. Ed. 738; Duff v. Sterling Pump Co., 107 U. S. 636, 2 Sup. Ct. 487, 27 L. Ed. 517; Wells v. Curtis (Sixth Circuit) 66 Fed. 318, 13 C. C. A. 494; Ludington Novelty Co. v. Leonard (C. C.) 119 Fed. 937. Thus restricted, we are of opinion that his claim disclosed patentable novelty and is valid.

2. We do not, however, concur in the view of the court below that the wire fastener above described as being manufactured and sold by the defendant, and which is the only one of the defendant's devices involved under the present appeal, comes within the range of equivalents, and constitutes an infringement of D'Arcy's device. It is true that this device of the defendant consists, as does D'Arcy's, of a wire fastener integrally made, bent in the form of a double loop with three arms and connecting bases, and in which the central arm is clamped more or less completely around both the frame wire and spring. However, in the defendant's fastener the end arms of the loop are not clamped around both the frame wire and the spring as in D'Arcy's device, but around the frame wire alone; and in the defendant's fastener the spring is embraced only by the curved bases of the loop and thus held in place against the frame wire, while in D'Arcy's device the engagement of the spring by the bases of the loop is merely incidental. The function of holding the spring against the frame wire, which in the D'Arcy patent is, in effect, performed entirely by the clamping arms, is thus, in the defendant's fastener, performed by the curved bases of the loop, which are not used primarily as spacing members to keep the points of connection apart, but as the substantial enfolding members of the spring itself. The two devices thus show substantially different functions and uses of both the end arms and bases of the double loop. However, for the reasons above stated, the D'Arcy device cannot be held to cover every double loop wire fastener, the central arm of which is used as a clamping member, without regard to the uses and functions of the end arm and bases of the loop and the method by which they enfold the spring and frame wire, but must be limited to the structure shown in his specifications and drawings. And since D'Arcy's invention is not of a broad and primary character involving entirely new mechanical functions, but is a secondary improvement marking only a small step in the art, and with comparatively small meritoriousness in the improvement, the range of equivalents is correspondingly narrow and the doctrine of equivalents should be less liberally applied in his favor. Miller v. Eagle Mfg. Co., 151 U. S. 86, 14 Sup. Ct. 310, 38 L. Ed. 121; Bundy Mfg. Co. v. Detroit Time Register Co.

(Sixth Circuit) 94 Fed. 525, 36 C. C. A. 375; King Axe Co. v. Hubbard (Sixth Circuit) 97 Fed. 795, 38 C. C. A. 423; Taber v. Meriden Brittannia Co. (C. C.) 106 Fed. 83. Applying this rule we are of opinion that the defendant's device is not a mere colorable departure from the D'Arcy device coming within the range of permissible equivalents, but involves a substantial departure from the specific structure disclosed in the D'Arcy patent, to which alone his claim is valid, and hence does not constitute an infringement. Duff v. Sterling Pump Co., supra.

3. It is to be noted that this is not an appeal from a preliminary injunction, but is, as above stated, an appeal from an interlocutory injunction entered at a hearing on pleadings and proofs, leaving only the ascertainment of profits and damages preparatory to a final decree. This is said in explanation of the extended consideration we have given to the merits.

That part of the decree which awards an injunction must be reversed, and the cause will be remitted for further proceedings.

ELLIOTT & CO. v. YOUNGSTOWN CAR MFG. CO.

(Circuit Court of Appeals, Third Circuit. August 30, 1910.)

1. PATENTS (§ 16*)—INVENTION—ENLARGEMENT OF USE IN SAME ART.
   Photography and blue printing are simply different phases of the art of light printing, and the mere transfer of a device used in one to the other does not involve patentable invention.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 16.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BLUE PRINT MACHINE.
   The Fullman patent, No. 771,774, for an apparatus for copying drawings (a blue print machine), which consists of an upright glass cylinder around which are wrapped the drawing and sensitized paper, an arc light which is lowered into the cylinder by a clockwork mechanism and an automatic cut-off for extinguishing the light when it reaches the bottom was anticipated in the prior art in all respects except in the specific means shown for effecting the automatic cut-off. Claims 1, 2, 3, and 5, which claim such means broadly, are void for anticipation. Claim 4, which is limited to the particular means described in the specification, *held* valid, but not infringed.

3. PATENTS (§ 112*)—PRESUMPTION IN FAVOR OF—WHEN NOT INDULGED.
   The ordinary presumption in favor of a patent, because of the action of the Patent Office in allowing it, is not to be indulged, where controlling references were not cited or considered in that connection.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162–165; Dec. Dig. § 112.*]

4. PATENTS (§ 35*)—RECOGNITION BY THE PUBLIC—CONSIDERATION TO BE GIVEN TO.
   The recognition of the patent by the public, as where it has been bought up under the advice of counsel, instead of being contested, or where licenses have been taken out or infringement discontinued on the failure to negotiate for them satisfactorily, are matters which are entitled to consideration on the subject of invention, but are of no significance against an adverse showing.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

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

5. PATENTS (§ 297*)—INTERFERENCE PROCEEDINGS—EFFECT OF ON SUBSEQUENT LITIGATION.

The result of interference proceedings is not conclusive of invention in a subsequent suit for infringement between the same parties. The only question there is one of priority, and while it is no doubt persuasive that in those proceedings invention was affirmed by one who subsequently denies it, it is not to be allowed to prevail over other considerations which control it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 486; Dec. Dig. § 297.*]

6. PATENTS (§ 18*)—INVENTION—CONTEMPORANEOUS APPLICATION BY SEVERAL PARTIES FOR THE SAME DEVICE.

Semble, that, where several persons contemporaneously apply for patents for the same device, the fact that they caught the idea at the same time goes to show that it was simple and obvious, and that it did not require inventive genius to produce it.

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

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

Suit in equity by the Youngstown Car Manufacturing Company against Elliott & Co., Reinbold Herman, and Byron K. Elliott. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 173 Fed. 315.

T. A. and J. B. Connolly, for appellants.

F. W. H. Clay, for appellee.

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

ARCHBALD, District Judge. The patent in suit is for a blue print machine. As specified in the patent, the device consists in an upright glass cylinder or frame, around which are wrapped the drawing to be copied and the sensitized paper to which it is to be transferred; the two being kept in intimate contact by a canvass envelope or cover drawn down over them. The printing is done by electric light, and this is supplied by an arc lamp suspended immediately over the open top of the cylinder, on a cord and pulley, by means of which it is let down into the cylinder to do the printing. As the lamp moves down the axis of the cylinder, it is at all times equally distant from the paper to be printed upon, and thus affects all parts of it equally. And being allowed to descend by a controlled and even motion, regulated by a clockwork attachment, and the current being cut off automatically, immediately upon the lamp reaching the bottom, not only is the printing done evenly, as it proceeds, but there is no over printing, such as results where the light is not cut off as soon as the operation is completed. The cut-off device, as described in the patent, consists of a self-opening trip-switch inserted in the electric circuit, which is held in closed position during the printing operation, by means of a catch or stop mounted on the frame of the switch, which is disengaged so as to open the switch and break the circuit, when a counterweight to

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

the lamp which is drawn up as the lamp descends comes in contact with certain mechanism by which the catch or stop is drawn away.

If Fullman, the patentee, was the original inventor of a device of this character, there can be no question as to his right to be protected in it, and, so far as the patent was found to be expressive of the invention, it no doubt would be valid. It appears, however, that the principal part of the present apparatus was the work of one Hall, a British inventor, who patented it in England in 1897, and that Fullman got his ideas from this, the only new feature which he introduced being the automatic cut-off, to put out the light when the process was completed, this being done by hand in the Hall apparatus. The novelty of the device is thus made to depend on this added feature. That it is important to have the light cut off at just the right moment must be conceded. Not only is electricity economized and over printing avoided, but, being automatically regulated, the exact amount of exposure desired is secured, and the operator is able to dismiss it from his attention, once the apparatus is set in motion. But unfortunately for the inventor an automatic cut-off was not new in photographic printing, being shown in the Urie photographic printing machine (1892), in the Schwarz (1898), as well as in the earlier British patent (1897) to Suter. In the Urie apparatus electric light is used, the same as in the patent in suit; the fact that it is incandescent instead of arc being immaterial; and the current is automatically cut off and turned on by a switch, in the form of a contact plate, located on the power shaft by which the machine is operated, and rotated by it, intermittent electrical connection being thus brought about, and the lights turned on and turned off, according to established periods in the cycle of the machine. In order to shorten or lengthen the electrical connection, the plate is made in two sections, which are adjusted on each other circumferentially, and are held together by a suitable clamping screw. So in the Schwarz machine, where electric lights are also used, provision is made for lighting and extinguishing them automatically, the current being alternately established and broken, coincident with the exposure desired, by means of cams directly connected with and operated by the mechanism and motive power by which the different sections of the sensitized paper are moved forward successively to receive impressions. In the Suter, also, there is an automatic cut-off, of some intricacy, which, although operated by independent motive power, is so co-ordinated with the other parts of the apparatus that, as each section of the sensitized paper is brought into operative position, an electric light below it is automatically turned on, and is again turned off when the printing is completed. The distinction is attempted with regard to these machines, that they are found in the photographic, and not the blue printing, art, and the refinement is even indulged that progressive blue printing is an art by itself. But photographic copying or light printing is all one; photography and blue printing being simply different phases of it. Nor is progressive blue printing anything apart. In each the plate or tracing which carries the picture or figure to be transcribed is exposed to the light which filters through it, transferring it by the effect of light and shade to the sensitized paper prepared to receive it. That blue prints could be successfully made on the

Urie, the Schwarz, or the Suter apparatus is not to be doubted, the same as photographs, so called, on the Hall or Fullman, provided a cylindrical frame would not stand in the way. Once, therefore, that an automatic cut-off was made use of in either of these earlier devices, it was conclusive upon the novelty of the idea upon every one coming after; and the only thing open to later inventors was the particular means that might be adopted for the accomplishment of this purpose. To the extent that this is observed the device of the patent may be good. But not beyond that.

An examination of the patent, however, discloses that, as to a majority of the claims which are relied on,[1] it is not so confined, these being stated so broadly that any kind of an automatic cut-off comes within their terms. Thus, in the first, second, third, and fifth claims, "means to automatically break the circuit for the purpose of extinguishing the light"; "an [i. e., any] automatic device to cut off the light upon the completion of the printing process;" "means for automatically opening the switch when the lamp has completed its travel;" and "means," etc.—the same as in the first claim—are the expressions employed. Each of these, if taken literally, is realized by any character of automatic cut-off, as applied to a blue print machine of the Hall type, and that, indeed, is the breadth of construction that is contended for. The fourth claim, which is also relied on, is not open to this objection; the cut-off declared for being "the automatically-operated switch controlling the light-circuit," which is to be referred to the cut-off described in the specifications and saves the claim. But, so far as the others go beyond this and call for "means," unspecified, by which the cut-off of the current is to be automatically brought about, they are met by the references which have been cited, and cannot be sustained. The court below seems to have been impressed with the idea that in the Urie, Schwarz, and Suter the motive power which actuated the cut-off was external to the machine itself and not dependent for its action on the movement of the lamp in relation to the

[1] The following are the claims of the patent referred to.

(1) In an apparatus for copying or reproducing drawings, etc., the combination of a cylinder, means to support the subject-matter to be copied or reproduced upon the exterior of said cylinder, an arc-lamp adapted to be lowered into the interior of said cylinder, and means to automatically break the circuit for the purpose of extinguishing the light.

(2) A printing frame and a lamp, movable one in relation to the other, in combination with an automatic device to cut off the light upon the completion of the printing process.

(3) In an apparatus for copying drawings, etc., the cylindrical printing-frame, the suspended electric arc lamp and means for controlling its descent within the frame, an electric switch controlling the light-circuit, and means for automatically opening the switch when the lamp has completed its travel.

(4) In an apparatus for copying drawings, etc., the cylindrical support for the drawing, a suspended lamp arranged to descend axially within the frame, a governing apparatus for controlling the descent of the lamp, and the automatically-operated switch controlling the light-circuit.

(5) In an apparatus for copying or reproducing drawings, etc., the combination of a cylinder adapted to be rotated, means to support the subject-matter to be copied or reproduced upon the exterior of said cylinder, an arc-lamp adapted to be lowered into said cylinder, and means to automatically break the circuit for the purpose of extinguishing the light.

frame, but, however this may be and whatever of novelty may reside in the agency of the lamp in effecting the cut-off, as a feature of the device in suit, it does not change the fact that the automatic cutting off of the light, when the printing is through, was old in the art, and that no one therefore could monopolize the idea such as is attempted here. Stress is also laid on the fact that, in the interference proceedings which were declared in the Patent Office between Fullman on the one hand, and Herman, under whom the defendants are acting, on the other, invention was asserted, and the right of a patent on the strength of it contended for, the case being carried in the end to the Court of Appeals of the District of Columbia, and the right of Fullman at every stage sustained. But the scope of the invention was not involved in those proceedings, nor whether, as now, it was patentable if broadly maintained. The only question there was one of priority between the two contestants, and that is all for which the decision stands. It is no doubt persuasive that in those proceedings invention was affirmed by the parties who now deny it; but that cannot be allowed to prevail over other considerations by which it is necessarily controlled. Nor is the ordinary presumption to be indulged in favor of the patent, because of the action of the Patent Office in allowing it; the Urie, Schwarz, and Suter patents, as it appears, not having been referred to, as they have been here. There is enough, moreover, for the presumption to act upon (if it be regarded as important), in the particular device described in the specifications and declared for in other claims which are good; all that is now denied to the invention being the right to any extended breadth of scope. The same also is to be said of the alleged recognition which has been given to the invention by the public, the complainant, as it seems, under the advice of counsel having bought up the patent rather than contested it, and other parties having either taken out licenses, or discontinued infringement upon failure to negotiate for them upon satisfactory terms. These are matters which are no doubt entitled to consideration under ordinary circumstances, but they are of no significance against the showing here. Nor is it necessary to dwell upon the suggestion that applications were made for blue print machines with an automatic cut-off by four different inventors about the same time, Fullman and Herman among the rest. The fact that so many persons caught the idea goes rather to prove that it was simple and obvious, and not that it required inventive genius to conceive. It is not like the case where the art is waiting for the device, and inventors striving unsuccessfully to produce it, under which circumstances invention may well be held to appear.

The invention not being able therefore to be asserted broadly, the claims in controversy where this is done are invalid and the patent to that extent cannot be sustained. Nor is the complainant bettered if the cut-off described in the specifications is read into the claims in order to save them, assuming that this can be done, the defendants in that case not infringing upon them, their device in this respect not being the same.

It remains to consider the effect to be given to the fourth claim, as to which, as already intimated, no objection can be made. One of the elements which is there declared for, however, is "a governing ap-

paratus for controlling the descent of the lamp"; and this, as described in the specifications, to which resort for it must be had, consists of a clock escapement, the same as in the Hall machine, from which the appliance is taken bodily. And there being no novelty, by reason of the Hall, in controlling the descent of the lamp, any other means that might be devised for doing so was open to the defendants, the present inventor, as to this feature, also being confined to the particular means shown. But this the defendants do not employ, the control in their machine being effected by means of a hydraulic cylinder and piston, which is not at all the same. This is enough to distinguish the device, but there is also a difference in the cut-off used. This does not consist of a counterweight and tripping mechanism, such as are described in the specifications, the cutting off of the current in the defendants' machine being brought about by a switch contact, made by a stop attached to the cord on which the lamp is hung, which is drawn into contact as the lamp reaches the bottom of the frame. It is true that in both the complainant's and the defendants' machine the lamp as it descends draws up the particular means by which the cut-off is produced, and to this extent there is a certain measure of similarity between the two. But that is as far as it goes, the short circuiting by positive contact, which takes place in the one instance, not being at all the same as the trip-switch cut-off, by which the current is broken in the other. In neither of these two respects therefore is the fourth claim realized in the defendants' device, and infringement of it is not thus made out. And the same is true, as it will be observed, of the other claims relied on, if narrowed down by reference to the specifications sufficiently to be sustained.

It results, therefore, that, however considered, the complainant's case is without merit, and that the decree must be reversed with directions to dismiss the bill on the ground of noninfringement, with costs.

AMERICAN BANK PROTECTION CO. v. ELECTRIC PROTECTION CO. et al.

(Circuit Court, D. Minnesota, Fourth Division. January 3, 1910.)

No. 851.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DROP FOR ELECTRIC CIRCUITS.

The Robins patent, No. 850,101, for a drop for electric circuits, covers a new automatic plunger drop which was not anticipated, discloses patentable invention, and is not shown by the evidence to be invalid on the ground of prior public use for more than two years before the application therefore was filed. Also *held* infringed.

2. PATENTS (§ 81*)—PRIOR PUBLIC USE—EVIDENCE.

The defendant in an infringement suit who attempts to defeat the patent by evidence of prior public use not only has the burden of proof, but

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

must establish the fact by clear and satisfactory evidence beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*

Priority and continuance of public use of invention as affecting patentability, see note to Eastman v. City of New York, 69 C. C. A. 646.]

3. PATENTS (§ 328*)—INFRINGEMENT—VAULT LINING.
The Grass patent, No. 880,020, for a vault lining for use in connection with an electrical alarm circuit, construed, and *held* not infringed.

4. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC TIME ALARM.
The Robins and Jacoby patent, No. 771,748, for an electric time alarm consisting of a combination with a time mechanism of an electric alarm circuit connected therewith, *held* not infringed by a device using an entirely different mechanism in its circuit closer and its arrangement with respect to the mechanism of the clock by which it is actuated.

5. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BURGLAR ALARM.
The Robins and Jacoby patent, No. 771,749, for a burglar alarm, claims 3 and 6, for a combination of a time circuit closer and door bolt circuit closer and a gong circuit, are void for lack of invention, and the circuit-closing device shown in other claims must be limited to that described or its mechanical equivalent. As so construed, *held* not infringed.

6. PATENTS (§ 327*)—DECISIONS—PREVIOUS DECISIONS AS CONTROLLING—PREVIOUS ADJUDICATION OF VALIDITY OF PATENT.
A decision of a Circuit Court sustaining the validity of a patent should be followed by another Circuit Court if the evidence in both cases is substantially the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 622; Dec. Dig. § 327.*]

7. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BURGLAR ALARM.
The Robinson and Green patent, No. 708,496, for a burglar alarm, *held* not anticipated, valid, and infringed as to claims 1, 2, 3, 7, 8, and 10, but not infringed as to claims 9, 11, 12, and 13.

8. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC BURGLAR ALARM.
The Coleman reissue patent, No. 11,626 (original No. 570,906), for an electric burglar alarm, claims 6 and 21, are void for lack of invention in view of the prior art. Claims 18 and 20 are for a combination which was not anticipated and disclose invention and are entitled to a fairly broad construction. As so construed, *held* infringed.

9. PATENTS (§ 138*)—REISSUES—VALIDITY.
A reissue patent cannot be defeated by a patent to another issued before the reissue, but after the original patent on which it is based.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 202; Dec. Dig. § 138.*]

10. PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL BURGLAR ALARM.
The Coleman patent, No. 626,670, for an electrical burglar alarm, in view of the prior art, must be limited to the specific mechanism therein described or its mechanical equivalent. As so limited, *held* not infringed.

11. PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL BURGLAR ALARM SYSTEM.
The Coleman patent, No. 627,054, for an electrical burglar alarm system, claim 17, limited as it must be to the means set forth in the patent for testing the alarm mechanism, or their equivalent, *held* not infringed.

12. PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL BURGLAR ALARM SYSTEM.
The Coleman patent, No. 632,513, for an electrical burglar alarm system, construed, and *held* not infringed.

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

13. PATENTS (§ 328*)—INFRINGEMENT—BURGLAR ALARM SYSTEM.
The Coleman patent, No. 667,115, for a burglar alarm system, claims 12, 13, 14, and 15, limited to the devices described, were not anticipated and are valid. Also *held* infringed.

14. PATENTS (§ 287*)—LIABILITY FOR INFRINGEMENT—OFFICERS OF CORPORATION.
Directors of a corporation cannot be held individually liable for infringement of a patent by the corporation merely because they signed a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 459; Dec. Dig. § 287.*]

15. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS.
A complainant in an infringement suit who recovers only on a part of the claims of a patent sued on is not entitled to recover costs as to such patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 607; Dec. Dig. § 325.*]

In Equity. Suit by the American Bank Protection Company against the Electric Protection Company, Alvin Robertson, H. N. Stabeck, W. E. Jones, George E. Towle, W. A. Laidlaw, C. H. Baldwin, and Charles Carothers. On final hearing. Decree for complainant.

Paul & Paul, for complainant.
John E. Stryker, for defendants.

WILLARD, District Judge. This case involves an alleged infringement of certain patents, to wit: C. Coleman, No. 11,626, August 17, 1897; C. Coleman, No. 626,670, June 13, 1899; C. Coleman, No. 627,054, June 13, 1899; C. Coleman, No. 632, 513, September 5, 1899; C. Coleman, No. 667,115, January 29, 1901; F. C. Robinson and J. E. Green, No. 708,496, September 2, 1902; W. H. Robins and J. F. Jacoby, No. 771,748, September 2, 1902; W. H. Robins and J. F. Jacoby, No. 771,749, October 4, 1904; W. H. Robins, No. 850,101, April 9, 1907; J. L. Grass, No. 880,020, February 25, 1908.

The bill of complaint alleges infringement of 12 patents. At the time of taking complainant's testimony in chief, counsel for complainant gave notice of withdrawal of two of the patents, and the record has been made on the other 10 patents, above named.

Robins Patent, No. 850,101.

As to this patent the complainant says in his brief:

"The novelty in this drop of patent No. 850,101 consists in combining with the drop plate, or 'drop,' as it is called in the claims of the patent, a spring-pressed pin which is normally in the local circuit and in contact with the drop."

The defendants in their brief say:

"The alleged invention consists in substituting for the flat spring of Robinson and Green or other old patents a coiled spring surrounding a follower pin, actuated in the same way and performing the same functions as the flat spring. This is a case of equivalents where the substituted element performs the same function in substantially the old way and by substantially the old means."

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

That this new drop with the coiled spring and the follower pin does not perform the same function in substantially the same way and by substantially the same means as the drops formerly used by the complainant or other persons is apparent from the testimony of defendants' own witness Jacoby. He said, in stating the difficulties with the former drops:

"The drop is really, as it were, the heart of the system. It was very important to have a good article, something that would work without fail at the critical moment, and in attempting to better it I produced a different arrangement of these contacts. * * * But this platinum contact on the upper spring and on the shutter was put on there by solder, and the break was not very sudden, because of the angle of incline of this contact surface, and the arc that was formed at the time of this break in testing the system, or the alarm, would melt the solder and cause it to flow over the top of the platinum and cause the platinum to roughen, and the shutter would often stick up and not fall as it was intended to, being pressed down wholly by gravity; and this caused a great deal of annoyance to our company from the patrons, caused us a great deal of expense to send experts out to fix it, and it didn't keep fixed. It didn't stay fixed."

As to the object of the new device he said:

"The whole object was to have something to support this plunger which would give a direct pressure upon this shutter—a downward pressure upon the shutter, instead of a sliding pressure. The object of the plunger was so that we might have something to increase the speed of the falling of the shutter by this spring pressure, but to have a limited motion to the plunger so that the break might be both sudden and of sufficient space to prevent arcing of this gap. This direct motion of the plunger also avoided all the friction of the sliding contact on this drop. Defendants' Exhibit, Complainant's Drop No. 2."

The complainant's witness Robins, speaking of the objections to the old drops and what was accomplished by the new drops, said:

"Since we first started we had considerable trouble at times with our drops. The old original drop, D–8, we found had too short a break, and very often it was the case it would arc and burn off the contact. To overcome that this drop, D–9, was the next one out. That one was intended to eliminate those other troubles by making a longer break; but in this drop frequently it would burn, and the contact points would get rough so that the shutter would stay up instead of dropping when the armature came back. And in order to overcome all these troubles I invented this drop, D–7.

"Q. 48. Now what is the difference between that drop D–7 and the preceding drops you have referred to there, D–9 and D–10, and in what way does it overcome the objections?

"A. This drop D–7, which has the plunger point contact, overcomes several of those other troubles. One of the main parts is that it does not stick. The shutter always falls when there is a contact. The spring throwing the plunger helps force down the shutter, which makes a better contact with the ringing circuit. The break is quicker, and eliminates a great deal of trouble of arcing."

The new plunger drop was in every way a success. This is indicated by the fact that the defendants adopted it in its entirety without any change whatever, and are now using it.

This device, to my mind, indicates something more than mechanical skill, and involves invention. Thomson v. Citizens' National Bank of Fargo, 3 C. C. A. 518, 53 Fed. 250; Krementz v. S. Cottle Co., 148 U. S. 558, 13 Sup. Ct. 719, 37 L. Ed. 558.

It is true that the spiral spring had been used before. It appears in the patent to Wood, No. 383,933, of June 5, 1888; but it had never been used in the combination with an automatic drop, as it now appears in the patent in suit. 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; Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; American Tobacco Co. v. Streat, 83 Fed. 700, 28 C. C. A. 18.

In my opinion the patent is valid, and the complainant is entitled to a decree as prayed for in its bill, unless the defense now to be considered can be maintained.

It is claimed by the defendants that this patent is void because the drop was in public use and on sale by complainant for more than two years before the date of the application for the patent. This date is December 6, 1905. The use relied upon must have existed, then, prior to December 6, 1903. By far the most satisfactory evidence in the case upon this point is the testimony of E. Ward Wilkins, a witness for the complainant, who was at the time he testified, and for some years prior thereto had been, the secretary and manager of Patrick, Carter & Wilkins Company of Philadelphia. It was from this company that the complainant, while Jacoby was with it, had bought drops from time to time. Wilkins testified, basing his evidence upon correspondence between his company and the complainant, which he produced, that the first order which his company received from the complainant for the plunger drop was on the 23d of September, 1903. The complainant sent to his company at that time a sample drop and specifications, and asked for a price on 350 of them. A price was made at a dollar for each one, which offer was accepted by the Philadelphia Company, and it agreed to ship them before January 1st. One hundred and fifty of the drops were shipped on the 24th of December, 1903, from Philadelphia, and the 200 others on the 30th of December of the same year. I consider, therefore, that it is conclusively established that none of the drops now in use were bought by complainant to be placed in its system until September, and that none were actually received and used by it from other parties prior to January 1, 1904.

It is claimed, however, by the defendants, that other kinds of drops which had been used in the complainant's factory were remodeled and made into the plunger variety, and that this was done in the early part of the year 1903; such remodeled drops having been placed in the systems which were then put out. The principal witness to support this contention of the defendants is Jacoby. He testifies repeatedly that this plunger drop was used in the early part of 1903, and yet it is apparent from his own testimony that he has no definite recollection of the time, and no accurate knowledge as to the date when the first one was used. He said, for example:

"It was actually cold weather, we had heat in the building, and it was closed up at the factory at the time that Mr. Robins made the first plungers for us. I don't know how near the center of winter it was. Might have been the fall before. I am not real certain about that. I never tried to fix that in my mind in any way."

Robins himself, who was a witness for the complainant, testified:

"I know it was in hot weather, for we had the windows up at the time that this first drop was invented; but I know a few days after that it was practically cool weather, because the windows was all down, especially the time we was testing these drops, etc. It was not a hot day. That I judge from my recollection of the time of year."

Robins says, however, that, instead of being the fall of 1902, this took place in the fall of 1903.

That Jacoby is mistaken when he testified that the plunger drop was first made and used in the early part of 1903 is almost conclusively established by other testimony given by Wilkins, the witness above mentioned. When he gave his testimony, it had already appeared from the evidence of Jacoby, Robins, and others that there were at least three, and according to one witness four, kinds of these drops made and used by the complainant between 1902 and 1904. Jacoby himself mentions three, the last of which, numbered 3, is the plunger drop, and the one now in use. That numbered 2, according to the testimony not only of Jacoby but of Robins, was entirely designed by Jacoby and was his invention. Wilkins produced a letter from the complainant company, dated May 21, 1903, placing with his company an order for 300 drops to be delivered within 60 days. These drops were of substantially the kind described and identified by Jacoby as drop No. 2, and were not the plunger drop No. 3. This order was filled by Wilkins' Company in July and August, 1903.

That the plunger drop was greatly superior to drop No. 2 was proven by the testimony of Jacoby himself as well as by that of other witnesses. It is therefore impossible to believe that if Jacoby really invented the plunger drop in the early part of 1903, and, as he testified, placed one of them in the set of trunks prepared for Donaldson in March of that year, he should two months afterwards have placed an order for 300 of the No. 2 drops, which, according to his theory, had been entirely superseded by drop No. 3. This evidence itself is sufficient to show that Jacoby is entirely mistaken when he claims that the present plunger drop was in use prior to July 7, 1903.

It is claimed, however, by the defendants, that their case does not rest upon the oral testimony of Jacoby, but that he produced documents fixing the date beyond any question, and placing it prior to July 7, 1903. This document produced by Jacoby consisted of a notebook, in which he testified that he had made, under date of July 7, 1903, memoranda relating to various matters which he then or immediately thereafter discussed with McClintock the manager of the company. He says that the purpose of this discussion with defendant was to satisfy him what the improvements were that Jacoby had suggested in regard to the business of the complainant, and that they were valuable, and the specific item in this memoranda upon which reliance is placed is the following:

"Patent the improvements in auto D."

It is claimed by Jacoby that this was to remind McClintock to apply for a patent on the plunger drop now in use. As has been said, there had been several improvements before the last one.

Robins and Jacoby differ as to who the inventor of the plunger drop

was. Each claims to have first suggested it to the other; but I am satisfied that it was Robins' idea. Jacoby himself testified:

"Well, I never understood that he did, although we had some distinction between the two styles I believe but I don't remember what they were. Possibly we designated this new style by Mr. Robins' initials or something. We had an understanding between us sometimes of that nature. I am not certain that we did that."

This emphasizes the difference between the two styles, and indicates quite clearly that the last style, No. 3, was Mr. Robins' invention, and that style No. 2 was Jacoby's. Taking into consideration the order for the drop No. 2 made as late as May 21, 1903, and the fact that the drop No. 3 was not ordered until the following September, that the former was Jacoby's invention and the latter Robins', it seems quite clear that the improvements mentioned in Jacoby's memorandum of July 7th were the improvements represented by drop No. 2, and not the improvements represented by drop No. 3.

J. G. Donaldson, a witness for the defendants, testified that being in the employ of complainant in 1903, in the latter part of March, he was given a new set of sample trunks which contained this new plunger drop. He himself says that he then knew nothing about electricity, and it is quite unlikely that he would have then known the difference between the drops, even if he had examined them. The same may be said of his testimony relating to the incident at Creston, in April or May, 1903, as was said of Jacoby's testimony when he undertook to fix the early part of 1903 as the time when drop No. 3 was first used. It is hardly possible to believe that this improved drop No. 3 was installed in Donaldson's trunk in March, 1903, and was in his trunk when he was at Creston in April or May, 1903, when we know that as late as the 21st of May of that year the complainant was still buying drop No. 2 in quantities as high as 300.

The unreliability of oral evidence upon such a matter as this of dates is well illustrated by the testimony of Walter E. Stephenson, a witness for the defendant. After identifying the plunger drop now in use by the complainant and the defendants, he testified as follows:

"Q. 10. Will you fix as near as you can the date at which you first knew of that drop being sold on the open market?
"A. About the middle of 1903.
"Q. 11. Do you know what company first put it out?
"A. Yes.
"Q. 12. What company was it?
"A. Patrick, Carter & Wilkins of Philadelphia."

As has been seen, it was conclusively proven that this company never received an order for these drops until September, 1903, and never sent any out of their factory until the 24th of December of that year.

The defendants claim that a record of installations was kept by the complainant which would fix the date at which the drops in question were first placed upon complainant's system; that notice was given to complainant to produce such record, and it declined. Jacoby testified to the keeping of a certain book of records; but I find nothing in his testimony relating to that book which indicates that it shows upon its face what kind of a drop was installed in any particular system therein

mentioned. The only statement which he made bearing upon that particular question was the following:

"Q. 146. Would it, or would it not, be possible from an inspection of that book to fix the date when this drop, complainant's drop No. 3, went into use?
"A. I think I could understand exactly the dates and the bank systems to which they were applied; the various kinds of drop."

McClintock, a witness for complainant, testified as to the general manner in which the company kept evidence of the installations, and said that as far as he knew there was nothing in any of those records which would show the particular kind of drop that was used in any given system.

When it is attempted to defeat a patent by evidence of prior use, "courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof should be clear, satisfactory, and beyond a reasonable doubt." The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; National Hollow Brake Beam Company v. Interchangeable B. B. Co., 106 Fed. 693, 45 C. C. A. 544 (Eighth Circuit).

So far from establishing beyond a reasonable doubt that this plunger drop No. 3 was used in the early part of 1903, the evidence to my mind strongly preponderates toward the contention that they were not used for commercial purposes until they were acquired from the Philadelphia company on December 24, 1903. The patent, therefore, cannot be held void by reason of prior use.

Grass Patent, No. 880,020. February 25, 1908.

If the points, 16, in the patent appear in the structure, all the witnesses agree that when the lining is pushed in these points will touch the inside of the molding and close the circuit. The defendant, however, does not make use of these points, nor does the complainant.

Complainant's witnesses are not all agreed as to how in the structure actually used by it the circuit is closed in case of a pressing or buckling. Fletcher says:

"And if anybody should press against that lining and press it in they could easily press it in two inches, and in that case this lining buckles up and these edges of the outer lining will start to strike the molding."

He says that the pushing in of the frame from the outside "would simply bend those edges of the outer lining up to such an extent that it will touch the molding."

Again, he says:

"The fact is that when you push the post in it is an attempt to separate the lining, and in doing that you bring those edges up of the lining, and when those edges come up they will strike the sides of the molding; the inside of the molding when you push that post in."

It was claimed by the complainant in the argument that these points, 16, were merely the edge of the outer lining turned inward; so that the theory of this witness is that a pressure from the outside of the vault would push the edge of the outer lining so far in that it would come in contact with the inside of the molding.

Complainant's expert Carter in his direct-examination described only one method of closing the circuit. He said:

"The outer lining plates, however, lap by or approach each other more closely at their margins than the inner lining plates, so that, if the linings buckle inward at the joint, the edges of the molding, 11, are liable to slip off the edge of the inner lining plate on one side and strike the overlapping edge of the outer lining plate behind it, thus closing the circuit."

Upon his cross-examination he gives another way in which the circuit may be closed, and he there said:

"It may occur in either one of two ways, either by the fact that, as the buckling continues, the edge of the plate, 11, on one side will drop down onto the underlapping edge of the outer lining, the edge from which the points, 16, are shown as turned up, and thus short-circuit the system, or it may occur by reason of the fact that the strips, 11, will be forced to move or creep lengthwise on the lining, and particularly with respect to the outer lining, until the metallic edge of the bolt holes of the plate strikes the bolts which extend through from the outer lining frame piece, 8, to hold the moldings or strips in place."

There is nothing in the patent, either in the specifications or the claims, to indicate that Grass had in mind either one of these methods of closing the circuit which Carter explains. It is apparent that his theory as to what would take place if pressure were applied to the outside of the vault is entirely different from the theory of Fletcher.

On the part of the defendant, it is claimed that the points, 16, constitute the essential element of the patent, and that without them it is valueless. The defendant's expert Roberts says:

"It is this inwardly projecting contact point struck up from the outer lining plate with its inner end near the lapping plate, 11, which constitutes the circuit-closing means referred to in each one of the claims in suit of the patent. The structure would be inoperative if it were not for these points, 16."

The defendant further claims that it is impossible to close the circuit by outside pressure with the device used in both complainant's and defendants' systems, without destroying the vault lining. The evidence of the two witnesses Pierce and Jones, is to this effect.

Roberts, in speaking of the two ways mentioned by Carter, says:

"I do not find in the Grass patent any description or suggestion of either of these alleged ways of short-circuiting the plates. It does not appear from the testimony that such ways of short-circuiting the plates of defendants' lining are possible by anything more than a complete breakdown of the lining which would occur upon an abnormal buckling or bending thereof. If defendants' lining were broken into in this manner, there is no telling where the short circuit would occur, if at all. I think it more likely that the insulation itself would be broken through before such crossing of the plates would occur in the manner suggested by Mr. Carter. It is certain that the patent contemplated but the one way described therein for closing the circuit upon the buckling of the plates. The patentee states in the portion there quoted in the specifications that any attempt to tamper with the wall would be 'instantly detected.' It is the proximity of the points, 16, to the curve plate which insures such instantaneous operation and detection of a tampering with the walls."

An examination of the exhibits which have been presented seems to indicate that it would be practically impossible to close the circuit either in the way mentioned by Fletcher, or in either one of the ways mentioned by Carter, without breaking some part of the structure.

The points, 16, not being used by the defendant, it has not infringed the patent.

But it is said by complainant that the points, 16, are not the only means by which the circuit can be closed, and that the means actually employed by the complainant in its structure, and referred to in all of the claims except the fifth and seventh, are the extension of the outer lining beyond the insulated material.

While the evidence shows that in the model made by Jacoby seen by one of the witnesses upon his desk the insulating material extended to the edge of the outside plate, yet it seems to be sufficiently proven in the case by the testimony of witnesses and by the defendants' exhibit, "Complainant's vault lining," that in the vault lining used by the complainant as early as 1903 the insulating material did not extend to the edge of the outside plate. Thomas, a witness for the defendants, testified that a molding with wooden strips similar to the exhibit last named was used by the complainant in the first part of the year 1903.

Later, and about 1904, complainant substituted for the wooden strip a curved metal molding. Upon the question whether the curved metal molding was not a mechanical equivalent of the wooden molding with metal tips, the defendants' expert testified as follows:

"The wooden strip with metal pieces and inwardly turned points thereof, by which the joints between the sections of the linings are covered and the lining circuit made continuous from section to section, is the full equivalent of the metal strip, defendants' exhibit, complainant's molding and washer. Both perform the same functions in the same manner. They are equally good as far as the results secured are concerned. The curved metal plate is possibly stronger, but I should say the wooden strip was plenty strong enough. The substitution of one for the other would be well within the skill of an ordinary mechanic. The metal strip being of metal and required to be insulated from the bolt passing through it, an insulating washer is employed for the purpose. The washer is provided with an indented seat in the strip. This method of insulating a bolt and seating a washer was well known, and is commonly used in electrical arts, and has been for many years."

I accept his view on this question.

The result, as far as this Grass patent is concerned, is that the bill cannot be maintained.

Robins & Jacoby Patent, No. 771,748. October 4, 1904.

Clocks have long been used to effect the breaking of an electrical magnetic circuit at any particular time of the day and to keep it broken for a determined period thereafter if desirable. In the patent of Holmes, No. 63,158, granted in 1867, the purpose of the invention is stated in the words above quoted. It follows, therefore, to use the language of defendants' expert:

"It thus appears that the only novelty, if there is any, in the Robins & Jacoby patent mechanism, as described in the claims in suit, lies in the particular mechanism of the circuit closer and its arrangement with respect to the mechanism of the clock."

It is true that the defendants' clock accomplishes the same result; but if it does not use the means employed by the complainant, or something which is the mechanical equivalent of those, there is no infringement.

A comparison of the two structures with a reading of the testimony of the complainant's expert is alone sufficient to show that the two devices are entirely different. The defendants' expert says:

"It is unlike the Robins & Jacoby mechanism in every respect, except that it is a time mechanism and controls an electric alarm circuit just as numerous structures of the prior art are time mechanisms controlling an electric circuit."

It follows, therefore, that as to this patent the bill cannot be sustained.

Robins & Jacoby Patent, No. 771,749. October 4, 1904.

In the patent to Carr, No. 490,870, January 31, 1893, it is said that the object of the patent is to provide an electrical magnetic alarm signal and an indicating apparatus at a central or police station, operated automatically by circuit-closing devices in the safe, designed to be actuated by any attempt to manipulate the lock or to enter the safe, on the part of any unauthorized person.

It is claimed, however, by complainant, that, so far as claims 1, 4, and 15 are concerned, there is included the element of a test bell, and that the object of the invention is to provide for indicating by such bell, when the bolts are thrown in the daytime, that the system is in working order. It may be conceded, as claimed by complainant's expert, Carter, that the test circuit in the Stern patent is for an entirely different purpose.

But though the testing feature of the apparatus may be novel, yet complainant is not entitled to a monopoly of all kinds of circuit closers by which the desired test may be brought about. It must be limited to the circuit closer described in the patent, or to one which is its mechanical equivalent.

It may be observed, in passing, that the construction of the complainant does not follow the patent; the complainant having placed the springs on the bolts, instead of placing them on the door.

When the two devices are examined, that of the complainant and that of the defendant, it is seen that they are entirely different. They accomplish, it is true, the same result; but they do not do it in substantially the same way nor by substantially the same means.

The complainant's expert, Carter, had some difficulty in selecting from the defendants' construction the parts which correspond with the elements of these three claims. He said, for example, on page 553 of complainant's record:

"I do not know that I would specify any particular part of defendants' construction which responded precisely to the 'contact plate' of this claim."

He also testified:

"So far as its function as a contact goes, the part of defendants' structure which corresponds to the 'contact plate' * * * is one of the knife-edged contacts."

Claim 22 relates to the dial combination.

In the patent to Shubert, No. 429,817, dated June 10, 1890, it is said:

"My invention relates to that class of alarms which are adapted to sound upon the turning of the knob and opening of the door."

There is nothing new, then, in the idea of sounding an alarm when the combination is turned. As in the case of the other claim, an examination of the two devices shows no similarity, except that, in view of the shape of the dial, they both necessarily have a circular part.

Complainant's expert, in selecting from defendants' structure the elements of the patent, was forced to say that the insulated member of the patent is the metallic disc of the defendants' device, although that disc is not insulated from the bolt work nor from the locktumbler; his theory apparently being that it is insulated because normally it is not in contact with the screw head. When asked what were the means provided in said tumbler and co-operating with said member, to normally hold it out of contact with said surface, he answered that these means were the notch in the head of the disc, together with the connection of the disc and dial spindle.

Claims 3 and 6 are apparently for a combination of a time circuit closer and door bolt circuit closer and a gong circuit, and it is claimed that this combination is new.

As has been said, the combination of the door bolt circuit and the gong circuit was old.

As to the combination of the time circuit closer and the door bolt circuit closer, the patent of Rousseau, No. 246,211, August 23, 1881, says:

"Whereby a certain section of a burglar alarm may be switched out of action at a particular hour to allow the opening of certain windows or doors without giving the alarm."

In the patent to Holmes, No. 63,158, May 26, 1867, it is said:

"The purpose of my invention is to effect the breaking of an electro-magnetic circuit at any particular time of the day, and to keep it broken for a determined period thereafter, if desirable."

It thus appears that there existed a combination of a door circuit with a gong circuit, and there also existed a combination of a door circuit with a time circuit closer.

It may be admitted that the combination of the three elements has not appeared before; but, with the two combinations already mentioned, it did not, in my opinion, require invention to unite them. Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991.

The bill cannot be maintained as to any one of the claims in suit.

Robinson & Green Patent, No. 708,496. September 2, 1902.

This patent has been held valid by the Circuit Court for the Eastern District of Tennessee, in a decision filed October 7, 1909, in American Bank Protection Company v. City National Bank of Johnson City, Tennessee, 181 Fed. 375.

That decision should be followed in this case, if the evidence in both cases is substantially the same. Office Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co. (C. C.) 67 Fed. 928.

Of the prior patents relied upon by defendants in this suit, the following were set up in the answer in that suit: Rowell & Duncan, No. 122,913; Duncan & Rowell, No. 109,193; William Duncan, No. 117,-

713; two patents to Freed, No. 667,123 and No. 626,684; Coleman patents, No. 11,626 reissue; No. 667,115; No. 666,737; No. 587,931; James W. and William D. Gilstrap, No. 530,411; Abraham T. Metcalf and Venning and D. Simons, No. 680,982; the German patent, Nicolaus, No. 60,594; John A. McGahy, No. 573,903; Scholes & Myers, No. 532,291.

The experts of the respective parties in this case are practically agreed that the wall of the vault is an essential element of the patent. Carter says:

"On the other hand, the essential contemplation of this Robinson & Green patent is that the shield shall guard the gong simply by being maintained in a certain necessary position with regard to the vault; that is to say, against the outside wall of the vault."

And again:

"On the other hand, the essential idea of the protection afforded the gong on the wall of the vault in the Robinson & Green patent is that it is the placing of the shield over the gong, and maintaining it in this fixed relation to the wall of the vault, that protects the gong. * * *

"On the other hand, the essential idea of the Robinson & Green patent is that the protection is afforded by establishing a certain undisturbable relation between the vault and the shield. * * *

"This location of the shield upon the vault wall is of the very essence of the Robinson & Green improvement, as I understand it, as Mr. Roberts has stated."

Roberts, the defendants' expert, testified:

"The Robinson & Green shield, however, is in its very nature a device which could be placed nowhere else than on the vault wall. * * *

"While the Robinson & Green shield is necessarily and essentially a device which must be placed upon the vault wall, in order that the means co-operating with the shield upon a movement thereof may be inclosed and protected by the vault."

In the case referred to from the Eastern district of Tennessee, Judge Sanford said:

"That the words used in the several claims * * * 'located outside the vault,' and other similar places, when construed in connection with the specifications and designs, all refer to the location of the gong on the outside wall of the vault."

This wall being one of the essential elements of the patent, an examination of those patents relied upon by the defendants, and not set up in the answer in the Tennessee case, shows that they do not cover or refer to the invention contained in the Robinson & Green patent. Roberts says:

"If the claim is construed, however, to cover substantially the structure of the Robinson & Green patent, in which the wall is a separating element between the shield and the circuit-closing means connected therewith through the wall, then I do not find the whole arrangement in any one patent of the prior art."

The next and most important question is whether the structure of the defendant is so far similar to the structure of the patent as to infringe it. Defendants' expert has pointed out several differences between the two structures, the most important one of which, apparently, in his opinion, lies in the fact, as claimed by him, that the defendants' shield

can be entirely removed from the wall of the vault without sounding an alarm, while that of complainant's cannot. He says that the defendants' shield can be placed anywhere, and that the alarm is sounded, not by a movement of the shield from the wall, but by a disturbance of portions of the shield itself.

Assuming that the defendants' shield can be removed from the wall without sounding the alarm, it is claimed by complainant that defendants' structure would be useless if located away from the wall. It is admitted by defendants' expert that, in case the shield were located away from the wall, it would be necessary to have the conductors between it and the vault protected, as well as other portions of the structure.

It seems plain, as claimed by plaintiff's expert, Carter, that if located elsewhere the situation would be precisely the same as that which exists with regard to the outside alarm in the defendants' system. This shield would have to be inclosed in a protective housing, and, when thus inclosed in a protective housing which could not be penetrated without sounding an alarm, it is difficult to see what would be the value of the claimed peculiarity of defendants' structure, namely, the sounding of the gong only upon the relative disturbance of parts of the structure already inclosed in the protective housing.

Upon the question as to whether or not the defendants' shield could be removed from the vault without sounding an alarm, the experts differ. Roberts says repeatedly that it can be done; his theory being that, the flat spring being fastened to the baseboard, and the baseboard being firmly fastened to the curved shield, and the shield firmly fastened to the bolt which passes through the wall, any movement of the bolt would necessarily move the curved shield and the baseboard at the same time. The spring on the baseboard would therefore maintain its relative position to the insulating collar on the bolt.

Carter, on the other hand, says that the defendants' shield cannot be removed from the wall without causing an alarm to be sounded. He, moreover, says:

"As a matter of fact I do not see any warrant or reason for calling the plate on which the gong is mounted any part of the shield."

And again:

"To attempt to distinguish between the vault wall and the board which is nailed to the vault as a plate for the gong is utterly idle. This board or base plate is a mere incident of the construction of both the Robinson & Green patent and of defendants' device. In both cases the gong might be nailed or fastened to the face of the wall without any baseboard, with substantially the same result. The inclusion of the baseboard is a mere matter of convenience."

If the flat spring in defendants' device were fastened to the wall of the vault, instead of being fastened to the baseboard, it would operate in substantially the same manner as does the complainant's device when the shield is taken bodily from the wall. That the defendants' spring might as well be placed upon the vault wall as upon the baseboard, seems to be also the opinion of the defendants' expert. In describing the defendants' system, he says:

"The shield is further provided with a simple form of circuit closer comprising a spring secured to the vault wall with its free end resting on an insulated

collar of the bolt which holds the shield to the wall. If the shield is forcibly withdrawn in an attempt to uncover the alarm bell or gong, the spring would come in contact with the bolt, and the alarm would be sounded."

The last part of this quotation would seem to indicate that Roberts was then of the opinion that the alarm would be sounded if the shield were separated from the wall.

That the baseboard is not an essential part of the defendants' device is also indicated by him when he says:

"It might be placed away from the vault and fastened to another wall or ceiling or floor, and it would operate in the same way to sound an alarm upon an attempt to lift the shield from the body to which it was secured."

With the flat spring of the defendants' system placed upon the wall itself, the fact that its circuit closer would be outside of the vault, instead of inside, is not a sufficient change from complainant's device so as to enable it to escape the charge of infringement.

The other differences pointed out by Roberts in his testimony are not important. As for example, that the complainant's has a tube alone passing through the wall, while the defendants' has a tube and a bolt.

The complainant has made use in its system of certain features which do not appear in the patent; the spring contact, the sand trip, and the inner lining. But of all these improvements it may be said, in the language of plaintiff's expert, as follows:

"XQ. 587. Without the addition of either the spring or the sand trip or the inner lining, was it a device operative to prevent drilling or other attacks which might be made on the mechanism through the shield without moving it?

"A. I should say that it was operative and a very excellent protection. It was not as complete a protection as it is now, or as it is with these additions, and particularly with the addition of the lining. The other additions are less important."

And again:

"There is no question but what the shields as made and installed by complainant and defendants are more effectively protected and afford more effective protection than the exact arrangement shown in the Robinson & Green patent, but the difference is simply a matter of degree."

And further:

"But I do not see that this fact is of any importance, or militates against the fact that the shield construction shown by this Robinson & Green patent does afford a very considerable degree of security, if made just as it is shown, and is the substantial basis of shield construction employed by defendants."

What has been heretofore said in regard to the similarity between defendants' structure and that of complainant's has had reference to claims 1, 2, 3, 7, 8, and 10, and these claims are infringed by defendants' device.

I consider that claims 12 and 13 should be construed with claims 9 and 11, as indicated by defendants' expert on page 274. As thus construed, they relate to the means of causing an alarm to be sounded when a metallic instrument is inserted through the perforation in the shield; the circuit being thus closed between the shield and the frame of the gong. Such a circuit could not be closed in that manner in the defendants' device, because it has within the curved surface of the shield an inner lining which is not perforated, and no metallic instru-

ment could ever reach from the outside of the shield to the frame of the gong.

My opinion, therefore, is that these claims are not infringed by the defendants' structure.

It may be added that the defendants' claim under a patent to Jones; but the device actually used by defendants more nearly resembles the complainant's structure than it does the structure mentioned in the Jones' patent.

Coleman Reissue, No. 11,626. August 17, 1897.
Original Patent November 10, 1896.

Claim 6 does not include the element of the time mechanism.

The idea contained in the claim as it reads is completely shown in patent to Rothenberger, No. 523,946, July 31, 1894. If the word "electrical" were omitted from the second line of claim 6 of the Coleman reissue, and the word "pneumatic" substituted therefor, the claim as thus amended would express exactly the Rothenberger idea. Complainant's expert practically so testifies. That system, however, was largely a pneumatic one, while complainant's is electrical.

Without considering the other prior patents referred to in the testimony, I come directly to the patent to Stern, No. 351,408, October 26, 1886, and treat that without considering the evidence of Stern himself relating to the manner in which his invention was used. Upon the question as to whether claim 6 is found in this patent of Stern, Carter testifies as follows:

"XQ. 75. Then, as I understand you, in order to make this Stern device correspond with the disclosure of the sixth claim of the Coleman reissue patent, it would only be necessary to enlarge the box shown in Fig. 4, and to cover the slot as shown in that box with the same electrically protected envelope which incloses the rest of the box?

"A. It would only be necessary to enlarge this box and close it up entirely, as you suggest, and then to place in it the entire alarm station mechanism shown in Fig. 2, including the relay instrument, the bell, and the battery; that is to say, that is all that would be necessary theoretically and so far as the construction that this claim actually sets forth is concerned. Practically, however, as I have already said, a system constructed out of the Stern system thus modified would be of no use unless provided with some automatic clock-controlled throw-off for enabling the protected premises to be entered at some time without sounding the alarm."

Whether the figures in the Stern patent show that all the instruments at the alarm station were to be included in the electrical envelope, I do not think very important. It may be that the bell, being common to several subscribers, was not so included, and perhaps the battery was not. But however that may be, the idea that all of the instruments at the alarm station might be so included is clearly shown upon line 85, of page 3, where it is said:

"In my improved system of burglar alarms the instruments at the alarm station are all preferably incased as shown in Fig. 4, and protected with an electrical envelope so as to prevent tampering with the instruments."

Coleman had bought this Stern patent in the latter part of 1895, or in the early part of 1896. This was before he made his application for

a reissue. The idea was therefore actually suggested to him by the patent itself.

It is said, however, by the complainant, that the alarm station provided for in the Stern patent is not entirely protected, although all the instruments may be therein, because there projects a visual signal, and a person upon the outside of the station could easily put the system out of operation by tampering with this signal. The idea of incasing the entire alarm station in an electrical envelope is suggested by Stern. To change his design by eliminating the visual signal would not, in my opinion, amount to invention.

The complainant says, also, that the Stern device was designed for a central station. Passing the point made by the defendants that Coleman suggests in his own patent its use at a central station, it seems that the location of the alarm station at an isolated point would not be such a change from Stern's idea as would amount to invention.

It follows, therefore, that the bill cannot be maintained as far as claim 6 is concerned.

Claim 21 adds simply to claim 6 the element of the braided cable. Carter testified that if the defendants do not use the braided cable they do not infringe this claim. He also testified that they did not in fact use a braided cable. He did say, however, that defendants used a twisted cable; but it is apparent from his testimony that he did not believe that the wires were intentionally twisted in the defendants' cable, so as to produce the same effect as that produced by the braided cable. But in no event was there any novelty in the use of a braided cable for this purpose. See patent to Larned, No. 181,078.

Roberts, the defendants' expert, considers that claims 18 and 20 are substantially the same. They add to claim 6 the element of time mechanism.

The elements of this claim are old. There had been clocks which automatically opened vault doors before. Patents to Pierce, Nos. 287,775 and 322,317. There had been vaults electrically protected. Patent to Smith, No. 251,071. There had been alarm stations separate from the vault electrically protected. Patent to Stern, No. 351,408. There had been the combination of an electrically protected alarm station and an electrically protected vault. Patent to Rothenberger, No. 523,946, and the patent to Stern, supra. But there had never been before any combination of a protected alarm station, a protected vault, and a clock mechanism which automatically opened the vault at a predetermined time. In each one of the patents referred to by Roberts there was some exposed point. As said by Carter:

"In each case he overlooks and ignores the exposure of some one or more vital feature of the system, and the complete absence of the fundamental conception of providing an isolated, as distinguished from a central, station system, and a system which is completely inclosed and self-protecting, as distinguished from one which is exposed in one or more particulars and requires a human guard or watchman to complete the protection which it is supposed to afford. Rothenberger was the only prior patentee who had a similar conception, and Rothenberger, as we have seen, discloses simply a visionary scheme of protection which in the first place was substantially pneumatic, instead of being entirely electric, as Coleman contemplates, and which in the second place was obviously incapable of ever being reduced to a practically operative form."

Although Rothenberger and Stern had both the alarm station and the vault protected, yet neither one of them had a clock, and therefore, under neither of these devices, after the system had been put in operation, could the owner himself enter the guarded structure without sounding an alarm. The idea that this should be done apparently never occurred to either one of them. It would not naturally occur to Stern, because his guarded structure was a dwelling house, and the owner living inside the house could at any time turn off the alarm.

It remained for Coleman to see that a device would be practically useless if the banker could not get into his vault each morning without sounding a general alarm. After he had seen this, he used a clock mechanism to obviate this difficulty.

Carter says upon this point:

"For if we assume a completely self-contained and self-protecting burglar alarm system which renders not only the protected premises, but the alarm station and connecting conductors, incapable of being attacked, controlled, or manipulated in any way whatsoever without sounding the alarm, it is obvious that the protection thus provided, when once started, would permanently obtain in the absence of some feature of the system by which it would be made to automatically throw itself out of operation at the end of the desired protected period. Without such provision, obviously the vault could not be opened even at the opening of business hours without bringing the alarm mechanism into operation and unnecessarily rousing the community by the sounding of a false alarm."

And again:

"In connection with the Duncan & Rowell system of the Haseltine British patent and the United States patents to Duncan, Duncan & Rowell, and Rowell & Duncan, and in connection with this Rothenberger patent as well, it may be again pointed out that a practical self-contained and self-protecting burglar alarm system such as Coleman contemplated and provided (one in which all necessity of a watchman is done away with) necessarily involves the provision of a clock-controlled device for turning off or rendering inoperative the alarm system when it is desired to open the vault for legitimate purposes (at the opening of business hours). And one criterion by which to determine whether or not the system of the Coleman patent is practically embodied in any prior art device is the presence or absence in the system of this clock-controlled mechanism. Where reliance is had upon alarming the community to protect the bank, by attracting their attention to the fact that the bank alarm is being sounded, it is obviously out of the question to permit the alarm to be frequently sounded as a false alarm, i. e., when no attack is being made on the system, and when it is not wished that any attention should be paid to the alarm. And since the only possible way in which the alarm can be prevented from sounding, in such a completely self-contained and self-protecting system, is to have the alarm connections automatically discontinued by clock mechanism within the system itself, the failure of any prior patent to show such clock mechanism conclusively demonstrates either that a completely self-protecting and self-contained system was not contemplated, or that the patentee failed to understand the necessities of such a system and has shown in his patent simply some impractical system existing purely in his imagination."

And again:

"And if it was true that all that Coleman did in this particular was to inclose a time operated controlling mechanism within the protected structure, so as to bring the protection to an end at a predetermined hour and permit the vault to be legitimately opened without unnecessarily arousing the community by sounding the alarm, this in itself was a conception of the greatest

practical merit indicative, as it seems to me, not only of invention, but invention of a very high order."

I agree with this last statement of complainant's expert, and consider that, so far as claims 18 and 20 are concerned, Coleman was an inventor.

The Sutton & Steel patent was issued June 22, 1897. The original Coleman patent was issued on November 10, 1896. In considering the validity of the reissue patent, I have not taken into account the Sutton & Steel patent. Anderson v. Collins, 122 Fed. 458, 58 C. C. A. 669; Roth v. Harris, 168 Fed. 279, 93 C. C. A. 581.

It remains to consider whether the defendants' system infringes claims 18 and 20 of the reissue patent.

The defendants have a guarded structure, a guarded housing in which the alarm is located, an electrical alarm system, and a time mechanism, all protected. The fact that the reissue patent shows only one alarm gong, while the defendants as well as the complainant have added several alarm gongs, is not at all material upon the question of infringement.

As Carter says in his testimony, any number of gongs could have been added to the Coleman system, and it is apparent that the defendants have made use of the one alarm gong which Coleman did provide.

The defendants having used these elements which are mentioned in the patent, do they operate in substantially the same way as those of the patent? With reference to the clock mechanism, it will be noticed that Coleman specifies no kind of a clock. The fact that the specific clock used by the defendants does not infringe the Robins & Jacoby patent does not necessarily indicate that the use of that particular clock would not be an infringement of claims 18 and 20 of the reissue patent. As to the operation of the clock, Coleman says, on page 3, line 62, of the patent, that he specifies no particular kind of a switch; in fact, he does indicate in the patent two kinds. Roberts says that the opening by a switch, first of the local alarm circuit, and then of the meter circuit, is peculiar to Coleman. But this was necessary, for Coleman at that time shut off his entire system during the daytime. He thus removed the entire protection, and it was necessary that he should open the local alarm circuit first; otherwise it would sound an alarm.

Roberts also says that the defendants' device does not shut off the alarm circuit as does Coleman's, but simply cuts out of the alarm circuit the combination lock dial and door bolt circuit. This, however, was nothing but a change suggested by the improvement afterwards made by Coleman himself in a subsequent patent, which cut out the door circuit, leaving the rest of the system operative in the daytime.

It is apparent that defendants, as Carter says, have utilized the essential and valuable idea involved in the time mechanism feature of the Coleman patent.

The defendants insist that the essential element of the Coleman system is its so-called "meter," that this meter responded to variations in the current, and that the defendants have nothing in their system which is similar thereto. It is true that nothing in the defendants' system would respond to an increase in the current; but, if the current is so far "varied" as to entirely stop, then the defendants' device does

respond. That Coleman used the word "variation" to include an entire cessation of the current is indicated on page 2, line 130, of the patent.

Complainant's theory is that this so-called "meter" is nothing but a circuit closer. It was used in the Coleman patent for the purpose of sounding an alarm, in case of an interruption of the closed circuit, or the closing of the open circuit. A circuit-closing device is used by the defendants for the same purpose. It is true that the defendants' device does not accomplish all that Coleman's device did, as it does not respond to all variations of the current.

With regard to these claims 18 and 20, a construction should be given to them sufficiently broad to make the circuit-closing device used by the defendants equivalent to that employed by Coleman.

Considerable space in the testimony is given to the number of circuits employed by the two systems, and particularly as to which in each system can be called the "main protective circuit." That Coleman employed two circuits, one normally open and the other normally closed, is plain from a mere reading of the patent.

Roberts himself in his testimony would not say that the statement of Coleman to this effect was incorrect. That the defendants have two circuits, one normally open and the other normally closed, is admitted. They say, however, that the normally closed circuit is only for the protection of the cable, and that the protection to the structure is furnished by the open circuits.

When the experts came to consider which in each system was the main protective circuit, they were indefinite. For example, Roberts was asked:

"Q. Do you find in the defendants' burglar alarm system a main protective circuit?

"A. I will answer yes and no."

Carter repeatedly said that it depended upon the use of the word "main"; and apparently each expert at different times, when treating of different parts of the system, called one circuit the "main circuit," and at other times called another circuit the "main circuit." For the purposes of these claims, however, under the construction which I think should be given to them, the circuit system used by the defendants, in my opinion, constitutes an infringement of the patent.

The result is that as to these claims the bill can be maintained.

Patent to Coleman, No. 626,670. June 13, 1899.

The Coleman reissue patent provided for taking the protection off the whole system during the daytime, and restoring it during the nighttime. The purpose of this patent is to allow the protection to remain during the daytime upon all the system except the door.

Carter says in his testimony:

"Claim 1, as will presently be seen, is broadly to this feature of automatically cutting out the protection of the door circuit alone at the opening of business hours."

Speaking of the defendants' system, he says:

"As compared with this arrangement, defendants' system shows a number of differences to which I shall presently refer, but which are not involved in

the broad statement of this feature embodied in claim 1. Defendants' system does follow and embody the substantial advantages of this arrangement, in that it also provides for the cutting out of the protection from the door circuit automatically, and by a time mechanism located within the vault, at the beginning of business hours, so that it will thereafter be possible to enter the vault without sounding an alarm, and so that at the same time the protection will be left on the other parts of the system."

Thus broadly considered, the claim is anticipated by the patent to Rousseau, No. 246,211, August 23, 1881. This patent says, line 7, page 1:

"The object of this invention is to provide an attachment or device for use in connection with a clock and a battery, and with burglar alarms, * * * whereby certain effects may be produced at set times. For instance, * * * secondly, whereby a certain section of the burglar alarms may be switched out of action at a particular hour, to allow the opening of certain windows or doors, without giving an alarm."

Carter says in his testimony that this patent simply shows a circuit-closing clock mechanism per se, and he is unable to perceive wherein it has any bearing on the combination of this claim.

It would appear, however, that the idea embodied in this Coleman patent was specifically stated by Rousseau in his patent.

The claim in the Coleman patent can therefore be sustained only as to the means by which the result is brought about.

As to the defendants' system, Carter says, as has been seen, that it embodies the substantial advantages of the Coleman arrangement. But that is not sufficient to show infringement. The defendants must have acquired the substantial advantages of the patent by the same means that Coleman employed, or by equivalent means.

An examination of the defendants' system and the Coleman patent, by referring to the testimony of Carter, and particularly to his cross-examination, is sufficient to show that the defendants not only do not employ the same means as those employed by Coleman, but that the means employed by them are entirely dissimilar, and are in no sense the equivalent of the means shown in the patent.

As to this patent, the bill cannot be maintained.

Patent to Coleman, No. 627,054. June 13, 1899.

Claim 17 is the only claim involved. That claim is as follows:

"In an electrical burglar alarm system, the combination with a main circuit extending between the guarded structure and an alarm station, and an alarm circuit located at the alarm station and having a switch and means for holding it normally closed, of an electromagnet for opening said switch, a circuit including it and extending to the guarded structure, and means for testing the alarm mechanism, substantially as set forth."

Carter's theory seems to be that the plaintiff can prevent the use of any means whatever for testing the alarm mechanism when such mechanism is in a guarded housing and is operated from a guarded structure.

He said:

"It is apparent that claim 17 is not limited to this specific arrangement, but is broadly phrased to express in general terms the feature of improvement to which I have called attention, i. e., the feature of enabling the local battery

in the isolated and inaccessible outside alarm station to be tested from the vault without requiring the alarm station to be visited for the purpose."

But this theory cannot be sustained. The plaintiff must be limited to the means set out in the patent, or to equivalent means.

The means described in the patent for securing the test are, among other things, a galvanometer and a switch, and the test resulting is an inaudible one. The galvanometer here described is not the "meter" referred to in the Coleman reissue patent. It is not a circuit-closing device, but is a real measuring instrument. Carter says this in substance, when he states:

"This is not the meter, galvanometer, or relay which responds to variations in current and serves to turn in an alarm thereby, but is a simple current-measuring instrument located in the guarded structure and used for the purpose of measuring the current in the local battery when the test circuit is completed."

The experts agree that in the defendants' system the test is made by opening the normally closed circuit. Roberts also says that not only the gong in the alarm station is sounded on such an occasion, but also all the other bells.

Carter says that the test is brought about in the same way as it would be if the cable connecting the vault and the housing were severed in an attack upon the system.

The system is tested, according to the patent, by measuring the current with a galvanometer, and the test is an inaudible one.

The defendants have no galvanometer, they do not measure the current, and the test is made by actually ringing the bells; so, of course, it is an audible one. Other differences between the defendants' system and that of the patent are pointed out in the cross-examination of Carter.

The means employed by the defendants are not the means set forth in the patent, nor are they equivalent of such means.

The bill cannot be maintained as to this patent.

Patent to Coleman, No. 632,513. September 5, 1899.

Carter in his testimony says:

"The improvement which this patent sets forth, and which constitutes the subject-matter of claim 1, consists in providing for a cutting out of the protection of the door of the housing from a point within the vault without withdrawing the protection from the rest of the system."

He practically repeats this statement in his redirect examination, and in his cross-examination.

Roberts says:

"In fact, the whole of the protection at the housing in defendants' system is removed by opening the switch, while in the system of the Coleman patent the shunt is intended to remove protection only or especially at the door contact."

This positive statement of Roberts is nowhere expressly contradicted by Carter. The latter says, to be sure, in speaking of defendants' system:

"Nor will the protection to the cable and housing by reason of the closed circuit be disturbed or withdrawn."

But upon the same page he says that the protecting circuit of the door bolts in defendants' system is a normally open circuit.

In his direct examination and cross-examination he is very indefinite upon the question as to whether in the defendants' system the protection is taken off from the entire housing or not, but in his redirect examination, speaking of the defendants' system, he says:

"In that system the cutting out of the protection to the outer housing, so as to permit the latter to be freely entered, is permitted by a switch within the protected structure."

He thus apparently concedes what Robert positively states, that the defendants' device has nothing to do with the door of the housing, but that it cuts out the protection from the entire housing.

In the patent the bolt contacts to the door of the housing are cut out by making a shunt path for the current around them, leaving the protection upon the rest of the housing. It is conceded that the defendants have no device of that kind. They have no shunt for the current, but the protection for the entire housing is cut off by breaking the current by means of switch No. 2.

Without then considering whether there is any difference in substance between this patent and the Coleman patent No. 626,670, it seems plain that the defendants have not infringed the former; for it cannot be seriously insisted that claim 1 prevents the use of any device whatever by the operation of which the outside housing of a burglar alarm system can be entered without sounding a general alarm.

As to this patent the bill cannot be maintained.

Patent to Coleman, No. 667,115. January 29, 1901.

Many devices are mentioned in this patent; but the only one in litigation here is that referred to in claims 12, 13, 14, and 15. The determination of the questions relating to these claims does not seem to be very important, in view of the fact that since the bill was filed the defendants have changed their device, and are not now using any springs which are controlled by the bolts.

If, however, the bill could at the time it was filed be maintained, it would seem that the complainant would be entitled to an injunction and an accounting.

With reference to the prior patents relating to the same subject, Roberts stated that, if claim 12 was to be construed as complainant's expert construed it, he found the combination and arrangement in several of the prior patents, and he added:

"If, however, the claim is construed as limited to the circuit and structural details, as in my opinion it should be, then I do not find the claim in any one structure of the prior art."

These claims cannot receive the construction suggested by Carter. They should be limited as indicated by Roberts. As so limited, they are in my opinion valid.

That the defendants have infringed them seems apparent. They use a screw bolt as does the complainant. When the bolt is unscrewed, that act closes the circuit and sounds an alarm. In the complainant's device,

when the bolt is unscrewed, that act opens the circuit and sounds an alarm. This is a difference that is not material.

Coleman uses two springs touching a metallic plunger attached to a bolt to complete the circuit. When the metallic plunger is withdrawn by unscrewing the bolt, the circuit is broken and the alarm sounded.

The defendants employ only one flat spring, which is pressed away from its contact point when the bolt is screwed home, and when the bolt is withdrawn it meets it, closing the circuit. This is an equivalent of the complainant's device.

As to this patent, therefore, the bill can be maintained.

Individual Defendants.

The principal defendant in the case is the Electric Protection Company, a corporation. Seven persons are joined with the corporation as defendants, and as to them the bill alleges that they are directors and stockholders of the company, and that:

"For the purpose of inducing the users and purchasers of electric burglar alarms to purchase the infringing devices manufactured and sold by said Electric Protection Company, said individual defendants, and each thereof, have promised and guaranteed that they will defend and save harmless every purchaser of electric burglar alarms manufactured and sold by said Electric Protection Company against all suits for infringement of patents."

In support of the allegations of the bill in this respect, the complainant introduced in evidence a document signed by the individual defendants, which is known as "complainant's Exhibit A-10." The mere signing of this document, without more, would not, under recent controlling authorities, be sufficient to justify the joining of these directors as defendants.

The evidence in the case does not show that the document when signed was used for the purpose of inducing persons to buy the system of the defendants. Each of these defendants was examined as a witness by the complainant, and no one of them testified that it was ever used to his knowledge to induce purchases; but they all, except Carothers, who was not interrogated on that point, testified that the purpose was to effect settlements and procure payments from persons to whom systems had already been sold.

Under these circumstances, the bill cannot be maintained against these defendants. Glucose Sugar Refining Co. v. St. Louis Syrup Co. (C. C.) 135 Fed. 540.

The authorities cited by the complainant in its bill do not indicate that it is entitled to any relief against these directors. What is said in the case of Peters v. Union Biscuit Co. (C. C.) 120 Fed. 679, was distinguished and disapproved of by Judge Adams, who wrote the opinion in that case and in the subsequent case above cited of Glucose Sugar Refining Co. v. St. Louis Syrup Co. In the case of Simplex Electric Heating Co. v. Leonard (C. C.) 147 Fed. 744, it was said that the corporation was used by the individual directors as a cloak or cover for their operations. In the case of Harrington v. Atlantic & Pacific Telegraph Co. (C. C.) 143 Fed. 329, the individual joined was Jay Gould, who had made a contract which was the basis of the suit, and who was the owner or controller of a majority of the stock of the de-

fendant company. The case of National Cash Register Co. v. Leland, 94 Fed. 502, 510, 37 C. C. A. 372, was an action at law, and the court said that the same rule did not necessarily apply in a suit in equity. In the case of Hutter v. De Quincy Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652 (Second Circuit), it was said that the officers could not be made liable unless they personally directed the infringement. In the case of Cazier v. Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 C. C. A. 104 (Seventh Circuit), the directors were held not liable. In the case of Calculagraph Co. v. Wilson (C. C.) 132 Fed. 20, the corporation was not made a defendant, and the court said that Wilson could not shield himself behind the corporation.

As to these defendants, the bill should be dismissed. Under the circumstances, however, no costs will be allowed them. Tyler v. Galloway (C. C.) 13 Fed. 477.

The complainant has not prevailed upon all of its claims in the Coleman reissue, nor in the Robinson & Green patents. It is not, therefore, entitled to costs with reference to these patents. Fairbanks, Morse & Co. v. Stickney, 123 Fed. 79, 59 C. C. A. 209 (Eighth Circuit).

It has prevailed upon all of its claims in the Robins patent, and in the patent to Coleman, No. 667,115. Upon the other patents in litigation the defendant company has prevailed.

The question of costs as between the complainant and the defendant company I will leave for determination when the final decree is entered.

Let a decree be entered dismissing the bill without costs as to the defendants Alvin Robertson, H. N. Stabeck, W. E. Jones, George E. Towle, W. A. Laidlaw, C. H. Baldwin, and Charles Carothers.

Let a decree be entered against the defendant Electric Protection Company for a permanent injunction and an accounting, as prayed for in the bill:

(1) As to claims 1, 2, 3, 4, and 5, of the patent to Robins, No. 850,101.

(2) As to claims 1, 2, 3, 7, 8, and 10 of the patent to Robinson & Green, No. 708,496.

(3) As to claims 18 and 20 of the Coleman reissue patent, No. 11,626.

(4) As to claims 12, 13, 14, and 15, of the patent to Coleman, No. 667,115.

Let a decree be entered dismissing the bill as to the defendant Electric Protection Company: So far as it relates to claims 6 and 21, of the Coleman reissue patent, No. 11, 626; so far as it relates to patent to Coleman, No. 626,670; so far as it relates to patent to Coleman, No. 627,054; so far as it relates to patent to Coleman, No. 632,513; so far as it relates to claims 9, 11, 12, and 13 of the patent to Robinson & Green, No. 708,496; so far as it relates to patent to Robins & Jacoby, No. 771,748; so far as it relates to patent to Robins & Jacoby, No. 771,749; so far as it relates to patent to Grass, No. 880,020.

To take the accounting herein ordered, a master will, upon motion, be appointed.

AMERICAN BANK PROTECTION CO. v. CITY NAT. BANK OF JOHNSON CITY, TENN.

(Circuit Court, E. D. Tennessee. October 7, 1909.)

1. PATENTS (§ 313*)—SUIT FOR INFRINGEMENT—DISMISSAL.
A court will not entertain a motion by defendant to dismiss a bill for infringement of a patent made before a hearing and based on affidavits relating to matters of fact going to the validity of the patent or the question of infringement.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 313.*]

2. EQUITY (§ 358*)—TAKING AND FILING PROOFS—OBJECTIONS TO EVIDENCE.
Testimony taken in rebuttal will not be suppressed, on motion or objection of defendant on the ground that it was not proper rebuttal testimony, after the defendant has by leave of court taken testimony in surrebuttal.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 748; Dec. Dig. § 358.*]

3. PATENTS (§§ 202, 286*)—ASSIGNMENT—DATE OF PASSING TITLE.
An invention was assigned before application for a patent, but the assignment was not recorded, and a patent was applied for and issued in the name of the inventors, who afterward assigned it to the same assignee, together with all claims for past infringement, which assignment was recorded. *Held*, that the equitable title passed by the first assignment, and the legal title as of the date of the second assignment, and that the assignee was authorized to maintain a suit for infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 454; Dec. Dig. §§ 202, 286.*
Persons entitled to sue for infringement, see note to Snead v. Scheble, 99 C. C. A. 583.]

4. PATENTS (§ 101*)—VALIDITY—IMPROVEMENT PATENTS.
It is not necessary that a patent for specific improvements on a burglar alarm system should include as an element of the combination the burglar alarm system itself.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

5. PATENTS (§ 167*)—CONSTRUCTION—REFERENCE TO SPECIFICATION AND DRAWINGS.
A patent is to be liberally construed so far as is consistent with the language used so as to sustain the just claims of the inventor, and for that purpose each claim is to be read in the light of the specification and drawings.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

6. PATENTS (§ 160*)—CONSTRUCTION—CORRECTION OF CLERICAL ERRORS.
Manifest clerical errors in the claims of a patent may be corrected by reference to the specification and drawings, especially where the claim contains the words "substantially as described," or their equivalent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 160.*]

7. PATENTS (§ 328*)—INFRINGEMENT—BURGLAR ALARM GONG.
The Robinson & Green patent, No. 708,496, for improvements in alarm gongs for electric burglar alarm systems, construed, and *held* valid and infringed.

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

8. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—INJUNCTION.

The fact that a defendant has discontinued the use of an infringing article does not deprive the complainant of the right to an injunction when the defendant contests the validity of the patent and has not disavowed an intention to further infringe.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.*]

In Equity. Suit by the American Bank Protection Company against the City National Bank of Johnson City, Tennessee. Decree for complainant. Memorandum opinion.

Paul & Paul and Webb & Baker, for plaintiff.
Harr & Burrow, for defendant.

SANFORD, District Judge. 1. Defendant's preliminary motion to dismiss the bill, in effect for want of title to the patent in suit, must be denied.

This motion denies complainant's right to the relief sought, partly on account of matters shown in the proof, and partly on account of matters shown by affidavit. The defense goes to the merits and cannot, in my opinion, be made by motion based on affidavits, but presents an issue of fact to be determined, on the merits, under the pleadings and proof in the case as any of the other issues in the case. This is not a case where the bill may be dismissed on motion under the doctrine of Mast, Foos & Co. v. Manufacturing Co., 117 U. S. 487, 20 Sup. Ct. 708, 44 L. Ed. 856, but falls, at least by analogy, within the rule laid down in Snow v. Sargent (C. C.) 106 Fed. 230, that a Circuit Court will not entertain a motion by defendant to dismiss a bill for infringement filed before a hearing and based on affidavits relating to matters of fact going to the validity of the patent or the question of infringement.

2. The defendant's motion to suppress the testimony of complainant's witnesses Mountford, Houghton, and Carter, and its objections thereto on the ground that the same were not proper rebuttal testimony, must likewise be overruled.

While it may be that a large part of this testimony was properly proof in chief, yet, after same had been taken, the defendant did not move to suppress this testimony on that ground, but, on the contrary, applied to the court for leave to take proof in surrebuttal, which was granted by Judge Clark. Since such testimony has been taken by defendant, I am of opinion that it is now too late to move to suppress the complainant's testimony or to object to same on the ground that it was not properly taken in chief, and that the court should not, in the exercise of its discretion, at this stage of the case, sustain the motion to exclude, or the objection to the testimony.

3. After careful consideration, I have reached the following conclusions as to the merits of the case:

(1) The complainant has proven title to the Robinson & Green letters patent, No. 708,496, in controversy in this cause. The complainant in the original bill is clearly the corporation styled "American Bank Protection Company"; the word "the" being no part of its

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

name, as shown by the caption of the bill and the signature of the complainant thereto, and this word, while used as an introduction to the first paragraph of the bill, being obviously merely the definite article grammatically required to begin the sentence and not alleged as part of the corporate name.

The complainant was incorporated on November 5, 1901. On November 9, 1901, Robinson & Green assigned their invention to this complainant by written assignment acknowledged the same day, but not recorded in the Patent Office until August 6, 1906. The patent was applied for on November 26, 1901, and issued to Robinson & Green on September 2, 1902. On July 2, 1906, Robinson & Green assigned and transferred to the complainant all their right and title to the invention and letters patent, and "in and to all claims for the past use and infringement of said letters patent to the full end of the term for which said letters patent was granted." This assignment was acknowledged by Robinson on July 10, 1906, and by Green on July 20, 1906, the same day the bill was filed, and recorded in the Patent Office on August 6, 1906.

I am of opinion on these facts that the assignment of November 9, 1901, operated to convey the equitable interest in the invention to the complainant, but that on the issuance of the patent in 1902 the legal title thereto was vested in the patentees; that the assignment of July 2, 1906, conveyed the legal title in the patent to the complainant with a specific assignment of all claims for prior infringement, all claims for subsequent infringement passing necessarily by the assignment of the legal title in the patent; that the certificate of acknowledgment is, under Rev. St. § 4898, as amended by Act March 3, 1897, c. 391, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3387), prima facie evidence of the execution of the assignment on the date the assignment bears date; and that the assignment of July 2, 1906, took effect from the date of its execution on July 6, 1906 (Murray Co. v. Gin Co., 149 Fed. 989, 79 C. C. A. 499 [C. C. A., Third Circuit], and cases cited), vesting the legal as well as the equitable title in complainant prior to the bringing of this suit.

There is, furthermore, no evidence that complainant has ever transferred its title to another corporation by the name of "The American Bank Protection Company"; the affidavits offered by complainant not being competent as evidence on this point, and furthermore not establishing such transfer as an accomplished fact, as distinguished from a mere intention of future transfer.

(2) I am of the opinion that the subject-matter of the invention does not relate merely to an alarm gong mechanism adapted in itself to operate as a complete burglar alarm or protective system—for which purpose it would have no patentable utility—but that it relates to improvements in alarm gongs for electric burglar alarm systems adapted to application to safes, vaults, and other receptacles or apartments for the storage of money and other valuable articles, by a combination of devices for protecting the gong of such burglar alarm system; that, while it does not relate to any of the other parts of the system than the gong and its protective devices, it is intended to be used in connection therewith; that it is directed towards the means by which the

alarm gong of such a system of vault protection is itself protected from injury or interference, and specifically contemplates the alarm gong of such a system upon the outer wall of such vault or receptacle, connected with an electrical circuit-closing device, with a specially constructed protective shield arranged over the alarm gong and electrically connected with such circuit-closing device and bolted to the outside of the vault or receptacle in such a manner that an attempt to disturb or raise the shield will result in a movement of its mechanical fastening by which the circuit will be closed and the alarm sounded, with the additional features of constructing such supporting bolt for the shield in the form of a tube serving as a conduit for the connecting wires leading from the electric gong to the interior installation, and of connecting the shield and alarm gong to opposite sides of the circuit, so that the introduction of a wire through the perforations of the shield for the purpose of disabling the gong will result in a closing of the circuit and the sounding of the alarm.

(3) In considering the several claims contained in the letters patent, I am of opinion that as the patent is, in its entirety, limited to specific improvements of certain parts of the burglar alarm system, to wit, the gong and its protecting device, it was not necessary that the claims should include as an element of the combination the burglar alarm system itself (Goshen Sweeper Co. v. Bissell, 72 Fed. 67, 73, 19 C. C. A. 13 [C. C. A., Sixth Circuit]), and that the specifications sufficiently point out the connection with the general burglar alarm system through the conductors 27 and 28 extended to any suitable circuit-closing devices arranged to be operated when an attempt is made to open the vault or apartment.

It is furthermore settled that a patent is to be liberally construed, so far as is consistent with the language used, so as to sustain the just claims of the inventors (Rubber Co. v. Goodyear Co., 9 Wall. 788, 19 L. Ed. 566; Klein v. Russell, 19 Wall. 433, 22 L. Ed. 116), and that for such purpose each claim of the patent is not to be construed as though it was complete in itself, separate and apart from the specifications, but that the claims of the patent are to be read in the light of the specifications and drawings which accompany them, for the purpose of arriving at their just construction, although not to vary or change them, especially where the claims themselves contain the words "substantially as described," or "substantially as set forth," or equivalent phrases, which import into the claims the particulars of the specifications and carry into the claims the description of the specifications. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Corn Planter Patent, 23 Wall. 181, 218, 23 L. Ed. 161; Westinghouse v. Brake Co., 170 U. S. 537, 558, 18 Sup. Ct. 707, 42 L. Ed. 1136; Stilwell-Bierce Co. v. Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584 (C. C. A., Sixth Circuit); Sanders v. Hancock, 128 Fed. 424, 63 C. C. A. 166 (C. C. A., Sixth Circuit); Maunula v. Sunell (C. C.) 155 Fed. 535, 542; Anderson v. Collins, 122 Fed. 451, 458, 58 C. C. A. 669 (C. C. A., Eighth Circuit); Mossberg v. Nutter, 135 Fed. 95, 99, 68 C. C. A. 257. In Mossberg v. Nutter, supra, the court said:

"In confining our attention too exclusively to a critical examination of the claims, we are apt to look too closely at the claims and to lose sight of the

important consideration that the real invention is to be found in the specifications and drawings, and that the language of the claims is to be construed in the light of what is there shown and described."

Furthermore, manifest clerical errors in the claims may be corrected by reference to the specifications and drawings, especially where the claim is for an invention "substantially as described." Maunula v. Sunell (C. C.) 155 Fed. 535, 542.

Applying these principles to the 13 claims of the patent in question, I am of opinion that these claims, when properly construed in the light of the specifications and drawings, cover the protective features of an alarm gong in a burglar alarm system placed upon the outside wall of a vault or apartment to be protected, by a protecting device operating through electrical connections with suitable circuit-closing devices inside of the vault or apartment; that the claims relate only to the protective features of such alarm gong used in connection with such general burglar alarm system; that the words used in the several claims "located outside of the vault," and other similar phrases, when construed in connection with the specifications and designs, all refer to the location of the gong on the outside wall of the vault or apartment to be protected and have the same force and meaning; that the word "outside," as used in line 85, in the phrase "upon the outside of the wall," is a manifest clerical error, when construed in connection with the specifications and drawings, for the word "inside," and may be corrected accordingly; that, construing the sixth claim in connection with the specifications and drawings, the words "said collar," as used in line 110, in the phrase "to said collar and said sleeve," refers to the washer 9 shown on the drawings, and that the word "sleeve," as used in said phrase, refers to the collar 12 shown on the drawings; that, thus construed, all the claims contained in said letters patent relate to protective features of an alarm gong located on the outside wall of the vault or apartment to be protected and connected with electrical circuit-closing devices in the interior of the vault or receptacle; that each of the several claims so construed involves a combination of elements which has produced a new and beneficial result never known before, rendering the alarm gong of the burglar alarm system, when thus connected and located, suitable and serviceable for a purpose for which it was never known or used; that the arrangement of elements in this combination involved the exercise of invention as distinguished for mere mechanical skill; that each of the claims discloses a patentable invention; and that the patentable invention contained in the several claims constituted a new and useful improvement in the alarm gong of an electrical burglar alarm system which is not anticipated by any of the prior patents relied upon by defendants, none of which in my opinion, for the reasons generally stated in the deposition of complainant's expert witness Carter, involved the essential idea of the location and protection of the alarm gong of a burglar alarm system, in the manner referred to by these claims, or were adapted to or actually used for the performance of the functions of this patent, and hence do not constitute anticipations thereof.

(4) I am further of opinion that the proof shows that the appliance in use in the defendant's premises, prior to this suit, constituted an in-

fringement of the Robinson & Green patent in the use of the improvements in the alarm gong of the electrical burglar alarm system installed in their premises, which infringed upon the claims of the Robinson & Green patent, and that, although it appears that the defendant has discontinued for a time the use of the devices protected by the patent, yet as defendant in its answer denied the validity of the complainant's patent, and did not expressly deny its purpose to continue or renew the use of this device, the complainant, under the doctrine of Johnson v. Foos Mfg. Co., 141 Fed. 73, 72 C. C. A. 105 (C. C. A., Sixth Circuit), is entitled to an injunction. See, also, Walker on Patents (4th Ed.) § 701. On this point I am unable to follow the doctrine of Whitney v. Railway Co. (C. C.) 48 Fed. 444, in drawing a distinction between an injunction against the manufacturer of an infringing article and an injunction against the continued use of an infringing article by the vendee of such article.

(5) I am further of opinion that the complainant is entitled to an accounting for damages by reason of the infringement. I do not deem it necessary at this time to pass upon the question of the sufficiency of notice of infringement or the marking of the patented article, as these matters, as I view it, bear solely upon the measure of damages and may more properly be considered upon the coming in of the master's report on the order of reference. Horn v. Bergner (C. C.) 68 Fed. 428, affirmed by the Circuit Court of Appeals, Fourth Circuit, 72 Fed. 687, 18 C. C. A. 679; Hill Mfg. Co. v. Stewart (C. C.) 116 Fed. 927. See, also, Lorain Steel Co. v. Switch & Crossing Co. (C. C.) 153 Fed. 205, and Westinghouse Co. v. Electrical Mfg. Co. (C. C.) 159 Fed. 154.

A decree will be entered in accordance with this opinion, sustaining the complainant's bill, granting an injunction against the further use of the infringing device, and ordering a reference to a master for an accounting of damages.

MATCHETTE v. STREETER BROS.

(Circuit Court, N. D. Illinois, E. D. August 15, 1910.)

No. 29,094.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VACUUM CLEANING APPARATUS.

The Matchette and Raddatz patent, No. 870,981, for a vacuum cleaning apparatus, has as one element of the combination an automatic governor adapted to open and close the pressure supply connection which has a positive "on and off" action, and was not anticipated in the prior art, and the combination with such novel and useful element discloses patentable invention, although the other elements are old; also, *held* infringed.

2. PATENTS (§ 247*)—INFRINGEMENT—USE OF IMPROVED DEVICE.

Where a patented combination is operative in itself, infringement is not avoided by the use with it of an auxiliary device which increases its efficiency.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 388; Dec. Dig. § 247.*]

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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 Frank J. Matchette against Streeter Bros., a corporation. On final hearing. Decree for complainant.

Brown & Williams, for complainant.

John H. Miller, T. D. Merwin, and Munday, Evarts, Adcock & Clarke, for defendant.

SANBORN, District Judge. Suit for infringement of letters patent 870,981, for a vacuum cleaning system, applied for January 15, 1906, issued November 12, 1907, to complainant and Richard Raddatz, assignor to complainant. Defendant's system, claimed to infringe the patent, was installed by the Sanitary Devices Manufacturing Company, a California corporation, in March, 1907. The suit is being defended by that corporation, and was brought May 11, 1908. One of the claims follows:

"9. In a vacuum cleaning apparatus, the combination of a suction main having a valve controlled inlet connection, an aspirator communicating with and adapted to exhaust air from said main and having a fluid pressure supply connection, and an automatic governor adapted to open and close said pressure supply connection according to variations of vacuum in the system; substantially as described."

Nothing new is claimed for the suction main, controller valve, or aspirator with its fluid pressure supply; but an automatic governor which will entirely open and entirely close the pressure supply according to variations of vacuum in the system is new. If the governor described in the patent specifications and drawings will do this, the combination is novel and useful. If it will not, both the elements and combination are old, being unmistakably present in the Bavier and Hawkes patent of 1900, No. 658,103, and other structures of the prior art. In other words, if an "on and off" governor, and not merely a "throttling" governor, has been produced, the patentees have brougnt out a valuable device, entitled to liberal protection.

The vacuum cleaning principle is well understood. In the small electric or hand power machines the vacuum is created by a constant pull on the cleaning tool. A low vacuum is steadily maintained by an electric fan, a pump, or a hand-operated crank or lever, which operates continuously by sucking air through the cleaning tool. The system of the patent, however, is designed for use in hotels, large stores, or steamships, and is adapted to be used on different floors, and by a number of operators, at the same time. This requires a good deal of power in order to create the needed vacuum. As shown in the drawings and specifications, it consists of a suction pipe attached to a vacuum tank at one end, and on the other carrying an aspirator or ejector, having a blast nozzle or jet nozzle. This is connected by a pipe with a steam boiler or other fluid pressure (in practice, with a steam boiler), having a pressure of 70 to 110 pounds. When the steam connection is opened, the rushing of the steam through the nozzle sucks the air from the tank through the suction pipe bearing the aspirator, and thus creates a vacuum. It is necessary, however, to control, and maintain the vacuum pressure, since this will constantly rise, unless used up as fast as created by the operation of the cleaning tools; and this control is what is sought to be accomplished by the patentees.

This they try to do by an automatic governor. It has been already shown that the suction pipe has one end attached to the vacuum tank and carries at the other an aspirator or steam-operated ejector, by which the vacuum is created. In order to automatically control the vacuum by shutting off the steam from the aspirator when the vacuum gets too high, and turning on the steam when the vacuum gets too low, another pipe is attached to the vacuum tank at one end, and to the suction pipe at the other, and in this second pipe a cylinder and piston are placed, so that they are connected at one end with the vacuum pressure of the tank and suction pipe, and at the other with the steam supply by a pipe attached to the aspirator steam supply pipe. The cylinder and piston constitute the automatic governor, or valve. Normally the piston vests at the bottom of the cylinder, in a position to keep a steam valve open, and the steam rushes through this and over the aspirator, thus creating and constantly increasing the vacuum. The piston is held in this position by a long spiral spring; the former being made hollow so as to inclose the spring. If the piston is moved upward about an eighth inch, the steam port or valve will entirely close, and shut off steam from the aspirator; thus stopping further increase of vacuum. The design of the patent is to produce this upward movement by a vacuum pull in the cylinder above the piston head of sufficient force to overcome the downward pressure of the spring. This end of the cylinder being connected with the tank and suction pipe, when the rush of steam over the ejector has continued long enough to create sufficient vacuum pull to overcome the spring pressure and the friction and inertia of the piston, the latter is designed to rise suddenly and shut off the steam. Further creation of vacuum being thus stopped, when the pull lowers from use of the system, leakage, or both, to such an extent that the spring can overcome this pull, and the friction and inertia of the piston, the latter is designed to be suddenly forced down to its normal position, opening the steam valve again, and starting the aspirator. These results are what the patentees desired, and the operation of the piston thus described is called an "on and off control," as distinguished from a "throttling control," which is what results when the piston does not rise high enough to entirely shut off the steam, or descend low enough to entirely turn it on. It neither creates sufficient vacuum nor saves steam. Complainant insists that the patented governor creates an "on and off" control, while defendants insist the contrary, that it is only a "throttling governor," like many in the prior art. Upon this question the case turns.

As will readily be seen from the description, the vibration of the piston back and forth is caused by nearly equal forces opposed to each other, suggesting the gradually slowing pendulum. The power of these forces may be approximated, as follows: (1) Vacuum pull per mercury inch, 6 pounds, making the high vacuum point of 8 inches, 48 pounds, and low point of 5 inches, 30 pounds. (2) Spring tension, 35 pounds. (3) Piston weight, 4 pounds. (4) Spring weight, 1 pound. (5) Friction of rest of rising piston, 8 pounds, and of falling piston 4 pounds. Thus the total force necessary to raise the piston is 48 pounds, exerted by the 8 inches of vacuum. On the

return trip, the 35 pound spring must overcome 8 pounds inertia of piston, less its weight of 4 pounds, leaving 31 pounds net spring tension; so the vacuum must fall to about 5 inches, or 30 pounds, before the piston will be reseated. The small factors of increased spring tension when the piston rises, and instantaneous lessening of vacuum when the steam is shut off are ignored because infinitesimal. The opposing forces being equal, why does not the piston balance, like a pendulum? Given 49 pounds pulling one way and 48 the other, or 31 pushing down and 30 pushing up, no very positive or energetic action would be expected. Apparently there would be no "snap action," no strong or decided movement. This result is what defendant's witnesses and counsel say is the inevitable action of the device, that its movement is so weak as to produce only a throttling action. Complainant maintains the contrary, and his theory is clearly stated by his expert, Mr. Carter, as follows: The on and off action is produced, "first, because the friction of rest is greater than the friction of motion, and tends to hold back the valve (piston) till the unbalanced pressure is considerable, and to then let it move clear over, when once started; second, that the inertia and momentum of the valve and directly connected piston exert a tendency in the same direction; third, that the spring is made so long that considering the slight movement (only an eighth of an inch in practice) permitted the valve the pressure exerted by the spring upon the valve is practically constant no matter whether it is in one position or another." Defendants contend that somewhere or somehow in the operation described by Mr. Carter there is lost motion; that, while the device can be made to work by suddenly opening and closing the handle valve in the sweeper, and under other limited conditions, yet the inevitable tendency, as shown in all the tests, is for the governor to throttle, and to assume a balanced position. Complainant denies this, though he admits that he does not use the device except with another called the auxiliary control or pilot valve. It appears in evidence that some form of auxiliary has been used by complainant from a time about two years antedating the issue of the patent down to the present, and that auxiliary controlling devices have been commonly used in mechanical operations for many years. The types employed by both parties operate by allowing the accumulation of a vacuum greater than necessary to move the piston, and then suddenly applying it, thus securing a positive off action, and by suddenly introducing atmosphere to the low point of the vacuum, while it is maintaining the "off" control, thus instantaneously breaking the vacuum pull, and permitting the full net tension of the spring to jump the piston back to its seat, and turn on the steam. It will be readily seen that such a vigorous and decisive result cannot theoretically be obtained by the patent governor itself, acting pursuant to its own principles, because the spring is always pushing and the vacuum always pulling, except, however, that a sudden opening of the vacuum pipe will instantaneously deplete the vacuum pull, and a sudden closing instantaneously increase it, thus causing such changes in the vacuum forces as to carry the pull above the 48 pounds on the one hand, and below the 30 pounds on the other, with

the forces all contained within the cylinder the vacuum cannot exceed 8 inches, nor be less than 5, other than as just stated. But by keeping the vacuum pull entirely out of the governor cylinder until a high limit of vacuum is reached, say of 9 inches or 54 pounds, and then allowing it to be suddenly applied, a positive off action is obtained, completely shutting off the vacuum production. On the other hand, by keeping the gradually lessening vacuum pulling against the spring until the low point is nearly reached, and then suddenly breaking vacuum by admitting atmosphere, a positive on action results. Even though the above estimates of weights, tension, and pressure are not accurate, it is manifest that nearly equal forces are constantly opposing each other leaving the margin either way quite small. Whether it is large enough to secure practical results is answered by the tests made, three of them witnessed by the trial judge. The final test most clearly demonstrated operativeness and utility in the patented device, notwithstanding theoretical objections and the unsatisfactory character of the first three tests.

The first test was made by Mr. Harrison in New York. The governor used was made from one of complainant's blue prints. His conclusions were that the governor, operating without the auxiliary or pilot valve, "could not be made to operate positively under uniform, or uniform varying, conditions of vacuum, * * * without tending to become balanced, so as to allow steam to flow continuously through same," also, that the governor would not operate, either with or without the auxiliary, without admitting air under the seat of the piston. The governor remained balanced for 15 minutes, with steam wasting, and, as there was no indication that it would change its position, the vacuum was broken by hand. This test is not conclusive, not only because "any device can be made to fail to work," many most valuable inventions have at first worked imperfectly, and the device was not made by complainant, and "no matter how many fail, if one succeeds, that is enough," as complainant's counsel correctly say. The real question is, Can any one make the device operate? If so, it is not inoperative. However, Mr. Harrison's testimony is important because it is a faithful description of the three-day test made later, with a device made by complainant.

Upon the hearing complainant was permitted to introduce further testimony. Mr. Raddatz, one of the patentees, was called, and produced a governor made under his instructions, introduced as Exhibit "O-six." It was constructed according to one of the blue prints in evidence. When it was tested, he says it operated with the on and off control; the steam being either turned on full or turned off entirely. The witness further explained why complainant's company does not use devices like O-six, saying it is by reason of the leakage from steam-condensation, which has to be taken away either by drain piping or dripping into a bucket, and because the vacuum in the upper end of the device draws over water and vapor into the vacuum reservoir, by which the dirt and dust are dampened. Mr. Raddatz then goes on to explain why the auxiliary control is used. It is to obtain a greater range of vacuum between the point where the steam is shut off and where it is turned on. The margin or

range due to the difference between the friction of rest and of motion is practically too small. It is desirable to increase this up to about 2 vacuum inches with the low point at 8 or 8½ inches and the high point at 10 or 10½, and in practice the difference of range is set at 3 inches. This differential is obtained by the auxiliary or pilot valve, without which the patent governor is not used. It is very undesirable to have the control work too frequently because there is a too rapid wear on the parts, "they might hammer." An aspirator cannot be controlled by throttling, but only by compelling it to work at full speed while in action, followed by a complete shutting off, cleaning work going on all the time. This test shows operativeness and utility, precisely as the final one did. After Mr. Raddatz had testified, a test of Exhibit O-six under complainant's supervision was made at the Great Northern Hotel in Chicago, at which counsel on both sides, Mr. Raddatz, Mr. Raymond (defendant's witness), and the trial judge were present. It was found that the device showed an on and off action when the handle valve of the attached sweeping tool was continuously wholly opened and wholly closed. The action of the governor, however, was somewhat erratic. It did not seem to correspond with any definite vacuum pressure as indicated by the vacuum gage needle, and showed no definite differential, margin, or range between high and low points. When the sudden opening and closing of the handle valve was stopped, the governor soon settled into a throttling position. Then the spring tension was changed, the on and off action again commenced, and continued for a short time, when the throttling again succeeded. The test being over, the hearing, was resumed. This test showed operativeness, but was not satisfactory from the standpoint of utility.

After the hearing, a three-day test of exhibit O-six was made under defendants' supervision in the basement of the Marshall Field retail store, Chicago, Mr. Raddatz and Mr. Williams, one of complainant's solicitors, being present. The trial judge spent a short time witnessing this test on two days. The results were practically the same as those observed by Mr. Harrison, and at the Great Northern Hotel. The tests thus being unsatisfactory, a final one was had on June 2, 1910, at complainant's factory in Milwaukee, with a new governor, identical with Exhibit O-six. This test was entirely conclusive in showing the positive on and off action claimed by the patent. It continued for nearly 90 minutes, under all ordinary operating conditions. The governor worked perfectly all the time, and the test was entirely satisfactory from the standpoint of operativeness and utility. The device is novel and useful, being the first positive on and off governor ever produced. The patent should be sustained without hesitation.

The only remaining question is that of infringement, and, in order to a proper understanding of the question, some further description of the auxiliary valve is necessary, since defendant uses the patented governor only with the auxiliary. There are manifold forms of auxiliary controlling devices. Both parties use them without any claim that either is novel or patentable. Defendant's plan of con-

trol may be profitably described in order to see whether it infringes. Defendant's governor is an equivalent of complainant's, but having a weaker spiral spring, compressing about one-seventh of its length when the piston rises. This governor is actuated entirely through an auxiliary valve made integral with and immediately above it. When the high vacuum point of 10 inches is reached, the vacuum pull lifts a piston in the auxiliary device, which opens connection with the governor cylinder above its piston, to which no vacuum has been previously admitted. The sudden exhausting of the air in the cylinder forces up the governor piston, and cuts off the steam. The vacuum is then held in both the auxiliary and governor until it runs down to eight inches, when the weight of the auxiliary piston lowers it enough to admit atmosphere through a port of the auxiliary into the governor cylinder, breaking the vacuum and causing the piston to fall and open the steam pipe again. Whether the spring aids the performance is somewhat uncertain, though the drawings indicate that it does so. Defendant uses the patented governor, made in exact copy, except the lighter spring, but makes it more efficient by employing auxiliary control to increase the vacuum range and secure a more positive on and off action. The double device is an improvement on the patented governor but this does not change the established fact that defendant uses it, and thus infringes. Complainant himself uses a similar auxiliary, to obtain better results than would be possible with the governor alone. While the auxiliary slightly changes the operation by the sudden admission of vacuum, and its sudden withdrawal, yet the patented governor works by the operation of precisely the same forces whether the auxiliary is, or is not, used with it. This makes a clear case of infringement, notwithstanding an improved operation is obtained through the auxiliary.

Another point concerning the interest of the parties should be mentioned. After the case was argued and submitted, but before the final test in Milwaukee, counsel on both sides stated that complainant's business had been purchased by a corporation called the McCrum-Howell Company, and that the latter had made some arrangement by which infringing plants other than that of Streeter Bros. should not be disturbed. The price to be paid by the McCrum-Howell Company for complainant's patent rights depends upon the patent being substained by the courts. So far as defendant's plant is concerned, no agreement exists which prevents the issuance of an injunction. Up to the time of the Milwaukee test, the case was defended with the utmost zeal and ability by solicitors for defendant, and Mr. Clarke was present at that test, and made every possible point which seemed necessary to its thoroughness. The Sanitary Devices Company, which installed the Streeter plant, and defended the suit, has indemnified Streeter Bros. against any loss or damage in this suit. There is therefore a substantial controversy left, without collusion, and because of the thorough contest made, and of the conclusions reached by the court before any of the transactions referred to had taken place, there seems to be no doubt that a decision should be made.

A decree will be entered as prayed in the bill.

COMMERCIAL ACETYLENE CO. et al. v. AUTOLUX CO. et al.

(Circuit Court, E. D. Wisconsin. May 2, 1910.)

No. 126.

1. PATENTS (§ 328*)—INFRINGEMENT—ACETYLENE GAS TANKS—CONTRIBUTORY INFRINGEMENT.

The Claude & Hess patent, No. 664,383, for an acetylene gas tank, for use on automobiles, etc., covers as the patented package, not only the steel tank containing acetone, but the internal equipment of a supersaturated solution of acetylene gas, which is an essential part of the patented device, and an unlicensed refilling of such tanks after the gas has been exhausted constitutes an infringement, and one who knowingly aids and abets such refilling is a contributory infringer.

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

2. PATENTS (§§ 256, 259*) — INFRINGEMENT — VIOLATION OF LICENSE RESTRICTIONS—CONTRIBUTORY INFRINGEMENT.

It is within the rights of the owner of a patent for an acetylene gas tank charged with gas for use on automobiles, which with normal use requires recharging after having been used a certain number of hours, by a notice attached to such tanks when sold to prohibit their use except when charged by the seller, and any one who with knowledge of such limited license recharges such tanks, which requires the practice of the invention of the patent, is an infringer of the patent, and one who with such knowledge sells an apparatus used and designed for recharging the same is chargeable as a contributory infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402; Dec. Dig. §§ 256, 259.*]

3. PATENTS (§ 283*)—INFRINGEMENT.

The fact that the manufacturer of a patented device is unable to supply the demand therefor with promptness, and that users are subjected to inconvenience by reason of the delay, furnishes no legal excuse for infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 448; Dec. Dig. § 283.*]

In Equity. Suit by the Commercial Acetylene Company and the Prest-O-Lite Company against the Autolux Company, Percival C. Avery, and others. On motion for preliminary injunction. Motion granted.

This is an application for a preliminary injunction pendente lite restraining the defendants from selling, arranging with, and inducing certain persons to buy certain high-pressure generators with the intent and knowledge and under such circumstances that they will be used for the purpose of filling with acetylene gas certain devices known as gas tanks, which have been manufactured by the Prest-O-Lite Company under certain letters patent and licensed, and sold under these patents with restrictions precluding any sale or use of such tanks when filled with acetylene gas by any one other than said complainant Prest-O-Lite Company, and certain gas tanks which had been formerly manufactured and sold by the Avery Portable Lighting Company, and are now in use in infringement of said letters patent.

The complainant the Commercial Acetylene Company is the owner by assignment of certain letters patent of the United States, numbered, respectively, 664,383 and 727,609, known as the Claude & Hess patents. The complainant Prest-O-Lite Company is the exclusive licensee of said patentee to manu-

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

facture and sell the device embodied in these letters patent for the purpose of use on automobiles, carriages, and other movable vehicles. The patented article covered by said letters patent consists of a steel cylinder into which acetone is introduced and acetylene gas is forced under pressure, said tank being furnished with an inlet and an outlet valve. Said Prest-O-Lite Company has manufactured and sold under this license contract upward of 150,000 of these devices, which are known to the trade as the "Prest-O-Lite gas tanks." Conspicuous notice is given to the public of these patents. Owing to the nature of the ingredients, great care and skill are required to secure the exact proportion and volume of acetone and acetylene gas which constitute the contents of these packages. A record of the formula for each tank is kept by the Prest-O-Lite Company. The complainant, the Prest-O-Lite Company, has established a uniform practice of giving in exchange for each empty gas tank of their make a recharged standard Prest-O-Lite gas tank, and has established five agencies throughout the country. For the purpose of insisting upon this practice of exchange or recharging, and to protect its customers from badly filled and inefficient tanks, the Prest-O-Lite Company has since its organization sold these devices solely with the intent that they be returned when empty to the Prest-O-Lite Company for exchange, and that they should not be sold or used when filled with acetylene gas by any one other than the patentee or its licensee, the complainants herein. This purpose has always been understood and recognized in the trade, and generally acquiesced in. In order to bring fully to the attention of the users the terms and conditions under which these tanks were sold and exchanged, the Prest-O-Lite Company since the 1st day of June, 1907, has placed upon every one of these devices sold and exchanged a metallic plate on which is engraved the following words:

"The Prest-O-Lite Gas Tank No. (Serial No.)
"The Prest-O-Lite Co.

"New York, Boston, Indianapolis, San Francisco, Toronto.

"Patented Dec. 25, 1900, May 12th, 1903.

"Notice this device is sold and purchased for sale and use only when charged with gas by the undersigned. No license is granted to use or sell this device when charged by any one else and no license is granted to any one else to recharge this device. Any sale or use of this device when sold or used in violation of this condition and limited license will be considered as an infringement of Letters Patent of the United States under which this device is made and sold and all parties so selling and using this device contrary to the terms of this limited license will be treated as infringers of said Letters Patent and render themselves liable to suit for damages and injunction without further notice. This license is good so long as this plate remains upon the device. Any erasure or removal of this plate will be considered a violation of this license. A purchase is an acceptance of these conditions.

"Agents and dealers are not authorized to vary this license.

"The Commercial Acetylene Co.
"The Prest-O-Lite Co."

In addition to this notice of the nature of the rights in these tanks passed by their sale to the purchaser, the Prest-O-Lite Company has attached to each and every of these tanks a paper label containing in large letters substantially the same matter as that placed on the metallic plate.

These conditions were well known to the defendants Avery & Burnham and their associates and the defendant corporation. The defendant Avery was one of the original officers and stockholders in the Prest-O-Lite Company, but severed his relations therewith for the purpose of establishing in the city of Milwaukee under the name and style of the "Avery Portable Lighting Company" an infringing plant for the manufacture and sale of a certain infringing device, and by recharging said licensed device of the Prest-O-Lite Company, and until February 5, 1909, said parties so connected with the Avery Portable Lighting Company were actively engaged in committing these infringing acts, and so continued until enjoined by an order of this court on final hearing from continuing to manufacture and sell the device known as

the Autogas tank, or from committing any other infringing act. About this time Avery and his associates organized a new corporation under the name of the Autolux Manufacturing Company at Milwaukee, for the purpose, as claimed by complainants, of continuing the invasion of the rights of the complainant under the patents aforesaid, and commenced the manufacture of an apparatus known as a "high-pressure generator," which has been extensively used in recharging the Prest-O-Lite gas packages and other gas tanks used on automobiles.

The defendants introduced a large number of affidavits of users of these gas tanks, showing that the demand has been so great that complainants could not supply the trade with charged tanks, and that great inconvenience had resulted to users who were obliged to send their exhausted tanks to Indianapolis in order to secure recharged tanks; that the high-pressure generators had proved a blessing to the users of Prest-O-Lite tanks because it enabled them to secure a prompt exchange of depleted tanks at home, etc.

Eleven such high-pressure generators have been sold by defendants and installed in populous cities, where they have been used to fill the gas tanks of the Prest-O-Lite Company and others.

Ferdinand A. Geiger, Keyes Winter, and John P. Bartlett, for complainants.

George Wilkinson and Marshutz & Burnham, for defendants.

QUARLES, District Judge (after stating the facts as above). The showing made by complainants on this application on its face presents two distinct legal aspects. The first rests on the patent alone for all necessary recharging of the Prest-O-Lite gas tank during the life of the patent; that any unlicensed person who charges such a tank with a supersaturated solution of acetylene gas for use or sale is an infringer, and that whoever advises, aids, or abets such tort is a contributory infringer; that no restriction by the patentee is necessary to re-enforce the sanction of the patent. Second. The conditions imposed by the patentee forbidding any one aside from the patentee from recharging the gas tanks are set up and insisted upon. The principle of law relied upon is that the patentee may withhold his device from the public entirely if he so elects, and therefore may impose such restrictions upon use or sale of the patented package as he may choose; that the purchaser or user who knows of such restriction is bound to comply therewith. To knowingly violate them is a tort, and whoever advises, abets, or aids in such violation is a joint tort-feasor. The contention of complainant is that defendants are guilty under either phase of the law. It may be well to consider these two propositions separately.

To clarify the first proposition, we must have in mind what the device is that is protected by the Claude & Hess patent. All along through the showing of defendants the idea crops out that one who has bought a patented gas tank owns the same absolutely, and may have the same recharged when and where he will; that is to say, that the legal effect of such purchase is to release the device from the monopoly. Now, if the empty steel shell with its two valves be the physical embodiment of the patent, this contention would be entitled to consideration. A reference to the language of the Claude & Hess patents and to their history in the Patent Office, and the construction placed upon them by this court in 166 Fed. 907, should suffice to si-

lence this contention. The "package," which is the patented product, consists not only of the steel tank, but of the internal equipment of a supersaturated solution of acetylene gas which is recognized as an essential part of the package. A long bitter fight was waged in the Patent Office on this very point, and the final conclusion was that the gaseous solution bore the same relation to the outer shell as the column of mercury bears to the glass stem and bulb of a thermometer. Indeed, it was conceded by the officials of the Patent Office that there was nothing patentable about the steel cylinder with two valves. Each element, as well as the combination, was old. Therefore it is obvious that the exhausted steel cylinder is not the physical embodiment of the patent, and has not been released from the monopoly, but in the natural order of things requires the renewal of the vital elements of the patent. This operation calls for the teachings of the patent the same care, skill, and inventive thought that are called into requisition when the tank received its initial charge. It follows, therefore, that whoever undertakes to recharge this tank for use or sale is practicing the invention to all intents and purposes, and is invading the monopoly. That this illicit business has grown to large proportions is convincingly shown by the affidavits submitted on both sides, and was established by the record in the suit of the present complainants against the Avery Portable Lighting Company. There can be little doubt from the facts here submitted that the high-pressure generator of the defendants has been extensively employed in filling Prest-O-Lite tanks, with the knowledge and consent of the defendants; that such generators, 11 in number, have been established in the large cities of the country for the purpose of facilitating this illicit business. This is attested by the clamorous chorus of auto users who furnish affidavits here for the defendants, singing the praises of the defendants' generator as a panacea for all their troubles. Seventeen of these deponents admit being owners or users of one or more of the Prest-O-Lite tanks. The clear inference from the defendants' affidavits is that, in the absence of the high-pressure generator, these Prest-O-Lite tanks could not and would not have been recharged, except through the agencies provided by the complainants. We shall see, when we come to discuss the law, that the defendants are contributory infringers under the first hypothesis.

The second proposition involves the legal efficacy of the conditions imposed by the patentee prohibiting use or sale of any such tank recharged by any other than the patentee. There would seem to be abundant reason why complainants should insist upon this condition that is stamped on every tank conspicuously and brought to the attention of every user. It is dealing with a combination of chemical elements of high explosive nature calling for great care, skill, and experience to insure safety and efficiency in operation. The reputation of complainants is at stake on every one of its tanks that goes out to the public bearing its name. Such reputation is bound to suffer when one of its tanks explodes, or falls below the standard of efficiency. But, whether reasonable or unreasonable, the authorities seem to recognize the right of the patentee to insist upon a restriction of this kind, no one being bound to purchase or use the patented article if un-

willing to abide by the conditions. No case exactly in point can be found, indeed, no such case has heretofore arisen, presenting the peculiar facts which make this a case of first instance. Numerous cases are cited where the patentee by a condition has insisted upon bringing within the monopoly some article or substance not covered by the patent. Such was Dick v. Milwaukee Office Specialty Co., 168 Fed. 930. See, also, the following cases cited by complainant's counsel: Tubular Rivet Co. v. O'Brien, 93 Fed. 200; Æolian Co. v. Juelg Co., 155 Fed. 119, 86 C. C. A. 205; Rupp & Wittgenfeld Co. v. Elliott, 131 Fed. 730, 65 C. C. A. 544.

The distinguishing feature of the instant case is that the patentee by condition merely insists upon the exclusive right to practice the invention, to control the elements that constitute the soul of the invention. The so-called condition is not broader than the prohibition of the patent. Viewed from any standpoint, the requirement of the so-called condition is entitled to respect and obedience at the hands of every person having knowledge of such restrictions. In some way the patentee must have protection; otherwise it would result that the monopoly would practically expire with the exhaustion of the first charge of acetylene. At the end of 34 hours of steady burning when the first installment of power has given out, any interloper may gain possession of the tank, and practice the invention with impunity. This would work a mockery of the entire patent, and set at naught the patent laws which assume to grant a complete monopoly for 17 years. This case is sui generis, not to be confused with the case of a patented device which passes to the user completely equipped, calculated to discharge for an unlimited period of time a given function, until it breaks down or wears out. In the case of the gas tank it is within the contemplation of the parties, and inheres in the very nature of things, that within a short time, a matter of weeks or months, the package will become exhausted, and a recurrence to the teachings of the patent will be necessary to invigorate the tank for another period of usefulness. (One of the gods of mythology was so constituted that at fixed periods he was obliged to recline on the earth from which he drew his supernatural power.) The very theory of the patent is that each tank must oscillate between the vehicle upon which it serves to the charging plant upon which it depends. Thus the doctrine of repair, so urgently pressed upon us, is not applicable. There is no breakdown here. The return of the exhausted tank is not accidental, but normal, and whoever knowingly interferes with this process invades the monopoly. The attempt to bring this case within the doctrine of repair because complainants take tribute in advance is not entitled to serious consideration. The government has left the matter of tribute entirely to the patentee and the public with whom he must deal. In the case of an ordinary sale of a machine the patentee collects his entire tribute when the sale is made. He expects nothing more, as the transaction is complete.

It is said that the condition is matter of contract, and binds only the purchaser who assents to the same. On the other hand, the theory is advanced that the condition stamped on the tank is like a covenant that runs with the land. Neither proposition is exact. The covenant

runs with the land whether the later grantee has notice thereof or not; the record furnishing constructive notice. Here it is purely a question of notice. Any person having actual notice that such restrictions have been imposed is bound to observe them. In Bement v. National Harrow Co., 186 U. S. 70, 91, 22 Sup. Ct. 747, 755, 46 L. Ed. 1058, the court say:

"The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property imposed by the patentee and agreed to by the licensee for the right to manufacture and use or sell the article will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

That defendants have encouraged a wholesale violation of such reasonable condition and have furnished machinery to facilitate such violation is established to my entire satisfaction. But defendants insist that defendants are three removes from the user who oversteps his legal rights, and therefore they are not technically contributory infringers. An infringement is a tort, and it is a fixed principle in the law of torts that all who engage in its consummation are joint tortfeasers. There is no magic in the term contributory infringers which will avail the defendants. The following cases cited by complainants' counsel fairly indicate the lines of contributory infringement. Judge Seaman in Dick v. Milwaukee Office Specialty Supply Co., 168 Fed. 930, approves and adopts the definition and reasoning of Judge Ray in a case with the same title found in 149 Fed. 427, where the court say:

"That such license restrictions are lawful, good, valid, and binding in the case of patented machines and articles has been established by a long line of decisions. Also that one who knowingly and directly aids, abets, and procures a violation of such license restriction is a contributory infringer of the patent."

This legal doctrine is fortified by several later cases cited by complainants' attorneys.

In Crown Cork & Seal Co. v. Standard Brewery, 174 Fed. 252, 259, the court say:

"If the defendants knowingly contribute to infringement of a patent by aiding a use beyond the limits of the license made by the patentee, [they are contributory infringers]."

See, also, Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692, cited by defendants.

The voluminous showing presented by the defendants consists mostly of a large number of affidavits from dealers and users of gas tanks used upon automobiles, describing the enormous demand for these articles growing out of the phenominal expansion of the automobile business, the utter inability of the complainants to supply sufficient tanks to meet this growing demand, and the great inconvenience of users who needed to have their tanks recharged promptly and were obliged to send their exhausted tanks a long distance to reach any charging plant maintained by complainants; that the installation of the Autolux generator of defendants was a great blessing, as it en-

abled such recharging to be expeditiously done at home. It is difficult to see how this showing furnishes any legal footing for the defendants. It would rather seem to emphasize and give color to the complainants' contention in two ways: First. Because it depicts in strong light the wonderful commercial opportunity and temptation for one who is willing to break into the field and appropriate this business of recharging complainants' gas tank. Consumers were willing and eager to pay the price. Defendants were equal to the situation, and proceeded under some early patents to construct a generator that would answer the purpose, and located them in populous centers where complainants had no recharging plant. This laid bare the secret spring that brought the high-pressure generator into existence, and accounted for their rapid distribution. It was a commercial enterprise promising large profits, if the business of recharging these tanks of complainants could be diverted and maintained. It satisfactorily appears that defendants well knew that an invasion of the monopoly of complainants was involved, and that they were anxious in their contracts for purchasers to assume responsibility for legal consequences. These matters were all talked over with the purchasers of the generators, which were in nearly every instance connected in some way with the auto business and were entirely familiar with the methods pursued by the complainants in licensing their tanks, and the conditions that were imposed upon every purchaser, and all appear willing, under the advice of defendants, to take the chances of litigation. Second. Such showing of affidavits gathered by defendants betrays the fact that such generators of defendants are being generally and regularly used to fill the Prest-O-Lite tanks. The fact that complainants were unable to furnish sufficient charged tanks to meet the demands of the public furnishes no legal excuse for the wholesale infringement. A similar excuse was presented in Crown Cork & Seal Company v. Standard Brewery, 174 Fed. 253, 257, and was summarily brushed aside by the court.

I am constrained to hold that the high-pressure generator of defendants was built and sold to enable certain reliable men to secure this illicit business of recharging the Prest-O-Lite tanks, the profit of such enterprise to be shared by the defendants. Trade conditions were peculiar, but trade conditions did not change the law nor the rights conferred by the government upon the patentee. The complainants are entitled to injunctive relief so far as may be necessary to protect and enforce the restrictions imposed upon the sale or use of tanks filled by any other than the patentee. The use or sale of the high-pressure generator for the purpose of recharging Prest-O-Lite tanks with acetylene gas must be prohibited. I am inclined to include the auto gas tank. They have been adjudicated as infringing devices, and so remain unless their status was changed by negotiation and adjustment of the parties which wound up the litigation between the complainants and the Avery Portable Lighting Company. The complainants' attorneys will prepare an injunctional order and submit the same to the defendants. The court will hear the parties as to the framework of the order.

DITTGEN v. RACINE PAPER GOODS CO. et al.

(Circuit Court, E. D. Wisconsin. June 10, 1910.)

1. PATENTS (§ 114*)—SUITS RELATING TO INTERFERING PATENTS—SCOPE OF INQUIRY.

Under Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), authorizing a suit in equity to determine rights under interfering patents, and which authorizes the court to "adjudge and declare either of the patents void in whole or in part," there is a wide range of investigation in such suits covering fraud, negligence, and inadvertence on the part of the Patent Office, and the court has power to determine the original question of patentability, and may declare both patents invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. PATENTS (§ 106*)—PROCEDURE IN PATENT OFFICE—LEGALITY.

Under rule 126 of the Patent Office, which provides that interference proceedings may be suspended where an issue is made against one applicant on the ground that he is barred by the statute from the right to a patent because of prior use for more than two years, until such issue has been tried, the action of the Patent Office in ignoring such an issue, which when made becomes the primary and paramount issue, or in referring it for an ex parte hearing, and in issuing the patent without any finding thereon, was unauthorized by law.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 106.*]

3. PATENTS (§ 76*)—PATENTABILITY—PRIOR USE OR SALE.

Where the inventor of a cigar pocket for more than two years before applying for a patent therefor made and sold such pockets in the regular course of his business, such articles were in "public use" and "on sale," and defeated his right to a patent under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), although they were not kept by him in stock, but were made up only on orders received; it being the custom of the trade to take such orders by sample.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92, 98; Dec. Dig. § 76.*]

4. PATENTS (§ 328*)—VALIDITY—CIGAR POUCH.

The Parmenter patent, No. 781,455, and the Dittgen patent, No. 662,226, each for a cigar pocket, and both covering the same invention, are void for prior public use and sale of the patented article by Parmenter for more than two years prior to either application.

5. PATENTS (§ 76*)—PRIOR USE—"ON SALE"—"PUBLIC USE."

A device will be "on sale" and in "public use" if it is offered for sale, whether any specimen of it is actually sold or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92, 98; Dec. Dig. § 76.*

For other definitions, see Words and Phrases, vol. 6, pp. 5825–5837; vol. 8, p. 7774.]

In Equity. Suit by John J. Dittgen against the Racine Paper Goods Company and O. L. Parmenter. Decree annulling patents of both parties.

George B. Parkinson, for complainant.
Winkler, Flanders, Bottum & Fawsett, for defendants.

QUARLES, District Judge. This is a final hearing in equity. The bill was filed pursuant to section 4918, Rev. St. (U. S. Comp. St. 1901,

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

p. 3394). An interference was declared in the Patent Office, which was bitterly contested. As a result of the opinions of the several tribunals of the Patent Office, a patent was awarded to Parmenter for count 1, and letters patent issued to Dittgen on count 2.

The bill charges fraud, inadvertence, negligence, and mistake on the part of the Patent Office. Its averments were so drastic that exceptions were taken by the defendant. Judge Seaman, however, following the case of Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 C. C. A. 255, and Ecaubert v. Appleton, 67 Fed. 917, 15 C. C. A. 73, overruled the exceptions, and gave free rein to the rigid examination of the methods and processes of the Patent Office.

The first difficulty which we meet at the threshold of this case is the proper construction of section 4918, Rev. St., which reads as follows:

"Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all the parties under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The courts are not agreed as to the scope of jurisdiction awarded by the statute. It will be observed that authority is conferred upon the court to declare either of the patents void in whole or in part, etc. In view of this peculiar language, it was held by a number of the lower federal courts that the court had not jurisdiction of the entire patent, but could proceed only so far as to determine which of the two interfering patents was entitled to relief, and that practically the sole question open under this section is that of priority between the interfering patents. It is difficult to see how the word "either" can be read to mean "both." Pentlarge v. Pentlarge (C. C.) 19 Fed. 817; Lockwood v. Cleaveland (C. C.) 20 Fed. 164; American Clay-Bird Co. v. Ligowski Clay Pigeon Co. (C. C.) 31 Fed. 466; Hubel v. Tucker (C. C.) 24 Fed. 701; Nathan v. Craig (C. C.) 49 Fed. 370. In Foster v. Lindsay, 3 Dill. 126, Fed. Cas. No. 4,976, it was held for the first time that the court might, upon proper issues and proof, decree that both patents are void. In Palmer Pneumatic Co. v. Lozier, 90 Fed. 732, 33 C. C. A. 255, the Court of Appeals of the Sixth Circuit held that, under this section, the court had a free hand to deal with the entire patent, and determine the original question of patentability. The Court of Appeals of the Sixth Circuit is high authority, and the case was cited with approval by Judge Seaman in disposing of exceptions to the bill in this case. In Boston Pneumatic Power Co. v. Eureka Patents Co. (C. C.) 139 Fed. 29, Judge Lowell seems to intimate his judicial sympathy with the earlier line of cases. Under this section as now construed, there is a wide range of investigation, covering fraud, negligence, and inadvertence on the part of the Patent Office. It is true, as claimed by the defendant, that the case was submitted

practically upon the same record that was made in the Patent Office. There is pith in the criticism of defendant that the complainant's proofs have not been introduced or arranged so as to present the case set out in the bill, but rather calculated to thresh over again the old questions of priority of invention, etc. The defendant contends that no new evidence has been submitted by the complainant, that the case has been practically heard on the same record as was originally made in the Patent Office, and that, therefore, the case should be ruled by Morgan v. Daniels, 153 U. S. 125, 14 Sup. Ct. 772, 38 L. Ed. 657.

There is one question, however, that stands out in bold relief. Early in the history of this interference, the attention of the examiner of interferences was called to the existence of a statutory bar by reason of the use and sale of the device sought to be patented for more than two years prior to the application. Complainant's counsel tried to secure a suspension of the interference until an issue could be made up and tried. Rummaging among the Delphic Oracles of the place, he tried to get a response as to which of the parties should assume the burden of proof on such an issue. Rule 126 of the Patent Office provides that the interference may be suspended in such case. This is clearly in accord with correct principles. When such a question arises, it becomes at once the primary paramount issue. Until it is disposed of, the minor issues of prior invention, etc., drop into the category of academic or mere moot questions. Nowhere can be found a better expression of this rule than that of the court in Oliver v. Febel, 100 O. G. 2384:

"The absurdity of a declaration of interference with a reservation at the same time of the question of patentability for future adjudication would be, so far at least as this court is concerned, too glaring to be tolerated. Otherwise we would be trying moot causes which it is not the province of any court of justice under our judicial system to try. It is, of course, competent for the Patent Office to regulate its business in its own way, and to determine for itself by its own rules when and in what order it will take up the questions which arise in the performance of its functions. But, as we have said, this court cannot be called upon to determine moot causes, and the present is no more than a moot cause, since upon the face of the record itself the question of patentability has been expressly reserved for further and future consideration."

Here was a statute of Congress that blocked the way to any monopoly. This contention was persistently pressed upon the attention of the Patent Office. Proofs were offered showing that for a period of five or six years after conception by Parmenter the cigar pouches which are the subject of count 1 were sold and used; that Parmenter during that period himself sold as many as 25,000 pockets like the subject-matter of count 1. The primary examiner rejected count 1, and denied a patent thereon because the invention sought to be covered had been on sale for more than two years prior to the application. But this decision did not check the course of the Patent Office. October 10, 1904, complainant called the attention of the commissioner to the statutory bar, and suggested inter partes public use proceedings. In a letter addressed by complainant's attorney to the honorable commissioner, he says:

"In this case the examiner of interferences in his opinion of December 18, 1902, called the attention of the commissioner (rule 126) to the fact that 'the senior party sold pouches covered by count 1, or offered them for sale for more than two years prior to October 13th, 1898, his recorded date.' Thereafter, upon motion to remand to the primary examiner, the honorable commissioner, upon January 30th, 1903, stated that 'the matter to which attention has been called by the examiner of interferences will be disposed of in regular order.'"

In reply to this letter the honorable acting commissioner says:

"You are advised that the testimony will be considered by the primary examiner in so far as it bears upon the question of sale of the invention for more than two years. But as pointed out in the decision of January 30th, 1903, Parmenter will be permitted to take testimony for the purpose of explaining or rebutting."

Parmenter elected to stand by his record, and asked that the application be remanded to the primary examiner to determine the statutory bar. He thereupon filed a brief as to the law of the case.

After all these proceedings the primary examiner passed the application to allowance without making any finding on the question of public use, treating it as an ex parte matter, apparently ignoring his own formal finding on the subject, and letters patent 781,455 were issued to Parmenter, being for count 1 of the interference. This is certainly a remarkable record whereby the Patent Office appears to have ignored its own rules and precedents, and to have proceeded in disregard of a federal statute. Rule 126 of the Patent Office was ignored and disregarded. There seems to have been an overweening anxiety to relegate to the background the basic question and the only question proper to engage attention until the same be disposed of in accordance with judicial methods of procedure. The persistent search after priority was what the Court of Appeals denominates "an unprofitable inquest." Palmer v. Lozier, supra. Perhaps the most radical inadvertence committed by the Patent Office was when near the close of this "unprofitable inquest" the fundamental issue was referred to the examiner for an ex parte hearing. Why should this basic issue be smothered by an ex parte hearing? Were not the rights of both parties involved, and were not both entitled to be heard?

In Westinghouse v. Hien, 159 Fed. 938, 87 C. C. A. 142, the rules of practice in the Patent Office are considered bearing upon the question whether a decision on the question of priority of invention necessarily forecloses the parties as to all collateral questions; but in the instant case, where the question of statutory bar was raised, rule 126 of the Patent Office was solely applicable, whereby the commissioner may before judgment on the question of priority suspend the interference and remand the case to the primary examiner for his consideration of the matters to which attention has been directed. From the decision of the examiner appeal may be taken as in other cases. This rule clearly contemplates that the new issue so awarded to the primary examiner must be tried as in other cases. Both parties have a right to be heard, and the conclusions of the examiner should be announced and entered of record so that an appeal may be taken specifically from the finding on such special issue. This orderly course of procedure was departed from. An ex parte hearing was ordered, and no finding was

made on the special issue, but was ruled sub silentio by an order for the issuance of the patent. From the time when the primary examiner rejected Parmenter's claims on account of sale and use of the patented article up to the time that a general order was entered for the issuance of the patents the dealing of the Patent Office with this question might be denominated as a game of "battledoor and shuttlecock," as the Supreme Court observe in an analogous case. Steinmetz v. Allen, 192 U. S. 543, 563, 24 Sup. Ct. 416, 48 L. Ed. 555. And this, although the honorable commissioner gave assurance by letter set forth in the record "that the matter to which attention has been called will be disposed of in regular order." The regular procedure would seem to be outlined in rule 126. This appears to be a bold departure from the law, calculated to work injustice to the parties as well as to the public. A court of equity cannot tolerate such arbitrary and contradictory procedure. The record affords sufficient reason why Parmenter should be estopped from claiming a monopoly as to a subject-matter that he deliberately relinquished to the public. The statutory bar, if established, would seem to cut off both patents.

The complainant, however, insists that, owing to contradictory statements made by Parmenter in his proofs, the court would be justified in relieving the complainant from the effects of the statutory bar. I cannot see how such an elastic standard of judgment could be tolerated. It is a simple question of fact: Were the patented devices kept on sale for more than two years prior to Parmenter's date of application? This must be decided on all the evidence in the case, and both parties must abide the legal consequences of such decision. The question of fact would seem to be disposed of by Parmenter's testimony. He freely admits that from 1894 until 1901 he offered for sale pouches embodying the invention. On page 73 of the defendant's record we find the following:

"Q. Did you after the winter of 1894 make pouches of the construction shown in Parmenter's exhibit pouch? And, if 'yes,' to what extent and for how long a time? A. I did. I think I have made at least 75,000 at different periods when that style of pouch was called for, and I have at all times been prepared to promptly execute orders for the same, with the only exception in the construction in some of the pouches ordered the inner angular folds were farther apart than those of the pockets made by me in 1890, and possibly, in some of the pockets, the cover did not extend beyond both sides of the tubes."

Speaking of the same pouch, he testified:

"It has stood an equal chance on the market. Since the winter of 1894–95 we have given it a fair chance in competition."

It is true these pouches were not made up in advance and carried in stock, for the custom of the trade was to sell all such pouches by sample, as the printing and advertising on the pouch must be done after the order has been received.

Mr. Walker, in his work on Patents ([11th Ed.] page 96), lays down the rule:

"Indeed, a device will be on sale within the meaning of the law, if it is offered for sale, whether any specimen of it is actually sold or not." The same is true as to public use. Egbert v. Lippman, 104 U. S. 333–336, 26 L. Ed. 755.

It is apparent, therefore, that the pouch in question was as much "on sale" as any other pocket sold by defendant. The theory of the brief presented by Parmenter was that an article could not be said to be on sale until it was in esse, and the filling an order, and being ready to fill all orders for such pouches, did not bring the case within the provision of section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382). Authorities were cited which, by reason of the distinguishing features, do not reach the principle of the instant case. It is unnecessary to discuss them in detail. To say that these goods were not on sale would be juggling with words that are plain. National Cash Register v. American Cash Register (C. C. A.) 178 Fed. 80.

I am satisfied from the evidence that the cigar pouches in question were on sale, and that large quantities of the same were actually sold before the date in question; and this conclusion is fatal to both patents in suit.

For these reasons, both patents must be set aside and vacated.

A decree will be prepared in accordance with this opinion.

MYGATT v. M. SCHAFFER-FLAUM CO.

(Circuit Court, S. D. New York. September 2, 1910.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LAMP SHADE.

The Mygatt patent, No. 821,306, for a prismatic glass lamp shade or reflector, *held* valid and infringed, on motion for a preliminary injunction.

In Equity. Suit by Otis A. Mygatt against the M. Schaffer-Flaum Company. On motion for preliminary injunction on United States patent 821,306 and design patent 37,983 for prismatic reflectors. Motion granted.

Howard Taylor, for complainant.
Leslie R. Palmer, for defendant.

LACOMBE, Circuit Judge. The disposition of the design patent may be left to final hearing. As to the mechanical patent the defendant's affidavits are voluminous and the exhibits of prior art devices are very numerous. The conflicting testimony is largely scientific, and a safer conclusion on the whole case can best be reached at final hearing after cross-examination of the witnesses, and it would seem not difficult for defendant to introduce its testimony within a reasonably short time. The showing here made as to the prior art tends to the same conclusion as that expressed by Judge Hough in Mygatt v. Gilbert:

"[It appears] to show applications of the known laws of refraction and reflection of beams of light, a knowledge which has been practically and commercially applied for at least as long as the use of Fresnel's devices for lighthouse lanterns, but [does not] appear [to anticipate the intelligent] combination of diffusion and reflection in an integral glass shade reflector, which is the essence of the present patent."

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

Moreover, the testimony as to acquiescence is quite persuasive.

Complainant may take order for preliminary injunction as to patent 821,306, but injunction will be suspended until October 15, 1910, to give defendant an opportunity to complete its proofs for final hearing.

NOTE.—The following is the opinion in the case of Mygatt v. Gilbert, handed down by Hough, District Judge, in the Circuit Court of the United States for the Southern District of New York:

HOUGH, District Judge. The decision on demurrer made by Judge Hazel constrains me to assume the negative of every proposition advanced on behalf of Gilbert in that proceeding. I therefore find that reissued letters patent No. 12,358 do upon their face disclose a patentable invention, and are upon their face valid and effective, also, that said reissued patent does not unduly broaden the claim of patent No. 763,688, nor is such patent anticipated by the Blondel patent, No. 563,836, Mygatt, Nos. 705,426, 763,689, and 687,848. An examination of the defendant's shade reveals a most palpable imitation of, and, in respect of its bell or flaring mouth, absolute identity of construction with, the complainant's patented article.

With respect to the collar, or upper portion of the shade, there is clearly an intended imitation calculated to deceive the public, and this imitation is the life of defendant's trade. In his price list he declares that his hood is known as the "prism hood," that it is "newly invented," and that it is made of "prismed crystal glass." The conduct of the defendant in refusing to identify and acknowledge as his own the publication from which the foregoing extracts have been made is an indefensible prevarication, and renders all statements by the defendant herein to me wholly unconvincing. If the statements of the defendant made to the trade and public by his price list are true, he is beyond all question an infringer upon several of the claims of the complainant's patent.

He now produces, however, the affidavit of an expert, who in pointing out the differences between the complainant's and defendant's products admits that "defendant's device has external reflecting prisms on the lower portion of the reflector," but asserts that: "The upper portion [collar] has no prisms at all and much less circumferential diffusion prisms. The projections on the external surface of the neck [collar] of defendant's device are lens-shaped knobs. * * * These lens-shaped knobs are materially different in arrangement and function from the circumferential diffusion prisms of complainant's patent."

Thus the defendant's position upon this application is that, while he holds himself out to the world as manufacturing a shade which by an arrangement of prisms reflects and diffuses light in a highly desirable manner, for the purposes of this litigation he claims that the diffusion portion of his shade contains no prisms, but merely lenticular knobs.

From my own investigation of the exhibits submitted, I incline to the opinion that the neck or collar of defendant's product contains no prisms, and is not (as claimed in his circular) a scientific arrangement at all, but merely an old and well-known method of ornamenting glass, to which his advertisements give a scientific merit it does not possess.

I am unable to find, therefore, that this defendant is as much of an infringer as he claims to be by his advertising circulars, as I do not think that his device infringes the second and third claims of the patent in suit; but, however imperfectly, the neck or collar of the defendant's shade is provided with "light directing surfaces permitting the light rays to pass through and out of the glass," and I am therefore of opinion that he does infringe the fourth and fifth claims of said reissued letters patent No. 12,358.

I have carefully examined the patents offered by the defendant in so far as they are not referred to by the demurrer. They appear to me to show applications of the known laws of refraction and reflection of beams of light, a knowledge which has been practically and commercially applied at least as long as the use of Fresnel's devices for lighthouse lanterns; but none of them

appear to me to anticipate the combination of diffusion and reflection in an integral glass shade reflector, which is the essence of the present patent.

Within the ruling in Palmer v. Wilcox Manufacturing Co. (C. C.) 141 Fed. 378, the complainant is entitled to an injunction upon giving a bond in the amount of $2,000, conditioned that in the event of defendant's success on final hearing complainant will pay all damages resulting from the operation of the preliminary injunction hereby allowed.

KAVANAGH v. FOLSOM.

(Circuit Court, S. D. New York. May 16, 1910.)

LIMITATION OF ACTIONS (§ 114*)—SUSPENSION OF STATUTE—EFFECT.

Where a statute imposing a liability for wrongful death provides for suit to enforce the same within a specified time, such limitation operates on the liability, and not on the remedy alone; and hence suit must be brought within that time, regardless of other statutes suspending the operation of the statutes of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 524; Dec. Dig. § 114.*]

At Law. Action by Mary R. Kavanagh, as administratrix, etc., against George W. Folsom, committee. Demurrer to complaint. Sustained.

John Delahunty, for plaintiff.

Bertrand L. Pettigrew, for defendant.

NOYES, Circuit Judge. This is an action to recover damages for the death of the plaintiff's intestate, based upon the New York statute permitting a recovery in such causes. It appears from the complaint that the action was not brought within the two years limited by such statute for the commencement of the action. The defendant demurs upon the ground that no cause of action is stated.

When a statute, like the one upon which the complaint is based, creates a liability provided the suit for its enforcement is brought within a prescribed time, the time fixed operates as a limitation of the liability itself, and not of the remedy alone. A condition of the right to sue at all is that the action be brought within the stated time. The statutory provision is not a mere statute of limitation, and consequently the provisions of other New York statutes suspending the operation of statutes of limitation are inapplicable. As this complaint fails to state that it was brought within the time prescribed by the statute upon which it is based, it fails to state a cause of action.

Demurrer sustained, with costs.

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

BUTLER BROS. v. UNITED STATES.

(Circuit Court, N. D. Illinois. May 27, 1910.)

No. 29,728 (2,088).

CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—SHIDA BASKETS—SIMILITUDE.

Shida baskets, composed of vegetable fiber derived from ferns, are not dutiable by similitude as manufactures of grass, etc., under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers overruled protests of Butler Bros. against the assessment of duty by the collector of customs at the port of Chicago on so-called shida baskets, which are composed of a vegetable fiber consisting of part of the primary axis growing above ground of a fern. These articles were classified as manufactures of wood under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647). The importers contended for classification by similitude as manufactures of grass, etc., under Schedule N, par. 449. The Board of General Appraisers overruled this contention, but did not approve the assessment of duty that had been made by the collector, being of the opinion that the goods should have been classified by similitude as manufactures of willow under Schedule D, par. 206.

Lester C. Childs, for importers.

Edwin W. Sims, U. S. Atty., and D. Frank Lloyd, Asst. U. S. Atty. Gen. (William A. Robertson, of counsel), for the United States.

CARPENTER, District Judge. Decision affirmed.

BEER v. UNITED STATES.

(Circuit Court, S. D. New York. May 11, 1910.)

No. 5,320.

CUSTOMS DUTIES (§ 85*)—APPEAL—NEW TRIAL IN CIRCUIT COURT—"HEREAFTER."

Under Act May 27, 1908, c. 205, § 2, 35 Stat. 404, amending Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138, it was prescribed that "hereafter" the parties litigant should be required to introduce all their evidence before the Board of General Appraisers, and cut off the right under said amended act, of a new trial in the Circuit Court on appeal from the board. *Held*, that this provision applied to cases decided by the board after May 27, 1908, even though, prior to that date, they had arisen and been submitted to the board for decision.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*

For other definitions, see Words and Phrases, vol. 4, pp. 3277–3279.]

On Application for Review of a Decision by the Board of United States General Appraisers.

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

The decision below, G. A. 6,788 (T. D. 29,144), affirmed the assessment of duty by the collector of customs at the port of New York. This decision was rendered July 6, 1908, which was after Act May 27, 1908, c. 205, 35 Stat. 403, had been passed, section 2 of which, prescribed, as an amendment to Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 131, that "The parties litigant shall hereafter be required to introduce all of their evidence before the said Board of General Appraisers prior to its decision of the case." On these proceedings for review of the board's decision the importer took out an ex parte order for further testimony to be introduced in the Circuit Court, as provided in said section 15 of the amended customs administrative act. The government moved for the vacation of said order on the ground that the act of 1908 had repealed the provision for further evidence contained in said section 15. The importer contended that the act of 1908 was not intended to apply to cases which like the present had arisen prior to the passage of that act and in which the hearings before the Board of General Appraisers had been completed prior to such date, even though the Board's decision was rendered after that date.

D. Frank Lloyd, Asst. Atty. Gen. (William K. Payne, Deputy Asst. Atty. Gen., of counsel), for the United States.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importer.

NOYES, Circuit Judge. Motion to vacate granted.

MITCHELL COAL & COKE CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. September 9, 1910.)

No. 4.

1. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF STATEMENT OF CLAIM—INTRODUCING NEW CAUSE OF ACTION.

Under the settled law of Pennsylvania, a new cause of action cannot be introduced into a pending suit by amendment after the statute of limitations has run against it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545; Dec. Dig. § 127.*]

2. LIMITATION OF ACTIONS (§ 99*)—ACCRUAL OF RIGHT OF ACTION—FRAUD.

The fact that the coal freight agent of a railroad company promised a coal company that in the future it would be given as favorable rates as were given to any other shipper, which promise was not kept, but lower rates were afterward given to other competing companies, did not constitute fraud which would prevent the running of limitation against an action to recover damages for the unlawful discrimination.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 99.*]

3. CARRIERS (§ 32*)—DISCRIMINATION IN RATES—WHAT CONSTITUTES—INTERSTATE COMMERCE ACT.

The allowance by a railroad company to certain coal companies shipping over its line of a stated sum per ton ostensibly for the use of trackage owned by such companies and the service of their own locomotives in hauling cars thereon from the rate charged plaintiff, which was also a shipper in the same district under similar circumstances, *held* an unlaw-

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

ful discrimination, in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson C. Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

4. CARRIERS (§ 36*)—INTERSTATE COMMERCE LAW—ACTION FOR DISCRIMINATION IN RATES—DAMAGES—LIMITATION BY PLEADING.

In an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for unlawful discrimination in rates on coal shipped between plaintiff and other shippers, where the statement of claim alleged damages in certain sums per ton on shipments from its different mines, its recovery is limited to such sums.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 36.*]

5. CARRIERS (§ 36*)—INTERSTATE COMMERCE ACT—ACTION FOR DISCRIMINATION IN RATES.

To entitle a shipper to maintain an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for being unjustly discriminated against in rates, it is not necessary that he should have paid the freight charged under protest.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 36.*]

6. CARRIERS (§ 32*)—DISCRIMINATION IN RATES—WHAT CONSTITUTES.

A shipper *held* not entitled to recover damages from a railroad company for discrimination in rates because of rebates paid to a shipper from another district; the rate from such district with the rebates deducted being higher than that paid by plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

7. CARRIERS (§ 32*)—INTERSTATE COMMERCE LAW—DISCRIMINATION IN RATES—"CONTEMPORANEOUS SERVICE."

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), which prohibits a carrier from charging to one shipper a greater or less compensation for a service than is charged to another for a like and "contemporaneous service," services rendered to a complaining and a favored shipper are "contemporaneous" as long as the discriminating rates remain in force, and for the purpose of comparison they need not be rendered on the same day, nor during the same week or month.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

8. CARRIERS (§ 36*)—INTERSTATE COMMERCE LAW—ACTION FOR DISCRIMINATION IN RATES—DAMAGES.

In an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for discrimination in rates charged on coal from the mines in violation of section 2, plaintiff is entitled only to recover for such discrimination as gave his competitor an unfair advantage in the same market.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 36.*]

At Law. Action by the Mitchell Coal & Coke Company against the Pennsylvania Railroad Company. On motions to amend plaintiff's

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

statement of claim and exceptions to referee's report. Motions overruled and exceptions sustained in part. Judgment for plaintiff.

Joseph Gilfillan and George S. Graham, for plaintiff.
Francis I. Gowen and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. This action of trespass is based upon unlawful discrimination in rates upon interstate shipments of coal and coke. Sections 2, 8, Act Feb. 4, 1887, c. 104, 24 Stat. 379, 382 (U. S. Comp. St. 1901, pp. 3155, 3159). It was brought on March 14, 1905, and the statement of claim—which was filed in the following November—relies upon the commission of discriminating acts between April 1, 1897, and May 1, 1901. The Pennsylvania statute of limitations bars an action of trespass after six years from the commission of the unlawful act, and it is evident, therefore, that the right to recover depends upon the plaintiff's ability to show discriminating acts after March 14, 1899, unless the defendant's own conduct has prevented the statute from operating. It is also evident that if the plaintiff ever had any right of action against the defendant based upon other discriminating acts committed before May 1, 1901, than the particular acts specified in the statement of claim, the statute of limitations became a bar to recovery thereon after May 1, 1907, at the farthest. And it became a bar at that date, no matter in what form the plaintiff should attempt to enforce redress for such other acts—whether by a separate suit, or by pursuing the course that has been actually adopted, namely, seeking to introduce these acts by way of amendment in a former suit. It is too well settled in Pennsylvania to need discussion that a new cause of action cannot be introduced by amendment after the statute has run. Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Phila. v. Railway Co., 203 Pa. 38, 52 Atl. 184; Mahoney v. Steel Co., 217 Pa. 20, 66 Atl. 90; Lane v. Water Co., 220 Pa. 599, 69 Atl. 1126; Shaffer's Estate, 228 Pa. 36, 76 Atl. 716.

The plaintiff has made several attempts to amend the original statement of claim so as to enlarge its scope by including new and additional discriminating acts. On April 17, 1907, the first petition to amend was presented, but this was withdrawn on October 30, 1907 (Notes of testimony, page 186), and therefore need not be considered. A second petition was presented on June 29, 1907, and on July 1, 1907, the court made an order referring the petition and the whole subject of amendment to the decision of the referee, who had meanwhile been appointed by agreement of the parties to take testimony and report his findings of fact and conclusions of law. His report, however, does not refer to the subject of amendment at all, but he holds that no part of the plaintiff's claim is barred by the statute, and puts the decision upon the defendant's fraudulent misrepresentation and concealment. On May 2, 1910, a third petition to amend was presented, and this with the second petition is now before the court to be disposed of. For the reason just given, and upon the authority of the cases cited, the petitions are refused. Similar applications were recently denied by Judge Fer-

guson in common pleas No. 3 of Philadelphia county in a suit between the same parties involving a different phase of the same dispute.

In this connection it will be convenient to consider the referee's ruling that the statute does not bar any part of the plaintiff's claim because the defendant has been guilty of fraudulent conduct. The statement of claim covers the period between April 1, 1897, and May 1, 1901, and the statute (which was duly pleaded by the defendant) normally bars recovery for any discrimination before March 14, 1899. But the referee was of the opinion that the payment of rebates to other shippers, as well as the amounts of such rebates, "were deliberately concealed from the Mitchell Coal & Coke Company by the Pennsylvania Railroad Company," and that the plaintiff "was misled by the representations of the officials of the Pennsylvania Railroad Company, made with the intention of preventing the Mitchell Coal & Coke Company from ascertaining the fact of the payment of rebates." He further found:

"69. The Mitchell Coal & Coke Company by its officers made diligent efforts to ascertain whether any rebates or other forms of advantage in the payment of money or otherwise were being given by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company, Glen White Coal & Lumber Company, Millwood Coal & Lumber Company, Bolivar Coal & Coke Company, and Latrobe Coal Company, or any of them, but the officials of the Pennsylvania Railroad Company deliberately shut off all avenues of information on this point, and fraudulently told the officers of the Mitchell Coal & Coke Company that none of the said other companies obtained or would obtain any advantage, and that the Mitchell Coal & Coke Company would be notified of any reduction in rates made to any of those companies. At the time when such statements were made, rebates under various forms and disguises were being paid to the said companies, and continued to be paid until after May 1, 1901."

These are findings of fact and are entitled to the weight that is usually and properly allowed to such findings; but they are not conclusive, and a careful consideration of the scanty testimony on this subject has convinced me that the referee was mistaken in the inferences he has drawn and in the application of the rule of law upon which he relies. As it seems to me, the utmost scope that can be given to the testimony concerning the declarations by Mr. Joyce, the defendant's coal freight agent, falls short of showing fraud. What happened was this: In March, 1897, Mr. Joyce promised Mr. Mitchell, the plaintiff's president, that in the future the plaintiff should be as well treated as any other shipper. Mr. Mitchell was then settling a claim growing out of shipments prior to March, 1897, and received the following promise from Mr. Joyce (Notes of testimony, p. 146):

"Now, Mr. Mitchell, I have got leave to settle this claim for less than $70,000, and, if you will take it at that, I will guarantee you that from this on you will get as good treatment and as good rates as anybody else shipping on the road."

Mr. Mitchell then goes on:

"Among other things he advised me to move my office to Philadelphia, so I would be in touch with the people, and they could notify me when anything was coming up, any business or lower rates. I settled with him that day for $69,500. That was in March, 1897. * * *

"Q. And Mr. Joyce told you you would get in the future as low rates and as good facilities as anybody on the road? A. Yes, sir.

"Q. And that they would notify you if there were any additional concessions of any kind made to any shipper. A. He advised me to come here where I could be in touch so I could be notified, and that he would assure me as good rates as anybody else.

"Q. And on the strength of that you made the settlement for $69,500. A. That was part of the consideration; yes, sir. Releasing that claim."

As will appear hereafter, this promise was not kept, and discriminating rates were afterwards given to some of the plaintiff's competitors. But the testimony quoted comprises all that was offered to support the charge of fraudulent concealment, and to my mind it is not sufficient. I am unable to discover the evidence to prove the finding that the plaintiff "made diligent efforts to ascertain whether any rebates or other terms of advantage in the payment of money or otherwise were being given by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company, etc., but the officials of the Pennsylvania Railroad Company deliberately shut off all avenues of information on this point, and fraudulently told the officers of the Mitchell Coal & Coke Company that none of the said other companies obtained or would obtain any advantage, and that the Mitchell Coal & Coke Company would be notified of any reduction in rates made to any of those companies." In brief, the evidence proves this situation: Every shipper was getting the best secret rates he could. The plaintiff had not been as successful as others, and was naturally dissatisfied. At the interview referred to, Mr. Joyce promised the plaintiff that the defendant would thereafter discharge its plain duty as a common carrier, and would not discriminate in favor of others. But the promise was afterwards broken. No subsequent fraudulent conduct or representation is either alleged or proved, and I am at a loss to see how this broken promise can be held to be such fraud as prevents the running of the statute. As the defendant argues—suppose the promise had been to charge only reasonable rates, or to carry safely, and suppose that either of these promises had been broken; could this be properly regarded as fraudulent conduct? Judge Dallas thought otherwise in Despeaux v. Railroad (C. C.) 87 Fed. 794, and the defendant's brief cites several other decisions to the same effect. If then, as I think, the broken promise made by the defendant's agent was not in itself fraudulent, and if there is no evidence of any subsequent fraudulent conduct or representation, it can make no difference which of the two rules of law is applied to which the Supreme Court of Pennsylvania refers in Smith v. Blachley, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849. Mr. Justice Mitchell, in discussing the subject, referred to these rules as follows:

"It is said in general that in cases of fraud the statute runs only from discovery, or from when with reasonable diligence there ought to have been discovery. But a distinction is made in regard to the starting point of the statute between fraud completed and ending with the act which gives rise to the cause of action, and fraud continued afterwards in efforts or acts tending to prevent discovery. On this distinction there are two widely divergent views. It is held on the one hand that the fraud, though complete and fully actionable, nevertheless operates as of itself a continuing cause of action until discovery; while, on the other hand, it is held that, when the cause of action is once complete, the statute begins to run, and suit must be brought within the prescribed term, unless discovery is prevented by some additional and af-

firmative fraud done with that intent. The United States courts have adopted the first view in treating the limitation of actions in the bankruptcy acts. Bailey v. Glover, 88 U. S. 343 [22 L. Ed. 636]; Traer v. Clews, 115 U. S. 528 [6 Sup. Ct. 155, 29 L. Ed. 467]. On the other hand, in Troup v. Smith's Ex'rs, 20 Johns. [N. Y.] 33, it was held that in a court of law the statute runs from the act 'whether there was a fraudulent concealment or not so as to prevent the plaintiff discovering the fraud,' and Chief Justice Spencer, said that even in a court of equity the plaintiff must fail, 'as the concealment of the fraud is not imputed to the testator. What he did was visible and what he neglected to do would or might have been discovered by repairing to the land.' This view appears to be still held in New York. Miller v. Wood, 116 N. Y. 351 [22 N. E. 553], and in other states. In many states, however, the decisions are so influenced by statutory provisions that they afford us little light on the subject as governed by the common law."

And he sums up the discussion on page 179 of 198 Pa., page 987 of 47 Atl. (53 L. R. A. 849):

"We regard the distinction as sound, well marked, and in harmony with the spirit and letter of the statute. The cases which hold that where fraud is concealed, or as sometimes added, conceals itself, the statute runs only from discovery, practically repeal the statute pro tanto. Fraud is always concealed. If it was not, no fraud would ever succeed. But, when it is accomplished and ended, the rights of the parties are fixed. The right of action is complete. If plaintiff bestirs himself to inquire, he has ample time to investigate and bring his action. If both parties rest on their oars the statute runs its regular course. But, if the wrongdoer adds to his original fraud affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character by virtue of which he deprives it of the protection of the statute until discovery."

I think, therefore, that the referee was in error upon this point, and that the plaintiff can only recover in respect of such injurious discriminating acts as were committed after March 14, 1899, and are specified in the statement of claim. No amendment having been allowed, the cause of action remains as the plaintiff stated it several years after the injurious acts were committed, and eight months after the suit was actually begun.

The acts declared upon are in substance as follows: Plaintiff owned bituminous coal lands in the Clearfield region of Pennsylvania and operated six collieries thereon, four of them in Blair county along the main line of the defendant, and two in Cambria county along the Cambria & Clearfield Railroad, a branch of the defendant's system. Of the first four collieries the plaintiff operated Gallitzin and Columbia No. 4 from April 1, 1897, to May 1, 1901, Columbia No. 7 from July 20, 1899, to May 1, 1901, and Bennington from October 30, 1899, to May 1, 1901. Of the other two, Hastings was operated from April 1, 1897, to May 1, 1901, and Columbia No. 6 from December 8, 1898, to May 1, 1901. Among other operators in the Clearfield region were the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, and the Millwood Coal Company. The Latrobe region lies immediately west of the Clearfield region, and in this were situated the collieries of the Latrobe Coal & Coke Company and the Bolivar Coal & Coke Company. Interstate shipments of coal and coke were made from plaintiff's collieries and from the collieries of the other five companies during the period from April 1, 1897, to May 1, 1901, and the plaintiff complains of discrimination against its business and in favor

of the rival shippers just named. The method of discrimination is described as follows: The Altoona Company and the Glen White Company each owned a short line or branch from their respective operations to the defendant's road, and also owned a locomotive which hauled the loaded or empty cars to and from the defendant's road. The Millwood Company had no branch, but had a switch or connection with its mine tracks, and along this switch its own locomotive hauled the empty or loaded cars. The Latrobe Company owned a branch, but had no locomotive, and the defendant's own engines hauled the loaded and empty cars. The Bolivar Company's colliery was reached over a branch owned by the defendant itself, and the loaded and empty cars were hauled by the defendant's own locomotives. All the plaintiff's collieries were connected with the defendant's road by short lines or branches owned by the plaintiff, but the motive power was furnished by the defendant upon them all, except that for a year and seven months (from October 1, 1899 to May 1, 1901) the plaintiff owned a locomotive at Gallitzin colliery, and used it to move the empty and loaded cars.

Having thus outlined the situation, plaintiff's statement goes on to compare the Altoona, the Glen White, and the Millwood collieries with the Gallitzin colliery between October, 1899, and May, 1901, averring that these four reached the same general markets, and that the defendant in transporting their products for these companies performed like and contemporaneous service for like traffic under substantially similar circumstances and conditions. The statement then charges that from October, 1899, to May, 1901, the defendant allowed the Altoona, the Glen White, and the Millwood Companies a rebate of 15 cents per ton on all the coal and coke passing over their lines or branches connecting these collieries with the defendant's road, but allowed no rebate or drawback or compensation whatever upon coal and coke shipped during the same period from the Gallitzin colliery. Plaintiff then compares the coal and coke shipped from its five other collieries during the whole period from April, 1897, to May, 1901, and also shipped from Gallitzin between April, 1897, and October, 1899, with the coal or coke shipped from the Latrobe and the Bolivar collieries, averring that the products from these eight operations reached the same general markets, and that the defendant performed for all of them like and contemporaneous service in transporting like traffic under substantially similar circumstances and conditions. Discrimination is charged because the defendant allowed the Latrobe and the Bolivar collieries a rebate of 10 cents per ton, but allowed no rebate or compensation of any kind to the plaintiff. Two specific charges are then made: (1) That for the coal and coke shipped from Gallitzin between October, 1899, and May, 1901, the defendant charged and collected from the plaintiff a greater compensation, namely, 15 cents per ton, than it charged and collected from the Altoona, the Glen White, and the Millwood companies; and (2) that for the coal and coke shipped from the five other collieries of the plaintiff and also from Gallitzin before October, 1899, the defendant charged and collected a greater compensation, namely, 10 cents per ton, than it charged and collected from the Latrobe and Bolivar companies.

This is a sufficient summary of the statement of claim. It contains precise and definite charges, and, as it contains no others, the plaintiff should be confined to these. The payment of the sums complained of —15 cents and 10 cents per ton respectively—is conceded, but the defendant explained it as mere compensation for trackage or for services rendered by the favored shippers. Whether it was such a compensation as the defendant might lawfully pay, or whether it was an unlawful rebate in disguise, was a question of fact, and the referee has decided it in favor of the plaintiff. With this finding I agree. There is some room for doubt in the evidence on this point, but, when all is said (and much has been ably said on behalf of the defendant), I see no sufficient reason to differ from the referee's conclusion. The defendant made no effort to prove the money value that might properly be put upon the use of the various branches, or upon the services rendered by the locomotives of the favored shippers, and the failure to throw light upon this obviously important matter is, I think, not without significance. There was a good deal of other evidence also upon one side or the other of the question under consideration, and, as I have already said, I agree that upon the whole evidence the payments referred to were unlawful rebates. To what extent did they injure the plaintiff? The statement of claim replies that upon all shipments made from Gallitzin between October, 1899, and May, 1901, the plaintiff has been injured 15 cents per ton, and that upon all other shipments the injury amounts to 10 cents per ton. The referee, however, held that the measure of damage was the sum paid to the Altoona Company, and applied it practically to all of the plaintiff's shipments from all its collieries. This it seems to me was a clear mistake. It gives the plaintiff what it did not sue for, and has not lawfully claimed; and the judgment to be entered hereafter must be computed in accordance with the sums demanded by the pleadings.

The defendant raises several other objections that may be briefly considered. It is suggested that the Interstate Commerce Commission should have been first applied to, and that the Circuit Court (for the present at least) has no jurisdiction of the suit. The recent decision of this court in Morrisdale Coal Company v. Pennsylvania Railroad Company (C. C.) 176 Fed. 748, is referred to in support of this proposition. That case is now sub judice in the Court of Appeals, and obviously, as it seems to me, I should not repeat a ruling which may shortly be declared erroneous. For the immediate purpose, I shall therefore hold formally that the circuit court should exercise jurisdiction of the pending controversy.

It is objected, further, that the plaintiff's right to recover is either wholly or partly taken away by its failure to make protest at the various times when it paid the higher rates charged against its shipments. In reply, it is enough to cite Pennsylvania Railroad Company v. International Coal Mining Company, 173 Fed. 1, 97 C. C. A. 383, where the Court of Appeals of the Third Circuit has decided that such an objection is not valid. That the plaintiff cannot recover in respect of any shipments upon which it also received unlawful rebates is not denied, but there is a dispute about dates on this subject. The referee has

found as a fact that no rebates were paid to the plaintiff after April 1, 1899, and I am asked to say that the evidence points to such payments as late as April 1, 1900. Undoubtedly there is evidence that would justify that conclusion, but there is also conflicting evidence, and I must decline to set aside the finding of the referee contained in the sixty-seventh paragraph of his report.

So far as the payments to the Bolivar Company are concerned, I am of opinion that they did the plaintiff no harm, and cannot furnish a basis for recovery. The Bolivar Company shipped no coal, its business being confined to coke, and upon coke the tariff rate from the Latrobe region, in which the Bolivar colliery was situated, was 20 cents per ton higher than the tariff rates charged against the plaintiff. Assuming, therefore, that the payments to the Bolivar Company were rebates, they did the plaintiff no harm, because they left the actual rate on coke paid by the Bolivar Company higher than the rate paid by the plaintiff on like shipments. And similar facts are true concerning the rates upon coke shipped by the Latrobe Company during the whole period covered by the action, and also upon coal shipped by the same company before April 1, 1899. Conceding that the payments received by this company were rebates, they did the plaintiff no harm before April 1, 1899. After that date, the defendant charged the same rates on coal from both the Latrobe and the Clearfield regions, and the rebate on coal then became injurious.

The defendant also argues that in computing the damages "contemporaneous service" must be confined to shipments made for the plaintiff and for the favored shippers at the same, or practically the same, moment of time; and that shipments a week apart, or certainly a month apart, would therefore be too remote. No doubt "contemporaneous" means "at the same time," but at the same time with what? A term is evidently implied which must be looked for in the context and in the subject-matter of the statute. In my opinion the well-known evil aimed at in section 2 requires the court to hold that the implied term in the comparison is the offending rates, making the word to mean, "at the same time with the offending rates," and that, as long as these rates remain in force, the services rendered to a complaining and to a favored shipper are "contemporaneous" within the meaning of the statute. As far as I am aware, there is no decision upon this subject, but Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, furnishes, I think, some inferential support to the construction just given.

It is further objected that the referee did not properly discriminate among the plaintiff's shipments, but computed damages on all of them without regard to the question whether they reached the same market that was reached by the coal or coke of the favored shipper. This objection I regard as well taken. Discrimination can only injure a complaining shipper if his rival has been given an unfair advantage in the same market, and I do not see why a plaintiff should be allowed damages on coal shipped, for example, to Baltimore, because a rival had received rebates on coal shipped to Newark. It may not be always easy to determine what is the same market, but, if difficulties arise, they

must be met and overcome in the usual way. It is obvious that different points of destination might belong to the same market, and that many other considerations may enter into the problem. But other questions of fact are often complicated, and, although they may be hard to solve, they are continually demanding solution. This question probably belongs to that class, but I see no rough and ready way out of the difficulty. If the parties cannot agree upon this point, there will have to be a further inquiry.

The defendant also objects that the service rendered to the plaintiff and to the favored shippers was not "like" in many instances, because not only were the points of destination different, but also because these points could be reached over various routes that were covered in part by other carriers. This objection may have a bearing upon the question whether the rival shippers were seeking the same market. Rates over one route might admit to the market, while rates over another route might shut the traffic out. This aspect of the matter has not been considered, and (as I understand) the evidence does not show by what route a shipment was actually made, but merely that it was possible to reach certain destinations over more routes than one. If the objection is thought to have any bearing upon the question whether the payments to the favored shippers were rebates, it seems sufficient to reply that the payments were made without reference to destination or route, and were apparently not influenced by either consideration.

An application to allow counsel fees to the plaintiff was presented to the referee, and is now before the court. Nothing was said about it on the argument, however, and the matter may stand over until judgment comes to be entered in accordance with the above opinion. A motion to enter judgment may be made at any time after the necessary computation has been made.

THE SIF.

THE MURCIA.

(District Court, E. D. Pennsylvania. August 4, 1910.)

Nos. 54, 1.

1. COLLISION (§§ 51, 55*)—OVERTAKING VESSELS—BURDEN OF PROOF AS TO FAULT.

Under article 24 of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which requires an overtaking vessel to keep out of the way of the overtaken vessel, it is her duty to pass at a safe distance and a safe point, and, in case of collision, the overtaking vessel has the burden of proof to show that it was occasioned by no fault on her part, but by some fault or neglect of duty on the part of the overtaken vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 57–61, 64; Dec. Dig. §§ 51, 55.*

Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

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

2. COLLISION (§ 94*)—OVERTAKING VESSELS—FAILURE TO ALLOW SAFE DISTANCE—SUCTION.

While passing up the Delaware river in the daytime, the steamship Sif overtook and attempted to pass the steamship Murcia on the latter's port side. After she had passed about half her length, the Murcia began to swing towards her, and, although the engine was stopped and then reversed, and the helm ported, continued to swing until with a sudden plunge her bow struck the Sif about 100 feet forward of her stern. The course of the Murcia was not changed until after she commenced to swing. *Held*, that she was not in fault, and that the fault was solely that of the Sif in passing so close that her suction caused the collision; the evidence tending to show that when the vessels began to converge the distance between them was not more than 100 feet.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197–199; Dec. Dig. § 94.*]

In Admiralty. Suit by the English & American Shipping Company, Limited, as owner of the steamship Murcia, against the steamship Sif, Anton Hermandsen, claimant, and cross-libel by Hermandsen against the Murcia. Decree for libelant.

Howard M. Long and J. Parker Kirlin, for the Murcia.
Henry R. Edmunds, for the Sif.

HOLLAND, District Judge. These are cross-libels, filed on behalf of the owners of the steamships Murcia and Sif, respectively, for damages arising out of a collision between the vessels at about 2 p. m. on the 26th day of November, 1908, in the Delaware river below Philadelphia, in the Cherry Island Cut.

The Murcia, a steel screw steamer of 303 feet in length, 41.5 feet in beam, was bound inward to Philadelphia from Huelva, Spain, with a cargo of iron pyrites. The Sif, a Norwegian vessel, 325 feet in length and 47.1 feet in breadth, at the time of the collision, was bound on a voyage from Santiago de Cuba, with a cargo of iron. At the place of the collision, the channel of the river is about 29 feet in depth, and both vessels, as loaded, drew about 21 feet of water. Both were proceeding up the river, in clear weather, with a flood tide, and there was no wind of any consequence. The Murcia, ahead, was being overtaken by the Sif. From the time the vessels left their anchorage, near Goose Island, the Sif followed until she reached the intersection of the Deep Water Point and Cherry Island range, when two whistles were blown by the Sif, indicating an intention to pass the Murcia to the westward along her port side, to which the latter assented by replying with two whistles. At this time the Sif was about her length astern of the Murcia, and started to pass the latter along her port side. She gradually drew ahead until she was about half way past the Murcia, and up to this time both vessels had maintained their course and distance apart, when it was noticed the bow of the Murcia was drawn toward the Sif, and the vessels were being drawn together. The engines of the Murcia were slowed down and then stopped in order to permit the Sif to pass, but this did not prevent the movement of the Murcia, and the pilot ordered the engines to be put full speed astern and the helm aport, both of which orders were obeyed. Notwithstanding this ma-

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

nœuvre, the Murcia continued to approach the Sif more rapidly, and then gave a sudden "dive" in the direction of the latter, the bluff of the Murcia's port bow striking the Sif on the starboard side at a point about 100 feet foreward of the latter's stern. The vessels remained in that position for more than a minute, during which time the Sif was proceeding ahead with the Murcia alongside. Both vessels were injured.

In the libel filed on behalf of the Murcia, it is claimed, inter alia, that the collision and damage resulting therefrom were not caused or contributed to by any fault of the Murcia, but were caused solely by the fault of the Sif, in that, being an overtaking vessel, she failed to keep out of the way of the Murcia, as she was required to do by article 24 of Inland Rules, and in that she passed too closely and converged and crowded upon the course of the Murcia while passing. This is denied in the answer of the Sif, and the latter, in the libel filed by it against the Murcia, avers that the collision was solely attributable to the stopping and backing of the engines of the steamer Murcia at the time and in the manner and under the circumstances mentioned in the libel, and to the general mismanagement, absence of care, and inattention of those in charge of the Murcia's navigation.

The Murcia had on board a competent river pilot, a man at the wheel, and the captain at or in the pilot house, and the Sif was properly manned with a pilot, master, chief officer, and wheelman on the bridge. Both vessels maintained their course and distance apart until the Sif had passed from a quarter to a half her length by the Murcia, when the bow of the Murcia began to approach the starboard side of the Sif. There is nothing in the evidence to show that this was the result of any mismanagement on the part of the officers of the Murcia. The important fact in this case is the one of distance at which the Sif attempted to pass the Murcia. It is claimed by the Sif that the distance between the two vessels at the time she was passing was from 300 to 400 feet. The Murcia, however, avers that when the Sif first began to overlap her they were from 100 to 150 feet apart, and that, as the Sif gradually drew ahead of the Murcia, the former converged slightly upon the course of the Murcia, so that, when the Sif was about half way by the Murcia, the distance between them had been reduced to from 50 to 100 feet, when the engines were slowed, then stopped, and finally put full speed astern, and the helm aport.

Taking the circumstances of the collision in connection with the evidence, we think it is clear that the contention of the Murcia is correct as to the distance the vessels were apart. Aside from the evidence of the witnesses as to the distance between the vessels, we have the fact that the Sif was 325 feet in length and the Murcia 303 feet in length, and that both vessels maintained their course until the Sif had passed the Murcia about half the former's entire length, when the Murcia, it is claimed, began to converge toward the Sif. If the distance was as great as claimed by the Sif, it would have been impossible for the Murcia to have collided with the Sif, as she did, at a point some distance foreward of her stern, the Sif being the faster boat, and at the time of the collision the Murcia had her engines put full speed astern,

so that the conclusion is amply justified that the Sif was attempting to pass too close to the Murcia, and the distance apart more nearly that stated by the witnesses for the latter. The Sif was the overtaking vessel, and, as such, had the burden placed upon her by the laws and usages of navigation of safely passing the slower ship, and as such overtaking vessel the burden was upon her to show that the collision was occasioned by no fault on her part, but by some fault or neglect of the duty on the part of the Murcia. The Aureole, 113 Fed. 224, 51 C. C. A. 181; City of Brockton (D. C.) 37 Fed. 897. At the time the Sif was passing the Murcia the latter maintained her course, and this is all the Sif had a right to expect the Murcia to do, as the Sif was the overtaking vessel, and it was her duty to pass at a safe distance and at a safe point. The Governor, Fed. Cas. No. 5,645; The Rhode Island, Fed. Cas. No. 11,745; Whitridge v. Dill, 64 U. S. 448, 16 L. Ed. 581; The Cephalonia (D. C.) 29 Fed. 332; City of Brockton, supra; The Aureole, supra; The Atlantis, 119 Fed. 568, 56 C. C. A. 134. As it was the duty of the Sif to select a place and to keep at a safe distance in attempting to pass and as she was the overtaking ship, it was her duty, in order to exonerate herself, to show that the fault was that of the Murcia. This we think she has wholly failed to do. The charge is that the Murcia was at fault, and that the collision was solely attributable to the stopping and backing of the engines of the steamer Murcia. This, it seems to me, under the circumstances, was the proper thing for the Murcia to do in its effort to avoid the collision, and, in fact, it is so declared by Judge Gray in the case of The Aureole, supra, in which case the same objection was raised to the same manœuvre by the overtaken vessel. In that case (113 Fed. 229, 51 C. C. A. 186) Judge Gray says:

"Under the circumstances, it seems to us as it seemed to the pilot at the time good judgment to slow up, so as to allow the Aureole the more quickly to pass; and the stopping of the engines just before the collision seems clearly justified by the situation in which the ships were."

In this case it was the judgment of the captain and pilot of the Murcia that this was the proper manœuvre, and the captain of the Sif testified, when he noticed the "Murcia was edging toward" him before she sheered, he "sung out," "Port your helm or stop your engines, stop your engine, and you will fall astern of us."

We find there is no fault on the part of the Murcia, and, as she was the overtaken vessel, the responsibility for the damage must rest upon the Sif, unless she satisfactorily explains the cause of the collision and exonerates herself. The Nathan Hale, 113 Fed. 865, 51 C. C. A. 489. What, then, must have been the cause of this collision? Clearly from the facts and circumstances it appears that the Sif attempted to pass the Murcia so closely as to cause a suction which drew the latter out of her course, and, in the attempt of the Murcia to avoid the collision, the engines were first slowed down, then stopped, and finally put full speed astern. Whether this was entirely in accord with the best method of controlling the vessel under these circumstances, it failed to prevent the collision, and it failed to overcome the fault of the Sif in passing the Murcia so closely as to cause the latter to be drawn out of her course and toward the starboard side of the latter.

The "dive" or "plunge" which the Murcia finally made into the side of the Sif indicates some unusual force as the cause, and the influence of the suction of one vessel over another has been recognized in navigation in a number of cases, especially where the sudden "plunge or dive" indicates that there is some force other than the motion of the vessel from her propelling force. That suction has been recognized as a fruitful cause of collision appears from the following cases: The Ohio, 91 Fed. 547, 33 C. C. A. 667; The Aureole, supra; The Atlantis, supra; The Mesaba (D. C.) 111 Fed. 215; The Fontana, 119 Fed. 853, 56 C. C. A. 365; The Bremen (D. C.) 111 Fed. 228; The City of Brockton, supra; The North Star (D. C.) 132 Fed. 145; The U. S. and The Monterey (D. C.) 171 Fed. 442.

The Sif, being in fault in its effort to pass the Murcia at a distance and at a point which resulted in the accident, should be held responsible for the damages resulting from the collision, and the order of the court is that the libel filed by Anton Hermandsen, libelant, against the steamship Murcia, William C. Butler, claimant, be dismissed, and in the action brought by the English & American Shipping Company, Limited, against the steamship Sif, Anton Hermandsen, claimant, there be a decree in favor of the libelant, with an order of reference to ascertain the damage.

THE JEFFERSON.

(District Court, E. D. Virginia. June 17, 1910.)

SALVAGE (§ 31*)—AMOUNT OF COMPENSATION—SERVICES TO BURNING SHIP IN DRY DOCK.

The masters and crews of three tugs awarded the total sum of $6,000 for salvage services rendered to a steamship, which caught fire while in a dry dock from burning buildings in the shipyard; the tugs, at the request of the superintendent of the yard, having rendered the most effective service in extinguishing the fire and preventing a possible loss of $140,000, the service having been rendered with great efficiency in freezing weather, with some risk to life from falling wires and timbers and considerable to health from exposure.

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

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit by E. W. Simmons and others, composing the officers and crews of the tugs Helen, Alice, and James Smith, Jr., against the steamship Jefferson. Decree for libelants.

See, also, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. ——.

Thorp & Bowden, for libelants.

Loyall, Taylor & White, for respondent.

WADDILL, District Judge. The libel in this case was filed by E. W. Simmons, master of the steam tug Helen, for himself and others interested as salvors, against the steamship Jefferson, her tackle, apparel, and furniture, owned and claimed by the Old Dominion Steamship Company. Subsequent to the filing of the libel, the crew of the tug Helen, and the masters and crews of the steam tugs Alice

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

and James Smith, Jr., duly filed their petitions, setting up their claims as salvors; the purpose of said libel and petitions being to recover salvage claimed to be due for extinguishing a fire on the Jefferson on the evening of the 25th of December, 1906, while she was undergoing repair in the dry dock at Newport News, Va. The claimant steamship company duly filed exceptions to the libel and petitions, raising, among other things, the question as to whether or not the services for which libelant and petitioners made claim was a salvage service; the Jefferson at the time being in a dry dock for reconstruction, lengthening, and repairs. After full argument before this court, the exceptions were sustained, and the libel and petitions dismissed. 158 Fed. 358. This decision was reversed by the Supreme Court of the United States on appeal. 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. ——. The case is now under consideration upon its merits; the parties respectively having adduced their testimony since the return of the case from the Supreme Court, and argued and submitted the same.

The right of the libelant and petitioners to recover is conceded, in the light of the decision of the Supreme Court, and the amount for which a recovery should be had is alone in controversy. The fire in the shipyard at Newport News, on account of which the service sued for was rendered, was a very serious one. It broke out on the evening of the 25th of December, 1906, about 4 o'clock, a high northwestern wind prevailing. A large building known as the carpenter's shop was totally destroyed, together with its contents, and the power house and plant and machine shop of the yard greatly endangered. The direction of the wind carried the fire towards the dock where the ship was, and away from the buildings aforesaid, in the yard, and the ship quickly caught fire; the same breaking out on its starboard quarter, she being stern in to the dock, and in close proximity to the burning building. The superintendent of the shipyard's docks called upon the three tugs to render assistance in the effort to save the Jefferson, and they promptly responded. The fire department of the city of Newport News, with three fire engines, about a dozen or more regular firemen, and quite a number of volunteer firemen, rendered timely and valuable service in controlling the fire and saving the buildings in the yard, with the exception of the large building aforesaid, and in part aided in extinguishing the flames on the Jefferson. The employés of the shipyard likewise to some extent aided in putting out the fire upon the ship; but, in the view taken by the court, the libelant and petitioners, with the fire apparatus of the three tugs, did by far the greater service, and were chiefly instrumental in subduing the fire upon the ship. The service rendered by them was really what prevented the burning of the ship entirely, though undoubtedly some assistance was rendered from the other two sources mentioned. A great crowd was present at the fire, and much excitement prevailed, and there is considerable conflict in the testimony as to just what did occur. It does not necessarily follow that this difference arises from anything but the viewpoint from which the several witnesses testified. The city fire department's witnesses naturally exaggerated what their department did, and the same is doubtless true of

those from the shipyard and the tugs; but they were neither, in the positions in which they were severally placed, able to tell what the others did. In some instances they were on opposite sides of the dry dock, the pier, or the ship on fire, and necessarily could not know what the others were doing.

Viewing the entire testimony, however, giving to each witness credit for good faith in what he said, the court is convinced, so far as the fire on the steamship was concerned, that the water thrown from the three tugs was the real and efficient cause that extinguished the fire. They were at the scene when the ship took fire, were able to and did lie on both sides of the dry dock containing the ship. They were especially equipped for fighting fire, being Chesapeake & Ohio Railway Company tugs, used not only for towing, in connection with their business at Newport News, but kept as harbor tugs, and equipped for protecting the company's property from fire, and by means of their powerful pumps and their hose, connected with that of the shipyard, they were enabled to throw constantly large streams of water upon the burning ship from different sides and locations, thereby keeping the fire under control, and finally extinguishing the flames, which prevented a total loss of the ship, so far as the same could be destroyed by fire. The shipyard's superintendent, who called upon the three tugs to render the services in question, states that to them is due the credit for extinguishing the fire on the ship, and it seems to the court that what he says, under these circumstances, is entitled to special consideration. He was in control of the shipyard docks, and charged with the duty of protecting the property under his care; and his testimony as to what he did, and what was done by those aiding in the work in hand, and what he says of the occurrences which then took place, is entitled to much more weight than the statements of the average person, whether engaged actively in fighting the fire or as a mere looker-on.

We have only to determine the amount the libelant and petitioners should receive for their services as salvors; no claim having been made in these proceedings by the owners of the tugs, the members of the city fire department, or the city itself, assuming the two last named could prefer such claim. In making the allowance, the court should be controlled by the usual rules governing salvage awards, which are not based upon a mere compensation for work done and labor performed, but upon public considerations affecting the interests of commerce, the advancement and safety of navigation, and the security of life and protection of property by those engaged in a hazardous service. In arriving at a proper award, the courts especially take into account the risks involved to the salvors, the enterprise, labor, and skill displayed, the value of the property salved, the extent of the danger from which it was saved, and also the value of the property and apparatus used in the expedition. It cannot be said in this case that the actual risk to the salvors was very great, though there was considerable from falling wires and timbers. During the fire one man was killed, and four fell overboard, two of them being of the salvors. The suffering from the weather was considerable. The service lasted from about 4:30 in the evening until about

8:30. The weather was freezing, the wind blowing hard, and the men constantly wet. One of the petitioners, Capt. Roper, of the tug Alice, from the exposure incident to the service, contracted rheumatism, and was confined to a hospital some four months. Great enterprise and skill was displayed, and arduous labor performed by the salvors in their service; in fact, Capt. Roper, of the tug Alice, which played the largest part in the service, and who gave general direction to the work of the tugs, had had large and varied experience in extinguishing fires, which, in the opinion of the court, counted for much in knowing what to do in the emergency in which he was placed.

The value of the Jefferson is believed to be about $300,000, and, assuming that all the materials capable of burning should have been destroyed—that is, supposing that the hull and machinery were not seriously affected by the fire—it would have cost $140,000 to have rebuilt her; and to have replaced merely the superstructure, joiner work, etc., on the ship, with the possible damage to the hull, would have cost from $75,000 to $80,000. The values of the tugs were placed as follows: The Alice, at $15,000 to $20,000; the Helen, $12,000 to $15,000; and the James Smith, Jr., at about $7,000 to $8,000. The amount that should be allowed the libelant and petitioners for their services rendered jointly in connection with the fire is $6,000, which the court is advised by counsel representing them all can be awarded in a lump sum. If this agreement cannot be had, the court will then properly apportion the amount among the masters and crews of the several tugboats, in proportion to the services believed to have been rendered by each of them.

UNION DISTILLING CO. v. BETTMAN et al.

(Circuit Court, S. D. Ohio, W. D. July 21, 1908.)

No. 6,391.

1. INTOXICATING LIQUORS (§ 122*)—DISTILLERS—BRANDING OF SPIRITS—LEGALITY OF REGULATIONS.

Circular No. 33, issued by the Commissioner of Internal Revenue May 10, 1910, instructing subordinates in his department that "all forms of distilled spirits from which the substances congeneric with ethyl alcohol have been removed for practical purposes altogether, and which have been heretofore marked as 'pure, neutral, or cologne spirits,' will be marked 'alcohol,'" under which the marking of any distilled product as "spirits" has been discontinued, is in violation of Rev. St. § 3287 (U. S. Comp. St. 1901, p. 2130), which provides that "all distilled spirits shall be drawn from the receiving cisterns into casks or packages, * * * and the particular name of such distilled spirits as known to the trade, that is to say, high-wines, alcohol, or spirits, as the case may be, shall be marked or branded on the head of such cask or package"; it being shown that one distinct product of alcoholic distillation is known to the trade as "spirits," while another product is known as "alcohol," the distinction being so well known and established that their being so marked does not constitute a misbranding, and therefore the provision

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

therefor is not by implication repealed by Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 122.*]

2. INJUNCTION (§ 85.*)—GROUNDS OF RELIEF—IRREPARABLE INJURY.

A distiller is entitled to an injunction to restrain the enforcement by the Internal Revenue Bureau of an unauthorized order requiring a distilled product known to the trade as "spirits" to be branded as "alcohol," which as known in the trade is an inferior and cheaper product.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

In Equity. Suit by the Union Distilling Company against Bernhard Bettman and others. On motion for preliminary injunction. Motion granted.

Lawrence Maxwell, Jr., and W. M. Hough, for plaintiff.

Sherman T. McPherson, U. S. Atty., for defendants.

THOMPSON, District Judge. The bill alleges that the matter in dispute arises under section 3287 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2130), which provides among other things as follows:

"All distilled spirits shall be drawn from the receiving cisterns into casks or packages, each of not less capacity than ten gallons wine-measure, and shall thereupon be gauged, proved, and marked by an internal-revenue gauger, who shall cut on the cask or package containing such spirits, in a manner to be prescribed by the Commissioner of Internal Revenue, the quantity in wine-gallons and in proof-gallons of the contents of such casks and packages, and the particular name of such distilled spirits as known to the trade, that is to say, high-wines, alcohol, or spirits, as the case may be, shall be marked or branded on the head of said cask or package in letters of not less than one inch in length; and the spirits shall be immediately removed to the distillery warehouse," etc.

The bill further alleges that the complainant for years has been engaged in the business of distilling at Carthage, Hamilton county, Ohio, manufacturing, among other products distilled spirits known to the trade by the name of "spirits," with an annual output thereof of about 1,800,000 gallons, for which the said orator has had a profitable trade. That the defendant Bettman is collector of internal revenue for the First district of Ohio, in which complainant's distillery is located, and his codefendants are gaugers assigned for duty in said district. That on the 5th day of May, 1908, the Commissioner of Internal Revenue, by his circular No. 33, Internal Revenue No. 723, addressed to the collector of internal revenue and others, regulating the marking of packages of distilled spirits when drawn from the receiving cisterns of the distillery into casks or packages, ordered and directed that from and after July 1, 1908, "all forms of distilled spirits from which the substances congeneric with ethyl alcohol have been removed for practical purposes altogether, and which have been heretofore marked as 'pure, neutral, or cologne 'spirits,' will be marked 'alcohol.'" And the said gaugers, acting under the directions of said collector of said district, and in pursu-

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

ance of the instructions so issued as aforesaid by the Commissioner of Internal Revenue, have notified the said orator that they will not hereafter mark or brand said casks or packages, when containing such distilled spirits drawn from the receiving cisterns as aforesaid, with the word "spirits," but that they will mark or brand on said casks or packages the word "alcohol," and that they will not hereafter brand anything as "spirits." That if the said regulation of May 5, 1908, be enforced, complainant's business will be destroyed, and that it will suffer great and irreparable damage, and prays that the defendants may be enjoined, etc.

The question presented is whether circular No. 33, modifying existing regulations relating to marking casks or packages containing distilled spirits violates said section 3287, and whether its enforcement will cause the complainant great and irreparable damage. The affidavits submitted by the complainant show that the distilled spirits known to the trade are high-wines, spirits, and alcohol. As known to the trade, the first product of distillation is "high-wines"; the second, by rectification or redistilling, is "spirits" (ethyl alcohol); and the third, being the tailings or refuse of the distillation of "spirits," is "alcohol," and as required by section 3287 should be so marked, unless that section has by implication been repealed or modified by Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

It has been urged in argument that the phrase "spirits, as the case may be," used in section 3287, should be construed in a restricted sense, and applied to "rum, whisky, brandy, gin, and other distilled liquors," and as a matter of fact, under the department regulations of 1901, such potable spirits were so marked—that is, were marked rum, whisky, brandy, etc.—but "spirits" in the broader sense, the purest product of distillation, as known to the trade, were marked or branded on the casks or packages as "spirits," and were not confounded in any way with potable spirits. Under section 3287, high-wines, spirits, and alcohol, as known to the trade, were, prior to July 1, 1908, so marked, irrespective of the markings of potable spirits. If the trade usage disregarded technical names in the markings of distilled spirits, nevertheless it, by long continuance, sufficiently established its markings and brandings to prevent purchasers from being deceived or misled, and would not, therefore, come within the condemnation of the food and drugs act, and no implication can arise which would modify or repeal section 3287.

The complainant alleges that it has and will sustain irreparable damages by the enforcement of the regulations of May 5, 1908. If these regulations should be enforced, undoubtedly it would subject complainant to loss and damage, which, however, would not be destructive to its business or continue for any great length of time. The operation of the new regulations would be general, universal, and would not afford competitors any advantage, and customers would soon be compelled to adjust their business to the new conditions. But the damages sustained pending the adjustment would

be serious, and could not well be recovered at law, and in that sense would be irreparable.

The demurrer will be overruled, and a restraining order will be allowed as prayed.

In re BOSTON & OAXACA MINING CO.

(District Court, D. Mass. May 14, 1909.)

No. 14,609.

BANKRUPTCY (§ 60*)—"ACT OF BANKRUPTCY"—APPOINTMENT OF RECEIVER FOR CORPORATION.

The appointment of a receiver for a corporation by a court of equity at suit of minority stockholders who alleged fraud and mismanagement by the majority and prayed for the appointment of a receiver pendente lite to conduct the business, but did not ask for a winding up of its affairs, *held* not to constitute an act of bankruptcy by the corporation within Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309); it not appearing that the appointment was made "because of insolvency."

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 60.*

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

In the matter of the Boston & Oaxaca Mining Company, alleged bankrupt. On question of adjudication. Petition dismissed.

Arthur P. Teele, for petitioning creditors.

Whipple, Sears & Ogden, for objecting creditors.

DODGE, District Judge. The referee finds that the alleged bankrupt had its principal place of business in Boston, and I do not find sufficient ground in the evidence for disagreeing with this conclusion. The court, therefore, has jurisdiction.

The act of bankruptcy alleged is that on January 8, 1909, "one Cassius C. Bennett, of Pierre, S. D., was appointed receiver of said Boston & Oaxaca Mining Company because of insolvency by the circuit court, county of Hughes, state of South Dakota, and also by the superior court, county of Suffolk, in the commonwealth of Massachusetts, on February 4, 1909." Taking this allegation that a receiver was "appointed" on the dates referred to, to be equivalent to an allegation that a receiver "has been put in charge of" the alleged bankrupt's "property," the act of bankruptcy charged is that described in section 3a (4) of the bankruptcy act. There is no dispute that the South Dakota court referred to did by decree entered January 8, 1909, put Mr. Bennett in charge of the respondent's property as receiver, nor that the Massachusetts court referred to did, by decree entered February 4, 1909, make him ancillary receiver of the respondent's property in Massachusetts. The question to be decided here is: Were these receiverships established because of the company's insolvency?

The company's insolvency on the dates referred to is denied. The referee has made no definite finding upon this precise question.

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

He has found:

"That, even according to the present liberal definition of insolvency, this company, owing as it did about $18,000 on January 1, 1909, and having no available funds with which to meet its liabilities, was at the time of the filing of the petition against it on the 18th day of February, 1909, insolvent. As further evidence of this is the fact that the company had voted to issue bonds with which to raise funds to meet its pressing liabilities. In fact, it had owed the former treasurer, Mr. Pierce, $100 for borrowed money for over a year."

But the aggregate of the company's property, though not available on January 1st for the payment of its liabilities, might nevertheless have been, "at a fair valuation, sufficient in amount to pay its debts." Nor, if the company was insolvent in the only sense recognized in the present bankruptcy act at the filing of the petition, does it necessarily follow that the same state of things existed as early as January 8th or February 4th. Assuming, however, that the company was insolvent on both these dates, it still remains to be proved that the action of the South Dakota court or of the Massachusetts court was because of such insolvency. That fact is not established merely by proof that insolvency existed when the court acted.

The decree made by the South Dakota court on January 8, 1909, with the complaint and the plaintiff's affidavits in the case, are in evidence in these proceedings, marked "Exhibit 1." The decree recites that there was no appearance by the defendant, and that the court acted upon the consideration of the plaintiff's evidence only. The grounds whereon the decree was entered do not appear further than as disclosed by the statement in the decree that, having considered the evidence referred to, it appeared to the court "that it is necessary that a receiver pendente lite be appointed for the defendant company."

It is alleged in the complaint, toward the end of paragraph 6, that the company "has no assets sufficient to meet its indebtedness as it accrues." It might be possible to construe this as an allegation of insolvency in the sense of the bankruptcy act. But the language is ambiguous, as it seems to me, particularly in its connection with other allegations in the complaint. The allegations referred to are that ore of the estimated value of $200,000 at the company's mine might, but for the conduct of the majority of the board of directors, be run through the mill and turned into bullion, that the company's present financial condition has been brought about by said majority in order to enable them to convert the company's property to their own use, and that it is well known to said majority that the mine, if properly managed, could within a few months produce a sufficient sum to pay its indebtedness. In none of the affidavits filed with the complaint do I find any statement that the company is insolvent.

What the complaint and affidavits set forth as ground for the relief asked is, in brief, that the majority of the directors now in control are managing the company's affairs with the dishonest purpose of getting rid of the minority interest, and vesting the entire ownership of the mine in themselves. It is to prevent this that the court is asked to appoint a receiver, empower him to take possession of the company's property, and to bring such suits as may be necessary for that purpose. This is all the relief prayed for, except that the concluding prayer is

as usual for such other and further relief as may be just and equitable. No winding up of the company's affairs or distribution of its property is asked for. The appointment of the receiver being, as has been stated, an appointment pendente lite, gives him only such power as would be necessary to enable him to obtain and hold possession for the time being of the company's property.

"If insolvency, either as a distinct ground of proceeding or as coupled with others, was one of the substantial reasons for the appointment of the receiver, the case would come within the reasonable construction of the statute." Beatty v. Andersen Coal Mining Company, 150 Fed. 294, 80 C. C. A. 183. I am unable to believe it proved in this case that insolvency was one of the substantial reasons. Granting the allegation referred to in paragraph 6 of the complaint to have been an allegation of the company's insolvency, there was no admission of the allegation by the defendant, as in the case cited; nor was the scope of the receivership ordered such as would be appropriate to a receivership on the ground of insolvency, as in the same case. I find no reason to suppose that the action of the court upon the complaint and affidavits would have been in any respect different had that allegation been entirely omitted from the complaint.

The application for a receiver to the South Dakota court was not made by the alleged bankrupt, but by three of its stockholders. There is no allegation in the petition, nor would the facts have warranted such an allegation, that it, "being insolvent, applied for a receiver * * * for its property."

If the South Dakota receivership was not because of insolvency, the Massachusetts receivership, which was merely in aid of that established in South Dakota, cannot be said to have been established on that ground.

I am therefore unable to hold that the acts of bankruptcy charged are proved and must order the petition dismissed.

RICHMOND CEDAR WORKS v. BUCKNER et al.

(Circuit Court, S. D. New York. September 2, 1910.)

1. COURTS (§ 270*)—FEDERAL COURTS—JURISDICTION.

In a suit in a federal court against numerous defendants on a contract binding them jointly and severally, the jurisdiction of the court is not defeated because some of the defendants are not inhabitants of nor served within the district, but the case may proceed against those who have been served.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*]

2. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE IN FEDERAL COURT—NONPAYMENT OF STATE TAX.

Tax Law N. Y. (Laws 1909, c. 62 [Consol. Laws, c. 60]) § 181, requiring foreign corporations doing business in the state to pay a license tax, and providing that in default thereof "no action shall be maintained or recovery had in any of the courts of this state by such foreign corpora-

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

tion," does not affect the right of such a corporation to maintain an action in a federal court in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539–2567; Dec. Dig. § 661.*

Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

3. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE IN FEDERAL COURT—NONCOMPLIANCE WITH STATE LAWS.

The provision of General Corporation Law N. Y. (Laws 1909, c. 28 [Consol. Laws, c. 23]) § 15, that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless, prior to the making of such contract, it shall have procured" the certificate required by the act from the Secretary of State, applies only to actions in the courts of the state, and does not render void a contract made by a corporation which has not obtained such certificate, nor affect the right to maintain an action thereon in a federal court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539–2567; Dec. Dig. § 661.*]

4. INSURANCE (§ 635*)—ACTION ON MARINE POLICY—PLEADING—ALLEGATION OF LOSS.

In an action on a policy of insurance on a cargo of lumber, an allegation in the complaint that the lumber was shipped on a certain vessel, that on the voyage such vessel "was by the perils of the sea wrecked and totally lost," and that until said loss plaintiff was the owner of the insured property, is a sufficient allegation that the lumber was lost.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1599–1602; Dec. Dig. § 635.*]

At Law. Action by the Richmond Cedar Works against William P. Buckner and others. On demurrer to complaint. Demurrer overruled.

King & Booth, for plaintiff.

Hunt, Hill & Betts, for defendants.

LACOMBE, Circuit Judge. This is an action brought by the Richmond Cedar Works, a corporation of the state of Virginia, against the members of a Lloyd's insurance association, composed of individuals residing for the most part in Canada and known as the "New York Commercial Underwriters." Nine out of the 31 defendants are citizens of New York, resident in the Southern district thereof. They have appeared and demurred to the complaint.

The grounds of demurrer are: (1) That this court has no jurisdiction of the controversy, because most of the defendants are aliens and nonresidents, and two of them are residents, respectively, of Pennsylvania and Maryland. (2) That the plaintiff has not legal capacity to sue, because it has not taken out a certificate to do business in New York, nor paid the license tax. (3) On the ground that the complaint does not state facts sufficient to constitute a cause of action.

1. The action is brought upon a policy of insurance executed by individual underwriters, who agreed "jointly and severally" to insure a cargo of lumber belonging to the plaintiff against the perils of the sea. The nonresident defendants are not indispensable parties, the action has been brought against the nine residents only, and it

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will not fail because the others are named as defendants, but not served. Section 456 of the New York Code of Civil Procedure provides that:

"Where a summons issued against two or more defendants alleged to be severally liable is served upon some but not upon all of them, the plaintiff may proceed against those upon whom it is served as if they were the only defendants named therein," etc.

In Hagan v. Walker, 14 How. 29, 14 L. Ed. 312, the United States Supreme Court held:

"It does not defeat the jurisdiction of the court that a person named as defendant is not an inhabitant of or found within the district where the suit is brought. The court may still adjudicate between the parties who are properly before it, and the absent parties are not to be concluded or affected by the decree."

Upon the record as it stands this court has jurisdiction to hear and determine the controversy between the plaintiff and the nine resident defendants who have appeared.

2. Defendants rely upon two statutes. The first is section 181, of the New York tax law (chapter 62 of the Laws of 1909), which provides that every foreign corporation doing business in this state, with certain exceptions, shall pay a license tax and obtain a receipt therefor, and in default thereof "no action shall be maintained or recovery had in any of the courts of this state by such foreign corporation." Manifestly this prohibition refers only to actions brought in the state courts.

The other statute relied upon is section 15 of the general corporation law of the state of New York, being chapter 28 of the Laws of 1909, which provides that no foreign corporation other than a moneyed corporation shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that no such corporation shall maintain any action in this state upon any contract made by it in this state unless prior to the making thereof it shall have procured such certificate. This objection is disposed of by the decision of the United States Circuit Court of Appeals, Second Circuit, in Johnson v. New York Breweries (April, 1910) 178 Fed. 513, holding that:

"Until the state Legislature enacts a law declaring such contracts void, or the highest court of the state construes the present law as so declaring, we think the federal courts should not close their doors to actions arising under such contracts."

Moreover, in the absence of binding authority to the contrary, this court is not inclined to hold that the effecting of insurance here upon a single item of its property is the "doing business" within the state which the statute undertakes to regulate.

3. The only other objection is that the complaint does not sufficiently charge that the cargo of lumber which defendants insured was lost. It avers that it was laden on the schooner Jennie N. Huddell, to be carried from Norfolk to New York, and that thereafter said vessel sailed from Norfolk on the voyage described, and while proceeding therein was by the perils of the sea wrecked and totally

lost. It also alleges that until the said loss plaintiff was the owner of said insured property. The complaint is, in this respect, somewhat inartificially drawn, but it seems sufficient to warrant proof upon the trial that the lumber was lost.

The demurrer is overruled, with leave to answer within 20 days.

UNITED STATES v. 1,950 BOXES OF MACARONI et al.

(District Court, N. D. Illinois, E. D. May 16, 1910.)

Nos. 10,426–10,430.

FOOD (§ 24*)—FOOD AND DRUGS ACT—ADULTERATED MACARONI—PROCEEDINGS FOR CONDEMNATION—"ADDED POISONOUS * * * INGREDIENT."

Macaroni, to which a coal tar dye known as "martius yellow" had been added solely as a coloring matter, held to contain an "added poisonous * * * ingredient which may render it injurious to health," within Food and Drugs Act June 30, 1906, c. 3915, § 7, par. 5, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1191), and, when shipped in interstate commerce, to be subject to condemnation and destruction under section 10 of the act, the evidence showing that such coloring matter is a poison which will kill.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

Proceeding by the United States against 1,950 Boxes of Macaroni, and four other cases; V. Viviano & Bros. and S. Viviano & Bros., claimants. Decree for libelant.

Edwin W. Sims, U. S. Atty., A. R. Hulbert and W. H. Medaris, Asst. U. S. Attys.

Bernard P. Barasa, for claimants.

LANDIS, District Judge. These libels seek the destruction of five interstate shipments of macaroni charged to have been adulterated by the addition of a coal tar dye known as "Martius yellow," alleged to be a poison rendering the food product injurious to health. Food and Drug Act (Act June 30, 1906, c. 3915, § 7, par. 5, 34 Stat. 769 [U. S. Comp. St. Supp. 1909, p. 1191]). The question is whether the article proceeded against "contains any added poisonous * * * ingredient which may render it injurious to health." The proof shows macaroni to be composed of wheat flour and water; that to change its natural color, and make its appearance more inviting, Martius yellow was added; that this coloring matter, is not an ingredient of macaroni, serves no purpose other than to change its color, and is a poison which will kill.

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object. That object is the exclusion from interstate commerce of food products so adulterated as to endanger health. And where, as here, it clearly appears that a poisonous substance wholly foreign to the food product has been added to it solely to mislead and deceive, the court is under no duty to endeavor to protect the offender against loss from destruction of the adulterated article by indulging in hair-splitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury. With a

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

portion of our population macaroni is a staple article of food, and under the evidence here the cumulative effect of the poison in the substance under examination would be injurious to health.

Let there be a decree of condemnation and destruction.

In re LENNOX et al.

(District Court, D. Massachusetts. March 26, 1909.)

Nos. 13,053, 13,157, 13,242.

BANKRUPTCY (§ 468*) — ADJUDICATION IN INVOLUNTARY PROCEEDINGS — REHEARING.

After an adjudication of bankruptcy has been affirmed by the Circuit Court of Appeals, and a mandate sent down, the District Court is without power to grant a rehearing on the ground that the appellate court erroneously interpreted the record.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 468.*]

In the matter of Patrick Lennox and others, bankrupts. On petition for rehearing by alleged bankrupt. Petition denied.

Brandeis, Dunbar & Nutter and Jeremiah Smith, Jr., for petitioning creditors.

John P. Leahy, for Patrick Lennox.

Whipple, Sears & Ogden, for James Lennox.

DODGE, District Judge. In these cases adjudication was ordered June 16, 1908. Upon appeals and writs of error the alleged bankrupt attempted to obtain a reversal of these orders in the Court of Appeals. The cases are now here under mandates from that court, affirming the judgment of this court and commanding that such further proceedings be had here in conformity with the judgment of the Court of Appeals, as according to right and justice and the laws of the United States ought to be had, the writs of error or appeals notwithstanding.

The bankrupt now asks a rehearing in this court, and sets forth as the ground of his application that the record in these cases was, without fault on his part, erroneously interpreted by the Court of Appeals and the dismissal of the appeals and writs of error based upon such erroneous interpretation.

The application is one which this court cannot entertain. The merits of the question which the petitioner seeks to reopen have been settled by the appellate court. Now that they have been thus settled this court is without power to re-examine them. However unlimited its power to permit a rehearing while the case was originally before it and nothing had yet been established for its guidance by any higher court, the proceedings which it can now take in the case are defined by the mandate, and do not include any re-examination of questions with which an appellate court has dealt. Sanford Fork, etc., Co., Petitioner, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; Re Potts, 166 U. S. 263, 267, 17 Sup. Ct. 520, 41 L. Ed. 994. It appears from the petition that the bankrupt has made an application to the Supreme Court of the

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

United States for certiorari to the Court of Appeals, and that his application has been denied. The Supreme Court, also, is therefore to be regarded as having passed upon the question of adjudication. Burget v. Robinson, 123 Fed. 262, 266, 59 C. C. A. 260. It is not for this court to say that either the Supreme Court or the Court of Appeals in reaching its result interpreted the record before it erroneously. If there was any ambiguity in the wording of issues submitted to the jury at the trial here, the bankrupt should have taken steps for its correction either in this court or in the Court of Appeals before the final judgment there. No such attempt was made, and he cannot now set up any such alleged ambiguity.

The petition must be denied.

UNITED STATES v. JOHNSON.

(Circuit Court, D. Kansas, First Division. December 18, 1908.)

No. 8,700.

ALIENS (§ 67*)—NATURALIZATION—JURISDICTION OF COURTS.

Under Naturalization Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 478), which provides that "the naturalization jurisdiction of all courts herein specified, state, territorial and federal, shall extend only to aliens resident within the respective judicial districts of such courts," a district court of the state of Kansas has jurisdiction to naturalize aliens resident in the county where it is sitting only, its territorial jurisdiction while so sitting being restricted to that county by Dassler's Gen. St. Kan. 1905, § 2010.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 67.*]

In Equity. Suit by the United States against Charles Peter Johnson. Decree for complainant.

H. J. Bone, U. S. Atty., and Milton M. Dearing, Sp. Asst. U. S. Atty.

Godard & Valentine, for defendant.

PHILLIPS, District Judge. This is a bill to vacate the judgment of the district court of Clay county, state of Kansas, rendered on the 6th day of March, 1907, adjudging the defendant a naturalized citizen of the United States. The validity of the judgment is assailed on the ground that at the time the defendant filed his petition for naturalization he was a resident of Riley county, Kan., and not of Clay county, both counties, however, being in the same judicial district.

The question, therefore, presented for decision in this and other cases similarly situated submitted at this term of court is whether or not under the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420; Supp. 1909, p. 477]) an alien residing in one county can be naturalized by the decree of a district court sitting in another county of the same judicial district in the state of Kansas. Under Rev. St. U. S. 1878, tit. 30, p. 378, the only requirement was that:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: First, he shall declare on oath, before

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

a Circuit or District Court of the United States, or a district or Supreme Court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission," etc.

"Second, he shall at the time of his application to be admitted, declare on oath, before some one of the courts above specified, that he will support the Constitution of the United States," etc.

—from which it will be observed that there was nothing definite as to the venue of the application.

In view of the many abuses and impositions practiced by which undeservers obtained from the various courts certificates of naturalization, and the difficulty of ascertaining on inquiry the domicile of the applicant and his witnesses, the present act was made more specific. It declares:

"That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

"United States Circuit and District courts, * * * also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

"That naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to such aliens resident within the respective judicial districts of such courts."

So we are referred to the laws of the state of Kansas defining the jurisdiction of state courts. The Constitution of Kansas (art. 3, par. 148) declares that:

"The judicial power of this state shall be vested in a Supreme Court, district courts, probate courts, justices of the peace, and such other courts, inferior to the Supreme Court as may be provided by law; and all courts of record shall have a seal to be used in the authentication of all process."

Turning to the statutes of the state (St. 1905, § 2010, p. 427 [Dassler]), we find under the head of "Jurisdiction:"

"There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law) and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses."

While the state is divided into judicial districts for convenience, in which a district judge is elected, it is quite obvious that the district court for judicial purposes exists in each county as such of the judicial district. The powers and functions exercised by the court as such are limited to matters of jurisdiction within the venue of the county—that is, over persons and subjects—matter within the county, and not outside of its territorial limits, except in cases otherwise specially provided for. When sitting in a particular county, it is as a district court of that county, and not of the judicial district over which the judge is elected. The clear import, it seems to me, of the provision of the naturalization act, "that the naturalization jurisdiction of all courts herein specified, state, territorial and federal, shall extend only to aliens resident within the respective judicial districts of such courts," is that the alien applicant shall reside in the county where the district court acting on the application is held. This view best accords with the

remedial policy of the present law that for purposes of inspection by the bureau of immigration and naturalization into the grant of certificates of naturalization the record thereof may point to the residence of the party as of the county where the certificate has been granted, and where the public and parties interested may be expected to take notice of the records of the district court having jurisdiction over the person as well as the subject-matter.

It results that a decree canceling the certificate of naturalization in this case must be made.

PARK & POLLARD CO. v. KELLERSTRASS et al.

(Circuit Court, W. D. Missouri, W. D. June 3, 1910.)

COPYRIGHTS (§ 85*)—INFRINGEMENT—INJUNCTION.

Where a publication by defendant contains matter which infringes a copyright of complainant intermingled with other matter which does not, the entire publication may be enjoined, leaving it to defendant to apply for a modification of the injunction after he has eliminated the objectionable matter.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

In Equity. Suit by the Park & Pollard Company against Ernest Kellerstrass and the Fidelity Printing Company. On motion for preliminary injunction. Motion granted.

Alfred B. White, Inghram D. Hook, and Arthur H. Morse, for complainant.

Warner, Dean, McLeod & Timmonds, for defendants.

PHILIPS, District Judge. This is a bill in equity praying for a temporary and permanent injunction against the defendants from printing, publishing, advertising, and distributing, either by mail or gift, certain books or pamphlets entitled "The Kellerstrass Way of Raising Poultry." The one marked "Exhibit E" was published in 1909, and the other, "Exhibit F," was published in 1910. The complainant, a corporation, for many years had been engaged in the manufacture and sale of poultry feeds, and poultrymen's supplies, in the state of Massachusetts, and in the study, care, feeding, and raising of poultry, and during the years 1906, 1907, 1908, 1909, and finally in 1910, had issued books designated as "The Park & Pollard Year Book," "Year Book & Almanac," and "The Park & Pollard Company, Boston, Mass.," which had been copyrighted pursuant to law. The bill charges that the defendant Kellerstrass, engaged in the business of raising a like high class of chickens and pursuing methods for their care and cultivation in Jackson County, Mo., had, through the defendant Fidelity Printing Company, caused to be printed for him the book in 1909, "Exhibit E" of the complaint, entitled "The Kellerstrass Way of Raising Poultry," and in 1910 a book or pamphlet with like title, which the defendant Kellerstrass used for exploiting his business and for sale and distribution. The bill charges that said books or pamphlets so printed, published, and distributed by the defendants were and are an invasion and infringement of complainant's said copyright.

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

The defendant Kellerstrass on the hearing of the application for a temporary injunction presented his affidavit, in effect, admitting that the said book issued in 1909 contained matter constituting an invasion of the complainant's copyright, and that, on discovering the same, he ceased said publication or distribution or use of said book, and has destroyed all the copies thereof remaining undistributed, and that the plates for printing the same had been broken up or recast for other purposes, but denies that the "Exhibit F," printed, published, and distributed and used for the year 1910, in any wise constitutes an invasion or infringement of the complainant's said copyrighted book; and asserts that it is the sole intellectual production of the defendant Kellerstrass based upon his personal experience, observation, and original suggestion. In view, however, of the manifest piracy in his antecedent book of 1909 from the complainant's antecedent production, the conclusion is irresistible that in preparing and constructing his last book of 1910, even if he did not have the complainant's book present before him, its matter, arrangement, and suggestions were present in his mind.

While it is to be conceded to the defendants that there is much more in the book or pamphlet gotten up by them for the year 1910 that in no wise interferes with or appropriates the conceptions and suggestions contained in the complainant's book, yet a comparison of certain parts of the two books in question clearly demonstrates the fact that the author of the defendants' book has in some instances appropriated the language, ipissimis verbis, of the complainant's book, and in other instances has appropriated the thought and suggestions of the complainant after such a fashion as to leave little doubt that it was imitative, and with studied effort, by transposition and rearrangement, he has sought to conceal the fact of such imitation and appropriation.

While the restraining order can only apply to the portions of the book which constitute piracy or invasion of the complainant's copyright, and should only operate upon the forbidden matter, yet, as what is permissible and what is improper are so interwoven and combined in one and the same book that the defendant without elimination cannot use or employ what is his own without employing and using that which is not, he ought not at this juncture to exact of the court the task of such separation so as to relieve him therefrom. When he shall have made the proper, complete, erasures, he can then be heard as to a modification or restriction of the decree. In view of the statement made by the defendant Kellerstrass in his affidavit, presented on this hearing, that he has abandoned the publication, distribution, or use of the book, "Exhibit E," published in 1909, and that the type and matrices for printing the same have been destroyed, and therefore there is no injury therefrom threatened, the restraining order as to that is refused, but is granted as to "Exhibit F," the book published in the year 1910.

NOTE. See following authorities: Myers v. Callaghan (C. C.) 5 Fed. 726; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; Banks Law Pub. Co. v. Lawyers Co-Op., 169 Fed. 386–390, 94 C. C. A. 642; West Publishing Co. v. Edward Thompson Co. (C. C.) 169 Fed. 833–854; Drone on Copyrights, p. 385.

LEWIS v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. October 3, 1910.)

No. 22, March Term, 1910.

1. INSURANCE (§ 249*)—ACTION BY HOLDER OF LIFE POLICY FOR BREACH OF CONTRACT—PLEADING.

Where plaintiff, who was the holder of a life insurance policy issued by defendant, by the terms of which he was entitled to borrow from defendant a certain sum on the security of the policy, such sum having relation to the amount of premiums paid, alleged in his statement of claim that defendant had refused to make him a loan for the full amount to which he was entitled, and prayed judgment for damages, and further alleged facts showing that defendant was desirous that he should keep the policy in force, such allegations were in affirmance of the contract, and did not entitle him to recover back the premiums paid as on a repudiation of it for the alleged breach.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 249.*]

2. INSURANCE (§ 248*)—RESCISSION OF LIFE INSURANCE CONTRACT—BREACH OF AGREEMENT TO MAKE LOAN—SUBSIDIARY COVENANT.

A provision in a life insurance policy giving the insured the right to borrow money from the insurer on the security of the policy in progressive sums as the policy aged is not an indivisible part of the contract, but creates a subsidiary or collateral contract, a breach of which can be compensated in damages; and such a breach by the insurer is not a repudiation of the contract for insurance, which entitles the insured to rescind and recover the premiums paid.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 248.*]

3. INSURANCE (§ 248*)—RESCISSION OF LIFE INSURANCE CONTRACT—RIGHT OF INSURED—STEPS TAKEN TO AVOID.

Plaintiff held a life insurance policy issued by defendant, which gave him the right to a loan from defendant on signing an application therefor pledging the policy as security. Plaintiff had borrowed a portion of the amount to which he was entitled; but, desiring the remainder, he wrote defendant in New York, demanding the same. The letter would not reach defendant until the next day, but on the morning of the second day, no answer having been received, plaintiff commenced an action to rescind the contract on the ground of the alleged breach of the agreement by defendant. *Held* that, conceding that the refusal by defendant to make the increased loan would afford ground for rescission, it could not be charged with default because of its failure to answer within the time allowed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 248.*]

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

Action by Daniel C. Lewis against the New York Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 173 Fed. 1009.

Reynolds D. Brown, for plaintiff in error.

Arthur G. Dickson, for defendant in error.

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

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

ARCHBALD, District Judge. The plaintiff was insured in the defendant company for $30,800 on the ordinary life 20-year standard accumulation plan, by a policy bearing date July 12, 1904, and containing a provision for a cash loan, the right to which, as he claims, he was not permitted to enjoy. And the company, according to this, having broken their contract, this action was brought to recover the damages. The clause of the policy which was relied on is as follows:

"The insured may obtain cash loans on the sole security of this policy, on written request, at any time after it has been in force two full years, if premiums are duly paid to the anniversary of the insurance next succeeding the date after the loan may be obtained. The insured shall pledge this policy and its accumulations as collateral security for such loans, in accordance with the terms contained in the company's then existing form of policy loan agreement. The amount of loan available at any time is stated in the table on the second page, and includes loans then unpaid. Interest will be at the rate of five (5) per cent. per annum, payable in advance to the next anniversary, and annually in advance on that date and thereafter."

By the table which is there referred to, the insured, after four years, was entitled to borrow $1,940; and in part availing himself of this, on March 18, 1908, the plaintiff had secured $1,300, which was all that he required at the time, but was $640 less than he was privileged to borrow. A year later, however, the last of May, 1909, not being satisfied with the policy because of the deferred dividend arrangement, he made up his mind to change; but, there being no provision in the policy for a cash surrender value, he decided to realize on it, by borrowing up to the limit and then letting the policy lapse, and he accordingly applied to the company through the agency at Philadelphia for a further loan upon it. The representatives of the company, to whom he applied, being made aware of his purpose, endeavored to dissuade him, and suggested without success that he take a new form of policy, with regard to which there were some negotiations. The policy, on account of the existing loan, being in the possession of the company in New York, the additional amount to which he was entitled was not known to him, and in the course of his interviews with the Philadelphia agents he was advised that, on July 12, 1909, after the payment of his next premium, amounting to $960, he would be entitled to a loan of $2,556, or $1,256 more than he then had; it being stated to him that until then the policy had no further loanable value. Having obtained a copy of the policy, however, he discovered that this was not so, and that he had been entitled all along to $1,940, or $640 more than he had received, and he thereupon made a demand by letter, July 7, for this further accommodation. But on July 9, two days later, having obtained no reply, and there being but three days until the next premium was due, he began this action. At the trial the plaintiff, upon this showing, was allowed a verdict of $640, the difference between the loan which he had and $1,940, the amount which he had a right to. Not content with this, however, he claimed the full amount of the premiums paid, on the basis that there was a breach of the policy, which justified a rescission and authorized a recovery of everything that had been paid under it. And, this being denied him, the case is brought here for consideration.

The plaintiff in his statement of claim declares for damages for a breach of the agreement to loan him the amount he was entitled to, which affirms the contract, and not for the premiums paid, which repudiates it; the one cause of action being distinctly different from the other. American Life Ins. Co. v. Shultz, 82 Pa. 46. This appears by the ad damnum clause, where in conclusion it is declared:

"Wherefore the plaintiff claims damages from the defendant in the sum of $6,000, at which sum the plaintiff estimates the damages which he has suffered by reason of the willful failure and refusal on the part of the defendant company to comply with the terms of the policy aforesaid."

It is true that, leading up to this, after setting out the facts substantially as they are given above, it is averred that, receiving no further reply from the company to his written request for a loan on July 7, he notified them on July 9, through his counsel, that he treated their refusal to make the loan as a breach of the entire contract, and that he was not willing in consequence to continue paying the premiums, which, so far as it goes, may seem to be a repudiation of the policy. But it is also further averred that, as he believes, it was the sole purpose of the company, in declining the loan and prolonging negotiations, to induce him to renew the policy, by paying the premium to come due July 12, which negatives any intent on the part of the company to abrogate the policy, or no longer be bound by it, and, on the contrary, expressly affirms their desire to keep on with it, in confirmation of which it is stated that the plaintiff was assured by the representatives of the company, at Philadelphia, that, upon payment of the next annual premium, he would be entitled to a loan of $2,556, or $1,256 more than he then had; the only difference between the parties thus being that he claimed the right to $640 more at once, before the next premium was due, and that the company did not immediately fall in with this. And the damages claimed, on the strength of these averments, being those sustained by the refusal of the company to make the additional loan, whatever might otherwise have been made out of the facts stated, the action cannot be regarded as proceeding for anything outside of that. These damages consisted in the difference between the loan which the plaintiff had obtained, and the loan which, by the terms of the policy, he was entitled to, which the company, in disregard of their agreement, refused to allow him, amounting to $640, the judgment which he recovered. And, having thus got all that he declared for, there was no error in holding him down to it.

But not to decide the case on a question of pleading, and assuming that the liability of the company for the premiums paid, based on a rescission of the policy, was open for determination, the plaintiff shows no cause of action beyond that which was allowed him. The right to rescind and recover the premiums paid was not justified by the refusal of the company to loan the additional amount named in the policy. The right to rescind is an extreme right, and it is not every breach of contract that warrants its exercise. It exists, however, where the contract is entire, and either in time or manner of performance is broken by either party from the outstart. Norrington v. Wright,

115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Bowes v. Shand, L. R. 2 App. Cases, 455; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304. But where the contract, if divisible, or even if indivisible, is made up of several distinct and similar acts, to be separately and successively performed, the right to rescind, according to some of the authorities, depends on whether the conduct of the party in default is such as evinces an intent to abandon the contract, or no longer be bound by its terms. Mersey v. Naylor, L. R. 9 App. Cases, 244; Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159; Harding v. York Knitting Mills (C. C.) 142 Fed. 228. But never does the failure to perform afford ground for rescission, unless it be such as to defeat the object of the contract, and not simply go to a subsidiary part of it, which can be fully compensated in damages. 9 Cyc. 635, 650; 24 Am. & Eng. Encyc. Law (2d Ed.) 644. As is said in Weintz v. Hafner, 78 Ill. 27:

"For partial dereliction and noncompliance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself."

Or, as is put in City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090:

"A slight or partial neglect to observe some of the terms or conditions of a contract will not justify a rescission or abandonment."

It is only where the breach goes to that which is vital that this course is open. But, if that be so, the plaintiff had no right to throw up the policy and sue for the premiums simply because the company failed to honor, offhand, the additional loan required of them. The refusal, under the circumstances, cannot be said to have evinced an intent not to be bound by or live up to the terms of the contract, if that is the criterion. Indeed, it is a question whether, rightly considered, there was a refusal at all; the plaintiff not having given time for it. And much less can it be said that, the company having broken one part of the contract, there was no assurance that they would regard the rest of it, which magnifies the breach out of all proportion to its real significance. The fact is that the agreement for a loan was merely subsidiary to the main purpose of the policy, which was to insure the plaintiff for the benefit of the party designated; the right to a progressive loan as the policy aged, being an accommodation altogether secondary and subordinate, valuable, no doubt, but not vital.

It certainly was no more important than the right, under certain conditions, to a paid-up policy; and yet it has been held, in numerous cases, that the breach of this provision does not entitle the insured to recover the premiums paid as upon a rescission. Watts v. Phœnix Mut. Life Ins. Co., 16 Blatchf. 228, Fed. Cas. No. 17,294; Phœnix Mut. Life Ins. Co. v. Baker, 85 Ill. 410; Rumbold v. Penn. Mut. Life Ins. Co., 7 Mo. App. 71; Union Central Life Ins. Co. v. McHugh, 7 Neb. 66; Insurance Co. v. Matthews, 8 Lea (Tenn.) 499. And the same ruling was made with regard to the refusal to permit a change of the beneficiary. Harris v. Scrivener (Tex. Civ. App.) 78 S. W. 705. And the failure to return a part of the premiums, as agreed in the policy. Insurance Co. v. Heidel, 8 Lea (Tenn.) 488. It is true that,

in each of these cases, the action was for damages for a breach of the contract, and not in terms for the premiums. But it was held in each, which is the significant thing, that the premiums were not a measure of the damages.

The case of N. Y. Life Ins. Co. v. Pope, 68 S. W. 851, 24 Ky. Law Rep. 485, is also in point the suit there being for a rescission and a recovery of the premiums, on the ground that there had been a refusal of a loan by the company, in violation of the policy; but it was held that the plaintiff was only entitled to damages. It is true that, in Key v. Insurance Co., 107 Iowa, 446, 78 N. W. 68, the policy holder, on the refusal of a loan, was allowed to rescind and recover the premiums. But, as an inducement to take out the policy, there had been an express agreement in that case to make a loan on certain personal property, with the policy as collateral; and this being the inducement which moved the plaintiff to insure, the refusal went directly to the consideration. The case is thus to be distinguished from the ordinary one, where, as here, the agreement for a loan is merely an incident; the opportunity afforded by it not being the moving cause for taking out the policy. And, except as so distinguished, the case does not meet with our approval.

It is urged, however, that this court, in Supreme Council v. Black, 123 Fed. 650, 59 C. C. A. 414, sustained the right to rescind and recover back the premiums where there has been a breach of the insurance contract. But the attempt there was to cut down the policy, by an amendment of the by-laws, from $5,000 to $2,000; the company deciding that this was the highest amount for which thereafter a policy should issue. This, as was said of a similar attempt in Becker v. Berlin Ben. Soc., 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624, was a repudiation, pure and simple, there being an entire abrogation of the existing policy, and the substitution of another and very different one; the amount of insurance being reduced over one-half from that on which the insured had been paying premiums. Going as this did to the root of the contract, the insured was not obliged to submit, but had the right, as it was held, to rescind and sue for what he had paid on it. It is not at all like the present case, where, if there was any breach, it was merely of a minor feature.

But, assuming that the plaintiff, for the refusal of a loan, was entitled to rescind, he did not, in our judgment, put matters in shape to do so. The written request for the loan, which was required by the policy, was not made until July 7, and was not received by the company, at the home office in New York, where the policy was in pledge for the existing loan of $1,300, until the day following; and before a reply, in the reasonable course of events, could be made to it, the plaintiff, the next morning, July 9, appeared at the branch office in Philadelphia, where he had filed his request, and peremptorily demanded his money. And, upon being advised that no reply had as yet been received, he went off and at once brought suit, charging the company with having broken the agreement. But, according to the terms of the policy, in order to lay grounds for a loan, the plaintiff had not only to make a written request, as he did, but he had also to

sign a loan agreement, pledging the policy, and obligating himself, as therein provided. He may have been dependent on the company for the form of this agreement; but, without waiting or asking for that, two days after his request was made, the present suit was instituted. The right to a loan was not like money in the bank to be demanded over the counter. Not only were there certain formalities to be observed, as just stated, but, the question of a loan having to be referred to the officers of the company in New York, the representatives in the Philadelphia office having apparently no authority over it, a reasonable time had necessarily to elapse, after the request was sent in, before a response could be expected, and until it had passed, which certainly was not the case when suit was brought, it cannot be said that the company was in default, or that the agreement had been broken.

It is true that the plaintiff began moving for a loan the latter part of May, and had been told, as we have seen, by the representatives of the company at Philadelphia, that he was not entitled to any more than he had secured until after the payment of the next premium. But the facts show that he did not rest on this. Nor is it to be treated the same as if, after due application, there had been an express denial by the company. Having procured a copy of the policy on June 29 and consulted with his counsel, it was plainly to be seen that he was entitled to $640 above what he had borrowed, and he accordingly made demand for it. But he still waited eight days, until July 7, after he had returned from his vacation; and if he had the right to put the matter off in this way, for his own convenience, he cannot blame the company for the predicament in which he found himself by reason of the time for his next premium having meantime run against him. And neither had he a right to hold the company as for a breach, two days after he made his demand, because of there being only three days left to the life of his policy.

It is urged, as bearing on the right to rescind and recover the premiums, that there was no offer by the plaintiff, either before suit or afterwards, to repay the $1,300 which he had borrowed; also, that there was no offer to adjust or make allowance for the protection which he had enjoyed during the period for which the policy had been carried. This was exacted in Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423. But the necessity for it was denied by this court in Supreme Council v. Black, 123 Fed. 650, 59 C. C. A. 414. And, not being essential to the case, we do not undertake to dispose of it. Without regard to anything that is so suggested, it is clear, for the reasons already given, that the plaintiff got all that he was entitled to in the $640 which he recovered.

The judgment is affirmed.

THE PERSIAN.

THE HESPERIDES.

(Circuit Court of Appeals, Second Circuit. August 11, 1910.)

Nos. 266, 267.

1. COLLISION (§ 80*)—NAVIGATION IN FOG—ANCHORING IN FAIRWAY.
When dense fog obscures a waterway through which there is a well-defined track for moving vessels, prudence requires vessels then moving therein to continue with extreme caution, availing of such sights and sounds as they can make out till they reach some anchorage to which they can withdraw from the regular track, leaving the thoroughfare unobstructed by their presence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 152–155; Dec. Dig. § 80.*]

2. COLLISION (§ 83*)—MOVING AND ANCHORED STEAMSHIPS—FOG.
A collision occurred at night in a dense fog off the Massachusetts coast a short distance to the north of the northern entrance to Pollock Rip Slue between the steamship Persian going northward and the steamship Hesperides, which had anchored on account of the fog. The fairway for deep-draft vessels navigating up and down this part of the coast lies for miles through dangerous shoals and has been charted and marked by the government by lightships and buoys. From the Pollock Rip Shoals Lightship, which was a half mile or more to the northward of the place of collision, the range is straight to the southward through the slue for 4½ miles to the Pollock Rip Lightship, marked at intervals of 1½ miles by Whistling Buoy No. 2 and Bell Buoy No. 1, and the preponderance of evidence showed that the Hesperides was anchored directly in this range, which vessels in a fog follow by compass between the two lightships. The Persian stopped on hearing the fog bell of the Hesperides, but on seeing a light on the starboard bow the master assumed that it was on a small vessel, starboarded the helm, and proceeded at greater speed directly toward the Hesperides, whose stern light was then seen on the port bow, but too late to avoid collision. *Held*, that the Hesperides was in fault for anchoring in the dense fog in the fairway, which was constantly used by other vessels when there was open sea to the east of her; that the Persian was also in fault for not navigating with greater caution after hearing the fog bell of the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. § 83.*]

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

Suits in admiralty by the British & South American Steam Navigation Company, Limited, as owner of the steamship Hesperides, against the steamship Persian, and by the Miners' & Merchants' Transportation Company, as owner of the steamship Persian, against the steamship Hesperides. Cross-suits for collision. Decrees in favor of the Hesperides (159 Fed. 788), and the owner of the Persian appeals. Reversed.

This cause comes here upon appeal from decrees of the District Court, Southern District of New York, holding the steamship Persian solely in fault for a collision with the steamer Hesperides, which took place in a dense fog, on the night of June 29, 1907, near the northern entrance of Pollock Rip Slue, off Monomoy Island, on the coast of

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

Massachusetts. Both vessels were damaged, and cross-libels were filed. The opinion of the district judge will be found in 159 Fed. 788.

Wheeler, Cortis & Haight and Daniel H. Hayne, for appellant.

Convers and Kirlin, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The general facts are succinctly stated in the following excerpts from the opinion of the district judge, it being premised that at Pollock Rip Lightship the course of vessels bound up or down the coast makes an abrupt turn of about 90°:

"At the southern entrance to Pollock Rip Slue is stationed the Pollock Rip Light Vessel. From this light vessel to the northward at intervals of about a mile and a half apart are stationed first Bell Buoy No. 1, the Whistling Buoy No. 2, and then the Pollock Rip Shoals Light Vessel. There are shoals on each side of the line between the Pollock Rip Light Vessel and the Bell Buoy No. 1; on the course of the Pollock Rip Shoals Lightship, there are no shoals to the eastward. All the region to the eastward is open ocean. The Hesperides that night was bound from Boston to New York. Shortly after passing Pollock Rip Shoals Light Vessel the fog became so dense that her pilot decided to anchor. * * * Two anchor lights were properly set, indicating, under rule 2, a vessel more than 150 feet long at anchor, and a fog bell was regularly sounded as required by rule 15, until the collision. There was a strong southeast wind blowing, so that the Hesperides lay heading generally towards the southeast. While so lying at anchor the fog whistle of a steamer approaching from the south was heard, and about 11:36 p. m. the steamer Persian under way came into collision with the Hesperides, hitting her near the stem with the Persian's bow and causing damage to both vessels.

"The Persian that night was bound from Philadelphia to Boston. Her witnesses state that she encountered thick fog before she reached the Pollock Rip Light Vessel. She passed near the light vessel and Bell Buoy No. 1. Her captain testifies that shortly after passing the bell buoy she was put on a course N. E. by N. ½ N. This course would take her about half a mile east of the Pollock Rip Shoals Lightship. She was proceeding carefully, stopping several times and then proceeding ahead slowly. She met and passed the steamer Whitney to the west of and before reaching the Whistling Buoy No. 2. After passing the Whitney, and while the whistling buoy was distinctly heard to the eastward of the starboard side of the Persian, a bell of a vessel was reported by the lookout. The engines were stopped. A white light was then reported on the starboard side of the Persian. The engines were immediately started and her wheel starboarded; the captain testifying that he supposed the light was on a schooner or small vessel and that he would pass the schooner on his starboard side. Immediately a white light was reported on the port bow. Perceiving that the two lights were anchor lights on a large vessel directly in front, the engines were ordered full speed astern, but almost immediately, perceiving that the Persian still forged ahead, and that a collision was inevitable, the engines were ordered full speed ahead and the wheel put hard aport. This swung the Persian around so that with her port bow she struck the Hesperides a glancing blow near the stem."

The district judge held the Persian in fault because after the lookout reported the sound of the Hesperides' bell ahead she was not navigated with sufficient caution, in that her captain immediately assumed that the first light he saw was an anchor light on a schooner or small vessel and ordered the engines ahead to pass the supposed schooner on his starboard hand. The southeast wind swung the Hesperides towards

the northwest, so that the stern anchor light was further away than the bow light. The district judge found that:

"For the captain to have assumed, on seeing one anchor light, that the vessel was a small one and to have instantly started ahead at increased speed under a starboard helm, only changing the course enough to pass a small vessel, was, in my opinion, not navigating with caution until danger of collision was over."

He did not find the Persian guilty of faults charged in the libel, viz., proceeding at too high rate of speed in fog, not keeping a proper lookout, and failing to hear the bell of the Hesperides. The evidence did not sustain any such charges. That the speed of the Persian was moderate was manifest from the circumstances that between sighting the bow and the stern anchor lights there was time enough to starboard the helm, to put the engines in motion, and to get the steamer under stronger way than she already had while drifting under stopped engines. That an earlier stroke of the bell was not heard is easily accounted for by the direction of the wind, possibly also the earlier stroke synchronized with a fog blast from the Persian's whistle.

The district judge held the Hesperides free from fault. The gap indicated by asterisks in the first quotation, supra, from his opinion contains the following:

"(After he decided to anchor) her pilot testified that he headed the steamer to the northeast and proceeded in that direction for twenty-two minutes under a slow bell and then anchored. Her exact situation, as afterwards ascertained, was about half a mile northwardly from the Whistling Buoy No. 2."

Elsewhere he finds that she was anchored at least half a mile to the eastward of the range from the Pollock Rip Light Vessel to the Pollock Rip Shoals Light Vessel; that she was not anchored on any range, or in any fairway, but in the open ocean. It will be most convenient first to consider the evidence touching the actual position of the Hesperides as she lay at anchor.

The testimony first to be considered is that given by those on board of the Hesperides. Her pilot, Quinn, testified that he passed the Pollock Rip Shoals Lightship on the starboard hand as near as it was safe to go, and laid the regular course S. by W. ¾ W. (about S. S. W. by compass) intending to pass through the slue. There was a bank of fog ahead. He could not see Monomoy Light, or the Pollock Rip Lightship, or the gas buoy, or anything. He held his course for about a mile, when he ran into fog, at that time hearing the Whistling Buoy No. 2 broad on his port bow. This buoy lies about one-half mile to the eastward of the range between the two lightships. Considering it dangerous to run any longer, he starboarded, changed direction till he got the wind on his starboard bow, passing the buoy on his starboard and running on till about a mile from it, when he anchored at a place which he marked on the chart with an A. Moss, the captain, substantially corroborated this. He it is (not the pilot) who made the statement quoted by the district judge that the steamer ran 22 minutes to the northeast under a slow bell before anchoring. He said the whistling buoy was first heard a little on the starboard bow (the pilot put it broad on the port bow), explaining that it is a most difficult

thing to place and get the bearings of a sound in a fog; that "if a dozen men would try to take the bearing of a sound in a fog it would not be alike—one would differ from another."

Helby, the first officer, testified that after passing the lightship they altered the course to N. E. about 10:28 or 10:38 p. m., the buoy then being nearly ahead or a little on the port bow according to the sound, and kept on till 11 p. m., when they anchored, after going on the new course as he estimated about three miles. Shaw, the first officer, did not come on deck till they were about to anchor, was not there when they passed the lightship, and did not know when they changed the course. All this testimony as to place of anchorage is unpersuasive, it grossly exaggerates the distance run by the Hesperides on her new course; if she kept on for 22 minutes, as the captain testified, or until she reached the point A marked by the pilot, she would have been far to the eastward of the whistling buoy, more than three-quarters of a mile from the range. The entire testimony of the unprejudiced witnesses hereafter referred to flatly contradicts any such hypothesis.

From the deck of the Hesperides we have also some testimony as to the depth of water at her anchorage. This, if clearly established, would be important, because the chart shows 6¾ fathoms on or near the range where the appellants contend she lay and about 8¼ near the mark A. The weather conditions at the time would increase these figures about a fathom. It was the practice generally on the Hesperides to find the depth of water when she came to anchor in order to give the chief an idea of the depth; that was the third officer's duty. Accordingly, Helby, the third officer, worked the sounding lead himself just after she came to anchor. The marks (bits of bunting) on the lead line were at 2, 3, 5, 7, 10, 13, 15, 17, and 20 fathoms. Between 7 and 10 fathoms there were no marks at all. One has to estimate. Helby cast the line from the upper bridge. It was dark and foggy, and he determined the location between 7 and 10 with his hand and mouth. He says:

"On account of the fog, believing I had the wet, I felt down with my mouth to the wet and took the line and judged accordingly."

He found the wet between 7 and 10, close to 7, estimated it at 7½ fathoms, and so entered it in a small memorandum book which he carried in his pocket from which to record entries in the scrap log. Dispute arose as to this sounding, and there is no entry of it in the scrap log; the witness accepting the statements of the captain and pilot. The chief officer's log gives the depth 9½ fathoms; the official log 9 fathoms. The chief officer's log was written up the afternoon succeeding the collision. Finding no sounding on the scrap log he asked the third mate, who kept it, "How many fathoms?" and he said, "7½." He testified further:

"I went and asked the captain how many fathoms of water we got, and he said, '9½.' I said, 'The (third) mate says he got only 7½.' He said, 'yes.' And the pilot said, 'There ought to be 10 here, and we got 9½ fathoms.'"

The captain's narrative is as follows:

When about to anchor, "I asked the pilot: 'How much water have you got here? Nine fathoms we ought to have.' And I sung out to the chief

officer from the bridge telling him 9 fathoms of water. He sent the third officer to take soundings (who) reported 7½. The pilot said: 'That is nonsense; we must have at least 9 fathoms.' After the collision, * * * I took the lead line and dropped it over the side and took the correct sounding myself, before the two pilots Quinn and Horton and the chief engineer, and we got 9½ fathoms of water. I took the sounding on the upper deck, the lower part of the bridge."

Horton was the Hell-Gate pilot and Quinn's partner, who came on deck just as the collision occurred. The chief engineer who testified was not questioned on this point. Quinn and Horton corroborate the captain, although Quinn places the second sounding before the collision. They estimated the depth from the distance the 10-fathom mark was above the water. Horton says the sounding was taken by the third or fourth officer. Of these conflicting soundings it may be noted that one was taken by a person in the discharge of his routine duty, without any expectation as to what depth he would get, and the location of the wet was determined, as he said, in the only way it can be done in the dark, by feeling with the hand and mouth. The other was taken after the collision by persons having a pre-conviction that it would show a certain depth, and the location of the wet was determined by an estimate of the distance a bit of bunting, viewed from above, was above the surface of the water. The fog was apparently as thick and the light as obscure at the time of the collision as it was at the time of anchoring, but the pilot said they had a lantern over the side.

There is also testimony from the deck of the Hesperides as to observations taken the morning after the collision. Because of the change of the tide (and perhaps a shift of wind) she then headed N. N. E. and got under way under a port wheel which swung her off further to the eastward. Pilot Quinn testified that "when it cleared" the next morning, he made the whistling buoy by actual bearing S. ½ W., having estimated it by sound the night before at about S. by W. ½ W.; and that the Hesperides then lay almost exactly on the line from the buoy to Pollock Rip Shoals Lightship. He testified:

"I could see we were right on the line between the two. I could see the buoys down below; the bell buoy and the gas buoy and the Pollock Rip Lightship and the Whistling Buoy, and the Pollock Rip Shoals Lightship and also the red buoy No. 2."

Had this panorama unfolded while the Hesperides was still riding at anchor, and had bearings been then noted, this evidence would be more important; but such seems not to have been the case. The pilot does not say she was at anchor when he took the bearings, and the evidence of the captain indicates she was then under way. He was asked the question whether when he got under way the morning after the collision he saw the whistling buoy. He replied:

"After we got under way in the morning it was not exactly clear, it was clear enough to get under way, and shortly after we got under way the chief officer reported the whistling buoy. We heard it before we saw it on the starboard bow, a little on the starboard bow. We were then steering south by east by compass; I think it was that. (Evidently the Hesperides had swung under the port wheel considerably to the eastward from her heading at anchor of N. N. E.) The bearing of the sound was about south

by compass, on the starboard a little. We passed it (the buoy) close on the port side. We could then see it. Within half a minute after we heard the whistle we saw the buoy in going ahead, around the ship. We passed close to it, and could distinctly see it."

Corroboration of this is found in the testimony of pilot Quinn touching the movements of the steamer Silvia, which lay overnight well to the eastward of the Pollock Shoals Lightship:

"She was coming in from the eastward. It cleared out where he was before it did with me. He came to the lightship and passed me; circled right around me to anchor. He ran into the fog and came back to the lightship, and then he turned around again, and it cleared again when he got there; and I had started my anchor up and he was coming down on that course from one lightship to the other, and I steamed right ahead and got in ahead of him—we got under way before he got down to us."

We are satisfied that the proof does not show that the location of the Hesperides while at anchor was taken by range that morning.

We do not think it necessary to examine in detail the testimony as to the course of the Persian. After passing the bell buoy, she was headed a little to the eastward of the regular course for Pollock Rip Shoals Lightship to counteract the effect of wind and tide which tended to carry her to the westward and to make a clearance for any vessel which might be encountered navigating in an opposite direction. We prefer to take the position of the Persian at the time of collision, not from her witnesses, but from the independent testimony of those on the Whitney who passed her just before collision.

Upon the disputed question as to the location of the Hesperides we are fortunate enough to have two independent groups of unprejudiced witnesses. The first of these came from the Hamburg-American Line steamer Silvia. She was bound from Boston to Baltimore. Fog set in, so she anchored for the night a mile and a half or more E. N. E. of Pollock Rip Shoals Lightship. In the morning at daylight she got under way and then saw the Hesperides at anchor. There is some dispute between her captain and second officer, and her pilot O'Brien, who is another partner of pilot Quinn. It will not be necessary to discuss their testimony in detail, because upon the argument counsel for the Hesperides submitted a fragment of chart on which he had indicated the locations testified to by different witnesses. Upon this "G" is stated to be the "anchorage of the Hesperides as given by German witnesses," and G is substantially on the range between the two lightships.

Finally we have the testimony from the steamship Whitney. Her captain, who had held a master's certificate for 19 years, and during that entire time had been engaged in coast-wise navigation in the vicinity of Boston and Pollock Rip, testified that he left Boston on June 29th bound for New York. In the vicinity of Pollock Rip Shoals Lightship they ran into a dense fog, picked up the lightship, and passed it on the starboard hand, very close, about 100 feet off. He took his departure about 11:30 or 11:35 p. m. from the lightship on their regular course S. S. W. The exact compass course to the Pollock Rip Lightship is S. by W. ¾ W. He steered a quarter point more westerly because when they go into the slue in the night they go well to the westward of the bell buoy. He said:

"S. S. W., I think, would take our ship right to the west of Pollock Rip Lightship. We wouldn't change our course at all. We go in there a hunderd times in a year and we don't vary an inch from S. S. W. unless there is a strong tide running from the westward. Then we go south by W. ¾ W. (this is by our compass); all ships' compasses are not alike. * * * By our compass we go in a thick fog a great many times in a year, and we go S. S. W. and go just as near the lightship as we can get, and it will carry us to the other lightship. We don't alter our course once in a dozen times, and I have run the Yale through there on the same courses."

When about three-fourths of a mile beyond the Pollock Rip Shoals Lightship he heard the bell of a steamer. He thought at first it was on the starboard bow, slowed down, and stopped his engines, but soon discovered it was a little on the port bow, put his wheel hard over to port, and passed her very close. He estimated the distance at 200 feet—could see her lights through the fog but not very distinctly. This vessel was pretty near the range line running between the two lightships, on the direct track of all vessels, very close to it. Before passing this anchored steamer he had heard the whistle of another steamer which he took to be the Persian, because he knew she was due about that time and could tell most generally the whistles of the different steamers he was familiar with.

When he had got one-fourth mile, possibly one-half mile, beyond the anchored vessel, he passed this steamer on his port hand very close, could see her white lights, but not the colored lights. She was going very slow and stopped for him. He thought at the time that if she kept the course between the lightships she would be likely to run into the anchored vessel.

O'Donnell, chief officer of the Whitney, was on watch in the pilot house with the captain. He testified that, dense fog having set in, they passed close to the Pollock Rip Shoals Lightship (on their starboard side) so as to get a departure to go down to the other lightship; he did not remember whether the course was S. S. W. or S. by W. ¾ W. Some little distance below, having kept a straight course meanwhile, he heard the bell of an anchored vessel, very nearly on the port bow. The wheel was put hard aport to clear her, and almost immediately after hearing the bell he saw her lights. They passed her on their port hand not over 200 feet away. After passing their course was S. by W. ¾ W., and after going as he thought not over ½ mile they passed the Persian on their port side. He knew her whistle, having served on her as second mate. He passed her near enough to see her lights. She stopped her engines. He heard the answer signal in her engine room. He said:

"The anchored vessel was on the range line, in my way of thinking."

We see no reason to discredit this very specific testimony. The witnesses were disinterested. They had committed no fault of navigation and were charged with none. They had been involved in no catastrophe. They were experienced navigators familiar with the locality. There is no reason to doubt that they made departure from a point close to the upper lightship, nor that they held a course which would bring them to the lower lightship as it had hundreds of times before. She certainly passed the Persian, for the navigators of that vessel

corroborate her officers as to the details of such passing. Nor is there any doubt that the anchored vessel, which the Whitney passed, was the Hesperides. There is no suggestion of any other vessel in the vicinity except the Persian. Moreover, full corroboration of the story of the Whitney's officers comes from the Hesperides. Pilot Quinn says that a steamer which subsequently exchanged whistles with the Persian passed down to the westward of him. Cornwall, chief engineer, says a steamer passed, which he knew was a Metropolitan boat because he could see her, although he couldn't tell which one she was. The captain says that the steamer which passed while he was lying at anchor had to alter her course to pass. Helby, third officer, says a vessel passed them at anchor, but he did not take notice of the heading. Clucas, who attended to the anchor lights, says that while they were hoisting them a steamer went by under their stern, blowing fog whistles. The chief officer says a steamer passed "up under the stern," and he could just see the loom of the lights. It will be remembered that the Hesperides lay at anchor with 60 fathoms of cable, head to the wind, pointing towards the S. E.

We are satisfied that the Whitney held a range course, and that, in the short time which elapsed after leaving the lightship, she did not get off her course to the eastward with the wind and the set of the tide tending to carry her to the westward. We conclude therefore that the Hesperides was anchored substantially on the range between the two lightships on the direct track of vessels navigating up and down the coast in the locality.

Her counsel, however, contends that even if she rode at anchor on the range she committed no fault in so doing, since at this upper entrance to the slue there is open ocean to the eastward; that decisions holding vessels in fault for anchoring in a thoroughfare of a narrow river or channel or in a crowded harbor do not apply. One of his witnesses refers in illustration to a range between Fire Island and Sandy Hook, 180 miles; but we have no such case here. The fairway for deep-draft vessels navigating up and down this part of the coast lies for miles through dangerous shoals. It is a tortuous one with abrupt turns and short reaches, and the government has expended a great deal of money in charting, buoying, and lighting it, so that vessels proceeding about their lawful business may travel it in safety provided they give proper attention to the aids to navigation thus provided. Referring to the immediate locality, a glance at the Eldridge chart put in evidence shows that from Handkerchief Lightship to Shovelfull Lightship the course is N. E. by E. for 4⅞ miles; from Shovelfull to Pollock Rip Lightship the course is E. by S. ⅜ S. for 3½ miles; from Pollock Rip Lightship to Pollock Rip Shoals Lightship the course is N. by E. ¾ E. for 4½ miles. By daylight, or when the night is good for seeing lights, a vessel may take its departure from one lightship and head for the next one; but when all lights are obscured her navigator can proceed with safety only by following the compass course, which will bring him to the next point where he can be sure of his location. To assist him in picking his way, sounds as well as lights are provided. At Handkerchief Lightship there is a bell and another bell at Shovelfull, at Pollock Rip Lightship a steam

whistle, and at Pollock Rip Shoals Lightship a steam chime whistle. Along the way are flash buoys, red and white, bell buoys and whistle buoys, all intended to indicate the thoroughfare, which government hydrographers have sounded and charted to accommodate vessels, which have occasion to pass from points above to points below this dangerous part of the coast. The path of safety here is the indicated path. We should be inclined to think it imprudent navigation for a pilot, coming out of the north mouth of the slue bound for Pollock Rip Shoals Lightship, to run off in dense fog to the eastward into the open ocean, expecting to guess rightly, when to stop and turn westward again to make his immediate destination. Moreover, in that very open water to the eastward, withdrawn from the range, he might expect to encounter the vessels, which had elected to anchor while the fog lasted and to do so had betaken themselves to a place out of the direct track of vessels coming into or going out of the slue. We are of the opinion therefore that in anchoring, in this dense fog, substantially on the range, and in the direct track of vessels, instead of hauling off to the eastward so as to leave the thoroughfare unobstructed, the Hesperides committed a fault of navigation which directly contributed to bring about the collision. Bits of testimony found here and there in the record indicate that navigators appreciate the importance of leaving the fairway on ranges unobstructed, where navigation is as confined as it is in this locality. Helby, third officer of the Hesperides, says that pilot Quinn when he changed course to the N. E. told him that he did so because the weather was very thick, they were right in the very way of traffic, and he deemed it prudent to anchor. The pilot himself, who insists that the Hesperides was anchored a half mile further to the eastward than we have found her, says that he hauled out there to get off the regular line if anything was coming, and that he would not consider it wise to anchor his boat in a fog as thick as it was that night directly on the range line between the two lightships. The Silvia anchored a mile and a half to the E. N. E. of the upper lightship. Her pilot (Quinn's partner), after much fencing on cross-examination, admitted that a prudent man would anchor where he did rather than down on the line. The captain and chief officer of the Whitney said that the range was not a safe place to anchor.

We have not overlooked the fact that in The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123, the Court of Appeals of the First Circuit held the yacht Alva free from fault when at anchor in a fog in Pollock Rip Slue. In that case the damages sustained by the yacht were so large relatively to the stipulated value of the colliding vessel that the court thought it unnecessary to examine the question; if she were in fault it would not change the result. In consequence the Court of Appeals merely affirmed the District Court on this branch of the case, and the opinion contains no statement of the special circumstances which induced the Alva's acquittal from all charges of fault. Since that decision this court has twice indicated that when dense fog obscures a waterway through which there is a well-defined track for moving vessels prudence requires vessels then moving therein to continue with extreme caution, availing of such sights and sounds as they can make out till they reach some anchorage to which they can withdraw from the regular track, leaving the thoroughfare unobstructed by their pres-

ence. La Bourgogne, 86 Fed. 475, 30 C. C. A. 203; City of Lowell, 152 Fed. 593, 81 C. C. A. 583. Other authorities which may be consulted are The Benjamin A. Van Brunt, 98 Fed. 131, 38 C. C. A. 668; The Patience (D. C.) 167 Fed. 855; The Passaic (D. C.) 76 Fed. 460; The Milligan (D. C.) 12 Fed. 338; The James D. Leary (D. C.) 110 Fed. 685.

Since the majority of the court concur with the district judge in finding the Persian also in fault, it is unnecessary for the writer to indicate the reasons which induce him to reach a different conclusion.

The decrees are reversed, with half costs of this appeal to the Persian, and cause remanded, with instructions to decree in conformity with the views expressed in this opinion.

BANKERS' TRUST CO. OF NEW YORK v. T. A. GILLESPIE CO. OF NEW JERSEY.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1910.)

No. 950.

1. MECHANICS' LIENS (§ 173*) — TIME OF ATTACHING — RELATION BACK — NORTH CAROLINA STATUTE.

Under the mechanic's lien statute of North Carolina (Revisal 1905, §§ 2016, 2028), which gives a lien on property for all debts contracted for work done on the same or material furnished, and requires a detailed statement of the claim to be filed in the office of the superior court clerk of the county within 12 months after the completion of the labor or the final furnishing of the materials, as construed by the Supreme Court of the state, where the claim is filed within the time and in the manner prescribed, the lien relates back to the time of the beginning of the work or furnishing of the materials, and is effective against any subsequent incumbrancers or purchasers.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 304; Dec. Dig. § 173.*]

2. PAYMENT (§ 18*)—REQUISITES—ACCEPTANCE OF NOTES BY THIRD PERSON.

The acceptance by a contractor for work of notes of a third party for sums which have become due under his contract do not operate as a payment of the debt in the absence of an agreement to that effect, either express or to be inferred plainly from the circumstances and conduct of the parties.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 78–85; Dec. Dig. § 18.*]

3. MECHANICS' LIENS (§ 239*)—PAYMENTS.

A corporation engaged in the construction of a large power plant executed a mortgage to a trustee, and placed its bonds secured thereby in the hands of the trustee for sale under an agreement that the proceeds should be paid out by the trustee only on vouchers showing that a like amount had been expended for the benefit of the corporation. At times when the corporation was without funds to meet payments due the contractor for the work its president and his partner gave their notes for the amount which the contractor indorsed and discounted. On one occasion the president of the corporation induced the treasurer of the contractor by misrepresentation to include in a receipt for a payment $100,000, for which such notes had been taken, and the president afterward by the use of such receipt as a voucher drew a like amount from the trustee from the funds of the corporation. The notes covered by such receipt

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

were not paid, and were taken up by the contractor. The corporation became insolvent owing a balance to the contractor for which it obtained a decree establishing a mechanic's lien, which took precedence of the mortgage in a suit to which the mortgage trustee was a party. The president of the corporation owned $100,000 of its bonds which were held by the contractor as collateral to his notes, and which it surrendered to the court on taking decree for a lien. *Held* that, under the circumstances, the other bondholders were not entitled to require the contractor to credit the $100,000, so erroneously receipted for on its claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 239.*]

4. CONTRACTS (§ 232*)—BUILDING CONTRACT—CONSTRUCTION.

A contract for the construction of a power plant provided that the owner should pay the actual cost of labor and material, and pay the contractor a commission of 20 per cent. thereon, but, if such cost should exceed $1,500,000, commissions should only be paid on that amount. The work was to be done in accordance with specifications which were made part of the contract, but it further provided that the owner might make any changes in the quantity of work or materials deemed desirable, and that, if the cost should thereby be increased beyond the maximum fixed, the contractor should be entitled to commissions on such increase. The work was greatly enlarged by the owner's engineer by its orders, and the engineer included the additional work in his monthly statements on which the contractor was allowed and paid commissions as the work progressed. The cost of the work included in the original specifications was less than the maximum fixed. *Held* that, on the insolvency of the owner, its mortgagee was not entitled to object to the allowance to the contractor of commissions on the entire cost.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 232.*]

5. MECHANICS' LIENS (§ 239*)—APPLICATION OF PAYMENTS BY CREDITOR—SECURED AND UNSECURED DEBTS.

Where a contractor furnished labor and materials for which it was entitled to a mechanic's lien, and other items for which it was not entitled to a lien, and on full statements made by the owner's engineer, including both classes of work, it made payments generally, the contractor was entitled to apply such payments to the nonlienable items.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 239.*]

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

Ancillary bill filed by the T. A. Gillespie Company of New Jersey in a creditors' suit against the Whitney Company and others. Decree for the Gillespie Company, from which the Bankers' Trust Company of New York, trustee, appeals. Affirmed.

On the 29th of December, 1904, a contract was entered into between the T. A. Gillespie Company, a New Jersey corporation, and the Whitney Company, a corporation under the laws of North Carolina, for the construction of a canal, dam, and structures on the Yadkin river at or near Hall's Mill Ferry, in the counties of Stanly and Montgomery, in the latter state. The substance of the contract was that the Gillespie Company was to furnish all materials, and to construct and complete the said canal, dam, together with the bulkhead, spillways, wasteways, culverts, abutments, and other structures. The purpose of the work was to establish a plant for the generation and distribution of electric power. The Whitney Company agreed to pay the actual cost of the work to the contractor, including all expenditures by the contractor for materials, labor, supplies, explosives, maintenance of tools, plant, appliances, traveling expenses of foreman and laborers, and all of the expenditures directly connected with the construction of the said work, and also the actual cost of the work referred to in the contract as unclassified work, and a sum

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

equal to 20 per cent. of the cost to the contractor of the work classified in the contract, and a sum equal to 10 per cent. of the cost of the work included in the contract as unclassified work. In order that the amount of compensation to the contractor, and the terms and conditions of payment may be more fully understood, the following is copied from the contract: "The compensation of the contractor shall also include, and the company agrees to pay to the contractor the sum equal to twenty (20%) per cent. of the cost of the work to the contractor, as determined in the manner hereinbefore provided, together with twenty (20%) on the combined royalty and rental of seventy-five cents to be paid by the company to the Rowan Granite Company for each cubic yard of masonry constructed of its stone, and 20% on the cost of the granite that has been delivered at Hall's Mill Ferry by the company, provided, however, that no percentage shall be paid to the contractor on the amount of railroad freight charges for delivering stone at Hall's Mill Ferry, and provided further that the contractor's compensation for 'Unclassified Work' shall include a sum equal to 10% of the cost of said work to contractor. The company agrees to include in the contractor's compensation, and to pay the contractor twenty per cent. (20%) on $1,200,000, if the sum of the cost of the work to the contractor and royalty and rental, on which the contractor is entitled to receive 20%, should amount to less than $1,200,000, but, in the event of the company's taking possession of, and constructing any part of said canal, dam, and other structures, under the terms of this agreement, the contractor's compensation shall include 20% on the cost of only the work actually constructed by the contractor. The contractor agrees that if the sum of the cost of the work to the contractor, and royalty and rental, on which the contractor is entitled to receive 20%, shall amount to more than $1,500,000, the contractor's compensation shall include twenty (20%) per cent., on only one million five hundred thousand ($1,500,000) dollars. The contractor agrees to permit the company's engineer or other person designated by the company to examine the contractor's accounts and vouchers relating to the expenditures made in connection with work included in this agreement. On or before the fifth day of each month, the company's engineer shall prepare a correct statement showing the amount of money earned by the contractor during the preceding month, under the terms of this agreement, and the company agrees to pay the contractor, on or before the tenth day of each month, the total sum of money earned during the preceding month, as correctly shown by such statements, provided, however, that all the money earned by the contractor in excess of $50 M. before the first day of May, 1905, shall not become due until the fifteenth day of May, 1905."

The Gillespie Company commenced to work and furnish materials under the contract about the 1st of January, 1905, and continued in the performance of the same, and the construction of the work contemplated by furnishing labor and materials to February 14, 1908, a few days after receivers were appointed for the Whitney Company. On the 3d of February, 1908, a bill was filed by certain of the creditors of the Whitney Company in the Circuit Court of the United States for the Western District of North Carolina, and upon due proceedings had John S. Henderson was on that day appointed receiver of the property, estate, and effects of the said Whitney Company, and on the 4th of April following Charles W. Smith was, by the said court, appointed co-receiver with the said Henderson, both of whom qualified, and are the acting receivers of the said company. On the 28th of March, 1908, the T. A. Gillespie Company filed in the offices of the clerks of the superior courts of the counties of Montgomery and Stanly, and had therein recorded, a notice of lien upon the property of the Whitney Company, which said notice was thereafter amended by permission of the state courts, and of the Circuit Court of the United States, and was recorded as required by the North Carolina statute as a lien upon the property of the Whitney Company for a balance due upon the labor performed and materials furnished under the contract for the sum of $298,680.53. The mortgage in which the appellant, the Bankers' Trust Company, is trustee, was executed by the Whitney Company on the property upon which the lien is claimed by appellee to secure the payment of certain "first mortgage bonds." The facts in regard to said mortgage, as found by the master, are as follows:

On April 3 and 4, 1905, the Whitney Company recorded in Stanly and Mont-

gomery counties, N. C., a deed of trust to the Bankers' Trust Company of New York to secure the issue of "first mortgage bonds" to the amount of $5,000,000. These bonds were all issued and certified by the trustee and delivered to the Whitney Company. Subsequently the Whitney Company deposited with the Bankers' Trust Company $3,000,000 of these bonds under the terms of a resolution passed by the board of directors of the Whitney Company, October 14, 1904. This resolution provided for the delivery of these bonds by the Trust Company on the receipts of cash for the par value and interest, and that the funds so obtained should be paid out by the Trust Company on vouchers signed by the officers of the Whitney Company stating that the amount of money called for by the voucher had been expended in the interest of the company, and that the funds called for by voucher were required to reimburse the party who had made the advance. The net result of the transaction was the withdrawal of bonds for the amount of money already advanced. The payment of money for the bonds, withdrawing the bonds, and withdrawal of the funds took place simultaneously in most cases. Occasionally the money was left for a short time on deposit. Receipts from the Gillespie Company for money received were often used as a basis for these vouchers. They were not a necessary basis. The contractor was not a party to this transaction, but was aware of the use of the receipts by him. By this method a considerable part of the funds paid to the contractor during the progress of the work was raised. It appears, further, that the Whitney Company was without credit (in fact, shortly after the receivers were appointed, the company was adjudged bankrupt) and large amounts of money to continue the work were secured upon notes given by Whitney & Stephenson, a firm of brokers in Pittsburg, Pa., in which George I. Whitney was a partner. These notes were generally given by the said firm payable to George I. Whitney, and were endorsed by him, and by T. A. Gillespie, or by the T. A. Gillespie Company, and discounted for the purpose, as stated, of raising money to carry on the work pending the sale of the bonds. Whitney & Stephenson failed on the 7th of December, 1907, at which time there were of these notes outstanding and unpaid $251,500, which have since been assumed or paid by the T. A. Gillespie Company, the contractor. In the suit pending as heretofore stated brought by the creditors of the Whitney Company, to which the Bankers' Trust Company is a party, the court on the 8th of July, 1908, granted to the T. A. Gillespie Company leave to file in the said cause an ancillary bill for the purpose of asserting the right of the said Gillespie Company to a prior lien upon the property of the Whitney Company for the work done, and the materials furnished in the construction of the canal, dam, etc., which said prior lien was claimed by virtue of the North Carolina statute for the amount hereinbefore stated.

Upon the filing of the ancillary bill and the answer of the receivers and the Bankers' Trust Company, in which issues were raised with respect to the claim and priority of the Gillespie Company, the matter was referred to A. H. Price, Esq., as examiner to hear evidence, to take proofs, and report to the court, subject to such objections as the parties might make thereto, and thereafter, by consent of the parties, it was decreed by the court that the said Price should act as master in the case, and make his report to the court of his findings of fact and conclusions of law, and the form of decree thereon, with the right to except thereto, or appeal therefrom. Upon the first order appointing him examiner the said Price took the testimony, and upon the second order appointing him master he made his report, accompanied by his findings of fact and conclusions of law, and also his rulings upon certain exceptions which were filed by the parties to the report. The said master also made a supplemental report containing some amendments as to the findings of fact, etc., which was also excepted to by the Bankers' Trust Company and by the receivers. Upon the hearing by the Circuit Court upon the said reports and the exceptions, the exceptions were, by the court, overruled, and the report of the master ascertaining and declaring that the T. A. Gillespie Company was entitled to a prior lien under the North Carolina statute upon the property of the Whitney Company to the amount of $298,680.53 was confirmed by decree.

There are many details in the contract respecting the character of the work to be performed, the limit in which it is to be completed, the method of in-

spection, etc., which do not pertain to the present controversy, but it is deemed proper to reproduce the following quotations from the contract as relating to the several questions to be considered: "The contractor agrees that the company shall have the right to make any changes that may appear to the company to be desirable in the location, form or length of said canal, masonry, structures and auxiliaries, and to make additions or deductions from the quantities of labor and materials specified, or shown on the drawings, before or after the commencement of construction without violating this agreement, and the company agrees that if the cost of the work should be increased by changes or additions, in that event, the hereinafter specified maximum sum on which the contractor is entitled to receive twenty (20) per cent. shall be increased to the extent of such increase in cost. * * * The parties hereto agree that the company's engineer shall act as arbitrator in the settlement of every question, doubt and dispute relating to the construction and completion of said canal, dam, bulkhead, spillways and other structures, and the work of quarrying and preparing the granite, and that his determination and decisions shall be accepted as final and binding by both parties. * * * The contractor agrees to furnish all materials and to construct and complete said canal, dam, bulkhead, spillways, wasteways, culverts, abutments, and other structures, in strict conformity with the terms of this agreement and the requirements of the specifications, and in accordance with the drawing enumerated below. * * * The company and contractor agree that the specifications attached hereto, and all plans and drawings described or referred to herein are essential parts of this agreement."

On the testimony adduced the master found the following to be the true status of the account between the Whitney Company and the contractor:.

"Sixth. That the T. A. Gillespie Company, in the performance of said contract, expended the amounts as shown by the following account, which is a synopsis or summary of the pay rolls and vouchers and accounts attached to the lien filed in this case, viz.:

	Debit.		
Quarry pay roll	$ 286,528 19		
Dam pay roll	1,170,250 95		
Material at quarry	86,230 50		
Material at dam	940,880 87		
Freight	39,578 96		
	$2,523,469 47		
Less credits deducted by engineer from the various monthly estimates	80,339 10		
	$2,443,130 37		
Contractor's percentage	478,084 74		
Total	$2,921,215 11		
Cash paid by the T. A. Gillespie Company for interest and discount on notes of Whitney & Stephenson	8,016 77		
Interest on overdue balances throughout the period of the contract	7,125 38		
		$2,936,357 26	
—and received payment therefor as follows:			
	Credit.		
Cash received	$2,361,258 69		
Credits allowed, including interest	5,189 89		
Bonds taken at par in place of cash with accrued interest	94,420 50		
Cash paid by Whitney & Stephenson on notes	176,807 65		
		2,637,676 73	
Leaving a balance, which is the amount for which a lien is claimed, with interest thereon from February 15th, 1908, of			$298,680 53

9. The lien claimed by the T. A. Gillespie Company, the contractor, is by virtue of the following North Carolina statute: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. This section shall apply to the property of married women, etc." The further provision of the statute is that a claim of the character of the one in controversy specifying in detail the materials furnished, or the labor performed, and the time thereof, shall be filed in the office of the superior court clerk in the county where the labor has been performed, or the materials furnished, at any time within twelve months after completion of the labor, or the final furnishing of the materials. It is the fact that the claim in this case was filed in the manner, and within the time prescribed by the statute.

The master found as a fact that there was due the T. A. Gillespie Company, the contractor, from the Whitney Company, under the contract, a balance of $298,680.53, with interest thereon from the 15th of February, 1908, and held as a conclusion of law that the said claim was a prior lien upon the property of the Whitney Company. Upon the coming in of the report of the master, the same was heard by the Circuit Court upon exceptions thereto filed by the receivers and the Bankers' Trust Company. The exceptions were overruled, and a decree entered confirming the report of the master, and from that decree the Bankers' Trust Company appealed to this court. (The receivers did not appeal.)

W. A. Way, Thomas Patterson, Thomas J. Jerome, Charles A. Moore, and Burton Craige (Moore & Rollins, White & Case, and Patterson, Sterrett & Acheson, on the brief), for appellant.

Edwin W. Smith and William P. Bynum, Jr. (L. H. Clement, Walter Murphy, Reed, Smith, Shaw & Beal, and Cravath, Henderson & De-Gersdorf, on the brief), for appellee.

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

BOYD, District Judge (after stating the facts as above). As will be seen, the work contemplated by the contract between the Whitney Company and the T. A. Gillespie Company, the contractor and present appellee, was the erection of a plant for the generation of electric power on a large scale, and its distribution over a wide scope of territory. The project may be said to have been a gigantic one, and it required a great deal of labor, immense quantities of materials, supplies, and appliances, and involved the expenditure of a large sum of money. We have given a general outline of the principal facts in the controversy, but in the course of the discussion of the points involved, and in support of our conclusions with reference thereto, we will call attention to other facts found in the record.

The priority of the lien of the mortgage over that claimed by the contractor upon the property of the Whitney Company is one of the defenses set up in appellant's answer to the appellee's bill. As we gather from the record, this proposition was insisted upon by appellant's counsel before the Circuit Court; but it is not urged here, either in their brief or oral argument. However, as the question was presented below, and is discussed in the brief of the appellee, we take occasion before passing to the contested points in the case to refer to the North Carolina authorities, and other decisions which we think

settle the principle. The T. A. Gillespie Company, the contractor, commenced the work and the furnishing of materials under the contract about the 1st of January, 1905, and stopped, as stated, on the 14th of February, 1908, shortly after the property of the Whitney Company was placed in the hands of receivers. The mortgage to the Bankers' Trust Company was recorded on the 3d and 4th of April, 1905.

The theory advanced was that the lien provided in North Carolina for labor and materials did not attach to the property until notice of lien was filed under the provisions of the statute. The Supreme Court of North Carolina in construing the acts of the Legislature of that state pertaining to the question has held to the contrary. There are several decisions of that court that we might cite, but a leading case which covers the entire principle is that of Burr & Bailey v. Maultsby et al., 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517, in which it is held:

"Upon the filing of the notice within the time and in the manner prescribed by the statute, the lien given mechanics and laborers attaches to the property upon which the labor or materials have been bestowed and has relation back to the time of the beginning of the work or furnishing the materials; and is effectual, not only against all other liens or encumbrances which attached subsequently, but against purchasers for value, and without notice."

To the same effect are the decisions in Chadbourn et al. v. Williams and the Mechanics' B. & L. Association, 71 N. C. 444, and Lookout Lumber Company v. Mansion Hotel et al., 109 N. C. 658, 14 S. E. 35. The question has also been before this court in the case of Mott v. Wissler Mining Co., 135 Fed. 697, 68 C. C. A. 335, in which was involved the question as to when the lien for supplies under the Virginia statute attached. In that case it is held that the lien for supplies attaches when the same are furnished, and not at the time the notice or claim for the lien is filed in the court. See, also, In re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871.

It being thus established that, if the appellee is entitled to a lien for any amount whatever the same may be, it has precedence over the lien of the mortgage executed to secure the payment of the bonds, we come now to consider the propositions specially relied upon by the appellant. These will be taken up severally, but, before proceeding to their discussion, we think it well to state that they are all of a legal character based upon facts admitted, or found by the master, for the appellant in the concluding paragraph of the brief filed by counsel uses this language:

"If we were before this court complaining of findings of fact made by the master and confirmed by the court below, we fully recognize the justice of the rule that concedes the greatest weight to their conclusions, but, the facts not being in dispute and our propositions being legal conclusions from these facts, we submit that we were entitled from the hands of the master and the court below to a review of our propositions and a reason as to why they were unsound."

There are many assignments of error in the record, but following the argument, both oral and by brief in the case, the disputed questions presented for our consideration we conceive to be as follows:

First. Whether the acceptance of certain notes by the contractor,

executed by Whitney & Stephenson, and indorsed by George I. Whitney and T. A. Gillespie, constitutes a payment pro tanto upon the appellee's claim.

Second. Whether the Whitney Company should be credited with an item of $100,000 included in a receipt given August 3, 1906, by Johnson, treasurer of the Gillespie Company, for the sum of $347,108.40, the said item having been based upon three Whitney & Stephenson notes aggregating that amount, given as above stated, and for which, when presented to the Bankers' Trust Company by George I. Whitney, he withdrew $100,000 of the trust fund.

Third. Whether certain work done and materials furnished in excavating for a foundation, and for the construction of the canal dam, claimed as extra work, over and above that contemplated by the original specifications under the contract, should be considered in estimating the 20 per cent. to be paid to the contractor.

Fourth. Whether certain expenditures made by the contractor, certain materials furnished, and work done in the course of the performance of the contract are such as are lienable under the North Carolina statute; and, if not lienable, can such expenditures, materials, and work be legally included as a part of appellee's claim for lien?

The contention of the appellant is that whatever amount was due to the Gillespie Company has been paid, and this proposition is based upon the notes given by Whitney & Stephenson, and afterwards indorsed by George I. Whitney and T. A. Gillespie, or by the Gillespie Company, and discounted. It will be seen by an examination of the facts that these notes were executed, went into the hands of the Gillespie Company, and were negotiated after the amounts they were intended to cover had become due to the said company for work done and materials furnished under the contract; in other words, the notes were not given nor accepted at the time the debt was contracted, but were delivered to the company thereafter. They were notes of Whitney & Stephenson, and not of the Whitney Company, the debtor. The master finds that there was no agreement at the time the notes were accepted that they were to be taken in payment of the debt. There was no testimony offered relative to the making and acceptance of the notes in question, aside from the transactions themselves, and the appellant relies solely upon the character of the transactions, and the circumstances attending them to support the position that they constituted payment. We think the doctrine in respect to such transactions is well settled. In Delafield v. Construction Co., 118 N. C. 71 (marginal page 105), 24 S. E. 10, it is held that:

"Where a note or acceptance is given on a precedent debt, the presumption is that it was not taken by the creditor in payment of the debt, and the onus is on the debtor to show the contrary; otherwise, when the note or acceptance is taken contemporaneously with the contracting of the debt."

In the opinion in the case Chief Justice Faircloth quotes from Noel v. Murray, 13 N. Y. 167, as follows:

"Where the note is received on a precedent debt the presumption is that it was not taken as a payment, and the onus is upon the debtor to show that it was taken as a payment; but where it is received contemporaneously with

the contracting of the debt the presumption is that it was taken in payment, and the burden of proving the contrary rests on the creditor."

It is true, as insisted by appellant, that, independent of an actual agreement, the conduct of parties may determine that a note of a third party has been taken as payment by a creditor. This proposition is in thorough accord with the opinion of Chief Justice Ruffin in the case of Gordon v. Price, 32 N. C. 385, cited in appellant's brief, wherein it is said:

"The note or bill of a third party taken by a creditor may, under the circumstances, be satisfaction absolutely; that is, when so intended."

But the opinion in this case goes further to say:

"But at the same time the current of authorities in case of a pre-existing debt is the other way, establishes that the discharge of such debt is not presumed from the creditor accepting a note or bill of another merely, but there must be an agreement to that effect, either express or to be inferred plainly from the circumstances and conduct of the parties."

The execution, indorsement, and negotiation of the Whitney & Stephenson notes were not accompanied by any unusual circumstances. The testimony, we think, fully bears out the conclusion that the giving of these notes, and their negotiation through the contractor was only a method, as before stated, adopted to raise money for the Whitney Company pending the sale of the bonds, and, in our view, the fact that the contractor was under the law of North Carolina entitled to a lien upon the property as security for the debt strengthens the position that the notes were not taken in payment because such action on the part of the contractor would waive the right to the lien, and the acceptance of unsecured promissory notes instead.

The contractor was entitled, when the work was done, or materials furnished under the contract, to have the cash from the Whitney Company in payment, and it would be applying a harsh rule to hold that, because the contractor consented to and aided in an arrangement which enabled the Whitney Company to procure funds to supply emergencies, such arrangement had the effect to discharge the debt, especially in view of the fact that $251,500 of the notes, which were the basis of the arrangement, were never paid by the makers nor by the Whitney Company.

Returning to the authorities upon the point we are discussing, it is laid down in 3 Randolph on Commercial Paper, § 1534, that:

"If the debtor gives the note of another person in settlement it will still be no payment unless it is so agreed."

"And by the general commercial law, as well of England as the United States, a bill of exchange drawn, or a promissory note made by the debtor does not discharge the preceding debt for which it is given, unless such be the agreement of the parties." 2 Daniel on Negotiable Instruments, p. 288.

And the same author goes on to say that it was said in the time of Lord Holt:

"A bill shall never go in discharge of a preceding debt, except it be a part of the contract that it shall be so."

This doctrine is sustained in Peter, Executor, v. Beverly et al., 35 U. S. 532, 9 L. Ed. 522, and in Lyman et al. v. Bank of United States, 53 U. S. 225, 13 L. Ed. 965.

In the course of the transactions, and on August 3, 1906, the T. A. Gillespie Company, by R. A. Johnson, its treasurer, signed a voucher in which it was acknowledged that the said company had received from Whitney & Stephenson on account of their contract with the Whitney Company the sum of $347,108.40. This voucher is composed of a number of items, and among others one of $100,000. The facts show that the basis of this $100,000 was notes of Whitney & Stephenson given and negotiated as set out heretofore aggregating that amount. This receipt was used by George I. Whitney to withdraw from the Bankers' Trust Company funds arising from the bonds to the amount thereof, which included the item of $100,000. It is insisted by the appellant that this last-mentioned amount should be credited upon the claim of the appellee.

The master in his first report found as a fact that the receipt, so far as the $100,000 item is concerned, was obtained from Robert A. Johnson, treasurer of the T. A. Gillespie Company, by a false representation made to him by George I. Whitney, president of the Whitney Company, to the effect that he had an arrangement with T. A. Gillespie by which the receipt was to be given for the notes as for cash, and included in the voucher referred to. Upon an exception by the appellant the master eliminated that finding of fact, and gave the testimony in regard thereto, which is as follows.

Robert A. Johnson testified:

"Mr. Whitney asked me to include these two payments of $50,000 each in the receipt of August 3d; that he had made a special arrangement with Mr. Gillespie; and I included these payments in the receipt."

T. A. Gillespie testified that:

"There was absolutely no agreement with Whitney, and, as far as that receipt is concerned, I never knew anything about it until Mr. Parmalee called my attention to it in the preparation of the Whitney matter. There never was any authority from me to make any receipt."

This testimony is nowhere contradicted, and indeed it is not denied by appellant that the basis of the $100,000 included in the receipt was notes of Whitney & Stephenson to that amount, indorsed by George I. Whitney and T. A. Gillespie, and upon which Whitney received the money. If the testimony of these two witnesses was to be believed, and, so far as we can see there is nothing to discredit it, the master's finding in the outset that Whitney obtained the receipt for the $100,000 as a cash payment by misrepresentation, and without the knowledge of the Gillespie Company was warranted, except in so far as the said company is affected in the transaction by the knowledge of its treasurer.

If there was nothing further involved, following the line heretofore pursued in regard to the Whitney & Stephenson notes, we would readily determine that the Whitney Company was not entitled to a credit for the $100,000 as a cash payment. It appears, however, that a $100,000 of the bonds of the Whitney Company representative of this

$100,000 are outstanding, and inquiry naturally suggests itself as to how far this fact may affect the rights and interests of the other bondholders, for it must be admitted that the withdrawal of this amount from the hands of the trustee diminished the fund arising from the bonds to that extent. If, therefore, the $100,000 of bonds were in the hands of an innocent purchaser for value without notice, the question presented would be an important, if not a serious, one; but such is not the case, for, as appears from the record, there is a $100,000 of the bonds belonging to George I. Whitney, or at least, which he had in his possession, now in the hands of the T. A. Gillespie Company, having been placed there by the said Whitney as collateral security for the Whitney & Stephenson notes given and negotiated as has been hereinbefore set forth.

In this situation, the appellant and the bona fide bondholders appear to be amply protected against loss on account of these bonds. On the hearing Gillespie placed the bonds in his hands at the disposal of the court, and, in case the lien for the claim against the Whitney Company was established, admitted the jurisdiction of the court to make such decree respecting them as it deemed proper. The property of the Whitney Company is full security for the lien claimed by the appellee, and, these bonds being held only as collateral, the interest of the Gillespie Company in them ceases when the security upon which it relies for the payment of its claim is established. However, the question of the disposition of these bonds is not now before us, but we feel warranted in saying that at the proper time it will be within the province of the Circuit Court, sitting in equity, to pass upon the right of George I. Whitney under the circumstances to participate with the other bondholders in the distribution of the proceeds belonging to the mortgage fund, and to enter such decree as the merits of the case may require. That, however, is a matter confined to the bondholders in which the appellee has no particular interest, our determination going only to the extent that the $100,000 receipted for on August 3, 1906, should not be admitted as a credit upon the appellee's claim.

In the account of the appellee for the 20 per cent. commission, under the provisions of the contract, is included the sum of $115,128. This item is founded on an alleged increase in the proportions of the work, and the actual cost thereof, over and above the $1,500,000, which was at first estimated as the maximum. The appellant contests this claim on the ground that it exceeds the limit of the 20 per cent. commissions allowable under the terms of the contract. The master finds as a fact that the actual cost of originally estimated quantities of work on the dam and canal, plus the cost of foundations and masonry added to the dam, was $2,075,640. The result of this finding is that there was expended in the course of the work the sum of $575,640 beyond what was contemplated at the time of the making of the contract. It is on the latter sum that the additional commission is based. As we gather from the record the surveys preparatory to the work on the canal, dam, structures, etc., were made in July, 1902, and upon these surveys, the specifications, which are made a part of the contract, were drafted, and estimates as to the cost of the work formulated. The max-

imum compensation to the contractor founded on a cost of $1,500,000 was evidently based upon these specifications. No doubt at the time $1,500,000 was believed to be sufficient, to cover the cost of the work. Kennedy, the engineer of the Whitney Company, testifies that:

"The amount of the original work as contemplated by the contract was within $1,500,000 by $20,000 to $30,000."

T. A. Gillespie testified also:

"That the cost of the original work contemplated under the contract, without percentage, was about $1,500,000."

And the stipulation offered by the counsel for the respondents (one of whom was the present appellant), as agreed to by all parties, states that the cost of the work set forth in the estimate of July 17, 1902, was $1,468,505. The conditions which then presented themselves to the contracting parties no doubt led to the insertion of the following provision in the contract, which will be found also in the statement preceding this opinion:

"The contractor agrees that if the sum of the cost of the work to the contractor, and royalty and rental, on which the contractor is entitled to receive twenty (20%) per cent., shall amount to more than $1,500,000, the contractor's compensation shall include twenty (20%) per cent. on only $1,500,000."

It is clear to our minds, however, that, when the contracting parties made this provision, they intended at the time to provide for the contingency, if such arose, in which there might be a necessary enlargement in the proportions of the work, and a consequent increase in the use of materials, and the expenditure of money required to carry out the project, for in the contract we find another provision which, although set out in the statement, we reproduce here in order to emphasize to some extent the course of reasoning we are pursuing on this subject:

"The contractor agrees that the company shall have the right to make any changes that may appear to the company to be desirable in the location, form, or length of said canal, masonry, structures, and auxiliaries, and to make additions or deductions from the quantities of labor and materials specified, or shown on the drawings, before or after the commencement of construction without violating this agreement, and the company agrees that if the cost of the work should be increased by changes or additions, in that event, the hereinafter specified maximum sum on which the contractor is entitled to receive twenty (20) per cent. shall be increased to the extent of such increase in cost."

The contract further provides that the company's engineer should act as arbitrator in the settlement of every question, doubt, or dispute relating to the construction and completion of said canal, dam, bulkhead, spillways, and other structures, and the work of quarrying and preparing granite, and that his determinations and decisions should be final and binding on both parties.

The master finds as a fact that the work was supervised by J. J. Kennedy, engineer of the Whitney Company, and that subsequent to the signing of the contract changes were made in the plans and scope of the work by which the size of the canal was increased, the founda-

tion of the dam increased, and there was a change in the auxiliaries of the dam, in fact, says the master:

"The whole character of the project was changed by reason of the size having been increased."

And further says the master:

"The change was ordered by the president of the Whitney Company. * * * The scope of the work was increased by direction of the president of the Whitney Company."

In view of these findings, there is no escape from the conclusion that there was an increase in the work contemplated in the outset, and that this increase was at the instance of the authorities of the Whitney Company, and, in this connection, it must be borne in mind that the appellant makes no point as to the findings of fact by the master.

Further than this, the requirement of the contract was that the engineer of the Whitney Company should, on the fifth day of each month, prepare a correct statement showing the amount of money earned by the contractor during the preceding month under the terms of the agreement, and the Whitney Company agreed to pay the contractor on or before the 10th day of each month the total amount of money earned during the preceding month as correctly shown by such statements. It is shown that the engineer complied substantially with this provision, and in the course of operations the additional work upon the structure, together with the increase of cost, were included in the required statements, and these were accepted and acted upon by the Whitney Company, without objection, and if there should be no express authority in the contract for the additional work claimed, and the commissions upon the increase, the action of the Whitney Company was, in our opinion, an approval and ratification of what was done. The record does not disclose that the Whitney Company, the debtor, has at any time questioned the validity of this claim for commissions, or denied the obligation to pay it; and the receivers of the property of the company, although objecting to it in their answer, and before the Circuit Court, yet, when the decree of the court was entered sustaining the contractor's right to this item, they acquiesced and did not appeal.

We now come to consider the proposition that there were certain expenditures of money, materials used, and work done in the course of the operations for which the North Carolina statute does not provide a lien in favor of the contractor upon the property of the Whitney Company. It is admitted that there was a considerable outlay during the progress of the work, which, if standing alone, would not be a lienable charge, and, if these items were presented separately, we would not hesitate to adopt the position of the appellant with respect thereto, but, as we understand the situation, these objectionable features have ceased to be elements in the case. In the first place, the accounts of the contractor were from time to time presented as an entirety, were approved and certified by the engineer under the terms of the contract, and accepted by the Whitney Company. These accounts included, not only charges which are conceded to be lienable, but also

the charges we are now considering. Thereupon the Whitney Company made payments upon the whole without directing to what particular charge, or charges, the payments should be applied. Under these circumstances, we may well assume that as a part of the debt to the contractor was fortified by the right to a lien under the law, and a part of it entirely unsecured, that payments were first applied to that part which was the most precarious, for the law is such that, when payments are made upon several debts by a debtor without instructions as to the application, the creditor may apply such payments in his election, and the law goes further to say if the creditor, in the absence of directions as to the application, fails to apply a payment, that the law will appropriate the payment, to the most precarious debt.

If the contractor, when payments were received, exercised the privilege accorded him, then the amounts received from the Whitney Company from time to time were more than sufficient to discharge the nonlienable charges, or, if the rule of law stated is applied, the result is the same, and we may say further that the charges which constitute the basis of appellant's objection are contained in what is designated as Exhibit 11 in the testimony set out in the record, and as to this exhibit the testimony of Mr. Mitchell, an expert bookkeeper, and a witness, introduced by appellant, is to the effect that he had examined the books of the Whitney Company, and found that the items in that exhibit had all been paid, and Mr. Kennedy, the engineer of the Whitney Company, testified that he examined and approved the charges in Exhibit 11, and that they were accepted as proper charges under the contract by the Whitney Company.

There are, therefore, three phases in which this subject may be viewed: First. That the entire account of the contractor, including both the lien and nonlienable charges, was examined and certified by the Whitney Company's engineer, and in this form was accepted by the said company. Second. That the nonlienable charges have been paid as testified by Mitchell, or have been discharged by the application of payments received and applied by the contractor, or the application of such payments as directed by the law. Third. That under the terms of the contract, and the facts in the case, the contractor was entitled, in any event, to as much as $300,000 under the 20 per cent. clause, and taking the aggregate of work done, and materials furnished, and the aggregate of payments made, the balance due the contractor is less than the sum which it is admitted is lienable under the North Carolina statute.

We have discussed the questions involved in the order in which they are stated in the outset, with the result that we conclude there is no error in the decree of the Circuit Court.

The report of the master shows that he thoroughly investigated the cause in hand in its every detail, and that all of the testimony offered pertaining to the matters in controversy was carefully taken and recorded. His findings of fact are, in our opinion, supported by the evidence, and his conclusions of law based thereon are such as would readily present themselves to an intelligent, capable lawyer. We feel

constrained to say that this exhaustive report of the master, which was confirmed by the learned judge below, has materially aided us in reaching the conclusion that the judgment and decree appealed from should be affirmed.

Affirmed.

REXFORD v. BRUNSWICK-BALKE-COLLENDER CO.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1910.)

No. 946.

1. INSANE PERSONS (§ 70*)—PROBATE—JURISDICTION—ESTATES OF INSANE PERSONS.

Battle's Revisal, N. C. 1873, c. 57, § 7, provides that whenever it shall appear to the probate court that a sale of any part of a lunatic's real estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or it appears that the interest of the lunatic would be promoted by the sale of any part of such estate, the court may order a sale, and the proceeds shall descend and be distributed in like manner as provided for the sale of infants' estates, etc. *Held* that, the probate court having jurisdiction of a petition for the allotment of a maintenance for a lunatic and his family, to discharge debts unavoidably incurred for that purpose, and to direct sales of real estate to provide a fund therefor, and also to make provision for the care and preservation of the lunatic's estate, it was not ousted of jurisdiction because the guardian's petition also prayed for a sale to provide for the payment of pre-existing debts.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 70.*

Probate jurisdiction, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

2. COURTS (§ 1*)—"JURISDICTION."

"Jurisdiction" is the power to hear and determine a cause. It is coram judice whenever a case is presented which brings this power into action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3876–3885; vol. 8, pp. 7697–7698.]

3. JUDGMENT (§ 28*)—VALIDITY—JURISDICTION.

Where a proceeding embraces two causes of action, one within the court's jurisdiction and the other not, and the court enters judgment affecting both causes, the judgment is valid to the extent that it deals with the subject-matter within the court's jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 39; Dec. Dig. § 28.*]

4. EVIDENCE (§ 82*)—PRESUMPTIONS—COURT PROCEEDINGS.

Where a court had jurisdiction of the parties and subject-matter, it will be presumed that the subsequent proceedings were regular until the contrary is shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.*]

5. JUDGMENT (§ 501*)—COLLATERAL ATTACK.

Where a court had jurisdiction of the parties and subject-matter, its judgment could not be attacked collaterally for errors or irregularities in subsequent proceedings except for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. § 501.*]

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

6. INSANE PERSONS (§ 71*)—SALES IN PROBATE.

Sales of real property of a lunatic in proceedings before the proper probate judge or clerk of the superior court of North Carolina acting as a probate court are judicial sales.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 118–124; Dec. Dig. § 71.*

For other definitions, see Words and Phrases, vol. 4, pp. 3867–3870.]

7. INSANE PERSONS (§ 71*)—SALE OF LAND—TITLE OF PURCHASER—PROCEEDINGS—IRREGULARITIES.

A purchaser of real property at a sale held by a lunatic's commissioner under a probate order is not chargeable with errors or irregularities in the proceedings; it being sufficient if the court had jurisdiction of the parties and subject-matter, that the commissioner acted under a decree purporting to confer power of sale.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 71.*]

8. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—DEEDS.

Under the North Carolina law, the record of a deed is notice to a subsequent purchaser from the same grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513–539; Dec. Dig. § 231.*]

9. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—NOTICE.

Any facts sufficient to put a purchaser of land on inquiry is adequate notice, not only of such fact, but of anything to which such inquiry may lead.

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

10. JUDGMENT (§ 668*)—SALE OF REAL ESTATE—IMPEACHMENT—ESTOPPEL.

During the life of a lunatic, a commissioner was appointed and authorized to sell his real estate for maintenance and preservation, etc. He sold the timber in controversy on certain of the lunatic's land, and, after the lunatic's death, the commissioner's account was settled in the proceeding and transferred from the probate to the superior court of the state, to which all the lunatic's heirs were made parties. *Held*, that such heirs were concluded by the judgment confirming the commissioner's report, to which no exceptions were taken, and that they were thereafter estopped to impeach the title of the purchasers from the commissioner.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181–1183, 1188, 1189; Dec. Dig. § 668.*]

11. LIS PENDENS (§ 24*)—PURCHASERS PENDENTE LITE.

The commissioner of an insane person under a probate decree sold the timber in controversy on certain of the lunatic's land in a proceeding in which the probate court had jurisdiction, and thereafter, the lunatic having died and the proceeding having been transferred to the superior court of the state and all of the lunatic's heirs having been made parties, the commissioner's report including the sale of the timber was considered and confirmed; no exceptions having been taken to the report. *Held*, that a purchaser of the land on which the timber was located from the heirs during the pendency of such proceeding was bound by the decree, and could not therefore impeach the title of the timber purchasers.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38–46; Dec. Dig. § 24.*]

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

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

Action by C. H. Rexford against the Brunswick-Balke-Collender Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This action was brought originally in the superior court of Swain county, N. C., to the July term, 1908, of said court. Upon due proceedings had, the case was removed for trial to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

In his complaint filed in the state court the plaintiff seeks to have declared null and void certain deeds executed by John W. Terrell, commissioner, to sell the lands of William H. Thomas, a lunatic, which deeds are recorded in the counties of Swain and Graham, N. C., and under which the defendant claims title to certain trees and timber standing upon the land, of which plaintiff alleges he is the owner in fee simple. After the case was docketed in the Circuit Court, by leave of the court, the plaintiff changed the form of his action, and filed a bill in equity to remove a cloud from his title to the land in controversy. The bill sought, as did the complaint filed in the state court to have canceled certain deeds made by Terrell, commissioner, to J. F. Loomis and Xenaphon Wheeler, and from Loomis & Wheeler to W. C. Heyser, and from Heyser to the Brunswick-Balke-Collender Company, the present defendant, which deeds purport to convey a certain number of trees of a particular size growing and standing upon the lands claimed by complainant, and by the cancellation and annullment of these deeds it was sought to remove the alleged cloud upon his title to the land described. Heyser filed an answer disclaiming interest in the controversy, but the answer of the present defendant maintained the validity of the deeds under which it held its right to the trees conveyed thereby; and further averred that the trees were still standing upon the land, and had not been cut and removed.

In this situation the following order was made in the case on the 15th of April, 1909: "The above-entitled cause coming on to be heard on application of the complainant for the appointment of a special examiner to take testimony therein under equity rule 67, and it appearing to the court that the rights of the defendants in this action depends primarily on several questions of law based on documentary evidence of its title to the trees in question, and it further appearing to the court that it would facilitate the hearing of said cause, if such documentary evidence were offered and such preliminary question to the title first disposed of by the court. Now, therefore, it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument and all questions of fact in this cause be held in abeyance until said preliminary questions are disposed of by the court, and it is further ordered that this cause be and the same is set for hearing before the court on said questions on the 28th day of April, A. D. 1909, time 3 p. m. o'clock at Asheville, North Carolina. This order is made without prejudice to the rights of either party in case the court is of the opinion that it is necessary that further evidence be taken in said cause. April 15th, 1909. J. C. Pritchard, U. S. Circuit Judge."

Thereupon, without the intervention of a master, the court proceeded to take testimony, and on the 1st day of June, 1909, entered the following decree: "This cause came on the 28th day of April, 1909, to be heard and debated before the Honorable J. C. Pritchard, Circuit Judge of the United States for the Fourth Circuit, in the presence of counsel learned for plaintiff and defendant, the Brunswick-Balke-Collender Company, upon debate of the matter, and hearing what was alleged by counsel on both sides in relation to the issues raised by the pleadings touching the validity and construction of certain deeds of conveyance for certain timber trees: (1) A deed from James W. Terrell, commissioner, to J. F. Loomis and Xenophon Wheeler, dated the 3d day of August, 1883. (2) A deed from the said Terrell, commissioner, to the said Loomis & Wheeler, dated the 27th day of December, 1884. (3) A deed from said Terrell, commissioner, and T. H. Lester, B. D. Lester, and C. Y. Lester, of Swain county, North Carolina, to said Loomis & Wheeler, dated the 27th day of December, 1884. (4) A deed dated the 29th day of April, 1909, from the said Loomis & Wheeler, and their respective wives to

the defendant, W. C. Heyser. (5) A deed from the said defendant, W. C. Heyser, and his wife, to the defendant, the Brunswick-Balke-Collender Company; the said deeds being the same as those mentioned in the third paragraph of the plaintiff's complaint herein and the first paragraph of his amended complaint herein. This court ordered that the special case should stand for judgment, and the same standing for judgment in the presence of counsel for plaintiffs and defendants. Upon reading the said deeds and hearing what was alleged by counsel on both sides in relation thereto, this court doth, as to the first of the questions submitted for the judgment of the court, declare that by virtue of the three first above-mentioned deeds under and through which the defendant, the Brunswick-Balke-Collender Company, claims title to the trees in question mentioned and described in said deed, the plaintiff admitting that he and the defendant company claim title from a common source of title, and that the plaintiff's deed under which he claims embraced the same lands as the said above three deeds under which the defendant company claims, and the same trees mentioned and described in said company's deed, the defendant, the Brunswick-Balke-Collender Company, under and by virtue of said three deeds first above mentioned and the said other deeds above mentioned, does take and hold an absolute and indefeasible title, in fee simple, in and to all of the trees mentioned and described in the said deeds and is the owner in fee simple of said trees, and by virtue of the provisions of said deeds, the said defendant, the Brunswick-Balke-Collender Company, its successors and assigns, have the right to enter upon the lands upon which the said trees are situated and upon any other lands belonging to the estate of the said William H. Thomas, at the date of the said three deeds first above mentioned, for the purpose of cutting and removing said trees, and have the right of ingress and egress over the same and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so desire. And this court doth, as to the second of the said questions, declare that under and by virtue of the provisions of the said deeds the defendant, the Brunswick-Balke-Collender Company, its successors and assigns, are not bound by any provisions contained in said deed or otherwise, to cut and remove the said trees from the said lands within a reasonable time. And this court, as to the said first and second questions, doth order, adjudge and decree accordingly. And this cause is retained for further orders. This the 1st day of June, 1909. J. C. Pritchard, U. S. Circuit Judge."

From this decree the complainant appealed to this court.

Tucker & Lee, Adams & Adams, Frye & Raby, and Julius C. Martin (Martin & Wright, on the brief), for appellant.

Merrimon & Merrimon (Bryson & Black, on the brief), for appellee.

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

BOYD, District Judge (after stating the facts as above). There are many assignments of error on the part of the appellant set out in the record, but the whole case as presented to us in our opinion turns upon the effect to be given to the three deeds referred to in the decree, one dated August 3, 1883, and the other two December 27, 1884, in which J. W. Terrell, as commissioner appointed by the probate court of Jackson county, conveyed to J. F. Loomis and Xenophon Wheeler certain trees therein described upon the lands of William H. Thomas, Sr., in the counties of Graham and Swain, N. C. The timber rights conveyed in the said deeds are those now claimed by defendant by deeds subsequently made by Loomis & Wheeler to W. C. Heyser, and by Heyser to the defendant. If the original deeds from Terrell to Loomis & Wheeler are, for any reason, invalid, it is admitted that the

claim of the defendant under the deeds subsequently made constitutes a cloud upon appellant's title; otherwise, not.

The several points involved rest chiefly upon certain proceedings had in the probate court of Jackson county, N. C., before the clerk of the superior court, and the superior court of said county, and, in order to an intelligent understanding of the case, it will be necessary in the course of our discussion to give the character and substance of these proceedings, and, as near as possible, the order in which they took place. William H. Thomas, Sr., was a resident of Jackson county, N. C. He was a man of extensive business affairs and the owner of considerable property, consisting principally, however, of large tracts of wild unimproved lands, upon much of which there was valuable timber in the counties of Jackson, Cherokee, Graham, Swain, and elsewhere, in the western part of the state.

Before the inquisition hereafter referred to in which the said Thomas was adjudged a lunatic, he was largely indebted to various persons, and certain of his creditors had reduced their claims against him to judgment in the state courts, and besides William Johnson and R. B. Johnson had obtained judgment against him in the Circuit Court of the United States for the Western District of North Carolina for about the sum of $34,000. Whilst these conditions were existing, the mind of Thomas became impaired, and upon due proceedings had before the probate court of Jackson county on the 15th of May, 1877, he was adjudged a lunatic, and on the 5th of April, 1878, W. L. Hilliard was duly appointed and qualified as his guardian. In May, 1880, Hilliard, as guardian, filed his petition in the probate court of Jackson county by which he sought to provide a maintenance for the lunatic, and for his family, also to raise funds for expenses necessarily incident to important litigation pending in regard to lands of the lunatic, and to pay taxes, and further in the petition he asked for an adjustment and settlement of certain judgments which had been taken against Thomas before he was declared insane, and for the payment of his debts. It was also stated in the petition that the lunatic had no personal estate of any value. Acting on the petition, the probate judge made certain findings of fact in regard to the matters set out, and among them that the amount necessary for a maintenance for the lunatic and his family was $1,000 a year, and also that there had already accrued for the support of the lunatic and his family, and for necessary expenses incident to litigation attending his estate, and taxes, the sum of $2,450. Thereupon the order of the court was that there be set apart for the support of the lunatic and his family, and other expenses necessarily incident to the estate, the sum of $2,200 each for two years, $1,900 each for the two succeeding years, and $1,600 for the next year.

Proceeding further in the ascertainment of facts, the probate court found that the estate of the lunatic was indebted; that Johnson and Johnson had recovered a judgment against him in the Circuit Court of the United States for the Western District of North Carolina for about $34,000, and that there were judgments docketed against him in the state courts aggregating about $16,000; further, that the Johnson judgment was a lien on about 40,000 acres of unimproved land located

in the counties mentioned, which land was worth from 50 cents to $2 an acre; that the larger and more valuable tracts of land belonging to said Thomas were involved in serious litigation, requiring large amounts of money for costs, fees, attention, etc.; that William H. Thomas, Jr., of full age, James R. Thomas, age 19, and Sallie L. Thomas, age 17, were the children and presumptive heirs at law, and next of kin of the lunatic, and that the two minor children were a part of his family. Thereupon, on the 26th of May, 1880, the probate court entered a decree in response to the prayer of the guardian's petition by which James W. Terrell was appointed commissioner to make sale of lands belonging to the lunatic's estate, being directed to sell first such as were not subject to the lien of the Johnson judgment recovered in the Circuit Court of the United States, as before stated. The commissioner was empowered to sell lands at private sale for one-fourth cash, and the balance in equal installments in one and two years, and he was also required to report semiannually to the court of sales made, to whom sold, the particular tract sold, date of sale, and amount received. Terrell proceeded as commissioner to discharge the duties imposed upon him by decree of the probate court, and on the 1st of April, 1885, he made his report in which, among other realty, was included the sales of trees in 1883 and 1884 to Loomis & Wheeler, and which were conveyed to them by the deeds in question, and this report was confirmed by the clerk of the superior court of Jackson county.

As will be seen, the proceedings by the guardian were commenced in the probate court of Jackson county, and the findings of fact and the decree appointing Terrell commissioner with authority to sell the lands made by that court in 1880, but that the report of the commissioner was made to the clerk of the superior court of Jackson county, and confirmed by that officer in 1885. This is due to the fact that in the meantime the laws of North Carolina with respect to probate courts, and the clerks of the superior courts, had been changed. The law as it existed when the proceedings began will be found in Battle's Revisal. We quote the following from chapter 90:

"The clerks of the superior courts are declared judges of probate in their respective counties." (Section 1.)

And, as relating to the jurisdiction of the probate court at the time, we copy section 7, c. 57, of said Revisal:

"Whenever it shall appear to the court of probate, upon the petition of the guardian of any idiot or lunatic, that a sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance; or, whenever the court shall be satisfied that the interest of the idiot or lunatic would be materially and essentially promoted by the sale of any part of such estate, or whenever any part of his real estate is required for public purposes, the court may order a sale thereof to be made by such person, in such a way and on such terms as it shall adjudge; provided, however, that the court, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person. And if on the hearing, the court shall order such sale, the same shall be made and the proceeds applied and secured, shall descend and be distributed, in like manner as is provided for the sale of infants' estates, decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled 'Guardian and Ward.'"

The probate courts, by that name, were abolished by the North Carolina Legislature as will be seen by reference to the Code of North Carolina adopted in 1883 (volume 1, § 102), which is in this language:

"The office or place of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior courts as judges of probate, shall be performed by the clerks of the superior courts as clerks of said courts, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court."

And, further, section 7, copied above, was re-enacted verbatim as section 1675 of the Code of 1883, and the same jurisdiction with respect to lunatics and their estates was thereby conferred on the clerks of the superior courts.

The appellant insists that under the circumstances detailed the probate court had no jurisdiction to entertain the guardian's petition, or to order sales of the lunatic's property, and that, therefore, the proceedings had in that court were void, and the deeds to Loomis & Wheeler by virtue thereof are invalid. This is the first question for our consideration.

In the case of Blake v. Respass, 77 N. C. 193, the Supreme Court of the state of North Carolina held that:

"The statute (Battle's Revisal, c. 57) confers no power upon the courts of probate to provide for the payment of the debts of a lunatic contracted prior to the lunacy."

If, therefore, the petition of the guardian had been solely to provide for the payment of pre-existing debts, except such as were unavoidably incurred for the maintenance of the lunatic, there would have been no jurisdiction in the court to entertain the petition, or respond to its prayers by ordering sales of the lunatic's property, and that would be an end of this case, but as we see it the provision for the payment of debts of the lunatic was a secondary object of the petition, the prime purpose being to provide for a maintenance for the lunatic and his family, for debts theretofore unavoidably incurred for support, and also for current expenses incident to the care and preservation of his estate. By the averments in the petition it is made to appear that the lunatic's property was incumbered, was in litigation, and that the income therefrom had not been sufficient to meet the expenses incident to his support, and it is specifically stated:

"That there is yet due and owing on account of the support of the said lunatic and the maintenance and support of said infant children and costs accruing in litigation in the protection of said lunatic's property the sum of $2,000."

And among the first prayers of the petition are the following:

"That an account may be taken to inquire and ascertain of what the estate of the said W. H. Thomas consisted at the inquisition of the said lunacy.

"Of what the said estate does now consist.

"That a proper sum may be appropriated and settled for the maintenance and support of the said lunatic, for indebtedness already incurred, and for the support and maintenance for the future.

"And that a proper sum may be settled and approved for the maintenance and support of the said infant children, in the future, as well as the indebtedness of the past, and that the said sum so reported as necessary for the maintenance and support of the said lunatic may be paid to his guardian out

of the estate of the said lunatic, and that the sum so settled and approved for the support and maintenance of the said infant children be paid to the guardian of said children out of said lunatic's estate."

Undoubtedly the probate court had jurisdiction of a petition for the allotment of a maintenance for a lunatic and his family, to discharge debts unavoidably incurred for this purpose, and to direct sales of property to these ends, and, further, we think that a proper construction of the statute vested the power in the probate court to make necessary and suitable provisions for the care and preservation of the lunatic's estate.

In our research, we find no North Carolina case to the effect that the probate court had no jurisdiction over the estate of a lunatic further than to provide for maintenance. The decisions have only gone to the extent that the probate court was not authorized to provide for the payment of debts of a lunatic contracted prior to the lunacy; that this jurisdiction remained in the superior court where it had always been. In section 7 of chapter 57, Battle's Revisal, copied above, it will be found that the probate court, upon the petition of the guardian of a lunatic, had the jurisdiction to direct the sales of real or personal estate of the lunatic for four purposes: First, for the necessary maintenance; second, for the discharge of debts unavoidably incurred for maintenance; third, whenever the court shall be satisfied that the interest of the lunatic would be materially and essentially promoted by the sale of any part of his estate; and, fourth, whenever any part of his real estate was required for public purposes. The probate court found as a fact that the most valuable real estate of the lunatic was in litigation, and that there were necessary costs and expenses attending this litigation which involved the recovery and preservation of the property, also that taxes were accruing upon the lands, and that the lands did not yield enough income to pay such taxes.

We are, therefore, led to inquire the meaning of the statute wherein it says that the court shall have power to order the sale of any part of the real or personal estate of a lunatic whenever the court shall be satisfied that the interest of the lunatic would be materially and essentially promoted thereby. In view of this provision, will it be contended that the court having both the person and the estate of a lunatic legally in its custody is to sit idly by and see such estate subjected to loss or swept away by litigation for the want of jurisdiction to take steps for its preservation? To give the statute a construction leading to such result would to our minds be subversive of legislative intent, and would expose the estate of a lunatic in custodia legis to loss, and perhaps entire sacrifice without power in the court having it in charge to protect it.

We conclude, therefore, that the allegations of the petition of the guardian were sufficient to confer jurisdiction upon the probate court to ascertain the necessary maintenance for the lunatic and his family to be allotted out of his estate, to provide for debts theretofore unavoidably incurred for such maintenance and also to make such orders and decrees as were necessary to preserve the estate, or to save it from loss or dissipation pending the lunacy, and the fact that in the petition

the guardian went further and asked for sales of property of the lunatic to relieve liens, and to pay pre-existing debts, did not oust the jurisdiction of the probate court to proceed with the cause for the purposes contemplated by section 7, c. 57, above quoted, and to the extent authorized by the law. "The power to hear and determine a cause is jurisdiction. It is 'coram judice,' whenever a case is presented which brings this power into action. If the petitioner states such a case in this petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction." United States, Appellant, v. Arredondo et al., Appellees, 6 Pet. (31 U. S.) 681 (see page 708) 8 L. Ed. 547.

We lay it down as a further proposition of law that where a proceeding embraces two causes of action, the one of which is within the jurisdiction of the court in which the same is brought, and the other without, and the court enters judgment or decree affecting both causes, such judgment or decree is valid to the extent that it deals with the subject-matter within the jurisdiction. "If, however, the court has jurisdiction of the action and the parties, and is competent to give part of the relief granted, its judgment so far as within its powers is valid." 1 Freeman on Judgments (4th Ed.) § 120, p. 184. This doctrine is upheld in Abernathy v. Railroad, 150 N. C. 97, 63 S. E. 180. In that case a proceeding was brought before the clerk of the superior court of Mitchell county by the plaintiff against the railroad company under the North Carolina statute for the purpose of finding and recovering compensation for the right of way over his land occupied and appropriated by the defendant for railroad purposes. In the petition the plaintiff joined two causes of action—the one for compensation, and the other for damages. The Supreme Court held that a motion to dismiss on this ground could not be sustained, that the clerk had jurisdiction by reason of the fact that the petition sought compensation for the lands taken, and that the other cause of action was irrelevant and did not affect the jurisdiction.

It being determined that the probate court had jurisdiction of the parties, and of the subject-matter, the presumption that subsequent proceedings were regular will be indulged until the contrary is shown, and we find nothing in the record evidence (and there was no testimony aliunde) sufficient to warrant the conclusion that the probate court, when through its arm, the commissioner, made the sales to Loomis & Wheeler, was not acting within the limits of its authority. If the probate court, as we have stated, had been without jurisdiction of the parties and the subject-matter, its decree would be void, and no title could pass to a purchaser thereunder, but, when the jurisdiction attached, the case was coram judice, and errors or irregularities in subsequent proceedings cannot be availed of by collateral attack in another court. This proposition is so well settled that it is scarcely necessary to cite authorities, but we will call attention to Thompson v. Tolmie, 2 Pet. (27 U. S.) 156, 7 L. Ed. 381, in which the Supreme Court says:

"The jurisdiction of the court (under whose order the sale was made) over the subject-matter appears upon the face of the proceedings; and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally as they were in the Circuit Court."

We find also that in the case of Comstock v. Crawford, 3 Wall. (70 U. S.) 396, 18 L. Ed. 34, in which the court was treating of the action of a probate court in a proceeding to sell land by an administrator, it is held:

"But, when by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularities or irregularities of subsequent steps can only be questioned in some direct mode as prescribed by law. They are not matters for which the decree of the court can be collaterally assailed."

And to the same effect is the decision in the case of McNitt v. Turner, 16 Wall. (83 U. S.) 353 (21 L. Ed. 341):

"Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceedings being coram judice, cannot be impeached collaterally except for fraud."

A more recent case of Davis v. Gaines, 104 U. S. 386, 26 L. Ed. 757, treats generally of this subject, and reaffirms the decisions we have cited above, and refers to a number of leading authorities in support of the principle. Among the earlier cases in which the principle is decided is Elliott v. Peirsol, 1 Pet. (26 U. S.) 328, 7 L. Ed. 164, in which the court holds that:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court."

However, if after the jurisdiction attached there were irregularities in the course of the cause, or if the court acted in excess of its powers, what, if any, effect would such proceedings have upon the rights of a purchaser at a sale directed by the court's decree? The probate judge was, by the laws of North Carolina, a court as is also the clerk of the superior court who succeeded to the jurisdiction, and sales under orders or decrees of either were judicial sales. In Thompson v. Tolmie, supra, Mr. Justice Thompson in delivering the opinion of the court cited with approval Perkins v. Fairfield, 11 Mass. 227, in which it was held:

"That a title under sale by administrators by virtue of a license from the court of common pleas was good against the heirs of the intestate, although the license was granted upon the certificate of a judge of probates, not authorized by the circumstances of the case. The court said the license was granted by a court having jurisdiction of the subject. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before the probate court, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction."

And in McNitt v. Turner, supra, the court says that:

"A purchaser at a judicial sale by an administrator does not depend upon a return by the administrator making the sale of what has been done. If preliminary proceedings are correct, and he has order of sale and the deed, this is sufficient for him."

And in this same case, Mr. Justice Swayne, after discussing the points involved in the case, which related to a proceeding by an administrator in the state of Illinois to sell lands of a decedent for assets, and deciding that although there were irregularities the court which ordered the sale had jurisdiction, and laying down the rule which we

have before referred to that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, cannot be impeached collaterally save for fraud, proceeds further to say that the order of sale before the court was within the rule, and then quotes from Grignon's Lessee v. Astor et al., 2 How. 341 (11 L. Ed. 283), the following:

"'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of its jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' This case and the case of Voorhees v. Bank of the United States, 10 Pet. 449 [9 L. Ed. 490], are the leading authorities in this court upon the subject. Other and later cases have followed and been controlled by them. Stow v. Kimball, 28 Ill. 93, affirms the same doctrine."

And again in Gaines v. Davis, supra, the law as laid down in Thompson v. Tolmie is reiterated in the following language:

"The law appears to be settled in the states that courts will go far to sustain bona fide titles acquired under sales made by statutes regulating sales made by order of the orphans' courts. When there has been a fair sale the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings."

And the court goes further in the case of Gaines v. Davis to say that:

"It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the face of which the purchase was made authorized the sale."

The next question inviting our attention is that of notice. The appellant derives his title to the lands in question under a deed executed by the heirs of W. H. Thomas, deceased, lunatic, to J. S. Bailey dated April 18, 1903, and a deed from Bailey and wife to appellant dated the 26th of September, 1906. The deed from Terrell, commissioner, to Loomis & Wheeler, conveying timber on the lands in Swain county, was duly recorded in that county on the 31st of August, 1883, and the two deeds for timber on the lands in Graham county placed on record in that county on the 31st of December, 1884.

It is well settled in North Carolina that this recordation of the Loomis & Wheeler deeds was notice to Bailey at the time he purchased, for the decisions of the Supreme Court of the state are uniform to the effect that, where an instrument affecting the title to real estate is properly recorded, the record thereof is notice to a subsequent purchaser from the same grantor. The citation of a few of the many North Carolina cases declaring this to be the law will be sufficient. In Taylor v. Eatman, 92 N. C. reprint 563, it is held that:

"Registration of a prior voluntary deed is notice to a subsequent purchaser."

And in Austin v. Staten, 126 N. C. 783, 36 S. E. 338, it is held in substance that registration of a deed under the laws of North Carolina is required for the purpose of notice to a subsequent purchaser. The record discloses the fact that the description of the lands upon which

the timbers conveyed to Loomis & Wheeler were standing was fully set out in the recorded deeds. This constituted notice to all the world of what the deeds contained, and Bailey's purchase after the registration charged him with such notice. And it is an established proposition that any fact which is sufficient to put a purchaser of land on inquiry is adequate notice, and of everything to which such inquiry may lead. Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; Thompson and Wife et al. v. Blair et al., 7 N. C. 583, 3 Murphey's Law & Equity. If our reasoning is well grounded, and it seems to us that it is, the conclusion follows that the probate court had jurisdiction to make the decree directing Terrell as commissioner to sell property of the lunatic; that Loomis & Wheeler bought and took title by virtue of this decree; that rights thus vested cannot be attacked collaterally in a proceeding inter alios acta; and that Bailey bought in 1903 the lands upon which the timber conveyed to Loomis & Wheeler is located with notice of their title, and subject to their said rights.

We might, therefore, stop here and affirm the decree of the Circuit Court, and we would do so, but there is a further view of the case presented in the record, and argued by counsel, which we think it would be well to consider. This view is based upon proceedings had before the clerk of the superior court of Jackson county, and in the superior court of said county, subsequent to the dates which have been hereinbefore recited. The proceeding in the name of Hilliard, as guardian, continued before the clerk, and was pending on the 25th of October, 1889, when Hilliard resigned as guardian, and James R. Thomas (a son of the lunatic), who had become of age in the meantime, succeeded to the guardianship of his father. On the day of his appointment Thomas filed his petition as guardian before the clerk, in which he sought to make sales of the real estate of the lunatic for purposes set out in his petition, and also to collect the purchase money for sales made by Terrell and convey to the purchasers, etc. The lunatic died intestate in June, 1893, and James R. Thomas, the son, became administrator upon the intestate's estate. Before that the lunatic's daughter, Sallie L. Thomas, had intermarried with A. C. Avery, and William H. Thomas, Jr., a son of the lunatic had died, leaving him surviving as his only heirs at law, Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas, and Mary Thomas, all infants and for whom James R. Thomas became guardian.

On the 9th of January, 1899, a petition was filed before the clerk of the superior court of Jackson county in the name of James R. Thomas, A. C. Avery and wife, Sallie L. Avery, and James R. Thomas, as administrator of the estate of William H. Thomas, Sr., deceased, of full age, and Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas, and Mary Thomas, by their guardian, James R. Thomas. In this petition the several petitioners as the only heirs at law and next of kin of the deceased lunatic sought to have the proceeding instituted by Hilliard, and that instituted by Thomas, as guardians, consolidated, and to have themselves made parties plaintiff in the consolidated case. And the petition went further to allege that Terrell had been appointed commissioner to sell lands and convey the same to purchasers as provided in the order of the probate judge of Jackson

county; that he had sold a number of tracts of land and had collected the purchase money, and had also sold and cut timber for which he had not accounted. The petitioners prayed that the sales, receipts, disbursements, and liabilities of Terrell, as commissioner, and the account of James R. Thomas of sales of land, of disbursements of the proceeds of such sales by him as guardian of said Thomas, and as commissioner, be referred to a competent accountant to examine and report to the court after notice to the parties interested. Upon the petition, the clerk of the superior court of Jackson county on the 6th day of July, 1899, entered an order consolidating the two proceedings, also confirming sales made by James R. Thomas, as guardian, and directing him to make title for land sold by Terrell before the qualification of said Thomas as guardian upon the collection of the purchase money. On the 8th of September, 1899, the counsel for the petitioners and for Terrell filed an agreement in the case before the clerk, in which appears the following:

"It is further agreed that this special proceeding, entitled as above, shall be entered upon the docket of the superior court of Jackson county at the Fall term, 1899, thereof, to be then further proceeded with according to law, and for all purposes."

The clerk entered his order on the same date transmitting the entire case to the superior court, and it was docketed for the Fall term, 1899. After the case was so docketed, the superior court appointed M. W. Bell and Thomas A. Jones to take and state an account of the transactions of Terrell, as commissioner, and also to report to the court upon the issues and questions of fact and of law raised by the pleadings in the case. In discharge of their duties the said referees took an account of the dealings of Terrell, as commissioner, including the sales of land and timber, his collections and disbursements in connection with the estate of the lunatic. They made a report at length of the findings of fact and conclusions of law to the court on the 26th of February, 1905. They found as a fact that there was a small balance due Terrell from the estate, and among their conclusions of law they submitted these two:

"That this proceeding was properly begun in the probate court of Jackson county by virtue of chapter 57 of Battle's Revisal, and that the clerk of the superior court of said county by operation of law and statute in such case made and provided succeeded to the functions which the probate judge had theretofore exercised and had."

"We conclude as a matter of law that said Terrell had a right to sell the timber on the Graham and Swain county lands with the approval of the clerk of the superior court, and that the order of said clerk protects him in the sales made to Loomis & Wheeler."

There were no exceptions to this report, and at the October term, 1905, of the court, judgment was entered confirming the same in all particulars. All parties acquiesced in this judgment, and the same was therefore final.

We think that aside from being concluded by this judgment the heirs at law of the lunatic when they voluntarily made themselves parties to the proceeding in which the timber was sold to Loomis & Wheeler, and sought to hold Terrell to an account for the purchase

money, and recover the same from him if he was still liable therefor, thereby ratified the sales, and were estopped to impeach the title of the purchasers.

The remaining question is as to the effect of the final judgment of the superior court upon the rights of Bailey, who purchased and took deed from the heirs at law of Thomas, who were parties to the proceeding. Bailey bought in 1903 whilst the case was still pending in the superior court. The jurisdiction of the superior court in the case transmitted by the clerk and of all matters in controversy therein is settled, we think, by a statute of North Carolina, and decisions of the Supreme Court of that state construing it. The statute we refer to is chapter 276, Pub. Laws N. C. 1887, from which we quote:

"That, whenever any civil action or special proceeding begun before a clerk of any superior court shall be for any ground whatever sent to the superior court before the judge, the said judge shall have jurisdiction; and it shall be the duty of said judge upon the request of either party to proceed to hear and determine all matters in controversy in such action."

Referring to this statute in Oldham v. Rieger, 145 N. C. 254, 58 S. E. 1091, the Supreme Court says:

"That, whenever a cause which was originally brought before the clerk is constituted in the superior court at term by transfer, appeal, or in any other way, the court shall proceed to hear and determine all matters in controversy."

And in Re Anderson, 132 N. C. 243, 43 S. E. 649, treating of this same statute, the court declares:

"Whenever any civil action or special proceeding begun before a clerk of the superior court shall be for any ground whatever sent to the superior court, the said court shall have jurisdiction, although the proceedings originally had before the clerk were a nullity."

And in Railroad v. Stroud, 132 N. C. 413, 43 S. E. 913, it is held that a case on appeal to the judge from the clerk is as fully before the judge as if it had originally been returned before him. We cite, also, Smith v. Pipkin, 79 N. C. 569, reprint, 510, in which it is held that the superior courts have concurrent jurisdiction with the courts of probate over lunatics and their estates.

Were the timber rights of Loomis & Wheeler on the Thomas lands called in question in the superior court, or the title derived to them by the deeds from Terrell involved in the controversy? It plainly appears that the Superior Court took cognizance of these questions. The referees found, as shown by the quotations from the report, that the probate court and the clerk had jurisdiction, and, further, that Terrell had the right to sell the timber to Loomis & Wheeler. These were legal conclusions which were confirmed by the judgment of the court, and it is not our province to assume that the court exercised jurisdiction over matters not before it. The Supreme Court of North Carolina in Dancy v. Duncan, 96 N. C. reprint 98, decided:

"If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action, and binds the property in the hands of the purchaser."

See, also, Rollins v. Henry, 78 N. C. reprint 297.

And again, in Bird v. Gilliam, 125 N. C. 76, 34 S. E. 196, the court held that:

"A purchaser of land in litigation is conclusively fixed with notice, and takes his conveyance from a party to the suit subject to the final adjudication."

These decisions, both of which were rendered before the conveyance to Bailey was executed, established a rule of property in North Carolina, which we cannot disregard in passing upon property rights in that state. The appellant who bought from Bailey in 1906 took by his deed only such right as Bailey could convey, which, we are led to conclude, was the title to the lands in question subject to the timber rights under the deeds from Terrell to Loomis & Wheeler.

The decree of the Circuit Court is affirmed, and the cause remanded to the end that further proceedings may be had in harmony with this decision.

Affirmed.

IN RE JAMES.

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

No. 967.

BANKRUPTCY (§ 408*)—DISCHARGE—GROUNDS FOR REFUSAL—CONCEALMENT OF PROPERTY—"CONCEALED."

In Bankr. Act July 1, 1898, c. 541, § 14b (4), 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), which makes it a ground for refusing a discharge that a bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition * * * concealed or permitted to be * * * concealed any of his property with intent to hinder, delay or defraud his creditors," the word "concealed" includes a continuous concealment, and a bankrupt who concealed property from his creditors while insolvent before the four-month period, and kept the same concealed until within the four months, and until it was discovered by another, is not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Wilmington, in Bankruptcy.

In the matter of John L. James, bankrupt. An application for discharge was contested by Stone & Co., creditors. Decree denying discharge (175 Fed. 894), and the bankrupt appeals. Affirmed.

This is an appeal from a judgment of the District Court of the United States for the Eastern District of North Carolina, sitting as a court of bankruptcy. It appears that on the 25th of October, 1907, and for some time prior thereto, the petitioner was engaged in the mercantile business at Deep Bottom, in the county of Dublin, state of North Carolina, and continued in that business until the 4th day of November, 1907; that on the 25th of October, 1907, petitioner made a general assignment for the benefit of his creditors, and one Robert James was appointed trustee under the deed of assignment. It further appears that without the knowledge of any person, except his son, the petitioner hid, secreted, and concealed certain property to which reference will hereafter be made, amounting in value to about $50. On the 28th of

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

February, 1908, Stone & Co. and other creditors of the petitioner filed their petition in involuntary bankruptcy against the petitioner, alleging that within four months next preceding February 28th petitioner had committed an act of bankruptcy by executing and delivering on the 4th day of November, 1907, a deed of general assignment, and upon information and belief had within four months next preceding February 28, 1908, removed or caused to be removed from his storehouse a large quantity of goods and had concealed or caused to be concealed said goods in various swamps or other places with intent to hinder, delay, and defraud his creditors, and praying that he be adjudged a bankrupt, and said petition was served upon John L. James on the 29th of February, 1908; that on the 8th day of March, 1908, petitioner filed his answer to said petition denying that within four months next preceding the date of the petition (February 28, 1908), he had removed or caused to be removed or concealed or caused to be concealed any merchandise with intent to hinder, delay, or defraud his creditors as alleged, and, while admitting that prior to the 4th of November, 1908, he had taken some merchandise from his store and warehouse and stored it away in different places, he denied that this merchandise had been taken from his assignee (Robert James) or that it had been taken within four months next preceding February 28, 1908. The petitioner was duly adjudged a bankrupt March 11, 1908. On May 8, 1908, the petitioner filed his petition for a discharge from bankruptcy in due form, and the hearing was set for May 20, 1908. By specifications of objections and amendments thereof under dates of May 4, 1908, and June 3, 1908, respectively, Stone & Co., creditors of the bankrupt, opposed his discharge upon the ground that four months preceding the filing of their petition, to wit, February 28, 1908, the petitioner with intent to hinder, delay, and defraud his creditors had transferred, removed, destroyed, or concealed, sundry articles of merchandise (specified), and on May 20, 1908, the petitioner filed his petition to dismiss said specifications as being insufficient in law to warrant the court in refusing a discharge.

At this stage of the proceedings, the then judge of the District Court entered an order suspending further proceedings to await the determination of certain matters at issue in regard to certain real estate claimed as part of the bankrupt's estate. By an order entered July 21, 1909, the court modified the aforesaid order, and directed George H. Howell, Esq., as special master, "to hear the application of the bankrupt for his discharge and to take evidence and report the same, with his findings of fact to the court." Upon hearing on January 31, 1910, the court entered an order refusing to grant the bankrupt a discharge.

Upon the foregoing statement of facts, the court below held that the concealment of the goods of the bankrupt on October 24, 1907, was a continuous concealment extending to January 5, 1908, within the four months immediately preceding the filing of the petition herein; that said concealment was a concealment from the trustee; and that, therefore, the bankrupt was not entitled to a discharge.

Henry R. Miller and H. L. Stevens, for appellant.

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

PRITCHARD, Circuit Judge (after stating the facts as above). It is insisted by counsel for appellant that, inasmuch as the petitioner had concealed a portion of his property more than four months next preceding the filing of the petition, he thereby became exempt from the provisions of the bankruptcy law relating to the concealment of the property of the bankrupt, notwithstanding the fact that he continued to keep the property in question concealed until within the four months' period next preceding the filing of the petition. The purpose of the bankruptcy law is to secure fair treatment for both creditor and debtor, and ample provision is made by which an honest

debtor may, upon compliance with the provisions of the law, secure a discharge from his debts, and thus be enabled to start life anew.

The question naturally arises as to whether the petitioner in this case has complied with the law, or, on the other hand, whether he has done that which the law forbids.

The referee finds the following facts as respects his conduct:

"* * * (6) That on or about the 25th day of October, 1907, and before the bankrupt made the deed of assignment of all his property for the benefit of his creditors to one Robert James, he, without the knowledge of the said Robert James, or any other person except his son, hid in a swamp in Onslow county, on land leased by him, five caddies of tobacco, worth about 20 cents a pound, one case of gun shells, two trunks of shoes and dry goods, and a case of dry goods, with intent to hinder, delay, and defraud his creditors. That on or about the 25th of October, 1907, and before the bankrupt made the deed of assignment of all his property for the benefit of his creditors to one Robert James, he, without the knowledge of the said Robert James, or any other person except his son, hid, secreted, or concealed at one W. R. Sholer's house one barrel of boots and shoes, valued at about $50, with intent to hinder, delay, and defraud his creditors. That on or about the 25th day of October, 1907, and before the bankrupt made the deed of assignment of all of his property for the benefit of his creditors to one Robert James, he without the knowledge of the said Robert James, or any other person except his son, hid, secreted, or concealed in the Hardy Kenan house on the Burton place two barrels of flour, one bale of homespun, one large box of notions, two cases of shoes, four boxes of gun shells, two packages of snuff, two buckets of snuff, three rolls of wrapping paper, and two sacks of coffee, all of the value of about $416.25, with intent to hinder, delay, and defraud his creditors. That on or about the 5th day of January, 1908, one H. G. Swinson discovered the whereabouts of the property concealed in Onslow county, when the bankrupt voluntarily disclosed the hiding place of all the property concealed by him, except two trunks and their contents and one lot of tobacco, which were stolen or taken from the hiding place, without the bankrupt's knowledge or consent."

Subsection 4 of section 14 of the bankruptcy law provides that it shall be the duty of the judge, upon the petition of the bankrupt made in accordance with the provisions of the act, to grant a discharge, unless petitioner, "at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be transferred, removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud, his creditors." Thus it will be seen that a debtor who conceals his property with intent to hinder, delay, or defraud his creditors during the four months' period is not entitled to a discharge. It is the manifest purpose of this provision to prevent dishonest and unscrupulous debtors from imposing upon the public.

The findings of fact by the referee show that within the four months' period the property of the petitioner was concealed, and that such concealment was fraudulent and with intent to hinder and delay the creditors of the petitioner in the collection of their debts. While in the first instance the act of concealment was more than four months next preceding the filing of the petition, nevertheless it is undisputed that the concealment was continued until within the four months' period, with the consent and acquiescence of the petitioner, and for a fraudulent purpose, thus bringing this case clearly within

the purview of the statute. To hold otherwise would be to open wide the door for the commission of fraud by those who may be actuated by a desire to evade the payment of their honest debts. Suppose that, in this instance, there had been no discovery of the concealed property until the day of the filing of the petition for a discharge and it had then been discovered that the property had been concealed and that fact had been made to appear, would the judge, under such circumstances, be justified in granting a discharge? We think not. A bankrupt, in order to be entitled to a discharge, must come into court with clean hands, and show that his conduct has been that of an honest, upright man. But, under the circumstances of this case, it cannot be reasonably insisted that a court of justice should, by its decree, proclaim to the public that one who concealed his goods for the purpose of defrauding his creditors had dealt fairly with his fellowman, and that such an individual is entitled to the benefits of an act intended to promote honesty and fair dealing.

We have carefully considered the briefs filed by the appellant, but are of opinion that the cases relied upon are not applicable to the case at bar. For the reasons hereinbefore stated, the judgment of the lower court is affirmed.

BURLINGHAM et al. v. CROUSE et al.

(Circuit Court of Appeals, Second Circuit. August 11, 1910.)

No. 322.

1. BANKRUPTCY (§ 143*)—ASSETS—INSURANCE POLICIES—RIGHT OF TRUSTEE.
Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70, vests the bankrupt's trustee with title to the bankrupt's property, which prior to filing the petition he could by any means have transferred, provided that when the bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may within 30 days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same pay or secure to the trustee the sum so ascertained, and continue to hold the policy free from the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. *Held* that, where on the institution of bankruptcy proceedings one of the bankrupts had certain life policies on which the insurance company had loaned a sum equal to the full surrender value, holding the policies as security therefor, the policies did not pass to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. § 143.*]

2. BANKRUPTCY (§ 323*)—COLLATERAL—APPLICATION.
A bankrupt, having procured certain loans on life insurance policies to the extent of the full surrender value, assigned the policies to C. as security for the return of certain stocks and bonds loaned on a special account, and also to secure other indebtedness. Bankruptcy proceedings having intervened, C. paid the premiums and interest to save the policies from forfeiture, and, the insured having died shortly thereafter, C. received the proceeds of the policies, less the amount of the loan by the insurance company. *Held*, that C., after deducting the amount paid by him for premiums and interest, was bound to apply the balance of the

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

proceeds first to the payment of the special account, and the balance, if any, to the general indebtedness of the insured to him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 323.*]

Ward, Circuit Judge, dissenting.

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

Action by Charles C. Burlingham and others, as trustees in bankruptcy of T. A. McIntyre & Co., against Charles M. Crouse and the Equitable Life Assurance Society, to recover the proceeds of certain policies on the life of T. A. McIntyre. The proceeds of the policies were paid into court by the insurance company, and from an order adjudging that defendant Crouse was the owner and entitled to the proceeds of the policies, and requiring him to appropriate the proceeds to certain specified purposes, the trustees appeal, and defendant Crouse prosecutes a cross-appeal. Modified and affirmed.

D. Raymond Cobb and Irving L. Ernst, for complainants.

Newell Chapman & Newell, for defendant C. M. Crouse.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. In April, 1902, Thomas A. McIntyre obtained from the Equitable Company two policies upon his life. They were limited life payment policies, and each provided that, upon death of the insured, the company would pay to his executors, administrators, or assigns the sum of $100,000 in 50 annual payments or the sum of $53,000 in cash. On April 14, 1908, the policies were assigned absolutely to the firm of T. A. McIntyre & Co. in which the insured was a partner. On April 24, 1907, they were assigned by T. A. McIntyre & Co. to the Equitable Company as collateral security to a loan of $15,370. We have searched the record in vain to find copies of the agreement with the insurance company by which it loaned the $15,370, and reserved a lien upon the policies to secure repayment. From the language used in a notice sent by it to Crouse, it may be inferred that they contained some provision to the effect that nonpayment of the amount due on or before the day of grace might be taken by the company as a surrender of the policy. On February 25, 1908, T. A. McIntyre & Co. assigned the policies to defendant Crouse as security for the return or repayment of the amount of certain stocks and bonds which he had loaned or was about to loan to the firm. On April 25, 1908, petition in involuntary bankruptcy was filed, and on May 21st the firm and all its members were adjudicated bankrupts. Plaintiffs were elected and qualified as trustees on July 24, 1908.

The suit was brought on the theory that these policies passed to the trustees as property of the bankrupts, that when the transfer to Crouse was made the firm was insolvent, and that he had reasonable cause to believe such transfer was preferential. The bill prayed that the assignment be held null and void as against the trustees, and that the insurance company pay the sum due under said policies to them.

Each policy provided for the payment of $2,643.11 as premium on or before the 9th day of April in each year; also, that the policy should

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

lapse and be forfeit to the company on the nonpayment of any premium when due. A further clause, however, provided that, should default be made in the payment of any premiums, the insurer will waive such default and accept payment of said premium provided the amount thereof, with interest at 5 per cent. from the date of default, be tendered to it within 30 days after such default. On May 9th, the last day of grace for the payment of premiums on these policies, after petition in the bankruptcy was filed and receivers appointed, Crouse paid the insurance company $6,078.38 for premiums and interest, thus saving both policies from forfeiture. On July 29, 1908, McIntyre died, and the insurance company has paid into court the proceeds of said policies, less the amount of the loan, such proceeds being $90,698.32.

The first question to be determined is whether these policies passed to the trustees upon their appointment and qualification.

The relevant provisions of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) are as follows:

"Sec. 70. The trustees of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt—to all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets," etc.

The meaning and intent of Congress in enacting this proviso is in the opinion of the majority of the court very clear, when we consider the practice of insurance companies. The original idea of life insurance was to contract with the insurer that, if certain yearly premiums were regularly paid during the lifetime of the insured, a specified sum of money would upon his death be paid by the insurer to a person named in the policy as beneficiary. Under such a contract, nothing would be received from the insurer until the death of the insured, and the insured had no personal interest in the policy. Modified forms of contract have, however, become common. In some instances the policy is made payable to insured's estate, so that he retains the power to dispose of its proceeds at will. So, too, sometimes by express stipulation in the contract (as in this case), sometimes by practice of the company, the privilege is given to the insured to surrender his policy at any time (usually after several premiums have been paid) and receive a fixed sum of money in exchange. Such sum is called the "cash surrender value" of the policy. Unless such a policy passed to the trustee, the bankrupt could surrender it and himself collect the cash. Manifestly Congress "intended to prevent a debtor from investing in policies of this kind money which equitably belongs to his creditors and reaping the benefit thereof, after he has secured protection against the enforcement of debts due from him through a discharge in bankruptcy." In re Lange (D. C.) 91 Fed. 361. It is the object of the stat-

ute to place in the hands of the trustee, for distribution among the creditors, every dollar which the bankrupt could collect. Therefore, if he has a policy on which money could be collected by surrendering it, he must turn over such policy to the trustee who may thereupon surrender and collect. Having done this, there can be, of course, no possible objection to the bankrupt effecting new insurance on his own life, if some friend or relative chooses to assist him to pay the premiums. But his doing so would involve one element of hardship. The old policy may have been taken out many years before, when the assured was a young man and the annual premium low; for the new policy a much higher premium may have to be paid. Indeed, his condition of health might be such that he could not pass the examination and secure a new policy at all, and thus be unable to secure something for his family in the event of his death. It seems quite apparent from the language of the proviso that Congress was not solicitous to subject the unfortunate bankrupt to any such unnecessary hardship, and so has provided that if there is paid or secured to the trustee for the creditors all that the bankrupt could obtain by surrendering the old policy he may hold and carry such policy.

The policies in this case are of the kind referred to as having a cash surrender value; that value at the date when trustees qualified, was somewhat less than $15,000. Had the insurance company not made a loan to the bankrupts and secured itself by an assignment of the policies, the bankrupt or the trustees could have collected that amount upon surrendering them. But the company did make a loan of $15,370 on the security of the policies, and the propriety of that loan and the validity of the company's lien on the policies are not questioned. Therefore on the day the title vested in the trustees the cash which the company had agreed to pay on surrender would if surrender were claimed have been entirely absorbed in releasing the lien of the company, whether the privilege of surrender were exercised by the bankrupt or by the trustees. There was therefore nothing to pay or secure to the trustees to take the place of the money the bankrupt might obtain by surrendering because he could not obtain anything himself by such surrender, although the policy had a cash surrender value. To hold upon such a state of facts that the policies passed to the trustee as assets, unless the individual insured bankrupt, or the bankrupt firm or somebody paid the trustees $15,000, in addition to the $15,000 which the insurance company would take in satisfaction of the lien, would, in our opinion, be a clear violation of the intent of Congress as expressed in the section quoted supra. There have been many decisions construing this part of section 70, most of them are cited on the briefs, but we have found none in which the precise point now before us has been passed upon.

Since the title did not pass to trustees, they could not maintain a suit to set aside the transfer to Crouse, and the District Court correctly held that Crouse was the owner of and entitled to the proceeds.

At the time of the failure the bankrupts were indebted to Crouse on special account for securities delivered to them in the amount of $83,363 (after making certain credits). They were also indebted to him on account of 200 shares of Pullman company stock to the amount of

$30,900. They were also indebted to him in other amounts. The special account securities and the Pullman stock were advances for which the policies were assigned as security. Without going into intricate details of his various accounts, the majority of the court are of the opinion that the District Court was right in requiring him to apply the proceeds of the policies first to the payment of the special account and next—so far as the sum will go—to the claim for Pullman stock. But we think the net proceeds only should be thus applied, and that Crouse is entitled to deduct from the proceeds received from the company the $6,078.38 which he had to pay for premiums and interest to save the policies from forfeiture.

With this modification the order is affirmed.

WARD, Circuit Judge, dissents.

HERR et al. v. TWEEDIE TRADING CO.

TWEEDIE TRADING CO. v. HERR et al.

(Circuit Court of Appeals, Second Circuit. August 5, 1910.)

Nos. 15, 16.

1. SHIPPING (§ 113*)—BILL OF LADING—FREIGHT CONTRACT—CONSTRUCTION—"CRAFT."

A bill of lading provided that, unless the bill by express written agreement was to bear the cost of lighterage, it was agreed that the lighterage was for account and risk of the cargo, custom of the port notwithstanding. The bills contained a written clause that the freight was to be delivered by steamer or lighter at the steamer's option at a certain railroad in Rio de Janeiro, provided there was enough water and length to get alongside dock. The freight contract was indorsed, "These rates include delivery * * * providing there is water enough for craft to get alongside dock, and also include all derrick costs in discharging." *Held*, that the bill of lading did not provide that the cost of lighterage should not be at the expense of the cargo, but should be construed to mean that, if there was water and length enough to get the steamer alongside the dock, it was then at the steamer's option to discharge at the dock, or deliver by lighter at her own expense; the word "craft" meaning the steamer in question.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 2, p. 1707.]

2. SHIPPING (§ 108*)—LIBEL—CONSTRUCTION.

Where a libel for failure to deliver the tonnage contracted for alleged that after the shipment of 39 tons before April 1, 1907, subsequent shipments were delivered and accepted as under the shipping contract, and such allegation was admitted in the answer, it was properly determined that all the shipments were made under the contract, though there was some evidence to the contrary.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 108.*]

3. CUSTOMS AND USAGES (§ 19*)—CONSTRUCTION OF CONTRACT—PROOF.

A custom asserted among persons engaged in marine transportation, as to the construction of a contract, will not be applied where the witnesses examined as to the custom differ with reference thereto.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 41-46; Dec. Dig. § 19.*]

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

4. SHIPPING (§ 108*)—CONTRACT—"TON."

Where a freight contract engaged steamship room between New York and Rio de Janeiro for "approximately 1500/2000 tons," electrical machinery and apparatus, and also contained the schedule fixing dead weight and space rates at the steamer's option, the word "ton" should be construed to mean a dead weight long ton, notwithstanding an option authorizing the ship to charge freight at space rates.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 108.*

For other definitions, see Words and Phrases, vol. 8, pp. 6996–6997.]

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

Libel by E. M. Herr and others, as receivers of the Westinghouse Electric Manufacturing Company, against the Tweedie Trading Company, and cross-libel by the Tweedie Trading Company against E. M. Herr and others, as receivers. From a decree in favor of the receivers and dismissing the cross-libel, the Tweedie Company appeals. Decrees reversed in both cases, with instructions.

Ralph James M. Bullowa and F. M. Brown, for appellant.

Convers & Kirlin (J. Parker Kirlin and Charles R. Hickox, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. January 22, 1908, the receivers of the Westinghouse Electric Manufacturing Company filed a libel against the Tweedie Trading Company to recover charges alleged to have been wrongfully exacted for lighterage and demurrage in connection with consignments of electrical machinery by the steamer Glen Mae in September and for lighterage ex steamer Regina Elena in November, 1907, at Rio de Janeiro. June 3, 1908, the Tweedie Trading Company filed a libel against the Westinghouse Company to recover dead freight on the deficiency of machinery agreed to be shipped. The district judge directed a decree in favor of the receivers of the Westinghouse Company, libelants, and dismissed the cross-libel of the Tweedie Company.

We will take up the libel for consideration first.

The freight contract provided that it was made subject to the Tweedie Company's bill of lading, article 12 of which is as follows:

"* * * But unless this bill of lading by express written agreement is to bear the cost of lighterage it is expressly understood and agreed that the lighterage always both loading and discharging is for account and risk of the cargo, custom of the port to the contrary notwithstanding."

There was also on the freight contract the following indorsement:

"These rates include delivery at the Ferro Carrille Central Railroad, Rio de Janeiro, providing there is water enough for craft to get alongside dock and also include all derrick costs in discharging."

There was also the following written clause in the bills of lading:

"To be delivered by steamer or lighter at steamer's option at the Ferro Carrille Central Railroad, Rio de Janeiro, provided there is enough water and length to get alongside dock and also include all derrick costs for discharging as per indorsement."

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

These various provisions must be construed as consistent with each other if possible, and we think they can be. The lighterage was by the bill of lading to be for account and risk of cargo unless the bill of lading provided expressly to the contrary. We think it did not. If there were water and length enough to get alongside the dock, it gave the steamer the option of going alongside or delivering by lighter at her own expense. This privilege might be valuable in case of small shipments.

The indorsement on the freight contract made no mention of lighters, but required delivery at the dock provided there was water enough for "craft" to get alongside, which we think means for the steamer to get alongside. Presumably there would always be water enough for lighters. In other words, the lighterage was to be for account of the steamer only if she could get alongside, and did not do so.

It is argued that the Tweedie Trading Company by lightering at its own expense previous shipments ex steamers Meldroskin and Indiana construed the clause otherwise. But those consignments were small, and there is no proof that the steamers could not have gone alongside if they had wished to do so. While there was no special written clause on these bills of lading, they were subject between the parties to the indorsement on the freight contract. The district judge said:

"The ship's obligation was to make delivery on the Ferro Carrille dock, and until such delivery was made her contract was not complete."

If this be admitted, the question remains: At whose expense lighterage was to be, if lighterage were necessary? As the steamers could not go alongside, we think the libel of the receivers should have been dismissed.

We come now to the cross-libel. The claim is for demurrage of steamer Regina Elena and for dead freight on the difference between the tonnage shipped and the tonnage called for by the freight contract. The copy of the freight contract annexed to the libel was as follows:

Freight Contract.

New York

..... March 22nd, 1906.

No. 5377 Boston

ENGAGED freight room for account of Westinghouse Elec. & Mfg. Co. per Steamers to arrive, expected to sail from November, 1906 to April, 1907, for port of Rio de Janeiro M Tweedie Trading Company Agents for Approximately 1500/2000 tons Elec. Machy. & Elec. Apparatus.

Pcs.	or	Pckgs.	up to	3000#	-22½	cu ft	or	45c.	per	100#	strs option
"	"	"	3000#	" 5000#	-25c.	"	"	50c.	"	"	" "
"	"	"	5000#	"20000#	-45c.	"	"	90c.	"	"	" "
"	"	"20000#		"27000#	-55c.	"	"	1.10	"	"	" "
"	"	"	41500#		77½c.	"	"	1.55	"	"	" "
"	"	"	49000#		87½	"	"	1.75	"	"	" "

at rates Net Brokerage 2½% and 5 per cent. primage per 2240 lbs. or 40 cu. ft. and subject to the conditions The Tweedie Trading Co. B's/L

Alfred H. Post & Co.,
Per N. L. Wills,
Brokers.

Freight Prepaid.

The Westinghouse Company shipped less than 1,500 dead weight tons, but paid freight on 1,533 measurement and 233 weight tons, or 1,766 payable tons in all. The receivers claim that this fulfilled the contract, while the Tweedie Company claims that the Westinghouse Company was bound to ship at least 1,500 weight tons. This is the important question involved in the case. Another issue, however, was sought to be raised by the Tweedie Company, viz., that only about 39 tons having been shipped before April 1, 1907, the subsequent shipments were not made under the freight contract. But the libel alleged that the subsequent shipments were delivered and accepted as under the contract, and this allegation was admitted in the answer. Some proof to the contrary was taken at the trial and some in depositions taken in this court, although no leave was given for additional proofs on this subject. We think the trial judge rightly held that all the shipments made by the Westinghouse Company were made under the contract of March 22d.

Application was granted in this court to take additional proofs on the questions: (1) Whether there is a custom in this port whereby the freight contract must be construed as calling for from 1,500 to 2,000 dead weight tons; (2) whether the Westinghouse Company furnished specifications of the cargo before the freight contract was signed; (3) whether the copy annexed to the libel is a correct copy of the freight contract.

The last question is naturally to be considered first. The original freight contract was executed on a printed form in duplicate, and both originals have been lost. The copy of the contract annexed to the libel was admitted by the Tweedie Company to be correct in its answer and in its cross-libel and by its witnesses at the trial. Proofs have been offered in this court that the word "approximately" and the words "five per cent. primage per 2,240 lbs. or 40 cubic feet" were crossed out of the printed form. The facts that the word "approximately" is not appropriate when the number of tons is fixed at "from 1,500 to 2,000," and that provision for primage was unnecessary because none had been contracted for, and that reference to tons of 2,240 pounds or 40 cubic feet was unnecessary because rates of freight had been previously provided per 100 pounds, and one cubic foot do not prove that these words were not left in the printed contract. Without attaching great importance to their presence or absence, we hold that the copy annexed to the libel is correct because sufficient proof has not been furnished to overcome the admissions of the Tweedie Company in its pleadings and by its conduct.

We do not think that any custom has been established to the effect that a contract for shipment of a given number of undefined tons at a rate of freight per pound or at steamer's option per cubic foot requires the delivery of dead weight tons. Such a question has rarely arisen. The witnesses examined differ, and we are left to construe the contract from its terms.

The practice is undisputed that contracts to carry dead weight tons generally give the carrier the option to collect freight by weight or measurement in order to cover large but light packages. It is also undisputed that when the word "ton" is used alone a dead weight ton

is meant and in foreign trade long tons of 2,240 pounds. We think the word "ton" in this contract in connection with the quantity to be delivered is to be taken in the usual sense as a dead weight ton, and that the presence of the option usually given to carriers as to charging freight does not alter the meaning of the word.

During the early negotiations the parties had been considering rates of freight for 800 to 1,000 tons covering about 2,000,000 pounds. Without discussing all the testimony pro and con as to whether specifications, and, if so, what specifications, were furnished by the Westinghouse Company before the contract was signed, we are of opinion that the parties used the word in the same sense in connection with this contract for a larger quantity.

The decrees are reversed in both cases, with instructions to the court below to enter a decree dismissing the libel and an interlocutory decree for the cross-libelants with the usual order of reference; costs in both cases to the Tweedie Trading Company.

HENDERSON v. MOUND COAL CO.

(Circuit Court of Appeals, Third Circuit. September 24, 1910. On Motion for Reargument, October 11, 1910.)

No. 30, March Term, 1910.

BONDS (§ 128*)—EVIDENCE (§ 460*)—ACTION FOR BREACH—IDENTITY OF CONTRACT THEREIN REFERRED TO—ISSUES AND PROOF.

In an action on a bond given by the lessee of a coal mine and conditioned for the performance of the lease therein referred to, defendants, who were the sureties, denied that the lease set up in the statement of claim was the one secured and attached to their affidavit of defense a copy of another which they alleged was the one secured. On the trial, plaintiff produced a lease which was not attached to the bond, but by its terms required a similar bond, and this was admitted in evidence over defendant's objection. *Held* that, while such lease by reason of its conformity to the recitals in the bond may have been properly admitted as prima facie the one secured, it was not conclusive, and, its identity having been put in issue, defendants were entitled to show that another lease, unsigned, of even date, but differing materially in its terms, was the one shown them by defendants previous to the execution of the bond, and that they signed the latter on plaintiff's assurance that such lease was the one that had been signed; that the offer of such evidence was not an attempt to set up an equitable defense, nor to vary the contract by parol, but that it went directly to the issue as to the identity of the lease, which was an essential part of the contract sued on.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 205–217; Dec. Dig. § 128;* Evidence, Cent. Dig. § 2116; Dec. Dig. § 460.*]

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

Action by the Mound Coal Company against one Henderson and others. Judgment for plaintiff, and defendants bring error. Reversed.

A. L. Cole, for plaintiffs in error.

David A. Reed, for defendant in error.

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

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

ARCHBALD, District Judge. This was an action for $15,000, the penal sum named in a bond in which one J. E. Hedding (not sued) was principal, and the defendants were sureties, of which a copy will be found in the margin.[1] The bond bears date October 19, 1905, and, according to the recitals contained in it, was given in pursuance of the requirements of a coal lease between the plaintiff and Hedding, which called for a bond in the sum named, "conditioned to indemnify the said company [the plaintiff] against loss arising from any breach of said contract, and against the abandonment of said property." And, in conformity with this, it was there in substance agreed that if Hedding as lessee should well and truly keep the covenants required to be performed by him, and should not surrender or abandon the said lease or mine, without the consent of the plaintiff, the obligation should be void, or otherwise be and remain in full force and virtue. The lease was not attached to the bond, but the plaintiff produced at the trial a lease of even date and conforming terms, by which it was, among other things, provided that:

"Upon delivery of this lease, duly executed, the lessee shall give bond in the penalty of fifteen thousand dollars, conditioned to indemnify the lessor against any and all loss or damage arising from the breach by the lessee or his assigns, of any covenants herein contained, and further conditioned for the payment by the lessee to the lessor of the sum of fifteen thousand dollars in case this lease, without the consent of the lessor, should be sur-

[1] Know all men by these presents, that we, J. E. Hedding, H. C. Shugert, Charles D. Ames, James P. Spackman, Henderson & Schneider, are held and firmly bound unto the Mound Coal Company, a corporation of the state of West Virginia in the just and full sum of fifteen thousand dollars ($15,000), to the payment whereof well and truly to be made to the said Mound Coal Company as aforesaid, we bind ourselves, our executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 19th day of October, 1905.

The condition of the above obligation is such, that whereas, the above named Mound Coal Company has this day demised to the said J. E. Hedding, for the term of twenty years, beginning January 1, 1906, the coal mine now owned and operated by said company, in the city of Moundsville, West Virginia, together with certain other property therein mentioned, which lease bears even date herewith, and is intended for record in the office of the Clerk of the county court of Marshall county, West Virginia.

And whereas the said lease requires the said Hedding to execute and deliver to the said Mound Coal Company a bond in the penalty of fifteen thousand dollars, conditioned to indemnify the said company against loss arising from any breach of said contract and against the abandonment of said property.

Now, therefore, if the said J. E. Hedding, his heirs, personal representatives or assigns, shall well and truly keep all covenants of the said lease required to be performed by the lessee therein, and shall not surrender nor abandon the said lease or mine without the consent of the said Mound Coal Company, its successors or assigns, then the above obligation to be void, otherwise to remain in full force and virtue.

J. E. Hedding.	[Seal.]
H. C. Shugert.	[Seal.]
Charles D. Ames.	[Seal.]
James P. Spackman.	[Seal.]
Henderson & Schneider.	[Seal.]

rendered or abandoned by the lessee or his assigns, before the termination of the lease; it being intended that in the event of such abandonment the said sum of fifteen thousand dollars shall be paid to the lessor as liquidated damages in addition to the actual damages caused by any default of the lessee. Good and sufficient sureties shall be given on such bond, and if such security should become impaired, further security shall from time to time be given, to the reasonable satisfaction of the lessor."

On the strength of the provision there found, that in the event of an abandonment by the lessee the damages should be liquidated at $15,000, which should be in addition to the actual damages caused by any default, the plaintiff claimed and was allowed to recover the full amount of the bond; the court overruling the defenses attempted to be made to it.

The contention of the defendants is that the lease which the plaintiff produced was not the one for which they became surety, and that there was another and different lease, bearing the same date and in other respects similar, but varying from the one introduced in evidence in having no provision for liquidated damages in case of abandonment, either $15,000 or any other sum, a fact which they put in issue by their affidavit of defense, a copy of this other alleged lease, to that effect, being attached to it. And objection was made upon this ground to the lease offered by the plaintiff at the trial. The lease produced having been nevertheless received over their objection, the defendants, when their side of the case was reached, offered to prove, in support of their contention, by Mr. Henderson, one of their number, that he was called to Clearfield, Pa., in December, 1905, to meet Col. Colburn, the agent of the plaintiff company, at which time a lease with Hedding was exhibited to him, bearing date October 19, 1905, which lease was then in his possession; that a request was made by Colburn and Hedding that he (Henderson) join in a corporation which was to be formed to operate under the lease so exhibited; that, in pursuance of this conversation, he went to Moundsville to look at the property covered by the lease, accompanied by Col. Colburn, the agent of the plaintiff company, and Mr. Ames, another of the defendants; that, after examining the property, he was asked to sign a bond, which was called for in the lease shown to him at Clearfield, and that, on the assurance by Col. Colburn that the lease which had been so shown to him was the lease under which the proposed corporation was to operate, he signed the bond in suit in the firm name of Henderson & Schneider; that the lease attached to the plaintiff's statement of claim was not the lease which was exhibited to him, but was a new and substituted lease, calling for liquidated damages as a newly incorporated feature not found in the original, the lease exhibited to him at Clearfield being a lease between the plaintiff and Hedding, which had not been executed, but the terms of which Col. Colburn informed him at the time he signed the bond had not been changed, assuring him that the lease which was to be transferred to the corporation to be formed was the same in substance as that previously shown him. This offer was objected to by the plaintiff (1) because it was an attempt to introduce an equitable defense in an action at law; (2) because the witness admitted that he had signed the bond; and (3) because it was an attempt to vary the terms of the bond by parol. The

court sustained these objections and excluded the evidence, and this ruling is assigned for error.

The lease was not attached to the bond, and the only identification of it was its correspondence with the recitals in that instrument. If there was but one lease to which these recitals could apply, it would prove itself by its own terms, but, if there was more than one and there was any dispute about it, it was incumbent on the plaintiff to establish that the one produced was the one referred to. Apparent conformity might be sufficient for the purpose in the first instance, and the court was probably right, therefore, in allowing the lease produced by the plaintiff to come in as prima facie the one, notwithstanding the defendants' objection. But it was not conclusive, and, if issue was made on it, it was open to the defendants to contest and controvert it. This was done in the affidavit of defense which was filed, where it was in substance averred, the same as it was in the defendants' offer, that prior to the signing of the bond another lease, bearing the same date, and of the same general tenor, but differing in this material respect, that there was no provision with regard to the damages for abandonment being liquidated at $15,000, nor, indeed, anything on the subject, was exhibited to them, a copy of which lease was attached to the affidavit, and that the assurance was given at the time of signing the bond that this was the lease that the bond was given for, the defendants being induced to sign on the strength of that. This raised an issue of fact on the question of identity, if nothing further, on which the defendants were entitled to give evidence, and upon a proper showing to go to the jury, and it was error to reject the offer of evidence which has been quoted, which was in line with it. This was not an equitable defense, as it was charged, but went directly to the question of what the defendants were obligated for, the bond, as it stood, not being complete in itself, but being dependent on the lease which was there referred to, for which it was given, this being in controversy. Neither was this proof to be shut out, because the signing of the bond was admitted; the mere fact that the defendants executed the bond not preventing them from showing what it stood for. Much less was the evidence offered an attempt to vary the bond by parol; it being always competent where there is any question to identify by parol the subject-matter of a contract within the terms of it. 21 Amr. & Eng. Encycl. Law (2d Ed.) 1119. Ranney v. Byers, 219 Pa. 332, 68 Atl. 971, 123 Am. St. Rep. 660. And this applies where one writing is referred to in another. 16 Cyc. 670. It is said that the lease which the defendants set up was never executed, as is apparently conceded in the offer, but for the present we have nothing to do with that; also, that it does not comport with the terms of the bond, which recognizes as a requirement of the lease that indemnity shall be given, not only against loss for a breach, but also against the abandonment of the property, which is not found in the lease relied on by the defendants. This is more serious, but we do not think it is before us. The offer has to be taken as it reads, and is silent upon this subject, and, so taken, the defendants were entitled to prove it.

It is further urged that the evidence offered was admissible, because, if true, it showed fraud in the procurement of the bond, which had

the effect of avoiding it; but the right to make this defense in an action at law is disputed, the fraud not entering into the immediate execution of the bond, but merely going to the means employed in securing it, and may be regarded as doubtful. Hartshorn v. Day, 19 How. 211, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 26 L. Ed. 232; Mutual Life Insurance Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603. Although see Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Life Insurance Co. v. Bangs, 103 U. S. 780, 26 L. Ed. 608; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Equitable Life Assurance Society v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682; Wagner v. National Life Insurance Co., 90 Fed. 395, 33 C. C. A. 121. It is not necessary, however, to the disposition of the case to determine this question, and we will not therefore undertake to do so. And the same may be said of the other similar offers of evidence, the rejection of which is also assigned for error.

Neither do we feel called upon to decide whether the stipulation in the lease, which the plaintiff relies on, by which the damages for abandonment are liquidated at $15,000, is, after all, nothing but a penalty, being in addition, as it is said, to the actual damages. The lease where this appears is not, according to the defendants, the one for which they agreed to be bound, and, if they succeed in this contention, there will be no occasion to construe it. It will be time enough to determine its meaning when the objection made to it proves unavailing.

The judgment is reversed, and a new trial is awarded.

On Motion for Reargument.

PER CURIAM. As pointed out in the opinion already filed, it was error to reject the offer of evidence by which the identity of the lease which the plaintiffs rely on was called in question. The rejection of this offer is the subject of the fifth assignment, and is fully covered by it. This is the only point decided, but it is vital. Nor was any question made by the plaintiffs at the argument but that it would be, if it was held against them. It is true that only in the affidavit of Henderson and Schneider is there a denial that the lease, which is asserted by the plaintiffs, was not the one for which the defendants became liable. But it is difficult to see how the issues so made could be ignored as to the other defendants. Ames was not served and filed no affidavit, and the affidavits of Shugert and Sackman were directed to other matters; but, taking the affidavits all together, they are not so unrelated that they cannot be conjointly relied on. The defendants are sued jointly, and if they are to be jointly held a case good against them all must be established. And if the lease on which the plaintiffs rely is disproved as to any, it is disproved as to all, and there can be no recovery. This was practically involved in what we said before, but these observations may serve to make it a little plainer.

The petition for a rehearing is refused.

WYSONG & MILES CO. v. OAKLEY et al.

(Circuit Court of Appeals, Fourth Circuit. July 15, 1910.)

No. 929.

PATENTS (§ 328*)—INVENTION—SANDING MACHINE.

The Welker patent, No. 575,187, for a sanding machine, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Suit in equity by the Wysong & Miles Company against D. S. Oakley, E. N. Jansen, and Norton L. Upson. Decree for defendants (169 Fed. 640), and complainant appeals. Affirmed.

This suit was instituted in the Circuit Court of the United States for the Northern District of West Virginia on October 16, 1907, for the purpose of enjoining the appellees from manufacturing and selling certain sanding machines which the appellant claimed are infringements upon the letters patent which appellant claims to own. The patent referred to was granted January 12, 1897, No. 575,187, upon the application of Louis Welker, of Williamsport, Pa., filed March 12, 1896. The bill alleges in paragraph 1 that Welker was the original and first inventor or discoverer of certain new and useful improvements in sanding machines not used or owned by others in this country when patented, nor described in any printed publication in any country prior to his invention or discovery thereof, and alleges that such invention had not been in public use or on sale for more than two years prior to said application, and had not been abandoned to the public. It is alleged in paragraphs 5 and 6 that Welker, by assignment dated June 26, 1907, assigned said patent to Wysong & Miles Company and that thereby the said company became the sole owner of the said letters patent.

While it is alleged in paragraph 8 of the bill that appellant had invested and expended large sums of money for the purpose of carrying on the business of manufacturing and selling machines containing the said invention and alleges that a large number of said machines were made according to said invention and sold by the appellant, no proof was offered by the appellant in the case to show that any machines had ever been made by the appellant under this patent. The assignment was made on June 26, 1907. Witnesses for the appellant testified that the Wysong & Miles Company machine was different from the Welker machine and made on a different principle from the Welker machine. Witness for the appellant, W. E. Sykes, among other things, testified as follows: "Q. What have you learned to-day in regard to the making of the Welker machine, or machines upon the Welker plan, by the plaintiffs in this case, and from whom did you learn it? A. In conversation to-day with Mr. C. W. Miles, an attorney and witness in this case, I called attention to the fact that in my opinion the Welker machine could not do the work for which it was intended, and that no such machine had ever been constructed and operated. I then asked Mr. C. W. Miles if they had ever constructed such a machine, and he replied that they had not. * * *" It it also insisted that this fact is established by witnesses George Sprout, E. N. Jansen, W. E. Curry, witnesses for appellees, and James D. Snyder, Wm. M. Welker, and G. H. Miles, witnesses for the appellants.

It appears from the deposition of R. M. Clapp and G. H. Miles that as representatives of Wysong & Miles Company they visited the plant of the Oakley & Jansen Company before they bought the Welker patent, and that they were shown through the premises and were informed as to the kind of machines the appellees were making and the details of construction, and that after knowing these facts the Wysong & Miles Company looked up the Welker patent and bought it.

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

Paragraph 9 of appellant's bill alleges that the appellees have made and sold the machines containing the invention and improvements of said letters patent No. 575,187, and the bill prays for an accounting and injunction against the appellees to prevent them from continuing the manufacture and sale of the machines. After the evidence in chief had been taken for appellant, appellant served a notice upon appellees, which was filed in this cause on the 4th day of July, 1908, "that complainant will press for a decree upon the third claim only of the Welker patent in suit, No. 575,187." And said third claim in said patent is as follows: "3. In a sanding machine the combination of a pulley and stationary former, a sanding belt extending between said pulley and former, a means for adjusting said former substantially as set forth."

The answer of the appellees, in paragraphs 1 and 2, puts in direct issue the allegations of the bill as to the patent. The answer denies that Welker was the original and first discoverer of the improvements claimed in the bill, denies that such improvements were not known or used by others in the United States, denies that such improvements were not patented, or described in any printed publication in any country prior to the pretended invention of Welker, and avers that the improvements referred to were in public use and on sale in the United States for more than two years prior to the said application by Welker, and alleges that said improvements were not patentable improvements because the same had long since been previously included in patented machines and in general use. The answer also alleges that prior to the institution of appellant's suit the attorney for the complainant, C. W. Miles, visited the plant of appellees, and was there informed as to patents and inventions prior in time to the Welker patent and which rendered the Welker patent invalid. Such patents are referred to in paragraph 6 of defendant's answer. First. Patent to O. Sawyer, dated May 10, 1881, No. 241,429, for certain improvements in sanding machines. Second. Patent to O. Sawyer, dated January 27, 1891, No. 445,382. Third. Patent to F. W. Coy, dated March 11, 1884, No. 294,766. Fourth. Patent to F. W. Coy, dated April 8, 1884, No. 296,535.

It is insisted by appellees that all of said letters patent to Sawyer and Coy were for improvements in sanding machines, and for improvements which anticipated the very elements and principles involved and stated in the third claim of the Welker patent.

The answer in paragraph 7 also avers that the use of an abrasive belt passing over pulleys and having the rear face of said belt supported by a form of various shapes and sizes to suit any object to be abraded had been in general use in the United States for many years, and had been devised and used in different forms by different manufacturers for many years before Welker's application for a patent, and that the letters patent did not give to Welker the exclusive right to make, use, and sell the machines embodying the principle of the abrasive belt passing over pulleys and supported by an intermediate support or form on which the abrasive belt would rest, when used for abrading the article manufactured, and the answer denies that said patent gave the right to the appellant to claim such exclusive right against the appellees and as against the machines and appliances made, used, and sold by the appellees. The averments contained in the answer put in issue the validity of the Welker patent, and also raised the question as to whether appellee's machine infringed upon the Welker patent, if valid.

Upon the bill and answer and replication thereto the parties proceeded to take evidence, and the appellant took its evidence in chief before notice was served upon the appellees that appellant relied solely upon claim No. 3 in the Welker patent, and in March, 1909, the cause was argued, submitted, and an opinion was rendered April 16, 1909, and decree entered April 22, 1909, denying relief to appellant, and decreeing that claim No. 3 in the Welker patent, No. 575,187, is void as not containing any new or novel principle, or new application of the old principles such as would entitle the said Welker to a patent upon said third claim, and that all of the principles contained in the said third claim of said Welker patent are found in the prior F. W. Coy patents, Nos. 294,766 and 296,535, referred to in appellees' answer and in the evidence. From this decree, the appeal herein was taken.

C. W. Miles and Melville Church (Church & Church, on the brief), for appellant.

C. D. Merrick, for appellees.

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

PRITCHARD, Circuit Judge. The learned judge who heard this cause below in an opinion filed herein, among other things, said:

"The defenses relied upon, while variously stated, may be epitomized to be a denial of infringement and a charge that, in view of the condition of the prior art, this Welker patent is void for lack of novelty and patentable invention.

"After careful consideration of the case, I am convinced that the latter must prevail and for these reasons: The operation of a belt upon two or more pulleys is common to mechanics. That these pulleys may or may not have rims to inclose the belt, may or may not be adjustable, or may or may not be capable of being rendered stationary, are functions alike common and well known in mechanics. If two pulleys should be connected by a sanding belt one stationary and without inclosing rims, the other revolving at such speed as to revolve the belt, the stationary pulley would be as capable of polishing in its circular form as would the former found in the Welker machine. What inventive faculty is required to substitute for this stationary pulley different formers suitable for the different wood curvatures desired to be polished? What greater novelty is involved in having the belt run over two pulleys and a former, the latter stationary, than is involved in having it run over three different pulleys one of which is stationary? It seems to me to be wholly immaterial whether you call these old and very common devices pulleys or formers. The mechanical operation is the same, and no new or novel principle or new application of old principles is involved such as to warrant a patent monopoly. I do not think such devices involve patentable novelty at all but if I be mistaken in this view I am reasonably certain every principle of them will be found in the prior Coy patents Nos. 294,766 and 296,535. It follows that complainants' bill must be dismissed with costs."

It is insisted by counsel for appellant that the structures manufactured and sold by the appellees contained the features set forth in the patent in suit and embodied the combinations and elements as set forth in claim three of said patent, as distinguished from what is disclosed in the prior art, and particularly what is disclosed in the Coy patents.

It is also insisted that, "in view of the undisputed right of defendants to use the structure disclosed in the Coy patents, due to said patents having expired, their preference for and persistence in using a different structure or combination of elements, on which a later patent has been granted, and is still in force, becomes significant. These circumstances are given added force from the testimony of defendants' expert witness who testifies that the mechanism disclosed in the patent in suit is different in principle from those disclosed in the Coy patents," and, bearing upon this question counsel rely upon the testimony of W. E. Sykes, expert witness, who testified as follows:

"Q. 42. State whether in your opinion the Coy patent, No. 294,766, and the Coy patent, No. 296,535, were the patenting of such devices and combination as to render the said Welker patent void? A. I do not think so.

"Q. 43. Please state the reasons or grounds for your said opinion? A. The Welker patent is constructed in my opinion upon a different theory than that upon which either the Sawyer or the Coy patents are constructed. The Welker patent is an attempt to drive a sanded belt not along and over the face

of the former, but around the former, by means of a single pulley, using the former as a sort of a second pulley, although not as a pulley as pulleys are ordinarily used, for the reason that it does not revolve; while in the Coy patents a belt is driven about two pulleys and along and over the face of the former, situate between the two pulleys. In other words, the Coy patents more nearly resemble the Oakley & Jansen method than they do the Welker method of operating. I do not mean by this that the Oakley and Jansen machine is not a patentable device, in view of the state of the art, as shown in the Coy patents. As to the Sawyer patent, I do not think that it in any way anticipates any of the patents heretofore referred to, or the Oakley & Jansen machine. It is intended for a single class of work only, and does not possess a former, excepting as far as the two adjacent pulleys act as such."

This witness also testified relative to the Sawyer patent as follows:

"Q. 39. Compare the combination in the Welker machine with the combination in the Sawyer patent before referred to, and state the difference in said combinations? A. I find them similar only in that each possesses a sanding belt driven by a pulley. In all other respects they appear different. * * *

"Q. 41. State whether in your opinion the issuing of the said Sawyer patent in 1881 was the patenting of such a device or combination as to render void the Welker patent? A. I do not so regard it."

Counsel for appellant further contend that:

"Regarding the Coy patents, defendants' practical witness Curry testifies that, while he has had no practical experience with this machine, he considers it applicable to a certain class and range of work, that it belongs to the same class of machines as the Sawyer, and that the Sawyer machine is applicable to a wider range of work than the Coy machine. He notes that the Coy form is on the under, instead of the upper, side of the machine, and which he considers an objectionable feature. He testifies that in both the Coy patents the form is stationary or nonadjustable. He testifies that the Coy machine is not adjustable to treat scrollwork. He testifies that the Sawyer machine is adapted to a wider range of work than the Coy machine. He testifies to important modern developments, in view of which he does not consider the Sawyer as an ideal machine for all classes of work. He testifies that it is necessary in certain classes of work to advance the form beyond the normal belt line, that is, cause the form to give shape to the belt, or dominate the shape of the belt.

"Defendants' expert witness Sykes, relative to the Coy patents, testifies as follows:

"'Q. 42. State whether in your opinion the Coy patent No. 294,766 and the Coy patent No. 296,535 were the patenting of such devices and combinations as to render the said Welker patents void? A. I do not think so.'

"The testimony above referred to is directly opposed to any contention on the part of the defendants that the Sawyer or Coy patents disclose the invention in controversy, or that in view of said patents there was a lack of invention on the part of Welker."

The first patent is what is known as the "Sawyer Sanding Machine," for which patent was issued May 10, 1881, No. 241,429. The opening of the specifications filed at the time of the application for this patent contains the following claim:

"That Sawyer had invented 'certain improvements' in sanding machines; that the same relates to mechanism for smoothing convex or rounded wooden surfaces by the agency of an endless belt coated with sand, emery, or other suitable abrading material."

The use of the words "certain improvements" shows that prior to the date of the application sanding machines were in existence, and it is fair to assume that it was the intention of Sawyer to make certain

improvements in regard to such machines. The second Sawyer patent was issued January 27, 1891 (No. 454,382); and, while this patent is not in suit, it is referred to in the pleadings, and certain portions of the evidence relate to this point.

The next patent is what is known as the "Coy patent," issued March 11, 1884 (No. 294,766). The application in this instance was filed December 1, 1883, and recognizes the existence of abrading machines, only claiming certain improvements in relation to the same. There, it was contended that by the principle of a form or former, applied to the back of the belt to correspond to the shape of the article to be abraded, furniture with irregular surface could be polished. In the application it is said that the invention "consists of the provision of a rigid support, that is, one composed of materials incompressible in all directions under ordinary pressure, which may be formed in general outline to approximate the work to be abraded, said support having a yielding or compressible surface arranged to bear against the inner side of the belt between the supporting pulleys, the belt being caused by the article acted upon to conform to the contour of said support; the support being by preference detachable and secured to a fixed holder so that differently formed supports may be used interchangeably with the same pulley." The general scheme of this patent seems to have been to attain the highest perfection in polishing furniture with irregular surface, such as was described at the time of the argument.

The second Coy patent was issued May 8, 1884, and "this invention relates to abrading machines having an endless belt with an abrasive surface, mounted on two supporting pulleys, an intermediate support arranged to bear against the back of the belt at a point between the supporting pulleys, and supporting the belt against pressure exerted on the latter by the article presented to the belt for this smoothing action, as shown by letters patent No. 294,766."

Thus it will be observed that in the second Coy patent we have the idea of a former or support receiving additional development, and a rigid support is substituted for the idler pulley at the end of the machine, all of which clearly involves the end sought to be obtained by the Welker patent. Antedating the Welker patent we have four patents, to wit, the two Sawyer patents and the two Coy patents, all based upon the same idea and inaugurated for the accomplishment of the same end.

George Sprout, a witness examined, testified that he was foreman of the Parkersburg Chair Company, and that he had had 15 years' experience in machinery. Among other things, he was asked what machines his company had used, and in reply he said:

"A. They have sand belt machines, where the belts go over pulleys and forms. The forms are adjusted to flat surface or oval shape sanding."

When asked as to what machines were used at the Parkersburg Chair Company's plant, witness said:

"A. Wysong & Miles is one make and Oakley & Jansen is another. Then the superintendent, Mr. Curry, has got two makes of his own, long before he bought any from Wysong & Miles Company."

He was then asked to look at the copy of the L. Welker patent No. 575,187, and state whether he had examined said patent and figures, and in reply witness said that he had examined figures 5 and 1, the construction of the sand belt and form. When asked if he had examined the Oakley & Jansen machine, he said:

"A. I examined the two machines, and the Oakley & Jansen machine was quite different from the Welker machine."

Witness was then asked in what respect they differed, and he replied:

"A. In the first place, the difference is in the form. The Oakley & Jansen form is adjustable to any angle and to any shape, oval or straight, which you could not do on the Welker machine, for there is no adjustment to do it with. In order to do sanding, oval shaped, my experience is it requires a sand belt to go over a pulley and form; in order to make the belt buckle it requires two pulleys and a form. The Oakley & Jansen machines, the belt is adjustable automatically, independent of the form.

"Q. How many pulleys are used in the sanding belt on the Welker patent as shown by the diagram figure 1? A. One pulley which the belt passes around.

"Q. And at the other end what does the belt pass around? A. At the other end the belt passes around a form. * * * Q. From your practical experience in the use and operation of sand belt machines, please state whether the work which can be done on the Oakley & Jansen machines can be done on the Welker machine? A. The work on the Oakley & Jansen machine in regards to oval-shaped work couldn't be done on the Welker machine. The Welker machine only has one pulley and a form, where it requires two pulleys with a form in order to give the belt proper attention, and buckle it for oval shapes or round shapes."

Elias N. Jansen, one of the appellees, testified that he had had nine years' experience as a mechanical draughtsman and was familiar with the machine from the cuts shown in the figures accompanying the patent; that the appellees are manufacturing and selling sanding machines on a patent issued to D. S. Oakley, transferred to Oakley & Jansen Machine Company, and identified the same with the photographs, Exhibits Nos. 1 and 2, with the deposition of George Sprout; that the Oakley & Jansen machine is entirely different from the Welker machine, and explained the difference between them; that there were no parts similar in the two machines except that pulleys were used for driving the sand belt. He further testified that the machines made by the appellees were made with the sand belt running over two or more pulleys and the former is used between the pulleys; that Wysong & Miles Company are not making a machine like that shown in the cut of the Welker patent; that the only similarity between the two machines is the use of an endless sand belt; that it is not customary in the use of the Oakley & Jansen machine to locate the former at one end of the machine as shown in Exhibit 1; that it is more commonly used in the center of the belt.

W. E. Sykes was also examined by the appellants as an expert witness on patents. He testified, among other things, that in the Oakley & Jansen machine the belt passes along and over the surface of the former and not around it; that the former is not used in the Oakley & Jansen machine in the place of a pulley; that in comparing the combination used in the Welker machine and the combination used in the

Oakley & Jansen machine they are similar only in two features; that they possess a sand belt and a driving pulley; and that they differ in every other respect. He further testified that the Coy patents are like the Oakley & Jansen, but that they do not interfere with or infringe upon the Welker patent.

It is a matter of common knowledge that originally wood or other material was abraded by the use of a piece of sandpaper or a piece of wood, cloth, or some other material, coated with sand, emery dust, or other substance, which was applied to the surface sought to be polished or abraded by the hand. Gradually, with the development of manufacturing industries and the consequent demand for the manufacture of large quantities of furniture, the necessity arose for the use of machinery for abrading and polishing purposes; and this was accomplished by the use of a belt coated with material used in making sandpaper, which passed around pulleys or rolls. This method, of course, had its drawbacks, one being that the continuous belt could not be effectively utilized to polish a piece of furniture with an irregular surface; and it among other things suggested the idea of what is known as the "former," to be placed behind the belt for the purpose of bringing the same in contact with the surface sought to be abraded or polished. It appears from the evidence that about 13 years before Louis Welker filed his application for letters patent the various principles and elements to which we have referred were fully developed and used; and, as we have heretofore stated, letters patent issued for the same.

It is contended by counsel for the appellees that the Oakley & Jansen machine is an entirely different combination from that shown in the Welker patent, having many advantages and combinations of devices not contained in the Welker patent, the difference being epitomized as follows:

"First. The Oakley & Jansen machines do not use a stationary former upon a spindle at the end of the sand belt.

"Second. It does not pass the sand belt around the former.

"Third. The former is not fastened in place as in the Welker machine.

"Fourth. It does not have the oscillating movement as in the Welker machine and does not use the eccentrics for that or any other purpose.

"Fifth. The former used is an intermediate former or support.

"Sixth. The attachment to a former is to an arm instead of to a spindle.

"Seventh. The former is attached to said arm, not by a clamp nut, but by a vice, which seizes and holds the sides of the former and which is loosened and fastened in an entirely different manner from that used in the Welker machine.

"Eighth. The vice holding the former is hinged upon the arm, so that the former may be set at any angle desired with regard to the belt.

"Ninth. The arm holding the former is slotted, so that in fastening it to the frame of the machine it may be raised or lowered at will by the operator, by loosening a nut having its own wrench attached to it and a part of it.

"Tenth. The arm so fastened to the machine, by loosening said fastening, may be moved along the frame of the machine by means of a slot in said frame, and thus brought near to the driving pulley or near to the pulley at the opposite end of the machine, as may be desired.

"Eleventh. The frame of the machine may be raised at one end by means of a slotted arm, as shown in the photograph No. 1.

"Twelfth. There is an automatic tension of the belt by means of a movement of the carriage of the pulley at one end of the machine, which move-

ment is obtained by the turning of a wheel, to which a cord and sectional weights are attached, the said wheel turning a spindle with cogs attached to working in ratchet cogs of the frame of the machine.

"Thirteenth. Any size, shape, or length of the former may be used upon this machine, and the surface of it may have just such irregularity as may be desired to fit any object which the operator may desire to polish.

"Fourteenth. A more elaborate combination of the principles of said machine are shown in photograph No. 2, where an upright and horizontal machine are combined, and provision is made also for a third belt so that three men may work at said machine at one time."

This contention of appellees may not in all respects be correct, but in the main is sustained by the evidence considered by the court below.

It is also insisted by counsel for appellees that the patenting of an improvement does not absorb the elements of a patent previously granted, and that it does not prevent the use of it by the former patentee or by the public when the patent runs out. Being of the opinion that there is sufficient evidence to sustain this contention, and applying the principle thus invoked, we think the court below was right in holding that there was no infringement by the Oakley & Jansen machine, it being a new combination, with new devices used in a new way.

The court below found that the Welker patent does not contain any new or novel principle or new application of principles on which to base a patent on said third claim, and, further, that all of the principles contained in the third claim in the Welker patent are found in the prior F. W. Coy patents. There is no assignment of error which challenges the finding of the court as to these two points, and, in the absence of such assignment of error, these findings must be by this court assumed to be correct.

It is insisted by counsel for the appellees that there is no infringement; and that, owing to the condition of the prior art, the Welker patent is void for lack of novelty and patentable invention. After a careful consideration of the evidence and inspection of the machines exhibited as evidence, we are of opinion that what is known as the Welker machine does not involve a patentable invention. In other words, it is merely the result or product of mechanical skill—a mere change in the size of device or machine, based upon the mode of operation already patented. The evidence shows that the patent is based upon matters resulting from pure mechanical skill, and a comparison of the Welker patent with the prior Coy patents, Nos. 294,766 and 296,535, shows conclusively that every principle involved in the Welker machine is to be found in either one or the other of the Coy patents.

Under these circumstances, we are of opinion that the rulings of the lower court were proper, and must be affirmed.

STANDARD TYPEWRITER CO. v. STANDARD FOLDING TYPEWRITER SALES CO. et al.

(Circuit Court of Appeals, Second Circuit. July 28, 1910.)

No. 330.

1. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
While it is the general rule that a preliminary injunction will not be issued on an unadjudicated patent, there are exceptions, and such an injunction may properly be granted where the validity of the patent is reasonably certain, infringement is clear, and the defendant corporation was organized to act as sales agent for the patented machine, and after selling its sales contract commenced making the infringing machines, which it marked as patented on the date of the patent in suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. § 297.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FOLDING TYPEWRITER.
The Rose patent, No. 754,242, for a folding typewriter, *held* valid and infringed, affirming an order granting a preliminary injunction.

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

Suit in equity by the Standard Typewriter Company against the Standard Folding Typewriter Sales Company and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Appeal from an order granting a preliminary injunction to restrain the infringement of letters patent No. 754,242, issued on March 8, 1904, to Frank S. Rose, for a new and improved typewriting machine, and assigned, through mesne conveyances, to the complainant. The suit was brought to restrain the alleged infringement of two patents—No. 948,553, granted on February 8, 1910, to the complainant, as well as the Rose patent aforesaid—but as the preliminary injunction was dismissed as to the former the present appeal relates to the latter only.

Edwards, Sager & Wooster (Clifton V. Edwards and Thomas Howe, of counsel), for appellants.

W. R. Davis, D. W. Van Hoesen, and J. A. E. Criswell, for appellee.

Before WARD and NOYES, Circuit Judges, and HAND, District Judge.

NOYES, Circuit Judge. The subject-matter of the patent in suit is primarily a folding typewriter. The patentee states at the commencement of his specification:

"This invention relates to improvements in typewriters in which I seek to produce a new construction of the support or carriage for the type-platen or cylindrical roller which enables the same to be folded into compact relation to the keyboard, thus making provisions for ready and convenient transportation of the instrument."

Again he states:

"The important feature of the present invention is the provision of means whereby the platen and its carriage may be folded into compact relation to the banks of keys, thus making provision for the convenient transportation

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

of the instrument. In carrying out this part of the invention I employ a foldable sectional construction of a frame adapted to support the carriage and the platen. * * *"

The patent contains 11 claims, of which the first is especially relied upon here. This claim reads:

"In a typewriter, a foldable support for a platen carriage having one of its members movable to an abnormal position in overhanging relation to a keyboard."

It is evident that the feature of the claimed invention is the arrangement by which the carriage supporting frame is folded over into close relationship to the keyboard, whereby a compact package, convenient for transportation, is obtained. The drawings and specification also show that when the machine is folded the delicate operating parts are protected from injury by the upright and horizontal bars of the frame and carriage support.

Now it is old in many arts to fold devices in order to obtain compact packages for storage or transportation. Thus patents for folding cameras, folding go-carts, folding organs, and folding wheel chairs are shown upon the record. If, however, these devices in other arts would negative invention in going into the typewriter art and applying the folding principle, it does not follow that the present patent is invalid. It may well be that the folding principle is so old that a patent merely for folding parts of typewriters upon other parts would possess no patentable novelty. But this patent is for the folding of a specific part, the platen carriage, into specific (overhanging) relation to another part, the keyboard, for a specific purpose, obtaining a compact and safe package. We think that it is not shown to be invalid by anything in arts other than that of the typewriter, and that we must look to that art if we are to find anticipation, or such a state thereof as negatives invention.

In considering the typewriter art it will not be especially helpful to examine machines in which the platen and platen carriage are swung away from the type basket to expose the writing or to permit the type to be cleaned or repaired. In machines of this character the swinging of the platen carriage increases the cubic dimensions of the machine. The purpose of the swinging operation is altogether different from that of the folding of the machine in suit, and the results obtained are opposite. Passing, then, the patents of this nature, we may properly test the validity of the patent in suit by the patent put forward first in the defendants' brief and most relied upon by their counsel upon the argument—the Anderson patent, No. 581,570. If this patent does not anticipate or show such a state of the art that there would be no patentable novelty, undoubtedly no other patent cited has such effect.

The Anderson structure is a typewriter. It has a paper holder, consisting of a single arm, shown by the drawings to be normally held in position by means of a clamp and thumb nut, and probably capable, when loosened, of being turned into a position overhanging the keyboard. But there is nothing in the Anderson specification describing the holder as being so foldable, and it is by no means clear from the drawings that it is intended to be so used. Indeed, it would seem that the folding of the paper support might tear the paper and to some

extent dismantle the machine. The parts capable of being folded, the means of folding, and the results obtained by folding in the Anderson structure differ so materially from those of the machine of the patent that, in our opinion, the former does not anticipate. We think that the invalidity of the patent cannot be regarded as established.

Coming, now, to the question of infringement, it appears that "Complainant's Exhibit, Defendants' Machine," is an exact copy of the complainant's machine which is built under the patent, and with respect to this machine infringement is, of course, not disputed. "Defendants' Exhibit, Defendants' Machine No. 2," is also similar to the complainant's machine, except that, instead of there being two arms foldable upon each other to support the carriage, the carriage support is pivoted directly to the frame and is foldable upon it. We think, however, that this distinction is not a material one, and that the "foldable support" of the defendants' machine is the equivalent of the "foldable support" of the claim of the patent. Infringement by both classes of defendants' machines seems clear.

The patent in suit has never been adjudicated, and it is, of course, the general rule that a preliminary injunction will not be issued upon an unadjudicated patent. But exceptions to this rule exist in cases where the validity of the patent has been admitted and acquiesced in and we think the principle of these exceptions applicable here.

The defendant corporation was organized for the express purpose of acting as sales agent for typewriters made under the patent in suit. It had a contract for their sale, and sold many machines marked as patented. It brought suit against the complainant for the enforcement of the sales contract, based upon the theory that the patent was valid. It transferred the sales contract for a valuable consideration, and then copied the complainant's machine in every detail, and marked its product "Patented March 4, 1904"—the date of the patent in suit. It then made another machine, admittedly following the patent, but seeking by slight variations to avoid infringement.

Upon their own showing the defendant and its officers—the individual defendants—were guilty of fraud and deceit toward the complainant and toward the public. And the defendants' treasurer seems to think it helpful to his cause to assert that he attempted to go a step further and deceive his own stockholders.

It is true that the defendants may not be estopped to deny the validity of the patent. They may not stand in the position of licensees. It is equally true that they cannot be held in this suit for fraud or unfair competition. But their conduct toward the complainant, their manner of dealing with the patented article, and their attempt to appropriate the invention of the patent and yet escape the consequences, go a long way toward showing acquiescence on their part in, and admissions of, the validity of the patent.

For these reasons, although the validity of the patent has not been adjudicated, we are convinced with reasonable certainty that, upon final hearing, in case the record is not materially different from that presented here, the complainant will succeed. Consequently the preliminary injunction was properly granted.

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

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

(Circuit Court, E. D. Pennsylvania. June 17, 1910.)

No. 45.

1. PATENTS (§§ 172, 178, 328*) — VALIDITY AND INFRINGEMENT — ELECTRICAL DISTRIBUTION SYSTEM FOR RAILWAYS.
The Schlesinger patent, No. 546,059, for a system of distribution of electricity for electric railways, claim 1, covers a combination which was not anticipated and discloses invention, and which was sufficiently shown in the application and drawings, although not appearing in any one of the original claims prior to their amendment. The character of the invention, also, as a new, meritorious, and highly successful combination in the electric railway art, entitles the claim to a somewhat liberal construction and range of equivalents. Also construed, and *held* infringed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 247, 254½; Dec. Dig. §§ 172, 178.*]

2. PATENTS (§ 112*)—VALIDITY—ABANDONMENT OF APPLICATION.
The reinstatement of an application for a patent after several years, during which no action had been taken thereon, on a finding by the Patent Office that the delay was unavoidable within the meaning of Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384), is conclusive on the courts that the application was not abandoned.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 112.*]

3. PATENTS (§ 87*)—VALIDITY—ABANDONMENT OF INVENTION.
An abandonment of an invention after the filing of an application for a patent, upon which a patent was subsequently granted, must be established by clear proof showing an intention to abandon, especially where the invention is a meritorious and valuable one.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 112; Dec. Dig. § 87.*
Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

4. PATENTS (§ 83*)—VALIDITY—EFFECT OF DELAY IN PATENT OFFICE.
A patent cannot be defeated or limited by intervening rights of third persons applying for and receiving patents between the filing of the application and the issuing of such patent, where there was no abandonment of either the application or invention, and no expansion of claims, merely because there was delay in prosecution of the claims, which was satisfactorily explained to the Patent Office.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 83.*]

In Equity. Suit by John I. McDuffee, trustee, and the Allis-Chalmers Company, against the Hestonville, Mantua & Fairmount Passenger Railway Company and the General Electric Company. On final hearing. Decree for complainants.
See, also, 158 Fed. 827.

C. V. Edwards, Thos. F. Sheridan, and Joseph C. Fraley, for complainants.
Charles Neave and Frederick P. Fish, for defendants.

BRADFORD, District Judge. The patent in suit, No. 546,059, dated September 10, 1895, issued from the United States Patent Office to William M. Schlesinger, assignor to John I. McDuffee, Trustee,

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

for alleged improvements in electric railways. The suit is prosecuted by John I. McDuffee, Trustee, and the Allis-Chalmers Company, the present owners of the patent, against the Hestonville, Mantua & Fairmount Passenger Railway Company, the user, and the General Electric Company, the manufacturer and seller, of the alleged infringing railway apparatus or equipment. No question is raised as to title or such manufacture, sale and use, Schlesinger states in the description:

"My invention has relation to that form of electric railways wherein a line of conductors having generators located along the line of railway for feeding a current to and from end to end of the line or working conductors are used; and it has for its object to obtain safety of traffic or continuity of travel by preventing one or more electrical defects at any point on the line stopping the traffic or travel on the whole line or any extended portion of the same, thereby confining the fault to the smallest space or length of line possible, and to secure a better subdivision of the current to the different cars on the line."

The patent contains three claims of which only the first is in controversy. It is as follows:

"1. In an electric railway the combination of, a series of separate feeding conductors extending in multiple arc relation from one generator pole or terminal to points along the line of way, safety devices for said separate feeding conductors, a working conductor comprising a series of insulated or disconnected sections disposed along the line of way and supplied by said separate feeding conductors, and return circuit connections opposed to said sections and leading to the other generator pole, or terminal, substantially as described."

Fig. 3 of the patent which the complainants claim to be an embodiment of the invention as set forth in claim 1 is as follows:

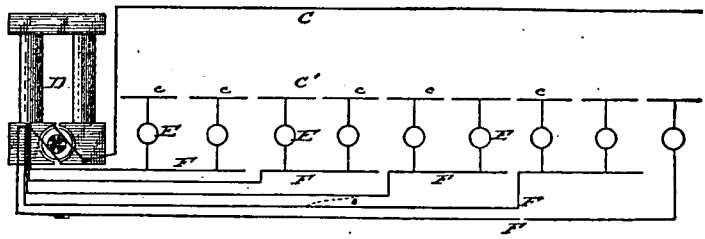


Fig. 3

With respect to this figure Schlesinger states in the description:

"Fig. 3 is a like view showing one of the conductors composed of sections and separate feeding-conductors for one or more of the sections and their safety devices. * * * By providing separate feeding-conductors for one or more than one safety device and conductor-section c, as shown in Fig. 3, any amount of current may be supplied to the different cars on the line, and in the last-described construction any one of the separate feeding-conductors F forms a reserve wire for connecting it with any one of the other feeding-conductors in case of a breakdown or defect occurring therein, as shown at s. * * * Referring to Fig. 3, wherein there are separate feeders in multiple arc from one pole or terminal of the source of electrical energy, it is clear that the potentials or line-pressures may be made equal at all points along the line. Moreover, the current for all the cars that may be found in any one section is carried wholly over the feeder or feeders of that section, the feeders and working conductor of other sections being electrically independent of each other, and the working conductor itself may be of comparatively small size.

One great advantage obtained by the system of Fig. 3 lies in this, that the effects of several classes of accident on the line may be thus localized, and each feeder, being supplied with a switch of the above-described or of any preferred construction, may be thrown, for example, automatically out of or put in line at will, the other sections not being in any way affected thereby. If, then, the working conductor be broken at any point or if there be a short circuit to ground, the movement of the cars over the other sections need not be interrupted."

Schlesinger in describing the features of the combinations represented in one or more of the drawings of the patent in suit other than Fig. 3 uses language which is in part applicable to certain features comprised in the combination illustrated in Fig. 3, as follows:

"The conductors C C' have a generator D, as indicated. One of the conductors C is continuous and leads directly to one of the commutator-brushes of the generator, while the conductor C' is composed of disconnected sections c c, or sections insulated from one another, * * * and is not directly connected to the generator. Each such section is provided or is in circuit with an electric or current safety device E, of any suitable or desired kind, and these safety devices E are connected to a common or single wire or conductor F, which leads to the other commutator-brush of the generator. The conductors C C' are the working conductors, and with each the traveling brushes of the car contact. The safety devices E are so constructed and arranged that so long as the insulation or electrical condition of the conductor-sections c and conductor C continues perfect or no short-circuiting occurs between the sections c and wire or conductor C, the current passes from conductor F to such conductor-sections through their safety devices to maintain the line or working circuit intact and secure safety and continuity of traffic or travel throughout the line; but as soon as there is an electrical defect or faulty insulation in any one of the sections c and conductors C tending to short-circuit the line-current then the safety device for said section acts or is operated by the excess of current passing through it to break the circuit or connection between said section and the feeding-conductor F. When this happens said section is electrically cut out of the conductor C', or no current is supplied to said section, while all the other sections of said conductor are in circuit with the generator, providing their electrical condition is good. Hence cars upon the latter continue their travel irrespective of the cutting out of any of the bad sections of conductor C'. * * * In a railway constructed as above described it will therefore be noted that the sections of one or both working conductors are in multiple arc and any fault or defect in the electrical condition of a conductor-section causes it to be automatically cut out of the line or working circuit without affecting the circuit connections of any other section, the traffic or travel upon any other part of the line is not interfered with, and travel is only temporarily stopped upon the faulty section of the conductor C', and cars arriving at this section are moved over it by any suitable extraneous means to keep the travel or traffic safe and continuous."

The system of distribution of electricity for electric railways embodied in claim 1 and illustrated in Fig. 3 is undoubtedly of great merit and has proved eminently successful. It possesses marked features of economy, safety, convenience, and utility in other respects. It presents a combination in an electric railway comprising the following elements: First, a series of separate feeding conductors extending in multiple arc relation from one generator pole or terminal to points along the line of way; second, safety devices for the separate feeding conductors; third, a working conductor comprising a series of insulated or disconnected sections disposed along the line of way and supplied by the separate feeding conductors; and, fourth, return circuit connections opposed to the sections and leading to the other gen-

erator pole or terminal. The division of the working conductor along the line of way into a series of insulated or disconnected sections, supplied with electric current by separate feeding conductors from a common or unitary source of electricity, among other advantages, restricts within narrow limits the effect of electrical faults occurring in different sections of the line of railway and secures continued maintenance of travel over the other portions of the line, promotes economy not only by securing such uninterrupted travel, but through a reduction in the diameter and consequent cost of the working conductor, minimizes electrical "drop" in its practical results, and insures a proper distribution of electricity as between the different sections of the working conductor by furnishing them respectively, by means of the separate feeding conductors, which may consist of wires respectively of different diameter, with electric current of such power and so regulated as to meet varying electrical requirements for the propulsion of cars over all portions of the railway, notwithstanding change in grade as between different sections and congestion of travel over some one or more of them.

The defences set up are substantially that the combination of claim 1 of the patent in suit was anticipated; that the prior art negatives invention on the part of Schlesinger at or before the date of the application; that if claim 1 be valid it must receive a construction so limiting its scope as to negative infringement by the defendants; that the invention, if any, was abandoned; that the invention disclosed in the application is substantially different from the combination in question; and that the rights of third persons receiving patents for inventions made after the date of Schlesinger's application and before the date of the patent in suit cannot be affected by the granting of that patent.

It will be convenient first to consider whether the invention disclosed in the application is substantially different from that of the combination of claim 1. The combination of claim 1, it is true, does not appear in any of the claims contained in the application as originally filed by Schlesinger November 24, 1885. But this fact is not of itself determinative of the question whether that combination was not disclosed in the application and its accompanying drawings when considered as a whole. These drawings are identical in every particular with the drawings of the patent in suit and in connection with the descriptive portion of the application they show a combination for an electric railway comprising every element contained in the combination of claim 1. They disclose in an electric railway a combination of a series of separate feeding conductors extending in multiple arc relation from one generator pole or terminal to points along the line of way, safety devices for the separate feeding conductors, a working conductor comprising a series of insulated or disconnected sections disposed along the line of way and supplied by the separate feeding conductors, and return circuit connections opposed to the sections and leading to the other generator pole or terminal. The combination was defectively and insufficiently described, its operation was in some respects erroneously stated, and the various claims were inartificially drawn or too broad to be allowed in view of the prior art. These imperfections could be remedied only by appropriate amendments made in the or-

derly prosecution of the case in the Patent Office; and the correction of such defects in the description of and claims for a meritorious invention is one of the principal aims the practice and procedure of that office were established to accomplish. It appears from the file wrapper and contents of the patent in suit that Schlesinger in the application as originally filed referred to the first three drawings as follows:

"Fig. 1, is a diagram showing line of railway and cars, a generator, a continuous line conductor, a sectional line conductor and safety devices with a common feeding conductor, embodying my invention. Fig. 2, is a diagram of generator and line conductors, showing both conductors composed of sections, each having a safety device and feeding conductors. Fig. 3, is a like view showing one of the conductors composed of sections and separate feeding conductors for one or more of the sections and their safety devices."

His reference to Fig. 4 is not material in this connection. In the descriptive portion of the application he makes, among others, the following statements:

"By providing separate feeding conductors for one or more than one safety device and conductor section c, as shown in Fig. 3, the same amount of current but of different electro-motive force may be supplied to the different cars on the line, and in the last described construction any one of the separate feeding conductors F forms a reserve wire for connecting it with any one of the other feeding conductors in case of a breakdown or defect occurring therein, as shown at s. I do not confine my invention to any particular kind of safety device as it may be of an electro-magnetic, a fusible strip, or other well known construction of same, neither do I limit myself to the number or to the length of the sections composing the conductors, nor to dividing one or both line conductors into sections nor to the manner of connecting the safety devices to the generator, as it is obvious that the same may be numerously varied without departing from the spirit of my invention."

The application contained nine claims, of which the seventh, relating to the detailed construction of the safety device shown in Fig. 4, appears as claim 3 in the patent as finally granted. All the other claims were too broad or otherwise defective and were disallowed. Careful examination of the file wrapper and contents has satisfied me that the essence of the invention embodied in the combination of claim 1 of the patent in suit had been conceived by Schlesinger prior to the date of his application as originally filed, and that such combination, while defectively claimed and in some respects inadequately described, was correctly illustrated by Fig. 3 which the inventor considered as embodying its best form. In that combination as appears from the application as originally filed, each of the disconnected or insulated sections of the working conductor is provided with an electrical or current safety device which is in circuit with a feeding conductor connected with one pole of the generator; there is a plurality of such feeding conductors separately and respectively leading to different portions of the line of railway; each of such separate feeding conductors is connected or in circuit with one or more of the safety devices and consequently with one or more of the disconnected or insulated sections of the working conductor; there are return circuit connections opposed to the disconnected or insulated sections and leading to the other pole of the generator; the separate feeding conductors, as shown in Fig. 3, which is identical with Fig. 3 of the patent in suit, are in multiple arc relation from the generator pole, receiving

their current respectively from a unitary supply of electricity, which automatically distributes itself among the conductors. Schlesinger particularly pointed out the advantage, as he thought, resulting from "providing separate feeding conductors for one or more than one safety device and conductor section c as shown in Fig. 3." That a unitary or common source of electricity for the separate feeders was and is plainly disclosed by Fig. 3 is beyond dispute. Mr. Buckingham in his cross-examination of Gharky, an expert for the complainants, relative to Fig. 3, said:

"How would you get different potentials from the generator here shown? As I understand it this generator has but one pair of brushes, which are connected to all of the feeders." (Rec. Vol. 7, p. 337.)

Morton, an expert witness for the defendants, in reply to the question, "What do you understand to be the supposed invention described in said patent and specially referred to in the first claim thereof?" stated the following as one of the elements of the combination:

"Second, the employment of a single or unitary source for the generation of the electric current from which the various feeding conductors are to be led, as distinguished from the employment of many separate sources, not electrically united with one another, and with all the feeding conductors."

He then added:

"All these elements and their combinations are well shown in Fig. 3 of the patent in suit." (Rec. Vol. 2, pp. 811, 812.)

As already stated, Fig. 3 of the patent in suit is in all respects identical with Fig. 3 of the application as originally filed. In the application as originally filed Schlesinger stated that among the objects of his invention was the securing of "a better subdivision of the current to the different cars on the line, and to feed to them the same amount of current but of different electro-motive force if necessary," and that under the arrangement illustrated in Fig. 3 "the same amount of current but of different electro-motive force may be supplied to the different cars on the line," while in the description of the patent as granted he said that under that arrangement "any amount of current may be supplied to the different cars on the line," and also "referring to Fig. 3, wherein there are separate feeders in multiple arc from one pole or terminal of the source of electrical energy, it is clear that the potentials or line-pressures may be made equal at all points along the line." The variation between the statements in the application as originally filed and the description of the patent as granted touching potentials, line-pressures and electro-motive force, are wholly unimportant, in view of the fact that both in the application as originally filed and in the patent description Fig. 3 shows a unitary and common source of electricity to supply the various separate feeding conductors, and the arrangement therein disclosed was capable of feeding different potentials to the various sections of the working conductor respectively, or a uniform potential to all of them, by means of resistances or feeder equalizers, variation in diameters or other devices, which were well known. The drawings and description of the application as originally filed clearly suggested claim 1 as finally allowed in the patent in suit; and it was not only the right of Schlesinger, but his duty, in the prose-

cution of the case through the Patent Office, by amendment to limit his claims to his real invention, correct inaccuracies in the descriptive portion of the application, and secure correspondence between the claims, the description and the drawings. Whether Schlesinger did or did not during the prosecution of his application in the Patent Office borrow some of the mere phraseology of the description of the patent in suit from the book of Crosby & Bell on The Electric Railway, published in 1893, is immaterial.

In the application as originally filed Schlesinger stated:

"Again while I have shown my improvements applied to an electric railway I do not wish to be considered as confining myself thereto, as they may be used as a circuit for any translating media."

And a number of the original claims are not confined to an electric railway. The above statement, however, and all such claims, were stricken out before the patent in suit was granted. The fact that the original specification was too broad in including "any translating media" affords no reason why the claims and description should not be restricted, as they have been, to an application of the system to electric railways. The conclusion reached on this branch of the case is that the invention embodied in the combination of claim 1 and illustrated in Fig. 3 is substantially the same as that for the patenting of which the application as originally filed was made.

As to anticipation but little need be said. That defence which was set up in the answer appears to have been abandoned. In their brief of argument the counsel for the defendants state that the defences to claim 1 are:

"That the claim is absolutely invalid in view of the prior art, and in view of the circumstances under which it was, at a late date, inserted in the application which resulted in the patent in suit; and the claim is not infringed upon any proper construction of that claim."

The expert Jenks, a witness for the defendants, says:

"I do not find among the references I have noted a description or illustration of this precise arrangement; namely, one safety device on each of two or more feeding conductors, or one safety device on each branch of each of two or more feeders, as illustrated in Fig. 3 of the drawings of the patent in suit."

Nor does the record disclose, so far as I can find, any anticipation, by patent or other matter, of the combination of claim 1.

Much stress, however, has been laid on the prior art as negativing invention on the part of Schlesinger with respect to the combination in question, and reference is made to numerous patents, printed publications and devices in support of the contention. It is urged that the present case "involves only those things which railway and lighting systems have in common." It is undoubtedly true that each of the elements composing the combination was old; and if claim 1 included merely an aggregation in contradistinction to a combination of those elements, the claim could not be sustained. But such is not the fact. That claim presents a true combination, and not a mere aggregation. Its patentability is sustainable on the recognized principle well expressed by Judge Sanborn in National Hollow B. B. Co. v. Inter-

changeable B. B. Co., 106 Fed. 693, 706, 707, 45 C. C. A. 544, 557, 558, that:

"A new combination of old elements, whereby a new and useful result is produced, or an old result is attained in a more facile, economical, and efficient way, may be protected by patent as securely as a new machine or composition of matter."

Coupled with the prima facie presumption of the validity of claim 1 arising from the granting of the patent, the great success which has attended the introduction of the system represented by the combination of that claim, the fact that the requirements of distribution of electricity are in the case of a system of electric railway in some respects here material different from those in the case of an electric lighting system, and the further fact that eminent inventors engaged at the same time in the art of electrical distribution as applied to electric railways and also to lighting systems had failed prior to the application for the patent in suit to supply the want so fully met by that combination, afford pursuasive and controlling evidence of its patentability. The scope of claim 1 will be hereinafter considered in connection with the question of infringement.

It is insisted, in substance, by the defendants that if Schlesinger was the first inventor of the combination of claim 1, it was abandoned to the public. It appears from the file wrapper and contents that from October, 1887, until November, 1894, no proceedings were had in the Patent Office in the prosecution of the application for the patent in suit. Section 4894, Rev. St. (U. S. Comp. St. 1901, p. 3384), as it existed prior to the granting of the patent in suit, was as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

In this case it appears that it was shown to the satisfaction of that officer that the delay in prosecuting the application after October, 1887, was unavoidable. In November, 1894, a petition to the Commissioner of Patents was filed to revive the application on the ground that one Van Stavoren, the attorney charged with its prosecution, had from time to time given assurances upon which reliance was placed that proper attention was being bestowed upon the case, and that he was "by reason of overwork and other causes incompetent to attend to business." The petition was granted by the Acting Commissioner December 10, 1894; he stating that:

"In view of the peculiar circumstances of this case, especially of the fact that the former attorney was insane, it is thought that the failure to prosecute was unavoidable."

This action was reversed January 8, 1895. Within a few days thereafter one Van Horn made affidavit setting forth with considerable detail the unbalanced mental condition of Van Stavoren and stating that his "mental ailment was very gradual and insidious," and its continuance from 1889. McDuffee, also, one of the complainants, made af-

fidavit strongly tending to account for and justify the delay. A petition for a reconsideration of the decision of January 8, 1895, that the application had been abandoned, was filed, which was granted by the Assistant Commissioner February 1, 1895, he making the following statement:

"The affidavits presented state in substance that it was believed that the mental disease of the former attorney began in the early part of 1886, and continued in a more or less aggravated form until about the time of his death in 1894, and that the knowledge of the abandonment of the application was not obtained by the applicant until after said attorney's death. I think, therefore, that under the circumstances the delay, although of so long a duration, may properly be termed 'unavoidable.' The petition is granted."

This finding is conclusive upon this court and establishes the fact that the application for the patent in suit had not been abandoned. An abandonment of an application for a patent is one thing and an abandonment of the invention which the application seeks to have patented is another. And the defendants urge that, notwithstanding the action of the Patent Office justifying the delay in the prosecution of the application, the invention embodied in the combination of claim 1, as finally allowed, was abandoned. A patentable invention may be abandoned actually or constructively. With the subject of constructive abandonment the court has nothing to do in this case. Generally speaking, an actual abandonment of the invention may be by express declaration or by circumstances evincive of an intention to abandon. No express abandonment of the invention embodied in the combination of claim 1 has been shown. If there was an actual abandonment in or after October, 1887, it must rest upon circumstantial evidence clearly establishing the fact. No room should be left for substantial doubt on the point. Especially is this true in view of the meritorious character of the invention and the facts that until October, 1887, all due diligence was observed in prosecuting the application and that no conceivable reason appears why the invention should have been abandoned at or after that time. In McMillin v. Barclay, Fed. Cas. No. 8,902, Judge McKennan in dealing with this subject said:

"Nor has the second branch of the defense, that the invention was actually abandoned, any better foothold. This must result from the intention of the patentee, expressly declared, or fairly indicated by his acts. There is certainly no evidence in the case of any express declaration of the patentee to that effect; and, if the lapse of years between the date of his application and of his patent, and his own conduct, can be fully explained upon any other hypothesis, they ought not to be imputed to an intention on his part to abandon his invention. The proof of actual abandonment, after application filed, ought to be indubitably clear. It ought not to rest upon doubtful or disputable inferences."

Here the record does not disclose any actual intention to abandon or any act or declaration of abandonment or any consent to the appropriation or use by others of the invention. In the absence of any evidence of a positive intention to abandon, I find it impossible to reconcile the fact, conclusively established by the decision of the Commissioner of Patents, that the application for a patent for the invention was not abandoned, with any theory that the invention must be presumed from the explained and justified delay to have been aban-

doned. The conclusion reached on this branch of the case is that the invention embodied in claim 1 of the patent in suit was not at any time abandoned.

The proposition advanced by the defendants that intervening rights of third persons receiving patents for inventions made after the date of Schlesinger's application and before the date of the patent in suit cannot be affected by the granting of that patent will now be considered. In Railway Co. v. Sayles, 97 U. S. 554, 563, 24 L. Ed. 1053, the court said:

"The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use."

But this doctrine has, in my judgment, no application to the case in hand. There was no attempt to enlarge the scope of the application as originally filed. It is true that before 1895 no claim specifically mentioned in terms a unitary or common source of electrical supply for the separate feeding conductors. But such unitary or common source was clearly indicated by Fig. 3 in connection with the description portion of the application as originally filed, and was covered by two or more of the broad claims, objectionable as they were on account of their generality, in that application. With respect to safety devices the application as originally filed contains precisely the same statement found in the application as it now stands, namely:

"Neither do I limit myself to * * * the manner of connecting the safety devices to the generator, as it is obvious that the same may be numerously varied without departing from the spirit of my invention."

In striking out of the description the sentence, "Again while I have shown my improvements applied to an electric railway I do not wish to be considered as confining myself thereto as they may be used as a circuit for any translating media," far from broadening, he narrowed his patent application. In Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, where suit was brought by Beach for infringement of a reissue patent and one of the defences was that the claims of the patent had been "unlawfully expanded pending the litigation in the Patent Office," and it appeared that before the patent was finally reissued a patent had been granted to Horton covering features of the same invention, the court, referring to Railway Co. v. Sayles, said:

"Had there been any expansion of the original specification and claims subsequent to the introduction of the Horton machine, especially if made with reference thereto, we should not have hesitated to apply the doctrine of that case, but we see no evidence of an intent to cover that machine, unless it were already covered, and agree with Judge Lacombe, that 'the original drawings and specifications suggest the claims finally made, which recognize and claim the two different operations of outside and inside applications.'"

I perceive no ground on which the doctrine of "intervening rights" successfully can be invoked to destroy or affect the patent in suit. Neither the application nor the invention was abandoned, there was no

expansion of claims; nor was there anything done by Schlesinger or those representing him to deceive or mislead the public. There was merely the lapse of time which has been accounted for.

The question of infringement remains for consideration. For convenience Fig. 3 representing an embodiment of the combination of claim 1 of the patent in suit, and a drawing of the apparatus of the defendants complained of, are here inserted.

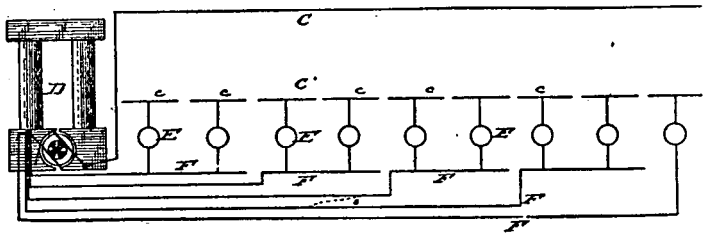
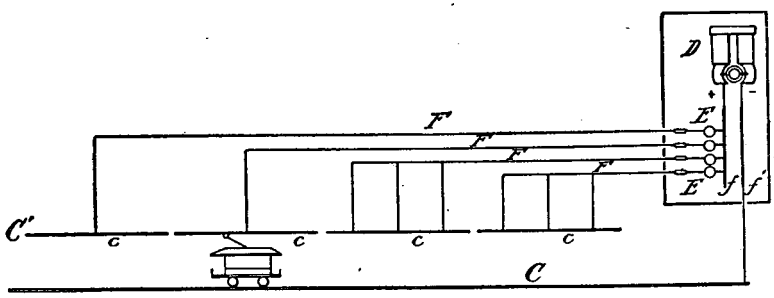


Fig. 3



The language of claim 1 accurately applies to the combination of the alleged infringing arrangement. The latter shows the combination in an electric railway of (1) a series of separate feeding conductors F F F F extending in multiple arc relation from one generator pole or terminal, f, to points along the line of way; (2) safety devices, E, for said separate feeding conductors; (3) a working conductor comprising a series of insulated or disconnected sections c c c c, disposed along the line of way and supplied by said separate feeding conductors; (4) return circuit connections C opposed to said sections and leading to the other generator pole or terminal, f'. It is contended by the defendants that the safety devices in the combination of claim 1, on the assumption of its validity, must be placed between the separate feeding conductors and the sections of the working conductor with which they are electrically connected; that the safety devices in the defendants' arrangement are not so placed; and hence that the defendants have not infringed. In the defendants' arrangement the operation by reason of an abnormal flow of electric current or otherwise of any one of the safety devices E will cut out of circuit only the particular section of the working conductor with which the separate feeding conductor carrying that safety device is electrically connected. In the arrangement shown in Fig. 3 of the patent

in suit the operation of any one of the safety devices will cut out of circuit only the particular section of the working conductor with which that safety device is electrically connected; but the separate feeding conductors are not limited respectively to only one safety device and its section of the working conductor. While in the defendants' arrangement each of the separate feeding conductors F is connected with only one section of the working conductor, in Fig. 3 each of the five separate feeding conductors, excepting the fifth and lowest, is electrically connected with two sections of the working conductor, the fifth and lowest being connected with only one section. With respect to this last feeding conductor the counsel for the defendants say:

"The illustration of one feeder feeding only one section at the right of Fig. 3 was clearly purely accidental and apparently is due to the fact that there was no room on the paper on which to show two sections."

They also urge that claim 1 reads on Fig. 3 after the elimination of the long feeder connected with only one section of the working conductor. It is true that after such elimination claim 1 would read on Fig. 3; but it is equally true that such claim reads on that figure without such elimination. And it is, moreover, true that such claim would read on Fig. 3 if so modified as to show all the separate feeding conductors electrically connected respectively with only one section of the working conductor. Further, the description taken as a whole shows that the connection of the long feeder in Fig. 3 with only one section of the working conductor was not accidental, but intended to illustrate one of the most important features of the system covered by claim 1. In the description of the application as originally filed, as well as in that of the patent as granted, it is stated that the object of the invention is, among other things, "to obtain safety of traffic or continuity of travel by preventing one or more electrical defects at any point on the line stopping the traffic or travel on the whole line or any extended portion of the same." In the application as originally filed Schlesinger further said:

"I divide one or both of the line conductors into sections which are disconnected or insulated from one another, and provide each section with an electrical or current safety device which is in circuit with a feeding wire or conductor common to all said safety devices, or, one or more of the safety devices may have separate feeding conductors. My invention accordingly consists of a line of conductors one or both of which consist of insulated or disconnected sections, a safety device for each section, and a common or separate conductor for all or any of the safety devices."

He also referred to the advantage of "providing separate feeding conductors for one or more than one safety device and conductor section c as shown in Fig. 3." The description of the patent as granted contains the following statement:

"I divide one or both of the line conductors into sections which are disconnected or insulated from one another and provide each section with an electrical or current safety device which has a separate conductor. My invention accordingly consists of a line of conductors one or both of which consist of insulated or disconnected sections, a safety device for each section, and a separate feeding-conductor for all or any group of the safety devices and of the improvements hereinafter described and claimed."

There, also, as in the description of the application as originally filed, reference is made to the advantage of "providing separate feeding-conductors for one or more than one safety device and conductor-section c as shown in Fig. 3." In view of the explicit statements in the original description that each of the disconnected or insulated sections is provided with a safety device; that one or more of such devices may have separate feeding conductors; that there is a common or separate conductor for all or any of the safety devices; and that separate feeding conductors for one or more than one safety device and conductor section c, as shown in Fig. 3, were desirable, it cannot seriously be questioned that claim 1 of the patent in suit if accompanied by the above statements in the original description would accurately read on Fig. 3, including the longest feeding conductor F, as well as the rest. For it must be borne in mind that the inventor, in using the words "common or separate conductor for all or any of the safety devices," used them with reference to the different arrangements represented by the several drawings filed with the application. They must, therefore, be taken distributively, and as applied to the arrangement of Fig. 3 be restricted to a "separate conductor for * * * any of the safety devices." Nor can a fair consideration of the description and drawings as a whole of the patent as granted fail to produce a conviction that claim 1 covers the arrangement illustrated in Fig. 3, including separate feeding conductors respectively connected with only one section or safety device as well as those connected with more than one. It must be conceded that some of the phraseology of the description, if not modified or qualified by other portions would raise grave doubt whether claim 1 covers the long feeding conductor connected with only one safety device and section as shown in Fig. 3. For reference is made to "a safety device for each section and a separate feeding-conductor for all or any group of the safety devices" as constituting part of the invention. This language taken alone, while applicable to the four feeding conductors each of which is connected with a group of two safety devices, seems to be inapplicable to the feeding conductor connected with only one such device. But the above quoted statement cannot be taken alone. It must be read in connection with other parts of the description which are explicit; and when so read all doubt is removed. Fig. 3, as illustrating the invention, is referred to both in the application as originally filed and in the description of the patent as granted, as showing "separate feeding-conductors for one or more of the sections and their safety devices," and reference is also made, as before stated, to the advantage of "providing separate feeding-conductors for one or more than one safety device and conductor-section c as shown in Fig. 3." Claim 1 must, therefore, be held to cover a combination in which the feeding conductors are severally and respectively connected with only one safety device and section of the working conductor as illustrated by the longest conductor F in Fig. 3.

Schlesinger states:

"Neither do I limit myself to the number or to the length of the sections composing the conductors, nor to the dividing one or both line conductors into sections, nor to the manner of connecting the safety devices to the generator,

as it is obvious that the same may be numerously varied without departing from the spirit of my invention."

The defendants lay some stress upon the fact that during the course of the proceedings in the Patent Office Schlesinger in certain proposed amendments of the application for the patent in suit, described "safety devices connecting the working conductor sections and the feeding conductors therefor" and claimed "a safety device between each section and its feeding conductor," or "a normally closed safety device between each said section and a feeding conductor." These proposed amendments, if allowed, would have resulted in claims narrower than those contained in the application as originally filed or in the patent in suit as granted. They were rejected, however, and cannot serve to limit the scope of the patent to the precise form suggested by them. In the arrangement shown in Fig. 3 two safety devices with their respective sections of the working conductor are electrically connected with the first or highest separate feeding conductor F. If these two safety devices were eliminated, and another placed in the separate feeding conductor at any point between the pole of the generator and the first branch conductor leading to the first section, by the operation of the safety device so placed not only one but two sections would be cut out of circuit. A similar statement is applicable to each succeeding couple of safety devices connected with a single feeding conductor. It is, therefore, evident that while the operation of any safety device in the defendants' arrangement cuts out of circuit only one section of the working conductor, the operation of any safety device substituted in the separate feeding conductor for a couple of safety devices connected respectively with two sections as shown in Fig. 3 would cut out of circuit both those sections. But the longest and lowest separate feeding conductor F shown in that figure is connected with only one safety device and section of the working conductor. If that safety device should be removed from its position in the figure and placed in its separate feeding conductor at any point between the generator pole and the branch conductor its operation would result, as does the operation of any one of the defendants' safety devices, in cutting out of circuit only the particular section with which such separate feeding conductor is connected.

In a patent such as that in suit the monopoly is not restricted to the precise form of the mechanism or arrangement shown by the drawings illustrating an embodiment of the invention, unless the patentee has so limited his claim expressly or by necessary implication. Here, there is no such limitation, express or implied. The inventor sets forth in Fig. 3 in connection with the description the best mode contemplated by him of applying the principle of his invention. This was all the law required of him. And at the same time he declared in terms that he did not confine himself to "the manner of connecting the safety devices to the generator" as it was obvious that the same could be varied without departing from the spirit of the invention. Any one of the separate feeding conductors of the defendants' arrangement leading from the generator to only one section of the working conductor and containing in it a safety device located near the generator is the equivalent of the long separate feeding conductor F electrically connected

with a single section of the working conductor, and a safety device for that section on the branch conductor, as shown in Fig. 3. The character of Schlesinger's invention as a new, meritorious and highly successful combination in the electric railway art, entitles claim 1 to a somewhat liberal application of the doctrine of equivalency. But it is not necessary to invoke such liberality. It is true that in the description it is stated that "when any section c is so cut out, it must be repaired," and "as soon as the repairs are made the safety device is manually adjusted to connect the section with the feeding-conductor." But with respect to this statement it should be observed, first, that it is made in that part of the description which deals with the arrangement illustrated in Fig. 1, and which statement is applicable to Fig. 2, in both of which the safety device is imperatively required by the structure therein shown to be interposed between the one continuous feeding conductor and a section of the working conductor, an arrangement with which this court has nothing to do in this case, and, secondly, that the precise place along the line of railway where repairs are to be made and the safety device manually adjusted is not of the essence of the invention as embodied and illustrated in Fig. 3, where separate feeding conductors are respectively in electrical connection with a single section of the working conductor as shown by the long feeding conductor F.

Letters patent No. 339,018 were granted to Schlesinger March 30, 1886, referred to as the indicator patent, the object of which was "to automatically locate a defective or faulty section after it has been cut out of the line-circuit" by providing "one or more indicator-boxes at the generator or other stations located along the line of way" and "for connecting each section or its safety device with a separate call or marked drop-plate in the indicator-box, so that when an excess of current passes to a section and operates its safety device to cut the section out of the line-circuit the safety device will also act to close or interrupt the circuit to the individual call or plate for said section in the indicator-box, and thereby automatically locate the faulty section." In the description of the patent in suit reference is made to the application for the indicator patent as follows:

"As soon as the cut-out or faulty section of conductor C is ascertained, which may be automatically done by means of an electrical indicator located at a central station and in circuit with all the safety devices of the line, as fully described in an application filed of an even date herewith, the repairs to the section are made," etc.

It is urged by the defendants that "this indicator patent, and the reference made to it in the patent in suit, furnish conclusive evidence that Schlesinger's alleged invention did not include any use of the safety device as indicators and certainly no use of them as indicators at the central station." So far as this suit is concerned I attach no importance to the indicator patent. It was not for nor did it include the combination of the patent in suit. Schlesinger had a right under the latter patent to place his safety device in any separate feeding conductor electrically connected with only one section of the working conductor, in such separate feeding conductor either at or near the generator or at any other point between the generator and the branch

conductor, and that right could not be lost or affected by the fact that in placing it at or near the generator or central station it would serve as an electrical indicator. He was entitled to any additional use or benefit to be derived from such rightful change in location of the safety device. The fact that in the defendants' arrangement the safety devices serve as such indicators is wholly immaterial on the question of infringement. Their location at or near the generator does not destroy their function as safety devices.

Other matters have been urged by way of defence which though carefully considered it is not deemed necessary to discuss; as they seem clearly untenable either in law or in fact. On the whole I am satisfied that the combination of the defendants' arrangement or system infringes claim 1 of the patent in suit. It includes all the elements of the patented combination, coacting and interacting upon the same principle, performing the same function in substantially the same manner, and producing substantially the same result. Let a decree for the complainants in accordance with this opinion be prepared and submitted.

SARFERT CO. v. CHIPMAN et al.

(Circuit Court, E. D. Pennsylvania. September 27, 1910.)

No. 25.

1. PATENTS (§ 328*) — ANTICIPATION — PROCESS AND MACHINE FOR SINGEING FABRICS.

   The Sarfert patents, No. 667,142, for a process of treating hosiery by singeing, and No. 758,937, for a stocking singeing machine for practicing such process, are void for anticipation by an unpatented machine and process in commercial use for some two years before the claimed invention by the patentee.

2. PATENTS (§ 328*)—INVENTION—PROCESS OF TREATING HOSIERY.

   The Sarfert patent, No. 667,140, for a process of treating hosiery to produce a silk or lisle finish by first roughening the fabric, and then singeing it, is merely for the employment in succession of two known and used processes, and is void for lack of invention.

In Equity. Suit by the Sarfert Company against Frank Chipman and others. On final hearing. Decree for defendants.

E. Hayward Fairbanks, for complainant.

Henry N. Paul, Jr., and Joseph C. Fraley, for respondents.

J. B. McPHERSON, District Judge. Three patents granted to Max Sarfert are embraced in this suit. They belong to the art of singeing fabrics, and two of them, Nos. 667,140 and 667,142, are concerned with processes. The other, No. 758,937, relates to a machine. They were all applied for in March, 1900, and the process patents were granted in January, 1901. The machine patent did not issue until May, 1904, although the application had been filed four years earlier, and the date of the invention seems to have been March, 1898. This delay in the office was caused by interference proceedings with Robert

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

Meyer, who had been granted a patent in January, 1900, on an application filed in March, 1899, but was finally decided to be a later inventor than Sarfert. The defendants admit infringement of certain typical claims of each patent, and rest their case upon lack of novelty, anticipation, and prior use. To understand the situation, it is necessary to examine the state of the art when Sarfert entered the field.

The purpose of singeing any fabric is to remove the nap or fuzz from the outer surface in order to produce a smooth and silky finish. In one form or another the process is well known, and has probably been practiced for at least a hundred years. The earliest reference to which my attention has been called is the case of Hall v. Boot, 1 Webster's Patent Cases, 97, a report published in 1844. This suit was brought on an English patent granted to Hall in 1817 for "a method of improving every kind of lace or net, or any description of manufactured goods whose fabric is composed of holes or interstices made from thread or yarn as usually manufactured, of every description, whether fabricated from flax, cotton, wool, silk or any other vegetable, animal, or other substance whatsoever." The specification is in part as follows:

"The object of my invention is to remove from every kind of lace or net, or other goods of the description above mentioned, all superfluous and loose fibers, or ends of fibers, which are not so bound and twisted into the thread or yarn of which the lace or net or such other goods is composed, as to form a part of the solid body thereof. These superfluous fibers do not contribute to the strength of the thread or of the lace or net or such other goods as aforesaid, but form a kind of fur or wool around the threads, which makes them appear thicker than they really are, and also fills up the meshes, holes, or interstices, of the lace or net, or such other goods as aforesaid, and makes them appear indistinct and woolly. My method of improving lace or net, or such other goods as aforesaid, is by passing them through, or at a very small distance over, a body of flame or fire, produced by the combustion of inflammable gas, while the said flame, or the intense heat thereof, is urged upwards, so as to pass through the holes or meshes of the lace or net, or such other goods as aforesaid, by means of a current of air which is produced by a chimney fixed over a flame immediately above the lace or net, or such other goods as aforesaid. The action of the flame is to burn, singe, and destroy as much of the said superfluous fibers or fur as may be removed without injury to the lace or net, or such other goods as aforesaid.

"A long piece of lace or net, or such other goods as aforesaid, or several pieces united together so as to form a large sheet, is made to pass between two rollers mounted one over the other, like the rollers of a flatting mill, and the lace or net, or such other goods as aforesaid, are further to be extended over other rollers so as to spread part of the lace or net, or such other goods as aforesaid, in a horizontal position. Beneath this part the flame is applied, and the rollers being turned round will cause the lace or net, or such other goods as aforesaid, to pass through or at a very small distance above the flame, so that every part of the piece shall in succession be subjected to the action thereof, and the velocity of the movement must be so regulated that the superfluous fibers of the lace or net, or other goods as aforesaid, will be acted upon in its passage through or over the flame, without having time to injure the lace itself.

"It must be obvious that the rapidity of the motion must depend upon the nature of the lace or net, or such other goods as aforesaid, and the intensity of the flame. It is of course impossible to give any general description of the motion that will be applicable to different cases; a slight trial, however, will be sufficient in each instance to ascertain and regulate the velocity. A regular and uniform motion will of course be most convenient and advantageous. The operation may be repeated as often as is found necessary to effect the required

improvement of the lace or net, or such other goods as aforesaid, and the operation will be most readily effected if the two ends of the piece are united together, so as to form an endless band, which, being extended over a system of rollers, will circulate about the said rollers when they are turned round, and so every part of the endless band will pass and repass continually through or over the flame. The apparatus for the production of the inflammable gas may be the same which is well known, and in use for the purpose of illumination. The gas is to be conducted in pipes to the machine, and to enter into a tube which is placed horizontally beneath the lace or net, or such other goods as aforesaid; when the lace or net, or such other goods as aforesaid, has been sufficiently operated upon by the flame acting on one side, the piece is reversed, and the other side is subjected to the action of the flame."

The reporter goes on to state:

"The witnesses for the defendants proved that the flame of charcoal, of waste paper, wood, shavings, or common pit coal had been used for many years to singe the fibers from silk, cotton, or lace sleeves, but the articles for this purpose had been placed on a wooden leg or a sleeve board. That bellows had been used to force the flame against the article, which it was said would produce the effect of burning the interstices."

Another patent to Hall was granted in 1823 for "a certain method of improving lace, net, muslin, calico, or any other description of manufactured goods whose fabric is composed of holes or interstices, and also thread or yarn as usually manufactured, of any kind, whether the said manufactured goods, or the said thread or yarn, be fabricated from flax, cotton, silk, worsted, or any other substance whatsoever." The specification explains with even more clearness than in the earlier patent what the inventor desired to accomplish:

"The object of this my invention is a more complete and expeditious method than any hitherto practiced of clearing articles fabricated of cotton, silk, wool, linen, and other similar materials, whether such are in the state of thread or yarn, or are manufactured by weaving, netting, knitting, or any other mode into fabrics composed of threads crossing over or connected with each other, so as to leave between them holes or interstices great or small, even so small as to be imperceptible to the eye, but through which flame or air heated thereby can be drawn. The clearing of the articles aforesaid is produced by burning or singeing off those loose fibers, or ends of fibers, which, not being bound or twisted into the thread or yarn, but standing out from it, give it a rough, woolly, and indistinct appearance; and this burning or singeing off of the fibers is effected by causing flame, or air heated thereby, to surround or penetrate the articles aforesaid, in such manner as to remove the loose or superfluous fibers, without at the same time injuring the body of the thread or yarn. The result of this process is that the thread or yarn acquires a clear, distinct, wiry, and round appearance, which adds greatly to the beauty of the lace, net, muslin, calico, or any other species of goods as aforesaid into which it may be made either previously or subsequently to the process of clearing, and thereby renders the articles more perfect and saleable. The heat that I commonly make use of for this purpose is that produced in the combustion of inflammable gas, and the apparatus or machinery that I employ in giving motion to the thread or yarn, or to the goods manufactured thereof, as also that employed by me in conducting the inflammable gas into the horizontal perforated pipes where the combustion takes place, likewise the aforesaid horizontal perforated pipes themselves, are similar to those set forth in the specification of my patent of November 3, 1817, for improving lace, net, etc., and therefore, to the exclusive use of the whole of the aforesaid apparatus or machinery I lay no claim in this patent. But my present invention consists in an improved current of air, and an apparatus, the object of which is to supersede the use of the chimney described in my aforesaid patent of November 3, 1817," etc.

Stockings, gloves, caps, shawls, etc., are spoken of as among the articles to be operated on, and one of the drawings shows a stocking in outline upon the machine. The inventor also had in mind the obvious advantage of singeing both sides of an article at one operation, and refers to it as follows:

"I also find it advantageous, when the fabric or texture is not too close, to place the draft pipes so as to draw the flame from the burners, either downwards or in an oblique direction; and, when both sides of a web are required to be cleared by one operation, draw one line of flame upwards and another downwards, whereby the goods, in their revolution or passage between them and the draft pipes, are cleared on both sides by one operation."

In 1876 another British inventor, James Cross, took out a patent for "a method of and apparatus for singeing woven fabrics at the selvages only." He states that:

"Hitherto such fabrics have been singed over the entire surface, or, when desired to be singed at the selvages only, this has been very imperfectly performed by hand by means of gas jets and a flexible tube."

He desired to singe at the selvages only, but the point to be noted especially is that he shows two sets of gas burners, one on each side of the cloth, and refers expressly to this feature in his first claim:

"The method hereinbefore described of singeing the selvages only of woven fabrics by causing them to pass through or in contact with flames from gas burners (or other suitable flames) arranged along both sides of the fabric as it is drawn through the machine."

In the United States a patent was granted to Ewen and McKenzie in 1868 for "improvements in singeing woven fabrics," and the specification describes, inter alia, two rows of burners, each acting on one side of the fabric. In 1886 John Ryle obtained a patent for an "improvement in machines for singeing ribbons and other fabrics," the object of the invention being to "provide a simple, cheap, and reliable means for the removal of fuzz, loose, and straggling films, from ribbons or other fabrics."

The foregoing references show very clearly the condition of the art toward the end of the last century. It was certainly not new to singe the fuzz from a stocking, although novelty might be shown in a particular device intended to accomplish this result; but the knowledge that woven fabrics could be "cleared"—to use Hall's word—by the application of flame had been common property for many years. Apparently, however, stockings had not often been subjected to the process. People were content to tolerate a more or less fuzzy surface on these articles of dress (which were of course for the most part not visible), and the stimulus of a popular demand for improvement was therefore lacking, especially in this country which was then importing nearly all the better grades of hosiery. These grades, however, began to be manufactured here about the period just referred to, and at the same time the Hermsdorff process of dyeing fast black came into general use. One of the steps in this process increased the natural roughness of the stocking, and helped to fix attention upon the objectionable fuzz. About the same time Thomas West accidentally discovered that these fiber ends could be removed by attrition—the so-called "rum-

bling"—and that cotton threads could thereby be given a finish like silk or linen, and this was an additional fact that compelled the trade generally to look for a satisfactory solution of the problem. That the old and well-known method of burning the fibers off was an obvious expedient receives confirmation from the fact that it occurred without delay and independently to several minds, as the testimony in this case satisfactorily establishes.

It appears, therefore, that the use of heat or flame to singe the outer surface of fabrics was old, and that a machine to singe both sides of a fabric at one operation was also old. If now we turn to Sarfert's patents, it will be plain, I think, that his contribution to the art probably requires benevolent consideration before any of it can be described as patentably new. The process patent No. 667,142 is confined to hosiery, but this limitation is of no importance. Hosiery is merely a class among fabrics, and the earlier patents included hosiery and many other articles. Even Sarfert himself does not claim to have discovered anything new in this part of the field except the fact that stretching a stocking will separate the threads, and will thus enable a flame or other singeing medium to reach all, or nearly all, the fibers forming the nap. To speak of such a fact as new seems to me a misuse of terms. Neither is it easier to discover invention when his method of stretching is examined. The method had long been used for the precise purpose of separating the threads. He himself describes it as "a board or frame of the kind familiar to those skilled in the art of dyeing which serves to stretch or distend the stocking so that its threads are separated or pulled apart." This board was used to stretch stockings so that the dye-stuff might more thoroughly reach their interstices, and it can hardly be said to be invention to stretch a stocking in the same way on the same board in order that the same interstices may be reached by a flame as were reached by the dyeing liquid. This combination of two old steps—stretching and singeing—is variously described in the 10 claims of the patent. Three of them are selected by the complainant as typical:

"5. The herein-described process for treating hosiery which consists in stretching the same on a former, whereby said hosiery is retained in substantially a right line during the act of singeing, and then singeing the same."

"9. The herein-described process of treating hosiery which consists in abnormally stretching the fabric in every direction, whereby substantially every portion of the fiber forming the nap or lint can be reached by a singeing agent, next singeing said hosiery, and lastly allowing the hosiery to assume its normal or unstretched condition.

"10. The method of singeing a stocking, which consists in supporting and stretching or distending said stocking from within, with its outer surface exposed, and then subjecting said surface in such condition to a singeing agent."

The machine patent No. 758,937 is inseparably connected with the foregoing process patent. It has 22 claims, but the complainant lays stress upon six:

"10. In a stocking-singeing machine, burner-tubes arranged to direct their flames toward each other, a suitable former over which the stockings to be singed are stripped, whereby the threads or fibers thereof are stretched or spread apart, the means for bodily moving said former and surrounding stockings between the flames of the burner-tubes, substantially as described.

"11. In a stocking-singeing machine, a pair of burner-tubes arranged to project jets of flame in opposite directions, a suitable former over which the stockings to be singed are stretched and by which they are supported in a flat condition, and means for feeding said former and surrounding stockings through the jets of flame, whereby both sides of the stocking are singed at one operation."

"14. The combination in a machine for singeing the outside of hollow or tubular articles, of movable means for supporting the article from within, and singeing means situated on opposite sides of the path of said article-supporting means to apply the singeing means to the article.

"15. In a machine for singeing the outside of hollow or tubular articles, such as stockings, means for supporting the article from within and in a flat condition, and singeing means for applying the singeing agent to both sides thereof, said means being relatively movable."

"17. In a machine for singeing the outside of hollow or tubular articles, such as stockings, burners arranged to direct their flames toward each other, a form, that is adapted to be inserted within the article to be singed, said burners and form being relatively movable in a path that will bring the burners on opposite sides of the form."

"19. The combination in a machine for singeing the outside of hollow or tubular articles, such as stockings, of means for supporting the article from within, and means for singeing the outside of said article."

The specification declares that the invention relates to "the art of singeing textile fabrics," and that it consists of "a machine for singeing the outside or outer surface of hollow or tubular articles—such, for instance, as hosiery—for the purpose of removing the fuzz, nap, or lint from the outer surface only thereof, and thus to impart to the article a finished appearance." The novel features are thus described in general terms:

"For the purpose of illustrating my invention I have shown a machine for singeing hosiery, as this example best illustrates the principle of my invention, and since my invention has been particularly designed for singeing hosiery and in accordance with the broad principle thereof I employ two principal instrumentalities—namely, means for supporting the stocking or other article from within and, second, a singeing means, these two means being preferably relatively movable, so as to apply the singeing means to the outside of the stocking to singe substantially the entire outer surface thereof. It is obvious that these principal instrumentalities of which my invention consists can be variously arranged and organized, and in the accompanying drawings I have shown one simple embodiment thereof which I have found in practice to be successful and which consists in employing two burners arranged to project their flames toward each other, a pair of driven rollers situated next to these burners, so that when a stocking and a form placed therein to hold said stocking flat is inserted between these rollers said form and surrounding stocking is projected between the burners and the outside of the stocking or its entire outer surface is subjected to the singeing agent, although it is understood that my invention is not limited to this specific arrangement and organization of these instrumentalities."

The specific description of the machine adds nothing important, and it seems clear, therefore, that no element among those claimed is new. Singeing means had been long in use, whether in the form of one gas burner or two. Driven rollers were a well-known device for moving an article along; and a board or frame to support the stocking from within was also old. Even the combination of the patent is old with the single exception of the stocking on the board. That element, although old in itself, does not appear in any previous combination, unless perhaps in the second patent to Hall, and it is this element alone

that can rescue the patent if it can be rescued at all from the charge that no patentable invention is disclosed. As it seems to me, however, it is very difficult to find invention in this use of the well-known stretching board, and, unless invention can be found at this particular point, the two patents now under consideration must certainly fall. I do not hesitate to say that, if no other question was presented for decision than the novelty of these patents, I should decide it against the complainants; but I pass it without formal decision because I believe the defense of anticipation has been established by evidence of unusual cogency, and I prefer to rest the decree upon this ground alone.

I am aware of the legal rules in reference to the defense of anticipation, and I fully agree with the reasons on which they rest. Their purpose is to compel great caution in weighing the testimony, but where the rules have been obeyed, and the defense is nevertheless established, the conclusion is more satisfactory than in the ordinary case. In the present controversy I think the testimony measures up to the full requirements. It is clear. It is detailed and specific. It comes from credible and disinterested witnesses. It is of ample volume, and it is corroborated in important particulars. Moreover, taken as a whole—and this I think is a matter of great value—it produces the irresistible effect of truthfulness. I have read with attention the several hundred pages that bear upon this point, and in my opinion no one who repeats that experiment can escape the conclusion that the two patents now under consideration were anticipated by a prior use that has been proved beyond any reasonable doubt. The facts are briefly these: In the latter part of 1896 the process of stretching stockings upon a board or former, and then exposing them to a gas flame for the purpose of singeing the exterior fibers, was used by the firm of Morgan & Menzies, then engaged in business in Wilkes-Barre, Pa. The purpose was to use it commercially, and within a very short time—before January, 1897—a machine was built to do this work. It was no doubt crude in certain respects, but it contained all the essential elements of the Sarfert machine, except that only one burner was used. A second burner, however, was added not long afterwards—as I think before April, 1897, although the date is not particularly important, as there would be no invention in merely adding a second burner—and the machine thus equipped continued to do satisfactory work in singeing stockings for the market. It was used steadily until 1899, when it was replaced by a second machine of a somewhat different pattern, but not essentially different in those elements that are now important. The first machine had driven rollers, and these in connection with an apron stretched over them carried the boarded stockings over the perforated burner. After the second burner was added, the boards were carried between the two flames so that both sides of the stocking were singed at one operation.

It is unnecessary to review the testimony in detail. The facts just outlined are the ultimate facts in dispute, and, as I have already said, they seem to me to be established beyond any reasonable doubt. If I am correct in this belief, the two patents now being considered have been fully anticipated; for the complainant does not claim an earlier date than June, 1897, for the process patent, and March, 1898, is the

date of the invention embodied in his machine. It may perhaps be added that both parties are required to prove their relevant facts by proof of a high quality—the defendant, because of the rules already referred to; and Sarfert, because his patents were not applied for until 1900, and both the process and the machine had already come into very general use during the two years preceding.

The complainant argues at considerable length that what was done by Morgan & Menzies was no more than an abandoned experiment. This position was practically forced upon the complainant, for he was obliged to admit that a machine of some kind for singeing boarded stockings had been made and used at Wilkes-Barre in 1896 and the early part of 1897. This admission made it necessary to avoid the effect of these dates, and an obvious expedient was to take the position that what was done was a mere experiment which came to nothing and was soon given up. I can only say in reply that in my opinion the testimony does not support the argument. It shows that from the very beginning the machine, although doubtless somewhat crude in construction, did the work for which it was intended, and supplied its owners with all the singed stockings needed for use in their business. Just how many does not appear with precision, but it must have been hundreds, and perhaps thousands, of dozens.

The remaining patent, No. 667,140, is also for a process, and I believe it to be void for lack of invention. Its object is to give a silk or lisle finish by singeing hosiery or knitted goods, and the patent is intended to be very broad, as the following paragraph from the specification will show:

"I have found that by singeing hosiery and other fabrics a smooth finish and fine surface and luster can be produced, but that to secure this result it is necessary prior to singeing to subject the goods to such treatment that the nap or fiber thereof is brought to such a condition that substantially every portion thereof can be removed by singeing, whereby said improved finish, surface, or luster is produced. It is obvious that the nap and fiber can be removed to a certain extent by singeing without any such special treatment beforehand, but, as far as I am informed, singeing the goods without the treatment to which I refer does not impart the finish which I secure, and although in the following specification I set out specifically one way in which my process can be successfully carried out, yet I claim broadly, as my invention a process of treating hosiery and other fabrics which consists, first, in subjecting the fabric to treatment that brings the nap or fiber to a condition, or which effects a condition, of the nap or fiber whereby it can be more readily and effectually removed by singeing, and then singeing such fabric. The treatments by which such a condition of the nap or fiber is effected may differ, and the treatment which I have selected for the purpose of illustrating my process is chemical; but, as before set forth, my invention is not restricted to any specific treatment to which the goods are subjected, but to a process that embraces the step of treating the fabric to effect a condition of the nap or fiber whereby it can be more readily removed by singeing and in then singeing."

There are seven claims, but the first four are relied on by the complainant as typical:

"1. The herein-described process of treating hosiery and other fabrics, which consists in, first, subjecting the fabric to treatment to increase the combustibility and inflammability of the fibers forming the nap or lint, and then singeing said fabric.

"2. The herein-described process of treating hosiery and other fabrics, which consists in, first, subjecting the fabric to treatment to increase the com-

bustibility and inflammability of the fibers forming the nap or lint, then singeing said fabric and then finishing the same.

"3. The herein-described process of treating hosiery and other fabrics, which consists, first, in subjecting the fabric to chemical treatment to effect a condition of the nap or fiber whereby the same is more readily and effectually removed by singeing; then singeing the fabric; and then finishing the same.

"4. The herein-described process for treating hosiery and other fabrics, which consists in singeing the fabric while in a state of oxidation; and then finishing the same."

The chemical treatment referred to is not Sarfert's invention at all. It is simply a step in the Hermsdorff process of dyeing fast black, and one of the results of taking this step is to increase the fuzziness of the stocking. This increasing fuzziness is not chiefly caused, or perhaps caused at all, by the application of the aniline black solution referred to in the specification, but is due to the fact that the stockings are beaten in a machine called a tom-tom in order to insure complete saturation, and the beating roughens the surface by breaking some of the fibers. After this step the stockings are green in color, and as the next and final step is to dye them black it is, I think, plain enough that, if singeing is to take place at all, this is the precise time when it must be done. To singe after the fast black has been produced impairs the color, and, of course, it would be absurd to singe before the green stage has been reached, because the process of dyeing the stocking inevitably results in producing more fuzz, and this would need to be singed off by a second operation. To perceive this fact seems to be within the range of a limited intelligence, and not to require the exercise of the inventive faculty.

A decree may be entered in accordance with this opinion, dismissing the bill with costs to the defendant.

PEERLESS BRICK MACH. CO. v. MIRACLE PRESSED STONE CO.

(Circuit Court, D. Minnesota, Fourth Division. September 30, 1910.)

1. PATENTS (§ 327*)—ACCOUNTING FOR INFRINGEMENT—EVIDENCE.

A decree holding a patent valid necessarily determines that the invention covered thereby is both new and useful, and, on an accounting for infringement under such decree, evidence to show that the patented feature of the machine is of no utility is incompetent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. § 327.*]

2. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

Where the owner of a patent and the maker of an infringing machine were the only manufacturers having machines of the kind in the market, no competing machine being then known, the infringer is accountable for the entire profits made which must be attributed to the patented feature of the machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*

Accounting by infringer for profits, see note to Brickill v. City of New York, 50 C. C. A. 8.]

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

3. PATENTS (§ 318*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
The testimony of an officer of a defendant corporation on an accounting for profits made from the sale of an infringing machine that some of the accounts for machines sold were not collectible was not sufficient in itself to require the deduction of the profits on account of such sales; there being no testimony of attempts to collect nor offer to assign any part of the accounts to complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

4. PATENTS (§ 318*)—INFRINGEMENT—DAMAGES RECOVERABLE.
Where, on an accounting for profits made by defendant from the sale of an infringing machine, the profits made on certain sales made in direct competition with complainant were allowed, complainant was not entitled to also recover as damages the profits it would have made from the same sales on its own machines.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

In Equity. Suit by the Peerless Brick Machine Company against the Miracle Pressed Stone Company. On exceptions to master's report. Modified and confirmed.

Paul & Paul, for complainant.

Charles S. Burton and Offield, Towle & Linthicun, for defendant.

WILLARD, District Judge. By the interlocutory degree in this case the Nolan patent, No. 811,518, for what is called a one-man brick machine, was sustained as to claims 3, 4, 5, 7, 8, and 9. As to claim 6 it was held void. It was also held that the defendant had infringed the claims sustained, the court saying:

"The defendant's machine is conceived and carried out as an exact duplicate of complainant's machine and clearly infringes the invention. That was conceded in the argument, and certainly is manifest by an inspection of the machines."

After the injunction granted in the interlocutory decree was served, the defendant made and sold a machine which its president testified was the same as the old one, except as to the handles. These, instead of being level with the tops of the partition plates, were an inch or more below such tops, and were curved. In proceedings for violation of the injunction by the sale of the new machines, it was held that they did not infringe the Nolan patent. The case having been referred to a master to take an accounting, he reported that the profits realized by the defendant by the sale of the old machines amounted to $7,530.93, and that the complainant had suffered damages to the amount of $680. The defendant filed exceptions to this report, and the case is now before the court upon the hearing of such exceptions.

The first exception is as follows:

"The defendant excepts to the omission and substantial refusal of the master to find in accordance with the evidence produced before him that the invention covered by the claims of the complainant's patent in suit found to have been infringed by defendant's machine was of no intrinsic or commercial value and did not contribute anything whatever to the intrinsic or commercial value of the defendant's said machines."

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

This is, in effect, a claim that the patentable feature of the complainant's machine was of no use. In fact, in the fifth exception, the defendant complains of the master's refusal "to find that the patentable feature did not contribute to the utility of the defendant's infringing machines." An invention cannot be held valid unless it relates to a new and useful machine. By the decree holding this patent valid it was necessarily decided that the patented feature did have some utility. Evidence upon the accounting to show that it was useless was in my opinion incompetent. The court, moreover, held that the novel feature in the machine, and the one which the defendant now says was valueless, measured "the difference between success and failure in the brick-making operation."

By other exceptions to the report the defendant presents a claim which is thus expressed in his brief:

"It is only a statement of the plainest equity to say that, unless the patented feature has produced profits for the defendant, the complainant cannot recover any portion of the defendant's profits."

In support of this claim the following quotation is made from Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664:

"If the defendant gained any advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for."

Applying the rule indicated by the quotation, we are to see "if the defendant gained any advantage by using the plaintiff's invention." That it did use it and between January 6, 1906, and November 27, 1907, the date of the interlocutory decree, made and sold 163 machines which were copies of the complainant's machine, is admitted. It is also admitted that the profits which it realized from such sales were $7,530.93. What part of that sum of $7,530 was due to the complainant's invention? In other words, what part of that sum would the defendant have made if it had not used the complainant's invention, but had used some other? The answer is no part of it. Its president, Miracle, testified that during the time covered by the accounting there were only two machines in the market, his and the complainant's. As his was a copy of the complainant's, it follows that during that time there was only one machine which the defendant could use if it desired to go into the business of making "a one-man brick machine." It makes no claim that the Schwartz machine was in any way a competitor of the complainant's. Such claim could not well be sustained in view of the fact that the Schwartz machine could make one brick a day, while the complainant's could make over 2,000.

It was not at that time known that the handles of the Nolan machine could be lowered, and, as the defendant now claims, the machine then successfully operated. The defendant had no choice. It must either stay out of the manufacture of that kind of a machine, or it must use the complainant's invention. It chose the latter course, and it seems certain that, if it had not used the complainant's invention, it would not, and it could not have made $7,530 or any part of that sum in the manufacture of a brick machine of this class. What it did make was therefore due solely to the Nolan invention, and, according to the

rule quoted above by the defendant, it must account for all the profits.

The eleventh exception is as follows:

"The defendant excepts to the refusal of the master to find that the complainant's proofs do not afford any means for segregating the profits due to the patented feature from the entire profits made by the defendant on the infringing machines sold."

In this class of cases the rule is thus stated by the Circuit Court of Appeals of this circuit in Brown v. Lanyon Zinc Company, 179 Fed. 309, on page 314:

"The true standard of comparison in any given case 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."

The other device or appliance must, of course, have been known at the time of the infringement.

In Black v. Thorne, 111 U. S. 122, on pages 123 and 124, 4 Sup. Ct. 326 on page 327 (28 L. Ed. 372), the court said:

"The question, therefore, was what advantage in its production did the use of the improvements in burning wet tan have over other known methods in common use of producing the same result; that is, the same heat. * * * If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer, or impair the just rewards of the inventor."

In Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, on page 453, 12 Sup. Ct. 49 on page 53 (35 L. Ed. 809), the court said:

"In regard to the holding by the master and the court that all the profits of the defendant from the valves it made and sold were to be attributed to the employment by it of the improvement covered by the patent of 1866, we hold that in view of what was determined in the former opinion of this court, and on the whole case, the safety valves known to the art and open to be used by the defendant would not do the same work as the Richardson invention covered by the patent of 1866, or have any commercial value, and that within the case of Garretson v. Clark, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371], it appeared, by reliable and satisfactory evidence, that the profits made by the defendant are to be calculated in reference to the entire valve made and sold by it, for the reason that the entire value of that valve as a marketable article is properly and legally attributable to the patented feature of the patent of 1866."

As has been said before, there was no one-man brick machine known between January 6, 1906, and November 27, 1907, which would do the same work as the Nolan invention. The defendant does not ask to have the Schwartz machine taken as a standard of comparison, and there is no other. The complainant is entitled, therefore, to recover all the profits.

At the hearing before the master, one of the officers of the defendant testified that some of the accounts arising from sales of the infringing machines were considered bad, and not collectible. These accounts amounted to $1,239. He testified that another account for $160 he considered doubtful. It is claimed by the defendant that complainant should not be allowed that part of these accounts which was profits. The only evidence given as to the value of the accounts is that quoted. It was not proven that any efforts had been made to cal-

lect the accounts, nor was there any offer on the part of the defendant to assign that part of the accounts which was profit, to the complainant. The exception to the refusal of the master to make this deduction cannot be sustained.

The master found that the profits realized by the defendant from the sale of 163 machines was $7,530.93. It was proven that as to 10 of these machines there was a competition between the complainant and the defendant for their sale, each party attempting to secure the proposed purchasers. In these attempts the defendant was successful, and the complainant claimed that, if it had been successful, it would have made $680 by the sale of these machines. The master allowed the defendant this sum as damages, and to this allowance the defendant excepted.

It seems quite apparent that the master allowed the complainant to recover twice for the same machines. The profits on the sale of these 10 machines are included in the sum of $7,530.93. The master allowed the complainant to recover them again as damages when he allowed the sum of $680. The damages referred to in section 4921 of the Revised Statutes (U. S. Comp. St. 1901, p. 3395) cannot be made to cover a case like this.

With this exception, the master's report is sustained.

Let a decree be entered in favor of the complainant for $7,530.93, with interest thereon from the 23d of August, 1910, and the costs.

UNDERWOOD TYPEWRITER CO. v. FOX TYPEWRITER CO.

(Circuit Court, W. D. Michigan, S. D. November 1, 1909.)

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATIONS.

   Where the questions involved in determining the validity of a patent are fairly doubtful, the decision of one Circuit Court of Appeals sustaining the patent should be followed in another circuit if the record is substantially the same, although a court would have no right to abdicate its own judgment.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 622; Dec. Dig. § 327;* Courts, Cent. Dig. § 328.]

2. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — TABULATING ATTACHMENT FOR TYPEWRITERS.

   The Gathright patent, No. 436,916, for a tabulating attachment for typewriting machines, was not anticipated, and, while not for a pioneer invention, covers a primary improvement, and the claims are entitled to a liberal construction and a fairly broad range of equivalents. Claims 4 and 5 also *held* infringed.

3. PATENTS (§ 328*)—CONSTRUCTION AND INFRINGEMENT—TABULATING ATTACHMENT FOR TYPEWRITERS.

   The Gathright patent, No. 452,268, for a tabulating attachment for typewriting machines, which covers specific improvements on the patentee's prior patent No. 436,916, construed, and *held* not infringed.

In Equity. Suit by the Underwood Typewriter Company against the Fox Typewriter Company. On final hearing. Decree for complainant.

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

Briesen & Knauth, for complainant.
Chappell & Earl, for defendant.

KNAPPEN, District Judge. This suit is brought on account of the alleged infringement of two United States patents granted to Josiah B. Gathright on tabulating devices for typewriting machines. The numbers and dates of the patents are, respectively, 436,916, September 23, 1890, and 452,268, May 12, 1891. These patents will hereafter be referred to, respectively, as the first and second Gathright patents. In the early history of the typewriting art, in order to bring words and figures into accurate vertical columns, as required in invoices, statements of account, and other work of that kind, it was necessary to advance the carriage to the columnating point one space at a time by repeatedly striking the usual spacing key or by unlatching the carriage and sliding it to the desired point by hand.

The specifications of the first Gathright patent, after reciting this early history of the typewriting art and stating that such processes were tedious and perplexing to the operator, and that the object of the invention "is to obviate these objections by providing means for automatically locating with the typewriter one or more columns of words or figures and of mechanically skipping any intervening space desired to be left blank," describe the tabulating mechanism as embracing a "supplemental spacing key," so called, and the use of a stop entirely distinct from the spacing mechanism, adapted to engage with the carriage. By the words "supplemental spacing key" the inventor says he means a key exclusively devoted to the duty of, first, disengaging the carriage rack from the detent and holding it disengaged until the carriage, traveling its usual path, has passed over the space which it is desirable to skip "to a stop whose location is adjustable and was predetermined to fit said skipped space; and, second, to remove the said stop by the act of releasing the said spacing key, thus permitting the carriage to resume service at the usual letter spaces." Of this supplemental skipping key the inventor further says that:

"It has only one service to perform. When it is pressed down in operation, it releases the carriage detent and places an adjusted stop in the path of the carriage to arrest it at the desired point. On permitting the supplemental spacing key to rise, it withdraws the stop from the path of the carriage, leaving it free to resume work, as usual."

This supplemental spacing key the inventor contrasts with keys which allow the carriage to advance but one letter space at a time, also with the common hand lever, whereby the carriage may be raised from its usual path and carried over any number of letter spaces; also, with any key adapted by light pressure to advance the carriage a single letter space and by a heavier pressure to entirely release the carriage, so that it may travel over a number of letter spaces to a stop. The tabulating attachment was entirely independent of the spacing and feeding mechanism, and was designed by the inventor to be attached to or removed from a machine without interfering with its use as a writing machine; the specifications saying:

"It would require only ordinary mechanical skill to adapt my stop rod and lugs to any kind of a self-feeding typewriting machine by following out the

principle of construction herein described. Therefore, I deem it unnecessary to illustrate its application to the great variety of typewriting machines which have been invented."

The claims of the first Gathright patent which are involved here are the fourth and fifth, which are as follows:

"4. The combination of a stop rod freely hung to the machine, a stop lug thereon, and a supplemental spacing key hung in the machine and adapted to move the said stop lug into the path of a portion of the feed carriage, and connection between the stop rod and rack bar, substantially as shown and described.

"5. In a typewriter, the combination of the usual letter keys and one or more spacing keys having mechanism in common for permitting the carriage to move a definite space at each stroke, and a supplemental spacing or skipping key fitted to permit the carriage to move any desired number of said spaces, according to adjustment, said key provided with independent mechanism for releasing the carriage from the detent, and mechanism for simultaneously interposing an adjustable stop, substantially as shown and described."

In the case of Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict, 151 Fed. 585, 81 C. C. A. 129 (hereafter called "the original case"), which was decided January 8, 1907, the Circuit Court of Appeals of the Second Circuit considered and construed both Gathright patents. It was there held that long previous to Gathright's first invention Schulte, McCormack, Yost, and others had conceived the broad idea of an automatic tabulating attachment, and had described operative mechanism for carrying it out, but that all the inventors prior to Gathright used the feed dog to contact with and stop the carriage, that the principal features of Gathright's first invention are, first, a supplemental spacing key exclusively devoted to the tabulating attachment and performing no function except in connection therewith; and, second, a lift slide and stop rod freely hung, adjustable longitudinally of the machine, and normally supported close beneath some cross-portion like the lateral arm of the feed rack. In the case of American Writing Mach. Co. v. Wagner Typewriter Co., decided at the same time with the "original case" (151 Fed. 576, 81 C. C. A. 120), the early history of the tabulating art is given.

In Gathright's invention pressure on the supplemental spacing key disengages the rack from the feed dog by raising the rack and holding it disengaged until the carriage passes over the desired space, when it is stopped by the lateral arm of the feed bar coming into contact with lugs adjustably, but firmly fixed to the stop rod, the raising of the rack from the feed dog being directly effected by the raising of the stop rod, which itself lifts the feed rack by raising the lateral arm thereof designed to contact with the lugs on the stop rod. When pressure on the key is released, the stop rod returns to its normal position, the lugs are removed from the path of the carriage, the feed rack lowered into engagement with the feed dog, and the machine is free to resume its step by step action. It was held by the Court of Appeals in the original case that Gathright's contribution to the art consists in "providing an independent mechanism, operated by a separate spacing key, by which adjustable stop lugs can be brought into contact with a portion of the feed carriage, thus dispensing with the use of the small

and comparatively delicate feed dog or detent to bear the greatly increased strain when the carriage is released from the step by step movement." The first Gathright patent was held to be valid, and, although not a pioneer invention, was held to cover a primary and valuable improvement on the tabulators of the prior art and to be the first practically and commercially successful tabulating device; and its claims thus entitled to a construction sufficiently liberal, and a range of equivalents sufficiently broad, to protect the actual invention. The Gorin tabulator which was there involved was held to infringe the first Gathright patent.

Under well-settled principles of comity and in the interest of uniformity of decision, this court should follow the decision of the Circuit Court of Appeals sustaining and construing the Gathright patent, except so far as new defenses or new features are presented here, or unless this court should be satisfied that the prior decision referred to is erroneous. In other words, when the questions are fairly doubtful, the prior decision should be followed, if upon substantially the same record, although this court has no right to abdicate its own judgment, or to surrender its own clear convictions. Pratt v. Wright (C. C.) 65 Fed. 99; Mast-Foos v. Stover, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; Con. Rubber Co. v. Firestone Tire & Rubber Co., 151 Fed. 237, 80 C. C. A. 589; Expanded Metal Co. v. Gen. Fireproofing Co., 164 Fed. 849, 850, 90 C. C. A. 611. Upon the question of the validity of the first Gathright patent (independently of the question of the degree of liberality with which the patent should be construed as against alleged infringement), it is earnestly contended by defendant that the prior decision is wrong upon the record then presented, and that the patent in question is clearly shown to have been anticipated by other references, either not before or not considered by the court in the original case.

The proposition that the decision in the original case as to the validity of the patent is erroneous upon the record there presented is largely based upon the proposition that the Schulte patent, which was directly considered in the original case, actually anticipated the first Gathright patent. It seems clear that the Schulte patent did not anticipate the Gathright patent, as that patent is construed by the Court of Appeals. The Schulte device differed radically from the Gathright invention in three important particulars: First, the feed dog came into engagement with the stop; second, this stop was positioned not automatically, but mechanically, by hand; and, third, the skipping key was not, in a proper sense, supplemental and independent of the spacing mechanism. In throwing the dog out of engagement with the feed rack, and into the path of the stop bar, the skipping key acted directly upon the mechanism connected with the universal bar, and, while in a sense supplemental, was so connected as by a light pressure to advance the carriage a single letter space at a time, and by a heavier pressure to travel over a number of spaces (a type of key from which Gathright expressly distinguished his invention), although in actual practice the inventor, and probably operators, preferred using the skipping key for skipping or tabulating work only.

The other patents relied upon here as anticipating the Gathright in-

vention and either not presented to, or not referred to by the court in the original case are British patent to Raggett, No. 1864, May 16, 1880, United States patent to Murphy, No. 324,407, August 18, 1885, and the Standard British patent, No. 7269, May 16, 1888. In my opinion, it is not fairly apparent that either or all of the patents last referred to, if considered by the court in the original case, would naturally have led that court to a different conclusion. The Murphy patent, however, was in fact presented as an anticipation, although not referred to in the court's opinion. It provides a mechanism by which, when the carriage (which is actuated in its forward movement by means of pawl and ratchet, in connection with rack and pinion, but against the tension of the spring) has reached the end of its journey, the escapement is released by means of a lever, and the carriage propelled in the reverse direction by the tension of the spring until it comes into contact with an adjustable marginal stop which defines the commencement of the printed line. It is true that by the device referred to the feed dogs are entirely relieved of shock when the carriage is arrested by the marginal stop in its reverse movement. It is also true that the device employs an independent and supplemental skipping key, whose only office is to release the escapement mechanism, and allow the carriage to return to the point of commencement. It is also true that the release of the escapement mechanism is effected in much the same manner as is that of the defendant here, viz., not by separating the rack from the pinion, but by releasing the detent from the ratchet and allowing the pinion to spin when the reverse movement is going on. But these features give the device no close relation to the skipping device of the Gathright patent. Murphy's patent does not, and cannot, employ a lever whose function is to release the escapement, and at the same time interpose a stop in the path of the carriage. The invention has no relation to a tabulating device. The "skipping" is backward, and not forward. The releasing mechanism is not adapted to use in connection with a tabulating device, for the reason that the carriage, being operated against the tension of the spring, can be so operated only by an actual use, as distinguished from a skipping, of the escapement mechanism.

The language in the specifications of the Raggett patent, which is especially relied upon to show anticipation, is this:

"I also provide a device for regulating the spaces in b, s, and d, and yds., ft. and in. This device may consist of an adjustable stop as shown in side view in fig. 46 or of a series of adjustable arms attached to a spindle, which arms stop the paper carriage in the required position."

The alleged anticipation under this patent is, to say the least, vague and unsatisfactory. Column or tabulating stops are nowhere mentioned. It is conceded that the patent does not specifically describe a mechanism consisting of a supplemental spacing key by which the carriage detent is released and an adjustable stop placed in the path of the carriage to arrest it at the desired point. Nor is the disclosure made by the specifications and drawings sufficient to clearly show the elements contained in the claims of the Gathright patent here involved. The most which can be said for the Raggett disclosure is that

the inventor may have had in mind a device of the nature of that shown by Gathright. If he did, however, have that device in mind, he failed to show it clearly enough to enable those skilled in the art to understand the nature and operation of the invention and to carry it into practical use. It must therefore be disregarded as an anticipation of Gathright.

The Standard patent provides a mechanism for changing the limit of travel of the carriage by interposing one or the other of two stop blocks (attached to an adjustable but rigidly hung bar) in the path of a stop projecting from a given rod. The inventor says of this feature:

"This arrangement is very convenient when extracts or quotations are to be introduced, or shortening of the lines, serving to distinguish one clause or matter from another. It is also of considerable advantage in tabulating or other work, where part of the matter is to be set at one side of a given line, and part at the other side."

The Standard invention provides a hand lever by which in the process of drawing the carriage back to the starting point the dogs are lifted clear of the rack and the friction from dragging the dog over the teeth of the rack bar is avoided. By use of this lever the escapement may be disengaged during the travel of the carriage to the point of engagement between the stop block and a given stop on the guide rod. Such lever is expressly distinguished by the Gathright patent specifications from the Gathright invention. It has no supplemental skipping key for disengaging the rack and detent, no key mechansim for interposing a stop lug in the path of the carriage, and no stop rod freely hung. The record indicates that the Murphy device was never manufactured, and that the Raggett devices could not, by reason of their inefficiency, be marketed. It does not appear that any tabulating device under the Standard patent was ever used, commercially at least. The tabulating devices of Schulte, Yost, or McCormack never came into anything like general use. Comparatively few only of the devices under either of these three patents were ever marketed or used.

I entirely agree with the decision of the Court of Appeals in the original case in holding the first Gathright patent valid. The question whether defendant's structures infringe this patent depends upon the degree of liberality with which the Gathright patent is construed. In the original case it was held by the Court of Appeals that "to Gathright belongs the credit of constructing the first commercially successful tabulator"; the court saying:

"The changes introduced by him seem simple and obvious in the light of the present, but it is a significant fact that all the prior inventors, Schulte, McCormack, and Yost, used the feed dog to stop the carriage, and it never seems to have occurred to any one before Gathright to make a tabulating apparatus wholly independent of the writing machine proper. Gathright's device, though an improvement upon the existing tabulators, was an improvement of such vital importance that it may be said that the art, when considered from a practical and commercial point of view, began with him. He converted a theory into a fact. His invention belongs to that large class which have ever been treated with liberality by the courts, where the inventor, by an apparently simple change, addition or transposition of parts has converted imperfection into completeness."

It accordingly held that Gathright's improvement was a primary one, and so was entitled to a liberal construction. The defendant here contends that this conclusion was reached in the original case under a misapprehension that tabulators prior to Gathright's invention "were not commercially successful, and never could be made successful so long as the feed dog was utilized to receive the entire shock of the spring propelled carriage," and under the mistaken view that the evidence presented in the original case showed that in the operation of the earlier tabulators the feed dog was "battered and worn beyond the help of the repairer." Defendant has accordingly introduced testimony of experiments made in the use of the feed dog as a stop, indicating that the feed dog, especially if artificially strengthened or if relieved from the full force of the blow by means of a brake, is fully able to stand without serious injury the shock of natural use as a tabulator stop during the lifetime of a writing machine.

But the court in the original case seems not to have attributed the commercial failure of tabulators prior to Gathright's solely to the inability of the feed dog to withstand use as a tabulator stop, but to have included in such causes the fact that prior devices did not operate independently of the writing machine proper, and, in general, the lack of the special features of the combination devised by Gathright. However, it seems obvious, notwithstanding the experiments introduced by defendant, that the use of the feed dog as a stop is, in the nature of things, undesirable. It is manifest that, if so used, great care must be taken in ensuring the proper degree of hardness and strength, with liability to injury or breakage in case of any failure in accuracy of construction; and that this, in the case of a construction so delicate as the feed dog, is of necessity attended with difficulty. Moreover, operated as it was in the Schulte, Yost, and McCormack devices, in connection with the spacing mechanism, it would seem that its use as a tabulator stop would be likely to interfere with the accuracy and alignment of the spacing mechanism. But whatever weight may be attached to the undesirability of the use of the feed dog by reason of its so-called delicacy, the fact remains that since Gathright's invention no tabulator has been used with commercial success which did not involve the principle of his invention, viz., a tabulating apparatus entirely independent of the writing machine proper, and embracing a stop rod freely hung and an independent spacing key, devoted exclusively to the duty of disengaging the carriage from the detent and interposing in the path of the carriage a stop wholly independent from the spacing mechanism, and, in turn, removing the stop from the carriage path and renewing the engagement between the rack and the detent. The correctness of the conclusion of the Court of Appeals that Gathright's invention turned what was before unsuccessful into a complete and lasting success is not successfully assailed. I am satisfied to adopt the conclusion of the Court of Appeals in the original case that Gathright's improvement is a primary one, that the claim should be construed as broadly as the invention, and that his claims are thus entitled to a liberal construction, and that, under this construction, infringement is not limited to the employment of the precise means adopted by Gathright, but extends to equivalents of the elements of his combination which per-

form substantially the same function in substantially the same way to obtain the same result. Smead v. Fuller & Warren Co., 57 Fed. 626, 6 C. C. A. 481; Electric Controller & Supply Co. v. Westinghouse Elec. & Manf'g Co., 171 Fed. 83, 96 C. C. A. 187; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279; Consolidated Valve Co. v. Crosby Valve Co., 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; Barbed Wire Patent, 143 U S. 275, 282, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Westinghouse v. Boyden Co., 170 U. S. 537, 572, 18 Sup. Ct. 707, 42 L. Ed. 1136; Hobbs v. Beach, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586.

As to the question of infringement. In complainant's machine which was before the Circuit Court of Appeals in the original case, no sprocket wheel is employed in the feed mechanism, and the supplemental key directly rocks a shaft in the rear of the machine and substantially in the plane of the escapement mechanism. By the rocking of the lower arm of this shaft a projection therefrom bears upon a projection from the dog, thus depressing the latter and releasing it from the rack, instead of raising the rack from the dog as in the description of the Gathright patent. By the rocking movement of the shaft a stop block upon an upper arm is thrown into the path of a projection on the carriage.

In "Complainant's Typewriting Machine" presented here, the feed mechanism employs a sprocket wheel with rack and pinion; the dog thus not engaging the rack. The supplemental skipping key directly rocks the shaft. By this rocking movement a projection from the lower arm of the rock shaft depresses one end of a pivoted lever, whereby the other end of the lever directly raises the rack from the pinion and disengages the escapement. By this same rocking movement a stop block on the upper rod of the rock shaft is interposed in the path of a block on the carriage.

The Gorin tabulator, which was held in the original case to infringe the first Gathright patent, was attached to a Remington typewriter which employed the rack and pinion escapement. In the operation of the tabulating device, a supplemental skipping key acted by its lever upon one of a series of several flat stops vertically hung in the rear of the machine, throwing it forward. By this forward movement an abutment upon the bar, and at right angles thereto, engages directly with a pivoted lever mechanism whereby the outer end of a connecting lever raises the rack from the pinion.

In both of defendant's alleged infringing machines the step by step mechanism is accomplished by rocking the dogs in and out of engagement with the sprocket wheel, which, in turn, operates the rack and pinion escapement. In defendant's "single key tabulator," by pushing a supplemental spacing key a rod in the back part of the machine, and at right angles with an arm of the spacing key, is made to rock forward by means of a transverse arm rigidly attached to the shaft, and by the rocking of the latter an upright stop rod is moved upwards and into the path of the carriage. Another transverse arm rigidly attached to the shaft (but extending in the opposite direction) by the same movement of the shaft removes the dogs from the path of the sprocket wheel, thus allowing the carriage to move, under the tension of the

spring, with the rack and pinion still in engagement. The mechanism of "defendant's decimal tabulator" differs from that of the single key tabulator in this: It is provided with a series of 10 skipping keys, each attached to a plunger rod which operates to raise to a greater or less height one of three flat stop bars at the rear of the carriage, two of these rods having four, and the third two, shoulders cut in the upper end thereof, so as to provide ten separate abutments as stops. The push buttons connected with these skipping keys protrude through a fretboard or cross-bar at the front of the machine. This cross-bar is connected at each end with a rod, constituting a lever arm operating directly to remove the detent from the path of the sprocket wheel. If the push buttons at the ends of the skipping keys were pressed through the fretboard, but without disturbing the latter, the only effect would be to raise the corresponding stop in the path of the carriage, without releasing the escapement. But the push buttons on the skipping keys are smaller than the end of a normally sized adult finger, and the pressing of the finger upon the button of the skipping key, in the usual manner, carries with it the fretboard, thus releasing the escapement simultaneously with the interposition of the stop in the path of the carriage. But for the locking mechanism hereafter mentioned, pressure upon the fretboard, except in conjunction with pressure upon the skipping key, would have no effect whatever upon the tabulating mechanism by way of interposing the stop. The two operations may thus be mechanically distinct and independent, although in practice they are accomplished conjointly by finger pressure upon the push button through pressure upon the fretboard. In order, however, to prevent an accidental release of the spacing mechanism in advance of the interposition of the stop through pressure upon the fretboard, a locking mechanism is applied which makes it impossible to release the escapement mechanism except in conjunction with the interposition of the stop. This mechanism consists of a swinging plate extending across the machine over the inner ends of the rods operating the stop mechanism, to which are attached the push buttons. The ends of this plate engage collars upon the rods connecting with the fretboard, thus preventing the movement of the rods operating the lever escapement mechanism. The lower edge of this plate is so curved as to be acted upon by conical buttons mounted upon each of the rods operating the stop mechanism, with the result that, when the push button is pressed, the plate is raised from engagement with the collars on the rods operating the escapement mechanism, and the two operations of releasing that mechanism and interposing the stop are necessarily accomplished simultaneously and conjointly.

It is evident that, if infringement is to be tested by absolute identity of means employed, neither of defendant's machines infringe. But, tested by the principles applicable to primary inventions, it seems clear that defendant's single stop tabulator infringes the first Gathright patent. With respect to claim 4: It has first a stop rod (to wit, the so-called stop bar) freely hung to the machine; second, the equivalent of a stop lug on the rod, to wit, a series of adjustable stops upon the carriage with which the end of the stop rod engages (as pointed out in the original case, it is a mere matter of convenience whether the

adjustable lug is on the stop rod or on the carriage); third, a supplemental spacing key, hung in the machine and adapted to move the stop into the path of the lug on the feed carriage; and, fourth, connection between the stop rod and rack bar by means of the rock shaft. The escapement is released and the stop interposed by one movement of a single independent spacing key. The connection between the stop rod and rack bar is thus direct and immediate, unless such connection is avoided by the fact that the release of the escapement mechanism is effected by removing the detent from a sprocket to which the pinion is attached and of which it is made part, rather than by raising the rack from the pinion or lowering the pinion from the rack. In my opinion the method of feed and resulting method of release does not alter the fact of connection between the stop rod and rack bar.

As to the fifth claim: Defendant's single-stop machine has, first, the usual letter keys and spacing keys, with mechanism in common for the step by step movement; second, the supplemental spacing or skipping key fitted to permit the carriage to move any desired number of spaces according to adjustment; third, said key provided with independent mechanism for releasing the carriage from the detent; and, fourth, mechanism for simultaneously interposing an adjustable stop. It seems clear that defendant's decimal tabulator also infringes claim 4 of the first Gathright patent, unless such infringement is avoided either by the fact that a series of stop rods and a series of abutments thereon is employed instead of a single rod, or because of lack of direct connection between the stop rod and rack bar, or the fact that the skipping key does not operate the stop-interposing mechanism.

With respect to the employment of a series of stop rods, it is, to my mind, correctly held in the original case that the question of infringement must be considered from the viewpoint of a single key, and that, if one key and its train of mechanism infringes, it is sufficient.

The question whether there is in this tabulator the requisite unity of stop-interposing and escapement-release mechanism, and thus the requisite connection between the stop rod and rack bar, is a question of more difficulty. Were it not for the use of the locking mechanism before referred to, I have doubts whether, in view of the independence of construction between the escapement-releasing and the stop-interposing mechanism, and the fact of their capability of operation independently of each other, these two mechanisms can properly be considered as the equivalent of the Gathright spacing key, which alone performs the two functions of escapement release and stop interposition. My mind is, however, strongly inclined to the view that by reason of the employment of the locking mechanism mentioned, and the conjoint use of the feed-releasing and stop-interposing mechanism thereby accomplished, the equivalent of the Gathright supplemental spacing key is found and the required connection between the stop rod and rack bar created. Judge Lacombe, who participated in the decision of the original case, held on application for preliminary injunction in the case of Underwood Typewriter Company v. Fox Typewriter Company, Ltd. (pending in the Circuit Court for the Southern District of New York), that both defendant's tabulating machines infringe the first Gathright patent. This decision, which is entitled to high consid-

eration, is of greater interest from the fact that the issues as to validity and infringement are the same in the two cases; the testimony taken being applicable on final hearing to both. This conclusion as to the infringement of claim 4 leads to a like conclusion in the case of claim 5.

As to the second Gathright patent: The claims here involved are numbers 6 and 8, as follows:

"6. The combination, in a typewriting machine having a carriage feed rack, of a detent hung to engage the said rack, a rock shaft journaled in bearings parallel with the feed rack to be rocked in a direction transverse thereto and having one arm communicating with the said detent to disengage it from the rack and another arm or block to be rocked into the path of a fixture of the carriage, and a skipping key connected with the rock shaft, substantially as described."

"8. The combination of a typewriting machine feed rack, a rock shaft nearly parallel with the rack wholly independent of the ordinary feed rock shaft, a lug upon one and stop blocks adjustably secured upon the other, a detent for the rack, the rock shaft having one arm to disengage the rack and detent, and another arm connected with a skipping key, substantially as described."

The distinguishing feature of this patent is the substitution of a rock shaft for the stop rod of the former patent. Without reference to the other considerations hereafter mentioned, it is evident that defendant's decimal tabulator does not infringe the second Gathright patent, for the reason that the stop is not rocked by a shaft into the path of the carriage, the movement being effected by a lever, the shaft being employed only as a pivot rod. But to my mind the second Gathright patent (passing the question of its validity as involving invention) is not infringed by either of defendant's structures. The later patent relates exclusively to specific improvements upon the processes of the earlier patent for the purpose of "adapting the general principles of operation set forth in my patent No. 436,916 to the specific cases herein described, and accomplishing the same objects thereby." This patent is not in any sense primary, and must be limited to the precise improvements disclosed. There is in my judgment no room for a range of equivalents. In each of the forms of device disclosed a rock shaft completely takes the place of the stop rod of the earlier patent; the arms thereon performing the respective offices of releasing the escapement mechanism and of interposing the stop are in each case merely stops, lugs, or cams rigidly fixed or adjusted to the machine, and in each case the releasing attachment acts directly upon either the rack or the detent, accomplishing actual separation thereof. The specific cases provided for and the precise methods disclosed by this patent are found in neither of defendant's structures.

With respect to defendant's motion to strike out and suppress certain questions put to the witness Burridge on redirect examination, together with answers thereto, upon the ground that they are not properly redirect examination, and are thus in contravention of the order of this court of June 2, 1908: By reference to the cross-examination of the witness Burridge, I am unable to say that questions 433, 441, and 444 may not be to some extent germane to the subject-matter of the cross-examination. In my opinion questions 429, 430, 439, 440,

445, 446, and 452 are not proper redirect testimony, and an order may be entered striking out and suppressing those questions and the answers thereto. The delay in deciding this case has resulted primarily from the fact that for several months following the submission of the final briefs I was obliged to do a large amount of work outside of my own district, and was thus unable until recently to give to the consideration of this case the time it seemed to require, in view of the size of the record, the nature of the issues involved and the large number of mechanical exhibits submitted.

It follows from the views stated that there should be a decree that both of defendant's machines infringe the first Gathright patent (with the usual reference for an accounting), and that the second Gathright patent is not infringed by defendant. As the patents have expired, injunction should not issue.

UNDERWOOD TYPEWRITER CO. v. FOX TYPEWRITER CO., Limited, et al.

(Circuit Court, S. D. New York. June 8, 1910. Addendum to Opinion, June 14, 1910. On Settlement of Decree, July 27, 1910.)

1. PATENTS (§ 288*)—INFRINGEMENT OF PATENT—JURISDICTION—EVIDENCE.
   The burden rests on complainant in a suit for infringement of a patent to establish, not only that the infringement occurred within the territorial jurisdiction of the court, but also that defendant was regularly engaged in business therein.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460–466; Dec. Dig. § 288.*]

2. PATENTS (§ 328*) — INFRINGEMENT — TABULATING ATTACHMENT FOR TYPEWRITERS.
   The Gathright patent, No. 436,916, for a tabulating attachment for typewriters held infringed.

In Equity. Suit by the Underwood Typewriter Company against the Fox Typewriter Company, Limited, and the Graves Typewriter Company. Decree for complainant.

See, also, 158 Fed. 476.

Briesen & Knauth (Arthur v. Briesen, Eugene Eble, of counsel), for complainant.

David G. McConnell (Fred L. Chappell, of counsel), for defendants.

HAZEL, District Judge. This suit relates to the expired Gathright patents, Nos. 436,916 and 452,268, for tabulating attachments for typewriters. The questions in controversy relating to the validity of said patents and the infringing devices have recently been considered on the same record before me by Judge Knappen of the United States Circuit Court for the Western District of Michigan in Underwood Typewriter Company v. Fox Typewriter Company, 181 Fed. 530, and decided in favor of complainant for infringement of claims 4 and 5 of the first of said patents and in favor of the defendant for noninfringement of the second thereof. It was practically understood at

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

the hearing before me that such decision would be followed by this court. The remaining contention which is insisted upon is the absence of jurisdiction of this court of the defendant Fox Typewriter Company, Limited; the claim being that said defendant was never engaged in the use, manufacture, and sale of typewriters having the tabulating attachment within the territorial jurisdiction of this court. It is also contended that the decree of the Circuit Court for the Western District of Michigan being in favor of the complainant herein against the Fox Typewriter Company, the successor of the Fox Typewriter Company, Limited, was in legal effect an adjudication of the acts of infringement charged in the bill.

An examination of the evidence satisfies me that the complainant has fairly established that the Fox Typewriter Company, Limited, publicly held itself out as having an office or agency in the city of New York for the sale of typewriters containing the infringing device. The burden of proof is upon the complainant to establish, not only that the infringement occurred within the territorial jurisdiction of the court, but also that the said defendant was regularly engaged in business therein. That the Fox Typewriter Company, Limited, sold typewriting machines within the jurisdiction of the court through its agent, the Graves Typewriter Company, is fairly shown. The complainant's exhibit machines 3 and 4 in evidence, a decimal tabulator, a single key tabulator and single tabulator, were prior to the filing of the bill herein bought from such agent. True, some of the circumstances upon which complainant relies to show that the defendant Fox Typewriter Company, Limited, was actually engaged in business and sold infringing machines in the Southern District of New York are probably trivial in themselves, yet, when they are considered together and given their full weight, it can scarcely be doubted that its acts gave jurisdiction to maintain this action. The point that the decision of Judge Knappen against the Fox Typewriter Company includes any liability of the defendant Fox Typewriter Company, Limited, is thought unsound. No good reason is advanced for refusing to hold the original company in view of the fact that it had a place of business in the city of New York prior to the beginning of the suit. The Michigan decree did not provide for an accounting by the Fox Typewriter Company, Limited. It is not claimed by complainant that the defendant Graves Typewriter Company was an independent infringer, and, as its connection with the sale of the infringing machine was merely as agent and not otherwise, the bill as to it must be dismissed with costs. There will, however, be a decree for an accounting under claims 4 and 5 of the Gathright patent No. 436,916, with costs, against the Fox Typewriter Company, Limited.

Decree may be entered accordingly.

Addendum to Opinion.

Since writing the foregoing my attention has been called by complainant's counsel to the latter part thereof wherein I state that the Graves Typewriter Company is not claimed by the complainant to have been an independent infringer, and therefore the bill as to such defendant must be dismissed. In such statement and holding I was

evidently in error for the bill distinctly charged that the defendants Fox Typewriter Company, Limited, and Graves Typewriter Company were joint tort-feasors and committed the acts complained of for their mutual gain. This averment was not seriously denied by the defendant Graves Typewriter Company, and, indeed, sales by it of the infringing machine are practically admitted. Therefore my earlier memorandum in this respect is amended and a decree may be entered as against both defendants for an accounting under claims 4 and 5 of patent No. 436,916. The complainant having succeeded as to one patent in suit only, each party may recover its costs from the other.

On Settlement of Decree.

The liability of the Fox Typewriter Company, Limited, and the Graves Typewriter Company, is sufficiently indicated in the opinion hereinbefore filed. That a reorganization was effected on November 2, 1904, by which the Fox Typewriter Company succeeded to the business of the Fox Typewriter Company, Limited, is immaterial in view of the fact that the latter continued to hold itself out to the public as being engaged in business in this district.

The Graves Company, it is true, sold typewriting machines after the merger of the limited company and the corporation, but the proofs are that permission was given the Graves Company in 1903 by the president of the company, who subsequently became president of the corporation, to advertise and exploit the company as being engaged in business in New York City. Such authorization was not discontinued or recalled until the year 1907, or just before this action was instituted. There is sufficient evidence warranting the inference that even though there was a merger in 1904, and business was thereafter conducted under the Corporate name of Fox Typewriter Company, that in New York City the Graves Company continued to use the name of the Fox Typewriter Company, Limited, during the time sales of the infringing machines were made by it, and that the defendant acquiesced therein.

The decree submitted by complainants may be entered.

VICTOR TALKING MACH. CO. et al. v. GREENBERG.

(Circuit Court, S. D. New York. May 24, 1910.)

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION—CONTEMPT PROCEEDING.

Evidence, *held* insufficient to warrant the punishment of a defendant for contempt for violation of an injunction against infringement of a patent, under the rule that the proof in such case should be very convincing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613, 618; Dec. Dig. § 326.*]

In Equity. Suit by the Victor Talking Machine Company and the United States Gramophone Company against Joseph Greenberg, sued

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

as Joseph Goldberg. On motion to punish defendant for contempt. Motion denied.

Horace Pettit, for complainants.
Mortimer W. Solomon, for defendant.

WARD, Circuit Judge. This is a motion to punish one Joseph Greenberg, sued as Joseph Goldberg, for violation of an injunction issued against him upon his default.

Proofs of contempt ought to be very convincing. In this case the affidavits are complicated and confusing. One Case and one Moody say that on April 8, 1910, they saw the defendant taking a Victrola machine from a delivery wagon into the office of one Macksoud at 80 Greenwich street. After that the defendant went in the wagon to several places, at some of which he collected or delivered talking machines and records which were infringements; Case and Moody following in a taxicab. Macksoud is evidently aiding the complainants to obtain evidence of violation of the injunction by defendant, and I think it quite clear that his dealings were not with the defendant, but with his son, Meyer Greenberg. It may be that Case and Moody followed Meyer, and not Joseph, Greenberg in the taxicab. While the affidavits do create considerable doubt about Joseph Greenberg's good faith, I am not sufficiently convinced to punish him for contempt.

Motion denied.

GOLD v. GOLD et al.

(Circuit Court, S. D. New York. May 25, 1910.)

PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—PLEADING—MULTIFARIOUSNESS.

A bill filed against an adverse party to obtain the issuance of a patent, under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), and which also joins the Commissioner of Patents as a defendant to compel the granting of a reissue, which is an ex parte matter, is multifarious.

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

In Equity. Suit by Egbert H. Gold against Edward E. Gold and another. On demurrer to bill. Demurrer sustained.

Otto Raymond Barnett and Samuel E. Darby, for complainant.
William A. Redding and Arthur C. Fraser, for defendants.

WARD, Circuit Judge. The prayer for relief seems to me to be so worded as to call for a decree on the interference only. But the structure of the bill and the including of the Commissioner of Patents as a party defendant show that the complainant's intention is to ask for a decree upon the question of reissue, as well as upon that of interference. If the Commissioner of Patents were to appear, as he might, relief on two independent causes of action, each not affecting all parties, would be demanded.

I think the bill is multifarious, and therefore the demurrer is sustained, with leave to the complainant to amend, if so advised, within 20 days; otherwise, the bill to be dismissed.

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

UNITED STATES v. SMITH et al.

UNITED STATES v. WERNER et al.

(Circuit Court, D. Oregon. September 12, 1910.)

Nos. 3,319, 3,320.

1. PUBLIC LANDS (§ 120*)—STONE AND TIMBER ENTRIES—FRAUD—EVIDENCE.
Evidence *held* to require a finding that certain stone and timber entries were fraudulent, and not made for the sole benefit of the entrymen.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

2. PRINCIPAL AND AGENT (§ 177*)—NOTICE TO AGENT AS NOTICE TO PRINCIPAL.
Where the agent of defendant S. had knowledge of the fraudulent acquisition of title to certain public timber land, and assisted the entrymen in procuring title from the government, intending thereafter to obtain the lands for S., and, this having been accomplished, S. organized a corporation which was a mere holding company formed by himself and other members of his family, to which the lands were conveyed in exchange for stock, neither S. nor the corporation could be regarded as bona fide purchasers without notice.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670–679; Dec. Dig. § 177.*
Bona fide purchasers, see note to United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

3. PUBLIC LANDS (§ 108*)—FRAUD—INTERIOR DEPARTMENT—DETERMINATION BEFORE PATENT—EFFECT.
Where a decision of the Secretary of the Interior directing that certain fraudulent stone and timber claims be passed to patent was brought about by false and fraudulent proof and affidavits, such determination was no bar to suit by the government to vacate the patents.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 304, 306; Dec. Dig. § 108.*]

4. PUBLIC LANDS (§ 120*)—PATENT—SUIT TO VACATE—PARTIES.
In general, the holder of the legal title to land is an indispensable party to a suit to set aside the patent.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

5. LIMITATION OF ACTIONS (§ 119*)—OPERATION OF STATUTE—TIME.
The statute of limitations does not cease to run in favor of the holder of the legal title to land as against a suit by the United States to set aside the patent until he is made a party to the suit and process issued and placed in the hands of the marshal with a bona fide intent that it be served.
[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 119.*]

6. PUBLIC LANDS (§ 120*) — FRAUDULENT ENTRIES — SUIT TO VACATE—LIMITATIONS.
Under Act March 3, 1891, c. 559, 26 Stat. 1093 (U. S. Comp. St. 1901, p. 1521), providing that suits by the United States to vacate patents to public lands shall only be brought within five years from the passage of the act, and suits to vacate and annul patents subsequently issued shall only be brought within six years after the date of the issuance of the patent, suits to vacate patents for fraud are barred after six years from the date of the patent, and not from the date of the discovery of the fraud.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

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

7. PUBLIC LANDS (§ 120*)—FRAUDULENT ENTRY—VACATION OF PATENT—LIMITATIONS—PARTIES.

Certain public timber land having been fraudulently entered and patents having been issued, the land was conveyed to S. or for his benefit, and he organized a corporation, he and members of his family owning all of the stock. To this corporation the land was thereafter conveyed. Within six years from the date of the patent, suits were brought by the United States against S. and others to set aside the patents as to most of the land, but the corporation was not joined until after the six-year period had expired. *Held*, that the corporation under such circumstances was not a bona fide purchaser, and that neither it nor S. was entitled to claim that the suits were barred by reason of the corporation's nonjoinder until after the time had expired.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

Bills by the United States against C. A. Smith and others and against Nils O. Werner and others. Decrees for complainant in each case.

John McCourt, U. S. Atty.

A. H. Tanner, for defendant Kribs.

W. W. Banks and L. H. Tarpley, for entrymen.

Dolph, Mallory, Simon & Gearin and Ueland, Lind & Jerome, for defendants Smith, Werner, and Linn & Lane Timber Co.

BEAN, District Judge. These two suits were brought by the government to set aside and vacate divers patents for public lands issued to sundry persons under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), and were tried and submitted together. There are 28 patents involved in case 3,320 and 17 in case 3,319. The filings in 3,320 were made on January 19, 20, 22, 23, and 31, and on February 1 and 26, 1900, and final proofs were made on April 18th, 19th, 20th, and May 16th. The land was conveyed at the time or within a few days after final proof to John A. Willd in trust for defendant C. A. Smith. On November 2, 1900, Willd conveyed it to defendant Greacen. February 11, 1901, Greacen conveyed to Rogers, and December 21, 1904, Rogers conveyed to Werner, all in trust for Smith, which deeds were all promptly recorded and the legal title stood in the name of Werner until it was subsequently conveyed to defendant Linn & Lane Timber Company as hereinafter stated. The entries in 3,319 were made in May, June, and July, 1900, final proof submitted in August and October, and the land conveyed by the several applicants to the defendant Kribs in trust for Smith about the date of final proof. On October 24, 1904, Kribs conveyed an undivided three-quarters thereof to Smith, and on December 28th of the same year conveyed the other undivided one-quarter to Swenson in trust for Smith, which deeds were also promptly placed of record. The title thus stood until it was subsequently conveyed to the Linn & Lane Timber Company, as hereinafter stated. After the several applications in 3,320 had been filed and prior to final proof, a special agent of the Land Department, who made a partial investigation of the matter, reported that he had reason to believe they were fraudulent, and the Commissioner of the

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

General Land Office subsequently directed Special Agent Stratford to investigate the several entries, as well as those in 3,319, and report thereon. On March 9, 1901, Stratford reported recommending the issuance of patents, but, his report being unsatisfactory, he was requested to continue his investigations. During the summer of 1901 Stratford obtained affidavits from the several entrymen and from defendants Puter and Kribs, and one McKinley, which he later submitted to the department together with a report in which he intimates that in his opinion the entries were fraudulent and patents should be withheld. In March, 1902, A. R. Greene, a special representative of the Secretary of the Interior, made a report to his superior giving at some length the circumstances surrounding the entries, but without accompanying proof or recommendations. Subsequently the Secretary of the Interior directed the Commissioner of the General Land Office to transmit the several reports and matters concerning these entries to his office, and after examination the Secretary, on the 17th of May, 1902, directed that the claims be relieved from suspension and that patents issue therefor, which was done accordingly. The patents involved in case 3,320 are dated August 12, 1902, eight of those in 3,319, the 9th of July, 1902, and the remainder August 12th of that year. In May, 1906, the defendant Smith, having previously acquired about 52,000 acres of timber lands in Linn, Lane, and Douglas counties, including those involved in these suits, organized under the laws of Minnesota a corporation known as the Linn & Lane Timber Company, with capital stock of $100,000, divided into 1,000 shares of $100 each, for the purpose of taking and holding title to these lands. Nine hundred ninty eight shares of stock were subscribed by Smith, and one share each by his wife and his attorney. Immediately after the organization of the corporation by the election of Smith as president, Johanna Smith, his wife, as vice president, Vernon Smith, his son, as secretary, and Nan A. Smith, his daughter, treasurer, and on June 4, 1906, Smith tendered to the directors of the corporation, consisting of himself, his son, and his wife, a deed executed by himself and wife for his lands in the counties referred to in payment of the stock of such corporation, and the same was accepted. On May 28 and August 15, 1907, respectively, Swenson and Werner, at Smith's request, conveyed the interests held by them to such corporation. The deeds from Smith, Swenson, and Werner to the corporation were retained by Smith and not filed for record in the proper county until the 9th day of September, 1908, more than six years after the issuance of the patents involved in these cases.

The bills of complaint in these suits were filed on May 25, 1908. In case 3,320 the majority, if not all, of the entrymen were made parties, also, Werner, Greacen, Rogers, Smith, Kribs, and Puter. The bill alleges that prior to the several entries involved in the suit an unlawful agreement was entered into between Puter, Smith, Werner, Willd, Greacen, Rogers, and Kribs, together with other persons to the complainant unknown, to defraud the government out of the title to the lands in this suit by procuring persons to enter the same for the use and benefit of such conspirators, and that Smith acquired the title with notice of such fraud. In case 3,319, the several entry-

men, together with Smith, Kribs, Swenson, O. J. and W. R. Mealey, and J. A. Thompson, were made parties. The bill charges a similar unlawful agreement or conspiracy between Smith, Kribs, Swenson, O. J. and W. R. Mealey, and J. A. Thompson, and other parties to the complainant unknown, and that Smith had full knowledge of such fraud when he acquired title. Subpœnas ad respondendum were issued upon the filing of the bills and placed in the hands of the marshal for service, and were in due time served upon the resident defendants. Smith, Swenson, and Werner were nonresidents of the state, and in July the marshal returned the subpœnas without service. On July 27th, upon the application of the district attorney, a warning order was issued to them which was subsequently duly served. In September and October Smith, Kribs, and Werner, and perhaps some of the other defendants, filed pleas in abatement, alleging that the property in controversy had been conveyed to and was owned by the Linn & Lane Timber Company prior to the commencement of the suits, and that it was therefore an indispensable party. On November 16th the complainant filed amended bills making the Linn & Lane Timber Company a party, and subpœna was issued and placed in the hands of the marshal for service upon its resident agent, and service was subsequently had. The amended bills contain substantially the same allegations as the originals, with the addition that the Linn & Lane Timber Company was organized by Smith for the purpose of defrauding the government and to consummate the fraudulent acquisition of title to the lands involved in these two suits; that the deed from himself to the company was not made in fact until after the commencement of these suits, but was antedated for the fraudulent purpose; and that all the deeds were concealed and kept from record in pursuance of such fraudulent purpose. Answers were subsequently filed denying the averments of the bill, and setting up as affirmative defenses (1) that Smith and the Linn & Lane Timber Company were purchasers of the property in good faith and without notice of any fraud; (2) that the decision of the Secretary of the Interior directing that the claims pass to patent is conclusive on the government in this suit; and (3) that the suits are barred by the statute of limitations because not commenced against the Linn & Lane Timber Company within six years from the date of patents. Replications were filed in due time, and, upon the issues thus joined, the evidence was taken in open court, and the cases submitted for decision upon the law and the facts.

The evidence is voluminous, and I shall not attempt to review it in detail, but shall state briefly the conclusions reached after a careful consideration of the testimony and the law applicable thereto.

There are substantially four questions presented for decision: First, whether the entries involved in these two suits were fraudulent; second, whether the defendant C. A. Smith was a party to such fraud or a purchaser of the property in good faith for a valuable consideration and without notice thereof; third, whether the government is concluded by the decision of the Secretary of the Interior that the entries should be passed to patent; and, fourth, whether the suits are barred by the statute of limitations.

Upon the first question but little need be said. It is, I think, very clearly established by the testimony that all the entries involved in both suits were fraudulent. In 3,320 the testimony shows that early in January, 1900, one of the Mealeys, who is a defendant in 3,319, called upon McKinley at Albany, and told him that there was a large tract of valuable timber land belonging to the government in the eastern part of Linn county, some 30 or 40 miles distant from Albany, which had recently been surveyed; that the Northern Pacific Railway Company then had cruisers in the timber estimating it preparatory to taking it under the lieu land law, and inquired of McKinley whether or not some method could be devised by which the title could be acquired. McKinley thereupon interviewed the defendant Puter, with whom he had been previously operating very largely in timber lands in this state, and, after a conference between them, it was agreed that they would acquire the title by procuring persons to make applications for the land under the timber and stone act, and would subsequently sell and dispose of it if they were able to do so. In pursuance of this understanding, they entered into an agreement with Mealey to pay him $10 for each claim he would show them or applicants furnished by them, and persons were thereupon solicited to make application for the land, Puter and McKinley agreeing to meet all expenses, pay the purchase price of the land, and each applicant from $75 to $100 for his trouble. Fifty-seven persons were thus procured to make applications to enter lands under the timber and stone act. Many of these persons resided in Albany and Salem, and some of them in Portland. They were taken in groups by McKinley or some of his assistants to Roseburg where they made the filings; the expenses incident to the trips being paid by McKinley. After the filings had been made, McKinley arranged for the publication of notices of final proof, and, when the proper time arrived, notified the applicants and took them to Roseburg, paid all their expenses, and, upon the making of final proof, they were paid the stipend agreed upon. It is clear that none of the applicants took the land for their own use and benefit, but for the use and benefit of Puter and McKinley.

The same may, I think, be said of the entries involved in case 3,319. They were all made through the defendants the Mealey brothers and Thompson, with the understanding on the part of the several entrymen that all expenses and the purchase price of the property would be paid, and that each applicant would receive $50 for his trouble. It is true there was no express agreement with the several applicants in either case that the entries should be made for the use and benefit of another, but this is the effect of the entire testimony. As Puter states in his testimony, the conspirators studiously avoided entering into such an express contract or agreement, for they knew it would be such an evidence of fraud as would invalidate the entry, but caused it to be reported, and the applicants to be advised by other parties that, if they would make the applications, they would receive upon making final proof the stipulated sum, and they acted on such understanding in making the applications and subsequently conveying the property as directed by Puter and McKinley and Mealey.

The next question is whether or not Smith was a party to the fraud

or a purchaser of the property in good faith, and for a valuable consideration and without notice. The evidence in 3,320 shows that, immediately after the first entries were made, Puter went East for the purpose of looking up a purchaser for the land. After interviewing several parties, he finally interested the defendant Smith, who gave him a letter of introduction to his (Smith's) agent or representative on the coast, the defendant Kribs. Puter met Kribs in San Francisco, and presented this letter of introduction some time in February or about the 1st of March, 1900, and later, about the middle of March, Smith came to San Francisco, and there he and Kribs had an interview with Puter about the matter. The parties do not agree as to what transpired at that interview. Kribs says that Puter told them that he had located 57 pieces of land in Oregon, and had agreed to furnish the locators money with which to make final proof for which he (Puter) was to receive a location fee of $200 for each claim; that the time was approaching when final proof must be made, and that he had had considerable trouble to raise the money and desired to make an arrangement by which the applicants could borrow the necessary money with which to make final proof and pay the location fee; that he gave a description of the land, the quality and quantity of timber thereon, and said that the land had been taken by "a lot of poor fellows," and that, after they had proved up, there would be but little trouble in purchasing it from them. Smith's version of the transaction does not accord with that of Kribs. Smith says Puter claimed that he had 8,000 or 9,000 acres of land in Linn county for sale; that it would average 75,000 feet of timber to the acre, was comparatively level, and a splendid logging proposition; that the timber was a fine quality of yellow fir, and was tributary to driving streams which would make it practicable to drive the logs to Portland; that he offered to sell the lands for $6 an acre, and "I told him, in substance, that if the timber was as he claimed, and the topography of the country and the streams, I would take the lands. Mr. Kribs was present at the conversation, and then we had an understanding there at that time that some time in the near future, when Mr. Kribs would get up, he would go and look these lands over, and, if he found the lands as Mr. Puter claimed, then I would take them. In other words, Mr. Kribs should be the judge whether the lands and everything was in accordance with the representations of Mr. Puter." Smith also testifies that there was nothing said concerning the title to the lands or of the entries having been made under the timber and stone act, or that it was necessary that final proof should be made before they could be disposed of. In this regard, Smith is corroborated by Puter, who testifies that he offered the lands for sale to Smith, and that Smith agreed that Kribs should come to Oregon, examine them, and, if he found them satisfactory, to make the purchase. So I take it to be clearly established that Kribs was the agent of Smith, with power and authority to purchase the lands and came to Oregon for that purpose. He arrived in Albany about the 1st of April, 1900. Prior to that time, the Northern Pacific Railway Company had filed a contest against each of the entries on the ground that they were fraudulent, alleging that they were not made for the use and benefit

of the several entrymen but for other parties. McKinley was under arrest charged with subornation of perjury in the matter of such entries. Kribs was advised of these facts, but notwithstanding he had operated in timber lands for some time, and was familiar with the requirements of the timber and stone act, he went ahead and examined the land, and concluded to purchase it from Puter for Smith, but, on account of the controversy over the title, the price was reduced to $5.25 an acre. Subsequently, when the time arrived for the first applicants to make final proof, a hearing was begun on the contest of the Northern Pacific Railway Company, and, after it had continued for about two days, it was postponed in order that Puter might effect a compromise with the railway company. Kribs was in Roseburg (where the local land office is located and the hearing had) during this time, and knew of these matters. After the hearing had been postponed, Puter went to Tacoma, the head office of the Northern Pacific Railway Company, and there a compromise was entered into between him and the railway company, by which he was to secure relinquishments from 24 of the applicants, and the railway company was to dismiss its contest as to the remainder. The agreement was carried into effect. Puter secured the 24 relinquishments, compromising with the applicants by paying each of them about $25 therefor in place of the $100 first agreed upon, and on the 18th of April, 1900, the railway company dismissed its contest as to the remainder. The several entrymen were thereupon notified by Puter and McKinley, and on the same day 16 of them appeared at the land office and tendered their final proof. After the final proof papers had been made and signed by the applicants, but before they were accepted by the land office, the applicants were taken into the office of Kribs' attorney, adjoining that of the land office, and there executed to Kribs a mortgage on the land described in their several applications to secure the payment of the sum of $600. After these mortgages had been executed, Kribs paid to the land office the purchase price of the land and the necessary fees, and furnished the money with which each of the applicants was paid the stipulated sum of $75 or $100 for making the entry. A few days later, and within a week, deeds were secured from all these applicants conveying the land by Kribs' direction to John A. Willd in trust for the defendant Smith, which deed was delivered by Puter to Kribs, and Kribs thereupon paid to him the balance of the purchase price of the land. The same course was pursued in regard to each of the other applicants when they made their final proof. The money used by Kribs for this purpose was furnished by Smith, and Kribs was acting for Smith in the transaction.

The lands involved in case 3,319 are adjoining or in the same vicinity as the lands involved in 3,320. Soon after Kribs and perhaps Smith had visited that section of the country and examined the timber growing on the government land, it became currently reported in the community that any person located upon timber land by the defendants Mealey and Thompson would receive $50 for doing so. In pursuance of this rumor and report, the several applicants whose patents are involved in the suit applied to the Mealeys and Thompson to be located upon government land, and were so located. They were taken to

Roseburg to make final proof by the Mealeys or Thompson, all the expenses of the trip being paid, both attending the initial filing and the final proof. When the final proofs were submitted, the same course was pursued in the matter of the mortgage and transfer of the property as in 3,320, except that the deeds were made by the applicants to Kribs in trust for Smith. The money with which to pay for the land, the land office fees, and the stipulated stipend to the several applicants was Smith's money and furnished by Kribs, and the transaction was for Smith's benefit. There is no direct testimony in this case that there was any understanding or agreement with Kribs to furnish the money with which to pay for the land, and pay the several expenses attending the location, and the amount due the locators prior to the initial application, but it seems to me that the conclusion is irresistible that such was the case. Neither the Mealey brothers nor Thompson had any money with which to carry on this enterprise. The land was in the vicinity of that acquired by Smith through Puter and McKinley. It was practically the same character. The filings were made after Kribs had commenced acquiring title in that vicinity. Mealey was familiar with this, and had assisted Puter and McKinley in their enterprises. The same method was pursued in order to acquire title, and I am of the opinion that the transaction was substantially of the same character and for the same purpose. I have no doubt that Kribs, not only had knowledge of the fraudulent character of the entries involved in these cases, but was an active participant in consummating such fraud. He was advised of the contest of the railway company, of McKinley's arrest, and of the hearing of such contest before he consummated the deal. In addition to this, the circumstances surrounding the transaction, the manner in which it was carried out, and the apparent attempt to conceal its real nature are strong badges of fraud, and I think no one can read this record without coming to the conclusion that it was a fraudulent transaction to which Kribs was a party. It may be true that Smith, his principal, had no actual knowledge of such fraud, although the evidence would be more satisfactory upon that point if the correspondence between him and Kribs and Puter concerning this transaction had not all been destroyed about the time the matter was being investigated by a federal grand jury, and it was rumored or reported that Smith and Kribs were liable to be indicted, and that the government was contemplating bringing a civil suit to cancel and set aside the patents. But, whether Smith had actual knowledge of the fraud or not, Kribs was his agent, authorized to purchase the property, and whatever knowledge Kribs acquired is chargeable to Smith. I conclude, therefore, that Smith was not a bona fide purchaser for value, and without notice of the fraud, and cannot claim the rights of such in this suit.

The next question is whether the decision of the Secretary of the Interior directing these claims to be passed to patent is conclusive in this suit. It was settled by the Supreme Court in U. S. v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, that the government has the same remedy to set aside a patent for land on the ground of fraud in procuring it as an individual would have to annul his deed under like circumstances, and that the decision of the Department in passing

the claim to patent is not conclusive when such decision was obtained by fraud. Now, the action of the Secretary of the Interior in directing these claims to be passed to patent was based upon the reports of Special Agents and the accompanying ex parte affidavits of the several claimants, and Puter, McKinley, and Kribs. It was clearly shown on the trial that these affidavits were false, and did not state the actual facts in the case, and they were known to be such to Kribs, the agent and representative of Smith. Indeed, the testimony in this case strongly shows that one of the special agents was corrupted by Kribs, and that the applicants were coached by him or with his knowledge and consent to make the false affidavits. He admitted upon the trial that his own affidavit did not state the actual facts of the transaction, but was an attempt on his part to make it appear that his connection with the matter was the mere loaning of money to the several applicants with which to make the final proof, and that the purchase of the land was an independent transaction with which he had no connection. Having thus induced the Secretary of the Interior to pass these claims to patent upon false and fraudulent testimony, with knowledge of its character, it certainly cannot be successfully contended that the decision of that officer is conclusive upon the government. Having knowingly obtained such decision by perjury and subornation of perjury, it cannot be relied upon as a defense.

The next, and what I deem the most important and difficult, question in this case is the statute of limitations. The statute provides that:

"Suits by the United States to vacate and annul patents heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent." Act March 3, 1891, c. 559, 26 Stat. 1093 (U. S. Comp. St. 1901, p. 1521).

These suits were not commenced against the Linn & Lane Timber Company until more than six years after the date of the issuance of the patents. As a general rule, the holder of the legal title is an indispensable party to a suit to set aside a patent (U. S. v. Winona & St. P. R., 67 Fed. 948, 15 C. C. A. 96; U. S. v. C. P. R. R. [C. C.] 11 Fed. 449), and the statute of limitations does not cease to run in his favor until he is made a party to the suit and process issued and placed in the hands of the marshal with the bona fide intent that it shall be served. Miller v. McIntyre, 6 Pet. 61, 8 L. Ed. 320. But the identity of Smith and the Linn & Lane Timber Company and their relation to the title to the property in controversy is such that I do not think the rule should be applied in this case. Smith is the real party in interest and the beneficial owner of the property. The corporation was organized by him as a mere holding concern. He owned all of its capital stock. He and the members of his family composed its board of directors, and were the officers of the corporation. In fact, Smith was the corporation and the corporation was Smith. The question of the statute of limitations should be therefore determined by the time the suit was commenced against Smith and the holders of the record title, and not against the mere holding corporation. If, prior to the commencement of these suits, Smith had conveyed or

caused the property to be conveyed to some natural person in trust for him, but had withheld the deeds from record and kept the matter secret until the six years had expired, it would hardly be contended that the action is barred, and no greater effect should be given to the organization of the corporation and the deeds to it. The suit was commenced against Smith when the warning order was issued to him and placed in the hands of the proper officer for service. U. S. v. Lumber Co. (C. C.) 80 Fed. 309, and 85 Fed. 827, 29 C. C. A. 431. At that time the statute had not run except as to the eight patents issued July 9, 1902. As to them, the suit is barred, for in my judgment the statute begins to run from the date of the issuance of the patent, and not from the discovery of the fraud. The language of the statute is plain and leaves no room for construction. It says suits of the United States to vacate or annul patents shall only be brought within six years after the issuance of patent. As said by Mr. Justice Gilbert, in speaking for the Circuit Court of Appeals for the Ninth Circuit, in 85 Fed., 29 C. C. A., supra:

"There is no room for construction. It is clear that Congress has said that all suits by the United States to vacate patents shall be brought within the period limited by the act."

The object of this statute is to extinguish any right the government may have in the land and vest a perfect title in the adverse holder after six years from date of the patent, regardless of any mistake or error in the Land Department, or the fraud or imposition of the patentee. U. S. v. Winona & St. P. R. R., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; U. S. v. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881.

A point is made of the fact that subsequent to the organization of the corporation, and before the filing of the original bills of complaint in these suits, Smith had sold 15 shares of the capital stock and pledged other shares to secure payment of an indebtedness of his, but this does not change the status of the matter or the rights of the parties to these suits. We are not concerned at this time with the status of the stockholders, but with the corporation itself. It is still the holder of the title, and has not disposed of it to a bona fide purchaser for value. It is admitted that it took title charged with whatever infirmities existed in the hands of Smith. It is therefore in no sense a bona fide purchaser or entitled to the protection of such, but is a mere holding corporation organized by Smith to suit his convenience and as a holder of the legal title for his use and benefit. Smith is a party to the suit, and it was commenced against him within six years from the date of issuance of all the patents except those issued in July, 1902, and I do not think that the defendants, either the corporation or Smith, can under these circumstances urge this statute as a bar to these suits, when it appears in the testimony that, after the property had been conveyed to the corporation by Smith, the deeds were retained by him, and the transfer not made public until after the statute of limitations had run.

I am aware that the soundness of this conclusion is not free from doubt, but I believe it to be in accordance with equity, justice, and sound reason.

When these cases were called for trial, the complainant made an application to amend the bills of complaint by alleging the value of the property involved, so that it might recover damages for the fraud in case it should be unable to obtain the primary relief prayed for in the bills. The ruling on this motion was reserved until the final decision in the case with permission to the government to give testimony upon the hearing in reference to the value of the property. I am now of the opinion that the amendment should not be allowed. The suit to set aside and vacate the patents on the ground of fraud is inconsistent with a claim for damages on account of such fraud. The one proceeds in disaffirmance of the transaction and the other in affirmance of it. Again, a suit to vacate a patent is equitable in its nature, while a proceeding to recover damages is legal, and the two therefore cannot be joined in the same suit. If the government has a cause of action against the defendants or any of them for damages on account of the fraud, it is a legal action, and should be brought on the law side of the court.

It follows from these views that the complainant is entitled to the relief demanded, except as to the patents issued in July, 1902, and decrees will be entered accordingly.

LOVELL v. H. HENTZ & CO. et al.

(Circuit Court, N. D. Alabama, S. D. September 24, 1910.)

BANKRUPTCY (§ 172*)—PLEDGES—DELIVERY AND POSSESSION—COTTON SHIPPED TO ORDER OF PLEDGOR—RETENTION OF BILL OF LADING.

Bankrupts sold cotton for future delivery through defendants as brokers, and shortly prior to their bankruptcy they arranged to make advance shipments to defendants, on which defendants agreed to advance them a certain sum per bale. Under such arrangement bankrupts made a draft on defendants, attaching thereto a forged bill of lading for 200 bales of cotton, and defendants paid the draft. Later bankrupts directed their agent to ship 200 bales to defendants, marked as described in the forged bill of lading, and the shipment was made; but, in accordance with the usual custom of bankrupts, the bill of lading was taken to their own order, with directions to notify defendants. In the first place such bill was pledged to a bank in exchange for the warehouse receipts for the cotton which the bank held, but was later delivered to bankrupts, who held it at the time of the bankruptcy. *Held*, that the transaction by which bankrupts obtained payment of their draft on the forged bill of lading amounted to no more than an agreement to pledge the cotton called for therein, which could only be made effective by delivery; that, the bill of lading for the cotton shipped not having been indorsed to defendants, there was no such delivery, and the title remained in the bankrupts, and passed to their trustee in bankruptcy, who was entitled to recover the cotton or its value from defendants.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 172.*]

Action by William S. Lovell, trustee in bankruptcy of Knight, Yancey & Co., against H. Hentz & Co. and others. On motion of plaintiff for peremptory instructions. Motion granted.

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

Percy, Benners & Burr, for plaintiff.
Phelan Beale and Daniel Partridge, Jr., for defendants.

GRUBB, District Judge. In this case the material facts are not disputed. It is a question of what the law is applicable to that state of facts. Therefore it is my duty to decide the case.

By way of explanation I want to give my view of the facts and the application of the law. This suit grows originally out of a transaction between Knight, Yancey & Co., and H. Hentz & Co., by which Hentz & Co., as the brokers of Knight, Yancey & Co., sold 2,000 bales of cotton on the Cotton Exchange for Knight, Yancey & Co. to certain parties. It seems to me that the transaction, so far as Hentz & Co. and Knight, Yancey & Co. was concerned, was that of principal and agent, or principal and broker. While I believe the rules of exchange made Hentz & Co. responsible to the purchaser for the delivery of that cotton, yet, so far as the purposes of this case are concerned, I think the relation between Hentz & Co. and Knight, Yancey & Co. was that of broker and principal, and I do not think there was any agreement on the part of Knight, Yancey & Co. to sell Hentz & Co. this cotton, but that it was sold through them to other parties. Therefore it does not seem to me that the rights of the parties can be determined alone by that one transaction, the sale. Afterwards Knight, Yancey Co. wired Hentz & Co., asking if they would permit them (Knight, Yancey & Co.) to consign cotton, some of this 2,000 bales, in advance of the time fixed by the sale for its delivery—during the month of May—and if they consigned cotton under that arrangement how much Hentz & Co. would advance them on that cotton. Thereupon Hentz & Co. replied that they would permit them to consign the cotton and advance them $65 a bale, which I believe was $5 less than the market price. In pursuance of that arrangement, Knight, Yancey & Co. drew a draft on Hentz & Co. for $14,000, which is, I believe, more than $65 a bale; but anyway, in pursuance of the arrangement, they drew that draft, with a forged bill of lading attached calling for 200 bales of cotton. That was done under the authority Hentz & Co. had given them to consign the cotton to them as their brokers, they agreeing to make certain advances on that cotton. Upon receipt of the draft in New York, with the supposed bill of lading attached, it was paid by Hentz & Co. Thereby they made the advance of $14,000 on supposedly 200 bales of cotton marked "P O L."

As a matter of fact, the bill of lading was forged, and there was no cotton represented by it. Not only did the railroad in fact not receive the cotton, but the railroad agent did not execute the bill of lading. However, in my judgment, that constituted an agreement on the part of Knight, Yancey & Co. to secure an advance by the pledge of 200 bales of cotton. It was not a pledge, because the bill of lading was not genuine, and it was necessary for the completion of the pledge for it to be genuine. It was, however, as I say, in my judgment, an agreement to give a pledge. It was of no validity as to third parties until the pledge was delivered to Hentz & Co. An agreement to

pledge gives no specific lien on any property. You cannot have a pledge on all the cotton owned by Knight, Yancey & Co., without designating some particular bales. There is no claim that at the time the draft was paid Knight, Yancey & Co. had 200 bales marked "P O L." In fact, it was marked a month or more afterwards. You cannot have a lien on a floating lot of property. You have to identify the property. Therefore the agreement to pledge was not valid to give Hentz & Co. any right in any particular property without delivery. It only gave them a right as a general creditor against Knight, Yancey & Co. for the $14,000. It could, however, be made effectual by the subsequent delivery to or appropriation to Hentz & Co. of the 200 bales of cotton marked "P O L," if that was done before the rights of third parties intervened to the same cotton. In other words, it would be competent to complete the pledge by Knight, Yancey & Co. afterwards shipping 200 bales marked "P O L" to Hentz & Co., and that could be done any time before the rights of third parties intervened as to that 200 bales of cotton.

If, before there was any appropriation of the cotton in that sense, a creditor had stepped in and attached the cotton, his right would have come ahead of the rights of Hentz & Co., if at that time there had been no such appropriation of the 200 bales. The law gives the effect of an attachment to the filing of the petition in bankruptcy. Such filing puts all the property of the bankrupt in the custody of the bankrupt court; only, instead of being for the benefit of the attaching creditor only, it is for the benefit of all creditors. Therefore the time to determine whether there was an appropriation of the cotton to Hentz & Co. is the time of the filing of the petition in bankruptcy. That was April 20, 1910. In order, therefore, for Hentz & Co. to avail of their agreement with Knight, Yancey & Co. to pledge this 200 bales of cotton, it must appear in this case that after March 29th, when the draft was drawn, and before April 20th, when the petition in bankruptcy was filed, Knight, Yancey & Co. appropriated 200 bales of cotton to fulfill their obligation under that fraudulent bill of lading. If Knight, Yancey & Co., before the filing of the petition in bankruptcy, had appropriated this cotton, 200 bales in controversy, to their obligation under this fraudulent bill of lading, then the trustee in bankruptcy would not have title to the property. On the other hand, if there was no appropriation of this 200 bales, up to the time of the filing of the petition in bankruptcy, by Knight, Yancey & Co. to Hentz & Co. to meet their obligation under the forged bill of lading given to Hentz & Co., then the trustee would have title to the property, and have the right to recover the proceeds of its sale in this case. Therefore the question is whether there was an appropriation by Knight, Yancey & Co. to Hentz & Co. of this 200 bales of cotton marked "P O L" which is in controversy in this case, before the filing of the bankrupt proceedings.

My judgment is that the transaction was in the nature of an agreement to pledge, and in that case possession would be required to be delivered by Knight, Yancey & Co. to Hentz & Co. in order to make the appropriation. But if the transaction created a lien that did not

require for its validity possession to be in the lienee, there must still have been an appropriation or a separation of some cotton, and a designation of that cotton in some way, as being applied by Knight, Yancey & Co. under the forged bill of lading. There must be evidence to show that was done, in order to show appropriation as defined by law. I think it would be sufficient to meet that view of the law, if there was evidence tending to show that the bankrupts had marked the cotton "P O L" and separated it from other cotton; possibly if they had marked without separating it. If they had so identified 200 bales of cotton and marked it by mark, so as to indicate their intention to appropriate it under this forged bill of lading, then that would have been sufficient; and if the transaction had stopped with the mere marking it would have been an appropriation. So, if they had shipped the cotton on a straight bill of lading, consigning it to Hentz & Co., at any time before the petition in bankruptcy was filed, and put it in the possession of the carrier under such bill of lading, that would have been an appropriation to Hentz & Co., and they would have had a superior claim to the trustee. Or, if they had delivered it to the Southern Railroad, telling it they had an outstanding bill of lading, dated March 20th, that the railroad had no cotton to cover that bill of lading, and that they were delivering this cotton to cover it, that would have been an appropriation of the cotton to Hentz & Co. to cover the forged bill of lading, and would have given Hentz & Co. a superior title to the trustee in bankruptcy.

The character of the transaction is to be governed by the intention of Knight, Yancey & Co., as evidenced by their acts; that is, their executed intention, shown by their acts—not what Mr. Knight might have had in his mind, not disclosed by his outward acts, but his intention as gathered from the transaction. Now, what was the transaction by which the Southern Railroad Company got possession of this 200 bales of cotton on or about April 14th? It began with the instructions from Mr. Knight to Bailey to telephone Patterson at Selma to ship immediately, or as soon as possible, 200 bales of cotton marked "P O L" to Hentz & Co. In view of the practice and course of business of Knight, Yancey & Co., that meant to ship 200 bales, marked "P O L" to the order of Knight, Yancey & Co., notify Hentz & Co.; for the evidence is that the practice was universal on the part of Knight, Yancey & Co. to ship all their cotton "shipper's order notify." Now, when Mr. Knight told Bailey, and Bailey telephoned Patterson, to ship 200 bales marked "P O L" to Hentz & Co., in view of this course of business, it was a direction to ship, not to Hentz & Co., but to the order of the shipper, Knight, Yancey & Co., notify Hentz & Co., the order to be indorsed thereafter on the bill of lading by Knight, Yancey & Co. and transmitted to Hentz & Co. And it is clear, from the testimony, that when Mr. Knight told Bailey to tell Patterson to ship it immediately, or as soon as possible, he had in contemplation that it could not be shipped until the firm got that much free cotton at Selma.

The testimony of Frazer, representative of Hentz & Co., taken by deposition, shows that, when he asked Knight for the bills of lading at Selma, Knight told him he did not know whether he could get them

or not, because they might be in the bank. That makes it very clear to me he must have contemplated just the use that Mr. Patterson made of this bill of lading, even after having instructed Patterson to ship the cotton immediately to Hentz & Co. I do not think there is any violation of instructions shown by Patterson, in his treatment of this cotton, after having received these instructions from Knight; but, even had there been, I think the transaction would be governed by what was actually done by Patterson. Now, what did he do? When he got the instructions he went to the bank, which held the cotton warehouse receipts in pledge for money borrowed by Knight, Yancey & Co., got them, and carried them to the compress company, and had 200 bales of cotton marked up "P O L" and delivered to the railroad company, obtained bill of lading from the railroad company to the order of Knight, Yancey & Co.—not Hentz & Co.—and took that bill of lading and repledged it to the bank in lieu of the cotton warehouse receipts which he had taken out. That was not an appropriation of that 200 bales of cotton to Hentz & Co. The bank undoubtedly would have a good title to the cotton as long as they retained the bill of lading. If that be true, it must be on the idea that Knight, Yancey & Co. retained control and disposition of that cotton. So long as the Selma bank held this bill of lading, it is clear to me there was no appropriation of that cotton by Knight, Yancey & Co. to Hentz & Co. This cotton was released, however, by the bank before the petition in bankruptcy was filed. How many days before it does not appear—probably only one day; and the bill of lading then went back into the possession of Mr. Patterson, as the agent of Knight, Yancey & Co. Patterson retained possession until the petition in bankruptcy was filed, and the bill of lading was delivered by him to the receiver in bankruptcy. Had there been no evidence as to what the contemplated use of that bill of lading was, after it was released by the bank to Patterson, I think his retention of the bill of lading would show that the cotton represented by the bill of lading continued to be within the power and disposition of Knight, Yancey & Co. The cotton was with the Southern Railroad. The railroad is always the agent of either the consignor or consignee. In this case Knight, Yancey & Co. was both the consignor and consignee. Therefore the possession of the railroad was the possession of Knight, Yancey & Co. Not only that, but Knight, Yancey & Co., so long as they retained the bill of lading, had the right to strike out the blank indorsement and have the cotton delivered to them. Hentz & Co. had no legal right to control the movement of the cotton or its delivery at any time while the bill of lading remained in the possession of Knight, Yancey & Co. Had they transmitted the bill of lading indorsed in blank, to Hentz & Co., a different question would have arisen. That would have been authority for Hentz & Co. to go and get the cotton, and the railroad would have become the agent of Hentz & Co; the possession in the railroad thereby being changed from that of Knight, Yancey & Co. to that of Hentz & Co. But that was never done up to the time the petition was filed.

Then, in addition to this, it was contemplated that that bill of lading would be used again by the bankrupt, because Patterson says the

practice was, in all cases, to transmit the bill of lading from Selma to Knight, Yancey & Co., at Decatur. In other words, what he would have done with the bill of lading, had he carried out the intention of Knight, to eventually let Hentz & Co. get the cotton, would have been to deposit that bill of lading in the Selma bank, with draft attached on Knight, Yancey & Co., at Decatur, and the bank, in Selma, would have given the account of Knight, Yancey & Co., at Selma, credit for that draft. When it reached Decatur, had this bankruptcy not intervened, Knight would have taken up the draft and thereby secured the bill of lading, and while in ordinary cases he would have drawn on Hentz & Co. with the genuine bill of lading attached, in this case, as he had already cashed the draft, he would not have drawn any draft, but would have suppressed the bill of lading. However, until Knight got possession of it by that means, the bill of lading was a thing having vitality. If it had been used in the way contemplated, to get the cotton to Hentz & Co., yet before it ever got into the hands of Hentz & Co. it was contemplated it was to be negotiated by the bankrupt by putting it in the bank at Selma and drawing on Knight, Yancey & Co., at Decatur, with that attached. Therefore it seems to me that, until the bill of lading reached Knight's hands and was suppressed, it cannot be said it effected any appropriation of this cotton to Hentz & Co., because the use contemplated by the bankrupts up to that time shows that they retained authority to dispose of the property and sell it, or do what they pleased with it. It is inconsistent with the idea they had appropriated it to Hentz & Co., because it is clear they had retained the right to do what they pleased with it up to that time. If it had been delivered to Knight before the petition in bankruptcy was filed, and he had suppressed it, then it seems to me it might have been considered an appropriation of the cotton represented by it. If that case had ever arisen, it was not intended that Hentz & Co. would ever get the cotton on the genuine bill of lading at all. Knight intended to keep that out of sight, on the idea that, after the cotton had been delivered to the railroad company, it would in the course of the business be delivered to Hentz & Co. on the forged bill of lading—in other words, the forged bill of lading would have gone through as a genuine one. At the time the petition in bankruptcy was filed, if Knight had actually taken up at the Decatur bank the draft with this genuine bill of lading attached to it, and suppressed the genuine bill of lading, I think it would be a fair inference that he did that with the intention to effect an appropriation of the cotton to Hentz & Co. under the forged bill of lading; but I cannot see how that could be true so long as the genuine bill of lading was outstanding, and was being used on the idea that the bankrupts controlled the cotton represented by it. I cannot see how it can be reconciled that they appropriated the cotton to Hentz & Co.—which means they parted with ownership and control—with the fact that they kept the bill of lading, which gave them the right to ownership and control, and exercised that legal right by disposing of the cotton to the Selma bank, and in the course of business would have disposed of it again to the Decatur bank, in order to get it to Knight. For that reason it seems to me that the title to the cotton, at the time the petition in bankruptcy was filed, was in Knight,

Yancey & Co. If that is true, it is vested in the trustee in bankruptcy, and, while Hentz & Co. have a claim against them for being defrauded on this draft, they have just such a claim as unsecured creditors have, because the right never passed to this particular lot of cotton, the 200 bales marked "P O L."

I have said, in the course of my remarks in this case, that the marking of the cotton "P O L" might in and of itself be sufficient to appropriate it to Hentz & Co. That would be true, if that was the entire transaction. But in this case it was not the entire transaction. The transaction commenced with the instructions given by Knight to Bailey, and ended with the disposition of the bill of lading at the time of the filing of the petition in bankruptcy. The marking was a part of that transaction, and only a part of it. In getting at the legal effect of the transaction, you do not consider one part only and discard the rest. Taking it all together, the legal effect was not to give ownership to Hentz & Co., but to retain ownership in the bankrupts. For these reasons, it seems to me that the plaintiff is entitled to recover in this case, as trustee of Knight, Yancey & Co., the bankrupts. And while Hentz & Co. have a claim against Knight, Yancey & Co., on the draft, it is not a claim that attaches to this 200 bales of cotton, or gives them any better right in the proceeds of this 200 bales of cotton, than other unsecured creditors have, because there never was a time, before the petition in bankruptcy was filed, when it could be said that this cotton was appropriated by Knight, Yancey & Co. to the payment of their obligation to Hentz & Co. under the forged bill of lading.

The court charges the jury that, if they believe the evidence, they must find a verdict for the plaintiff, and the form of the verdict will be, "We, the jury, find for the plaintiff in the sum of $15,136.16," one of their number to sign it as foreman.

UNITED STATES v. FIVE BOXES OF ASAFŒTIDA.

(District Court, E. D. Pennsylvania. September 19, 1910.)

No. 7.

1. DRUGGISTS (§ 2*)—PURE FOOD AND DRUG ACT—OFFENSES.

Pure Food and Drug Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1188]) § 2, provides that the introduction into any state from any other state of any drug which is adulterated or misbranded is prohibited, and any person who shall ship or receive and, having so received, shall deliver, or offer to deliver, in original unbroken packages, for pay or otherwise, to any other person, any such article so adulterated or misbranded, shall be guilty of a misdemeanor. *Held*, that the mere receipt of an adulterated or misbranded drug did not constitute an offense, where claimants had not delivered, or offered to deliver, the drug in unbroken packages; claimants having retained the packages in their possession, opened and tested them, and caused the standard of strength, quality, and purity to be plainly stamped on the containers prior to seizure.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 2.*]

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

2. DRUGGISTS (§ 11*) — PURE FOOD AND DRUG ACT — CONSTRUCTION — FORFEITURE.

Pure Food and Drug Act, § 2, makes it a misdemeanor for any person having received adulterated or misbranded drugs from another state to ship the same from one state to another or to deliver the same in unbroken packages for pay or otherwise, or offer to deliver the same to another person so adulterated or misbranded, and section 10 declares that such articles shall be liable to seizure and forfeiture when in the course of being transported from state to state, or when having been transported they remain unloaded, or unsold, or in the original packages. *Held*, that such sections were independent of each other, and hence it is not essential to the forfeiture of adulterated or misbranded drugs, under section 10, that the owner shall have been guilty of violating section 2.

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

3. COMMERCE (§ 41*)—INTERSTATE COMMERCE—REGULATION—ORIGINAL PACKAGES.

Pure Food and Drug Act, § 10, provides that any drug that is adulterated or misbranded within the meaning of the act, and is being transported from one state to another for sale, or having been transported remains unloaded, or unsold, or in the original packages, shall be subject to forfeiture. *Held*, that where, after an adulterated or misbranded drug had been transported in interstate commerce and received by the consignee who was the owner, the packages were opened and samples taken that the strength, quality, and purity might be tested, such sampling did not constitute a breaking of the original packages.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 41.*]

4. DRUGGISTS (§ 11*)—PURE FOOD AND DRUG ACT—FORFEITURES—"ADULTERATED."

Pure Food and Drug Act, § 7, provides that drugs shall be deemed adulterated when they differ from the standard of strength, quality, or purity as determined by the test prescribed in the United States Pharmacopœia or National Formulary official at the time of investigation, and that no drug shall be deemed adulterated if the standard of strength, quality, or purity be plainly stated on the container, although the standard may differ from the test. Section 10 declares that any drug that is adulterated or misbranded and is being transported from one state to another for sale, or having been transported remains unsold, or in the original or unbroken packages, shall be liable to condemnation in any District Court of the United States and condemned. *Held*, that a drug is not adulterated or misbranded so as to be subject to condemnation unless adulterated or misbranded at the time of seizure, and hence, where asafœtida below the prescribed test and misbranded was received by claimants in interstate commerce and tested and correctly branded before seizure, it was not subject to forfeiture.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 1, pp. 210–212.]

Libel by the United States against Five Boxes of Asafœtida. Dismissed.

Jasper Yeates Brinton, for the United States.

James Collins Jones, for respondent.

HOLLAND, District Judge. This libel is filed by the government under the provisions of the act of June 30, 1906, for the purpose of effecting the condemnation of five boxes of asafœtida, which it is alleged were adulterated within the meaning of this act of Congress. An attachment was issued and the drug seized by the government,

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

after which a claim was made by Smith, Kline & French Company, in whose possession the asafœtida was found, and an answer duly filed by them, in which the claimants urge that the libel be dismissed and that the drug seized under the attachment be returned to them.

From the libel and answer, upon which the case was argued, we gather the following undisputed material facts:

On the 3d day of May, 1910, T. M. Curtius, of the city of New York and state of New York, shipped via Clyde Steamship Company, a common carrier, five boxes of asafœtida to Smith, Kline & French Company, of the city of Philadelphia, in the state of Pennsylvania, for which, at the time, the latter paid Curtius in full and received the asafœtida in their possession, at their place of business, No. 429 Arch street, in this city. "Being a drug sold under a recognized name in the United States Pharmacopœia," it was adulterated within the meaning of the act of Congress at the time of transportation, in that it differed from the strength, quality, and purity as determined in the test laid down in the United States Pharmacopœia official at the time of the investigation, in this: That the standard of strength, quality, and purity determined by the test required that not less than 50 per cent. of the asafœtida should dissolve in alcohol, and, when incinerated, the said alcohol should yield not more than 15 per cent. of ash; whereas, less than 50 per cent. of the asafœtida contained in these five boxes was soluble in alcohol, and when incinerated yielded more than 15 per cent. of ash.

The claimants, immediately after the receipt of this asafœtida and before the service of the attachment, opened the packages and took therefrom sufficient for the purposes of examination, and caused the standard of strength, quality, and purity to be plainly stamped upon the containers, as required by the seventh section of the pure food act, and all the containers were so marked at the time of the service of the attachment. Smith, Kline & French Company, in whose possession the drug was found, were the owners thereof, having paid the full purchase price before the service of the attachment; but after its receipt they had never delivered it in original and unbroken packages for pay, or otherwise, or offered to deliver it to any other person before the containers were duly marked as required by the act.

Upon these facts the claimants urge that the libel should be dismissed, for the reasons: (1) That no forfeiture could be had under section 10 because under section 2 the facts in this case would not support a criminal prosecution against the claimants; (2) that the taking of samples operated to remove the merchandise from the provision of the act as "original packages"; and (3) that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section 10.

The provisions of the act upon which the government relies to enforce its claim for forfeiture of this merchandise, upon the facts as above stated, are as follows:

In section 2 it is provided that the introduction into any state from any other state of any article of drug which is adulterated or misbranded within the meaning of this act is hereby prohibited, and any person who shall ship or deliver for shipment from any state to any

other state, or shall receive in any state from any other state, and, having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of the act, shall be guilty of a misdemeanor.

Section 7 provides:

"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 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."

And section 10 provides that any article of drug that is adulterated or misbranded within the meaning of this act, and is being transported from one state to another for sale, or, having been transported, remains unloaded, unsold, or in original or unbroken packages, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

It is obvious that the claimants could not be convicted of a misdemeanor, as section 2 requires not only that they should have received the adulterated or misbranded drugs from another state, which they have done in this case, but the section further requires that, after having so received it, they deliver it in unbroken packages, for pay or otherwise, or offer to deliver it to another person so adulterated or misbranded within the meaning of the act, which they have not done. They have received it from another state, but they neither delivered nor offered to deliver it, for pay or otherwise, in the unbroken packages.

It is urged that, by reason of the fact that a criminal prosecution could not be sustained against them, no forfeiture can be had under section 10. We do not consider this contention sound, because section 2 and section 10 are not at all interdependent. The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in section 10. Congress has clearly defined in section 2 what acts or omissions shall constitute a misdemeanor with regard to adulterated or misbranded articles of food or drug, and, in order to ascertain whether or not any person is guilty of having violated the provisions of this section, it is not at all necessary to refer to section 10, as section 2, as to what shall be deemed a misdemeanor, is complete within itself.

As to adulterated articles, it is a misdemeanor (1) to ship from one state to another; (2) to receive and deliver, or offer to deliver the same for pay, in unbroken packages. Such articles are liable to seizure and forfeiture under section 10: (1) When in the course of being transported from state to state; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages.

It will be seen that section 10 fully and completely defines the conditions under which such articles are liable to seizure and forfeiture.

There is no reference to or dependence upon the misdemeanor defined in section 2, and it is unimportant, as far as the forfeiture proceedings are concerned, whether or not any person could be convicted under section 2. Congress has defined fully in section 10 when and under what circumstances the article of food or drug shall be forfeited without reference to the guilt of the owner under section 2. Under the common law, the offender's right was not divested upon forfeiture proceedings until conviction, but this doctrine never was applied to seizures and forfeitures created by statute in rem for violations of the revenue law of the government. The thing there is primarily considered the offender, or rather, the offense was attached primarily to the thing, and this whether the offense was malum prohibitum or malum in se. It therefore follows that when the thing is inculpated under an in rem statutory provision it may be forfeited, although the act which caused the forfeiture was not authorized or done by or with the consent or knowledge of the owner. Dobbins v. United States, 96 U. S. 395, 24 L. Ed. 637, 19 Cyc. 1357.

The purpose of this act is to conserve the public health by preventing interstate commerce in poisonous or deleterious food and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen and therefore subject to seizure without regard to the acts or knowledge of the owners or claimants.

Neither do we think that the taking of samples operated to remove the merchandise from the provision of the statute as original packages. There is no exact and comprehensive definition of the term "original package." The cases heretofore considered involving this question have been disposed of by the application not of a precise definition, but of certain broad general principles to the precise and particular facts.

An extract from the opinion of the Supreme Court in Brown v. Maryland, 25 U. S. 419, 6 L. Ed. 678, is probably the nearest guide we may have as to what may be considered an original package:

"It is sufficient for the present to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state."

In the case at bar, the claimants, upon receipt of these packages of asafœtida, merely took samples therefrom for the purpose of examination, and in order that they might comply with the provisions of the act in regard to causing the standard of strength, quality, and purity to be plainly stamped upon the containers. This could not be considered to have destroyed the commercial form, and obviously did not operate to "incorporate" the same with the general property of this state.

A substantially similar question was presented to the Supreme Court of Iowa in 1895, in the case of Wind v. Iler & Co., 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219, in which case the bungs in certain barrels of liquor were drawn for the purpose of testing the contents be-

fore accepting the same by the purchaser, and the question was whether it was still to be regarded as interstate commerce. Upon this point the court said:

"The question yet remains: Did the drawing of the bung in the barrels in which the liquors were shipped into the state have the effect claimed for it by the appellant? We think not. The barrel was opened in order that a small quantity might be taken from it and tested—not used—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the state."

This conclusion is supported by the decision in two well considered federal cases.

The first case (United States v. Fox, Fed. Cas. No. 15,155), decided in 1869, was a suit by the United States under the internal revenue act of July 13, 1866 (14 Stat. 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that, when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer, the person so selling should not be liable to the aforesaid penalty.

Fox sold one small wooden box containing twelve 1½-ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing the pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box. In respect to the smaller box of oil the court said:

"Although the top of this box was taken off by the defendant, Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped."

But as to the sale of the box of pomade the court said:

"The package was opened, and, three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury."

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package; the court holding:

"Goods are sold 'in original and unbroken package' within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed."

In the other case (In re McAllister [C. C.] 51 Fed. 282, decided in 1892), the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the

lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the state court and convicted. The state Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the state to prohibit, which it sought to do in an act of the Legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

"Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character."

In reaching the above conclusion the court said:

"It is argued that the taking the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the state. Low v. Austin, 13 Wall. 29, 20 L. Ed. 517. Any one calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a state may perhaps regulate its sale, it cannot prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged."

In the light of the foregoing adjudications, it cannot be held that the mere taking of a sample from the original package for the purpose of examination and for the purpose of complying with the act to plainly state upon the container the standard of strength, quality, and purity of the drug was a breaking up of the original package and operated to incorporate the same in the general property of the state. The original character of the package was not, for the reasons stated by the claimants, destroyed.

The third defense interposed by the claimants, that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section 10, must be regarded as more substantial and as a good ground for dismissing the libel. Under this in rem statutory forfeiture procedure of section 10, the article of drug itself is the thing inculpated, and it must be adulterated or misbranded within the meaning of the act at the time the government seizes it. It was not adulterated when seized, but branded as required by law. It is not sufficient that it was adulterated when it was being transported from one state to another and liable to forfeiture at that time. It was not then seized, and there is no language of the act to authorize seizure for any past offending condition of the drug. A drug that "is" adulterated or misbranded (is the language used) and "is" being transported from one state to another for sale shall be liable, etc. A drug, which, "having been transported, remains unloaded, unsold, or in original unbroken packages," shall it be liable to forfeiture for some previous irregularity, if not adulterated or misbranded at the time of

seizure? It is not so stated in the act. There is no seizure of a drug that "was" adulterated authorized. Having been transported and remaining unloaded, unsold, or in the original unbroken packages, it can only be forfeited when it "is" adulterated and misbranded when seized.

These boxes of asafœtida when seized by the government were not adulterated within the meaning of the act. It is true they "had been transported" (from one state to another for sale) and "remained in the original unbroken packages at the time the government seized them"; but they were not adulterated.

Under section 7 this asafœtida was adulterated only in case its standard of strength, quality, and purity was not plainly stamped upon the containers, but if so marked it was not adulterated. The liability to forfeiture of the drug, therefore, would depend upon whether or not the containers were so marked at the time the government seized them. They were so marked and not liable to seizure.

The containers having been branded according to the requirements of the act at the time of seizure, there is no valid ground for forfeiture, and the libel in this case is dismissed, and the government is directed to return to the claimants the five boxes of asafœtida seized under the attachment.

UNITED STATES v. NINE BOXES OF ASAFŒTIDA.

(District Court, E. D. Pennsylvania. September 19, 1910.)

No. 8.

Libel by the United States for the condemnation of nine boxes of asafœtida. Dismissed.

Jasper Yeates Brinton, for the United States.
James Collins Jones, for respondent.

HOLLAND, District Judge. The facts in this case are substantially the same as those upon which the case of United States of America v. Five Boxes of Asafœtida (No. 7 of 1910) 181 Fed. 561, was determined.

For the reasons stated in the opinion filed in that case, the libel in this case is dismissed, and the government is directed to return to the claimants the nine boxes of asafœtida seized under the attachment.

THE RICHMOND.

(District Court, D. Massachusetts. February 18, 1909.)

No. 129.

1. SALVAGE (§ 30*) — RESCUE OF GROUNDED VESSEL — AMOUNT OF COMPENSATION.

The steel tug Richmond, 135 feet long and worth before her injury $54,000, grounded in a fog on the breakwater at Rockport, Mass., at the extremity of Cape Ann, where she was fully exposed to the seas. The top of the breakwater was of loose rocks 40 to 50 feet wide and about even with the surface at low tide. The Richmond passed over until the break-

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

water was about under her center, leaving both her bow and stern without support at low tide. She was towed off at the next high tide by the tug Enterprise, but in the meantime suffered injury, to repair which cost $3,134, and there was great danger of further injury if she remained over another low tide. There was but one other vessel that could have reached her in time to prevent her so remaining. The actual pulling by the Enterprise occupied but about 15 or 20 minutes, and she went to the Richmond in the night from the port where she was lying and was gone about 2 hours; the Richmond being able to proceed under her own steam. The service was not especially dangerous. *Held*, that under the circumstances, and in view of the peril to which the Richmond was exposed, the Enterprise was entitled to an award of $1,500, $1,000 to the vessel and $500 to the master and crew.

[Ed. Note.—For other cases, see Salvage, Dec. Dig. § 30.*

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

2. SALVAGE (§ 18*) — SERVICE RENDERED BY CHARTERED VESSEL — RIGHT TO AWARD.

Where a tug under a time charter which was not a demise of the vessel rendered a salvage service at night, at a time when she was not actually working under the charter but was supposed to be laid up in port, the owner, and not the charterer, was entitled to the salvage award.

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

In Admiralty. Suit by Charles Walker, on behalf of the steam tug Enterprise and her master and crew, against the steam tug Richmond, for salvage. Decree for libelant.

Blodgett, Jones & Burnham, for libelant.
Elder & Whitman, for the Breakwater Co.
Wing, Putnam & Burlingame, for claimant.

DODGE, District Judge. This libel for salvage is brought on behalf of the owners of the steam tug Enterprise and on behalf of her master and crew on board at the time the alleged salvage services were rendered. The services are alleged to have been rendered to the Richmond on Sunday and Monday, July 19 and 20, 1908, and to have consisted in towing that vessel off the breakwater at Sandy Bay, near Rockport, Mass., on which she had grounded while bound from the Kennebec river to Boston.

The Breakwater Company, an Ohio corporation, has filed an intervening libel or petition wherein it alleges that, when the services described in the libel were rendered, it "had full right to the services of and controlled the steam tug Enterprise by contract"; that the Richmond was saved, through its services, "by its said tug and the captain and crew thereof and none others." It prays for an award to be made to it "for its said salvage services."

That salvage services were rendered to the Richmond by the Enterprise and her crew, whoever may be the persons entitled to receive the compensation awarded therefor, is not disputed. Nor is it disputed that the services consisted, generally speaking, in towing the Richmond off the breakwater referred to, upon which she had grounded. The first question is: What is the proper amount to be awarded for those services as compensation?

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

The elements which are to govern in fixing the amount I find to be as follows:

1. Value of property saved: It was agreed that the Richmond was worth $54,000 when she grounded on the breakwater, and that the cost of repairing such injuries as resulted from her grounding or lying aground was $3,134.; so that her value as saved was $50,866.

2. Danger from which the property was saved: The Richmond is a steel tugboat having a net tonnage of 196 tons. She is 135 feet long, carries a crew of 16 in all, and was drawing at the time 16½ feet aft and 11 feet forward. She ran aground on the breakwater at about 4 o'clock in the afternoon of Sunday, July 19th, in a fog. When she ran aground she had been going at reduced speed for some time, and her engines were reversed shortly before she struck. She ran aground without any violent shock or jar.

The breakwater referred to runs from Avery's Ledge, off Rockport, northerly, in a straight line, for half a mile or more. It then turns at a considerable angle and runs for a further distance, in a straight line more nearly westerly than northerly. The Richmond grounded on that part of the breakwater which runs northerly from Avery's Ledge, at a point 800–1000 feet north of the ledge. The breakwater is composed of granite in loose blocks and is from 40 to 50 feet wide on top. The rocks composing it show at intervals above water at low water so that the course of the breakwater can then be seen. At high tide they are all covered with water and invisible.

When the Richmond grounded the tide was ebbing, and it had been ebbing for an hour or more. She ran upon the breakwater and lay upon it about at right angles to its course at that point. About half her length ran upon or over the breakwater. She rested upon it for a distance equal to its width at that point from her main rigging forward. Her stem was well out beyond the breakwater on its easterly side and had deep water under it, as did her after part on the westerly or inner side. She lay about on an even keel. There was no substantial change in her position during the low water following her stranding and until the tide was nearly at its height on the next high water, occurring between 3 and 4 o'clock on the morning of Monday, July 20th. At that high tide she was taken off, as is below stated.

The danger to a steel vessel like the Richmond, necessarily involved in lying supported by rocks for a small portion of her length only, and without corresponding support fore or aft, as the tide fell, for the remainder of her length, is obvious. Her water tanks and boiler were emptied after she grounded in order to lighten her as much as possible. Her draft was thereby reduced some 2½ feet. The damage sustained, nevertheless, from lying aground in the manner described during one low tide only, was serious. She was dry-docked at Boston immediately after being floated, and was a few days later surveyed for repairs at Newport News. These examinations of her bottom showed extensive indentation of her plates on both sides of her keel where she had rested on the breakwater, a number of butts in her plating started, the cement under her boiler loosened and cracked, and several joints in steam pipes in her engine room started. There were minor injuries to her propeller and machinery. Repair of

these damages cost $3,134, as has been stated. In my opinion these facts sufficiently show that the danger of further serious structural injury to be apprehended from letting the tug stay on the breakwater during another low tide was very considerable, and that it was of very great importance to her safety that the opportunity of floating her at the next high tide should not be lost.

The place where she lay aground on the breakwater is of course an exposed place, being at the extreme end of Cape Ann and without shelter from the open ocean. The danger of injury from exposure to heavy seas there, however, as distinct from the danger involved in having to lie aground in the manner described, does not seem to me to have been of great importance. No doubt during the hours she spent on the breakwater there was at times "quite a roll on," as some of the witnesses stated. At low water, however, no sea could have affected her very much; it was only as the tide rose and she became more nearly water borne that it would have been possible for any rolling or pounding on the bottom to have taken place. The evidence shows that she did not as a matter of fact move, roll, or pound at all during the most of the time she lay aground. During the few minutes before she came off, when the rising tide had begun to lift her, there appears to have been a little motion and occasionally something which might be described as pounding on the bottom. No doubt any long continuance of this would have been very undesirable for her. Yet the danger involved in it, so long as the sea was no heavier than that running at the time, does not appear to have been serious in comparison with the danger involved in the strain of lying aground as above described. Under the circumstances shown, it seems to me that neither during the time she lay aground, nor during the day following her floating, was the sea running heavy enough to be considered a serious danger in itself.

3. Possibility of relief other than that afforded by the Enterprise: The lightkeeper from Straitsmouth Island appears to have been the first person to visit the Richmond after her grounding. Attracted by whistle signals from her, he came out to her in a dory accompanied by his son. By him, and later by other persons who came off to her later, the Richmond's captain sent messages ashore to be telephoned to his owners asking to have the Boston Towboat Company send two or three tugs to his assistance. These messages were received by the owners' representative in Boston, and an arrangement to send tugs made with the Boston Towboat Company. When this arrangement was made, or when, according to it, the tugboats were to be sent, did not appear. Nor did it appear that any tugboats were ever actually dispatched in pursuance of it. No reason appears for believing that any tugboats so dispatched would have reached the Richmond in time to float her on the next high water. No attempt appears to have been made to get the aid of any tugboats from other places except the Enterprise, in time for that tide. Ultimately, of course, tugboats enough to render any assistance desired could have been had from Boston or elsewhere; but there is little reason to believe that any of them would or could have been made available by the time of the next high water, with one exception. There was, as will appear, another tug besides the Enterprise at

Pigeon Cove which might have rendered, so far as appears, all the aid which the Enterprise actually rendered.

4. Number of salvors and property employed by them: The Enterprise is 70 feet 6 inches long, 17 feet 6 inches beam, draws 9 feet 6 inches, has a gross tonnage of 61 and a net tonnage of 30 tons, is a wooden vessel, and was built in 1893. $15,000, alleged as her value in the libel, must, it would seem, be an overestimate rather than an underestimate of the true value of such a tugboat. But, as will appear, the case is not one in which the value of the salving vessel is a fact of importance enough to require a careful determination of it. At the time these services were rendered, the Enterprise had a regular crew of six all told, but the whole crew, as will appear, did not participate in all the services rendered. The tug was regularly employed in towing stone cargoes for the Breakwater Company between a quarry at Folly Point and the breakwater, which has been described. She had a berth at Pigeon Cove which she regularly occupied when not engaged in active work.

5. Nature of services rendered, time occupied, and risks encountered: Attracted by whistle signals blown by the Richmond after her stranding, the Enterprise left Pigeon Cove on Sunday afternoon, July 19th, and went to where the Richmond lay, a distance not exceeding two miles. She had on board her captain, Joseph T. Riley; her mate, J. Frederick Foley, who acted as engineer during the trip; Fred E. Bryant, fireman; and Walter Bender, cook; also several passengers. She got to the Richmond about 5 p. m., which vessel had then been aground about an hour; the tide falling all the time. The Richmond had begun emptying her tanks and boilers, but had not yet finished doing so. At the request of the Richmond's master, the Enterprise took a hawser from the Richmond's stern and pulled on it until after 6 p. m.; the Richmond's engines also working astern meanwhile. During the last 15 or 20 minutes of the time the Enterprise was pulling, another tug from Pigeon Cove, the H. G. Nichols, took another line from the Richmond's stern and pulled also. None of the pulling then done had any effect toward starting the Richmond. It was doubtful from the first whether any effect could be produced after the tide had fallen so far, but the experiment was tried at the request of the Richmond's master. Both tugs returned to their respective berths before 7 p. m.

Before leaving the Richmond at this time the captain of the Enterprise asked if further assistance from her was desired at the high water on Monday morning. He was told in reply that the Boston Towboat Company's tugs had been sent for; but, if they did not arrive in time for the high tide referred to, the Richmond would signal for further assistance from the Enterprise.

The Enterprise got ready to start, in pursuance of this arrangement, before high water. On board the Richmond, as it was found that the rising tide was beginning to float her, and as nothing was seen or heard of any boats from Boston, the agreed signals to summon the Enterprise were sounded. In pursuance of them the Enterprise at once started, at 2 a. m., or soon after, with all her crew on board except her mate, who failed to join her in time. The persons then composing her crew were Capt. Riley, Orlando H. Vessels, engineer, Fred E. Bryant, fire-

man, Walter Bender, cook, George C. Marbel, deck hand. On arrival at the Richmond she at once took that vessel's hawser and began to pull. It is claimed on the Richmond's behalf that she came off the breakwater immediately, under a steady pull, and without any "jumping" on the hawser. It is claimed on behalf of the Enterprise that the time spent in pulling on the hawser was from 3:15 to 3:45 a. m. as would appear from the entries in the Enterprise's log book, also that some "jumping" on the hawser had to be done to make the Richmond come off. This is the question of fact most in dispute in the case. I am unable to put much reliance in the log book entries of the Enterprise, because they seem to me to have been altered since they were originally made, so as to tell a story different from that which they told at first. On the whole evidence my conclusion is that from 10 to 15 minutes actual pulling was done, and that 2 or 3 "jumps" on the hawser were made before the Richmond came off. After coming off, she was towed by the Enterprise to a point a few hundred yards inside the breakwater, where she anchored. After refilling her tanks and boiler she got her anchor soon after 9 a. m. and went to Boston under her own steam. The Enterprise left her at anchor and returned to Pigeon Cove, which she reached about 4 a. m., and thereafter began her regular day's work for the Breakwater Company at 6:45 a. m.

About two hours' time on Sunday afternoon and about two hours on Monday morning was the time spent by the Enterprise. The distance traversed on each occasion was not over four miles.

The services rendered on Sunday afternoon did not result in any benefit whatever to the Richmond, and, if compensation for them had been contingent upon success, would have deserved no compensation because unsuccessful. They were rendered at the Richmond's request, however, and, in view of the circumstances, on the implied understanding that they should be paid for, whatever the result, at a fair remuneration for the time and labor expended. This I find to be $50.

The services on Monday morning stand upon a different footing. There was a chance but no certainty of success, because no one before the attempt to get her off could certainly tell how firmly aground the Richmond was. The Enterprise's attempt to tow her afloat was made subject to the chance of failure, and it succeeded. The assistance rendered by the Enterprise I must regard as having been necessary to the Richmond, because it seems to me highly improbable that she could have got off without aid, deprived as she was by the emptying of her boilers of motive power of her own and having nothing but kedging to rely upon. The Enterprise, then, provided the assistance essential to the Richmond's safety and provided it at the precise time it was most wanted, that is to say, at the earliest moment when the tide had arisen enough to float her, and soon enough to avoid leaving her a moment longer than could be helped in contact with the breakwater rocks, after pounding upon them had become possible. The labor and time involved were not considerable, as has appeared, and notwithstanding the fact that Pigeon Cove Harbor is not lighted at night and the Enterprise had to find her way to and from the Richmond in the dark, I am unable to believe that she or her crew were exposed to any danger more serious than those to which they were every day exposed. The degree

of promptness and skill displayed sufficiently appear from the facts found above. They were adequate to the occasion, but there was nothing extraordinary about them.

Upon a consideration of all the elements which enter into the question, it appears, therefore, that regarded merely in the light of the time, labor, and risk involved, the Enterprise's services on Monday morning would deserve nothing more than a very moderate compensation, but that a considerable enhancement by way of premium or reward is justified by the large value at risk and the great importance of assistance at the precise time when the Enterprise furnished it; or, in other words, the timeliness of the aid rendered by her. In such cases, as was said in Baker v. Hemenway, 2 Lowell, 501, 505, Fed. Cas. No. 770, the principle followed is "to give tugs what will be a handsome gratuity, enough to induce prompt and even eager assistance, and this would be enhanced slightly by a great value at risk though in no important or definite proportion to value." I shall award $1,500, $1,000 of which is to go to the owners of the Enterprise, or whoever may be held to have the owners' rights to this portion of the award, and the remaining $500 to the master and crew on board on Monday morning, in proportion to their wages. The total amount of the decree against the Richmond, including the $50 awarded for services rendered on Sunday afternoon, which is to go to the owners as ordinary earnings of the boat, will thus be $1,550.

As between the owners of the Enterprise and the Breakwater Company, my decree must be in favor of the owners. I do not think the Breakwater Company has established a claim to any part of this salvage. The charter under which the Enterprise was working for that company was silent regarding any salvage which might be earned during its continuance, nor did it amount to a demise of the tug or make the charterer her owner pro hac vice. Nor did it, as in The Arizonan (C. C.) 136 Fed. 1016; Id., 144 Fed. 81, 75 C. C. A. 239, give to the charterer the entire disposition of all the tug's time and services. The services rendered to the Richmond were performed at times when the Enterprise was not, and was not expected to be, actually working under the charter. If the charterer's coal or water were used in the services rendered to the Richmond, the Enterprise may be liable to pay for what was so used; but I am unable to believe that the charterer thereby acquired any claim upon the salvage compensation. The libel of the Breakwater Company must therefore be dismissed.

There will be a decree in favor of the libelants, Charles Walker and others, alleged in their libel and the amendment thereto to have been the owners of the Enterprise, for $1,050, and in favor of Joseph C. Riley, master, Orlando H. Vessels, engineer, Fred E. Bryant, fireman, Walter Bender, cook, and George C. Marbel, deckhand, the crew on board during the services rendered on Monday morning, for $500, the same to be apportioned as above directed.

FARMERS' LOAN & TRUST CO. v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. September 12, 1910.)

1. STREET RAILROADS (§ 54*) — MORTGAGES — CONSTRUCTION — PROPERTY INCLUDED.

A clause in a mortgage given by a street railroad company operating an extensive system acquired largely by leases from various other companies, by which the mortgage is made to include all the railroads, contracts, and leaseholds then owned by the mortgagor, is sufficiently broad to cover an indebtedness due from a constituent company, or lessor, to the mortgagor arising under the terms of the lease, for betterments made by the mortgagor on the leased property.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 54.*]

2. STREET RAILROADS (§ 54*) — MORTGAGES — CONSTRUCTION—AFTER-ACQUIRED PROPERTY CLAUSE.

The after-acquired property clause of a street railroad mortgage construed with respect to the property subsequently coming within the mortgage thereunder.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 54.*]

In Equity. Suit by the Farmers' Loan & Trust Company, as trustee, successor of Morton Trust Company, as trustee, against the Metropolitan Street Railway Company and others. On application of complainant for supplemental decree in foreclosure. Decree granted.

See, also, 180 Fed. 637.

Bronson Winthrop, for complainant.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The complainant (and its predecessor) brought suit to foreclose mortgage of the Metropolitan Street Railway Company to Morton Trust Company dated March 21, 1902. A large part of the property covered by this mortgage was already subject to a mortgage by the same railway company to Guaranty Trust Company, upon which suit has been brought and decree of foreclosure and sale entered. Foreclosure suit under the Morton Trust mortgage being prosecuted to final decree, and the property being described in separate lots in the form of decree submitted for signature, this court held:

"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 supplementary sale where bondholders will have abundant opportunity to buy them in. A mere reference to the description of these items, which consists 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. It is not intended by this reservation to delay the disposition of these questions as to lots 13 to 18. A day will be named for hearing argument upon them, and decision as to all of the disputed items may reasonably be expected before the summer vacation." Opinion filed May 31, 1910. 179 Fed. 1010.

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

Sale under the first mortgage having been postponed, decision as to these lots can be filed in ample time. Complainant proposes an amendment to the decree in this suit, which would allow sale to take place without prejudice to the rights of any one and postpone the decision of all questions as to these lots to some later day. But these questions have been fully argued, and they may as well be disposed of now; there will presumably be enough other questions to occupy the court's attention in the future. Moreover, if the present decision is of such a character that any one wishes to review it, that can be done at the opening of the October term of the Circuit Court of Appeals; the cause being entitled to a preference.

Lot 14.

Lot 14 consists of:

"All the right, title and interest of the Metropolitan Street Railway Company in and to any and all claims and rights of action against the following street surface railroad companies, which accrued prior to March 21, 1902 (the date of the mortgage), and are not hereinbefore included and directed to be sold as part of the property hereinbefore described and designated as lot one, viz.: Broadway & Seventh Avenue Railroad Company (and 18 other designated companies)."

Lot 1 includes (as subdivision 2):

"All claims, demands and rights of action whatsoever of the Metropolitan Street Railway Company or its receivers against the Broadway & Seventh Avenue Railroad Company arising out of or connected with the subject-matter of said lease (that is, the lease of the latter company to the Houston, West Street & Pavonia Ferry Railroad Company, to whose rights the Metropolitan Street Railway Company had succeeded)."

Lot 1 contains also similar clauses as to 7 more of the 18 other lessor companies, namely, Eighth Avenue, Forty-Second Street & Grand Street Ferry, Ninth Avenue, Sixth Avenue, Twenty-Third Street, Bleecker Street, and Fulton Ferry, New York & Harlem.

The claims against these lessor companies are for obligations arising under the contract of lease, mainly if not wholly for money expended by the lessee in betterments on the property leased such as the installation of electric motive power, etc. They arise out of or are connected with the subject-matter of the lease. Complainants contend that they are covered by the clause in the mortgage which enumerates:

"All and singular the railroads, railroad routes, estates, leaseholds, properties, rights, privileges and franchises described as follows, to wit, * * * together with all and singular the improvements on said properties and all and singular the railroads, lands, buildings, structures, fixtures, privileges, franchises, rights of way, trackage rights, contracts, consents, leaseholds, easements and other rights and interests now owned by the railway company, * * * and also all maps, drawings, profiles, licenses, records, deeds, contracts and agreements, patents and patented inventions, and processes now owned by the railway company."

Complainant correctly states that all of the companies against which the claims enumerated in lot 14 existed were companies forming part of the railway system of the mortgagor covered by the mortgage to the complainant. All of them were leased to the mortgagor or operated under trackage agreements. All of these leases and agreements are ex-

plicitly covered by the mortgage. In each case there was physical connection between the lines owned by the Metropolitan and the lines of each of the companies respectively. A car operated over the tracks owned by the mortgagor could have passed successively over the lines of every one of these companies without leaving the rails. The whole outfit constituted a unitary railway system which was covered by mortgage. The conclusion is equally correct that:

"Contracts under which any subsidiary company is liable to the Metropolitan for equipping or improving the property of such subsidiary company are unquestionably contracts in relation to the railroad system operated and mortgaged by the Metropolitan Company."

The clause above, quoted from the mortgage, is a broad one, and the court is not persuaded that it should be narrowed so as to exclude claims arising against these lessor or subsidiary companies under the contracts which they made with the Metropolitan; it is sufficient limitation to hold that the mortgage covers only such as are limited to property or interests connected with the railroad system of the mortgagor. With such limitation the claims enumerated in lot 14 are covered by this mortgage. Some of these claims, however, are covered also by the mortgage to Guaranty Trust Company and are within the terms of the decree foreclosing that mortgage. They are also specifically enumerated in lot 1 as described in the decree in this suit, and should not be twice enumerated. Lot 14 should, therefore, be amended by striking out the claims under the eight leases listed in lot 1. What is left after such amendment should be sold with the other property covered by this mortgage.

Lot 17.

This lot includes:

"Any and all demands, claims, contracts, rights, interests, notes, bonds, stocks, choses in action and all assets and property of every nature and description, real and personal, except cash in hand, including all interest of its receivers therein which belonged to or were of Metropolitan Street Railway Company on March 21, 1902, not hereinbefore in lots one to sixteen, both inclusive, specifically described and designated."

This of course does not include any claims against the leased lines already provided for. It is thought that the language above quoted from the mortgage was not intended to cover any "stocks" because it is immediately succeeded by an enumeration of shares of stock. With that word struck out this lot may be included in the sale.

Lot 15.

This lot is described in the same language as lot 14, except that it is confined to such claims and rights of action against the enumerated lessor or subsidiary roads as "accrued to the Metropolitan Street Railway Company or its receivers subsequent to March 21, 1902 (the date of the mortgage)." It excludes everything included in lot 1.

The provisions of the mortgage covering after-acquired property are by no means as broad as those relating to property owned by the mortgagor at the date of execution. They are as follows:

"And also all present or future improvements and additions made or to be made upon and to any or all of said railroads or property, real and personal, and any and all equipment therefor and renewals or replacements of the same or of any part thereof or of the appurtenances; and also all and every other railroad, which the railroad company shall hereafter acquire or construct by means of the proceeds of any of the bonds hereby secured, and all power houses, real estate, equipment and other property, real or personal appurtenant thereto.

"The railway company agrees and covenants that this indenture is and always will be kept a first lien upon all the premises and property described in the granting clauses hereof now owned by the railway company, and upon all property hereafter acquired by it in connection with such premises, and property, and upon all renewals and replacements of such property, and all additions, switches, side tracks, betterments and improvements thereto, subject only to existing liens."

The words relied upon by the complainant are "future improvements and additions to be made upon and to any and all of said property real and personal"; that is, to the "property" enumerated either in general or specific terms in the preceding clause which mortgages the "property" owned at the date of the mortgage. The claims themselves are not enumerated, but are, it is said, of the same general nature as those acquired by the Metropolitan before the execution of the mortgage. Some are for moneys expended subsequently for betterment or equipment of some leased line which under the terms of the lease the lessor was to repay. Others, it is suggested, are for balances due under some traffic agreement where a part of the receipts of some independent company, which used Metropolitan tracks, were to be turned over to the latter. Some, it may be, are for power sold, etc. The argument is that claims of the Metropolitan against all the street surface railway companies mentioned, whether leased or controlled by stock ownership, which accrued after the execution of the mortgage, are additions to the same general class of claims against subsidiary companies which were owned by the Metropolitan at the time the mortgage was executed, and as such "additions" are covered by its terms.

It is thought, although not without some doubt, that the language is broad enough to cover such claims against the subsidiary companies as "arise out of" or are connected with the subject-matter "of the leases or traffic agreements with such roads." The description should be amended accordingly, but the roads enumerated in lot 1 should be struck out of this lot.

Lot 18.

This lot is in the same language as lot 17 except that it covers demands, etc., which "accrued to or were acquired by the Metropolitan or its receivers, subsequent to March 21, 1902 (the date of the mortgage)."

What these are is nowhere disclosed in the proposed decree. So far as they are claims against the subsidiary companies arising out of or connected with the subject-matter of the leases or traffic agreements, they are already provided for in lots 1 and 14. If they are not of this character, it would seem to put too severe a strain upon the after-acquired property clause to construe it as covering these on the theory that they are general "additions" to the personal property of the mortgagor. This lot should be withdrawn from the sale.

Lot 13.

This includes $50,000 bonds of the Twenty-Third Street Railway Company and $36,000 bonds of Forty-Second Street & Grand Street Ferry Railroad Company, all of which were bought subsequent to the execution of the mortgage. They are not "additions" within the meaning of that word as used in the after-acquired property clause. This lot should be withdrawn from sale.

Lot 16.

This lot includes:

"All the right, title and interest of Metropolitan Street Railway Company in and to any and all rent due or which may become due, and in and to each and every claim, demand, and right of action which may have accrued or may accrue to said Metropolitan Street Railway Company or its receivers under and by reason of a certain indenture of lease dated February 14, 1902, made by said Metropolitan Street Railway Company to Interurban Street Railway Company (now New York City Railway Company)."

This lease is expressly referred to in the mortgage which is made subject to the lease and to all and singular the provisions thereof. So long as the lessee avoids any breach of its covenants, possession under the lease cannot be disturbed, for the mortgage is subject to the burden of the lease. But it seems to have been the intention to bring within the lien of the mortgage all returns under the lease as long as it continues. If the lease be broken by the lessee, claims for damages would take the place of these uncollected returns; but the lien should attach to the damages as fully as it would to the returns. What amount of damages may be provable is a complicated question which it is not now necessary to decide.

The claims mentioned in lot 16 may be included in the sale.

Supplementary decree may be prepared in conformity with the views expressed in the memorandum.

BROOKLYN DAILY EAGLE v. VOORHIES, Postmaster.

(Circuit Court, E. D. New York. September 13, 1910.)

1. POST OFFICE (§ 26*)—EXCLUSION OF MATTER FROM MAILS—POWER OF COURTS TO REVIEW ORDER.

A federal court of equity has jurisdiction of a suit to determine whether or not the matter because of which it is proposed to exclude a newspaper from the mails has been legally held to be unmailable by the Postmaster General, under the statutes of the United States, and if his action is found to be unauthorized to enjoin the exclusion of such paper.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

2. POST OFFICE (§ 34*)—MAILABLE MATTER—ADVERTISEMENT OF LOTTERY.

A newspaper advertisement offering a prize for the best essay on the name of a certain breakfast food to be judged by three persons named, and each essay when submitted to be accompanied by three labels from packages of such food, may or may not be an advertisement of a lottery which will render the newspaper unmailable under Rev. St. § 3894 (U.

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

S. Comp. St. 1901, p. 2659), depending on whether or not the prize is "dependent upon lot or chance." To escape such condemnation the offer must be made and carried out in good faith, and the prize awarded on the merits, and the advertisement should contain a sufficiently definite statement of what the word "best" means as used therein to advise competitors of the standard of comparison to be applied by the judges.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 34.*]

3. LOTTERIES (§ 3*)—ELEMENTS.

The three necessary elements of a "lottery" are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4245–4252; vol. 8, pp. 7710–7711.]

In Equity. Suit by the Brooklyn Daily Eagle against Edward W. Voorhies, as Postmaster of the United States Post Office in the Borough of Brooklyn, City of New York. Decree for complainant.

Samuel T. D. Jones, for complainant.

William J. Youngs, U. S. Atty., and William Austin Moore, Asst. U. S. Atty., for defendant.

CHATFIELD, District Judge. The Brooklyn Daily Eagle has filed a bill in equity seeking to restrain the postmaster of Brooklyn from refusing to accept as second-class mail matter the editions of that paper, if those editions contain the advertisement of a contest in which prizes are to be given for the "best" compositions upon the name of a certain breakfast food. Each essay is to be accompanied when sent in with three labels cut from packages of this food, and the essays are to be judged by three gentlemen of well known and indisputable standing from a literary standpoint.

The defendant has admitted the facts, but has offered two objections to the granting of the relief. The first objection is that the contest proposed is a lottery. The other objection raised is that the court has no jurisdiction, inasmuch as the defendant claims that he, as postmaster, and his superior, the Postmaster General, under whose instructions the case shows that he is acting, are executive officers of the government, and that the question of all use of the mails is vested in their discretion; such discretion not being subject to review by the courts.

The defendant has cited in support of this the provisions of sections 3929 and 4041, Rev. St., as amended by sections 2 and 3, respectively, of Act Cong. Sept. 19, 1890, c. 908, 26 Stat. 466 (U. S. Comp. St. 1901, pp. 2686, 2749), and Act Cong. March 2, 1895, c. 191, 28 Stat. 963 (U. S. Comp. St. 1901, p. 3178), under which the Postmaster General, after a hearing as prescribed in the statute, may find that the particular use of the mails would tend to defraud or be a lottery, and compel a cessation of that use by the parties responsible therefor; the mail matter or money being returned to the sender.

This statute does not cover the present case, for the mails have not been used, the Postmaster General has not found any use to be con-

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

ducting a lottery, and has made no order that any particular use of the mail by any person be prevented for such a reason. He has only instructed the postmaster of Brooklyn to take out of the mails, or to refuse to accept for delivery through the mails, copies of the newspaper in question, if it shall contain what the Postmaster General assumes will be an advertisement of a lottery and what the complainant stated it intended to print and offer for transmission. This instruction is given under the regulations by which the postmaster is authorized to submit doubtful mail matter to the Postmaster General for appropriate action, but in the present case the submission has been made of proposed, rather than offered, second-class mail.

With the motive for these instructions no fault can be found, yet there would seem to be no question that the United States courts have the authority under the statutes and Constitution to determine whether or not the Postmaster General or the postmaster of Brooklyn is acting within the authority given them by act of Congress (for they have no other authority) in administering the offices which they hold and in carrying out the provisions of those statutes. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894. Such a determination also involves passing upon the statutes themselves, i. e., as to whether they as a matter of law cover the facts of the particular case. School of Magnetic Healing v. McAnnulty, supra, at page 107, of 187 U. S., 23 Sup. Ct. 33, 47 L. Ed. 90. These cases also approve of the practice of bringing a bill in equity to prevent a threatened wrong, when the sole question is as to whether or not the matter because of which the newspaper is to be excluded from the mails has been legally held by the Postmaster General unmailable under the statutes of the United States. Hence we are asked to consider whether in this particular case the advertisement in question would be an advertisement of a lottery, under the language of section 3894, Rev. St. (U. S. Comp. St. 1901, p. 2659), which is as follows:

"Nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, * * * be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished," etc.

It has been held in numerous cases, such as Waite v. Press Publishing Association, 155 Fed. 58, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171, U. S. v. Wallis (D. C.) 58 Fed. 942, and Horner v. U. S., 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237, that the three necessary elements of a "lottery" are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit.

The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The

acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive.

The contest suggested also involves the giving of prizes, and hence the only question at issue is whether the distribution of these prizes would depend solely upon chance. As to this it is impossible upon the pleadings to determine conclusively. The complainant alleges that the advertisement was intended to solicit essays which should be judged from the standpoint of literary merit, and alleges that the judges were expected to and would honestly compare the essays submitted.

The defendant, admitting the allegations of the complainant in so far as the intentions of the parties are concerned and the good faith thereof, alleges that it is evident upon the face of the advertisemnt that this good faith might not or need not necessarily be carried out, and that therefore the contest would result in a distribution of prizes by chance, and such a distribution would be a lottery, citing the case of State v. Shorts, 32 N. J. Law, 398, 90 Am. Dec. 668.

The government also contends that inasmuch as the advertisement does not specifically say that the essays shall be judged because of literary merit, but, on the other hand, offers a prize solely for the "best" essay, which might be best written, best expressed, most persuasive, longest, shortest, or best from any other standpoint, the judging would depend upon the whim of the judges, and not upon their application of any recognized standard.

It must be held that to offer a prize for the "best" essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word "best" means. But a distinction as to the methods of the judges is academic, for if the contest be honestly carried on (and this is admitted), and the best essay from any definite known standpoint selected, such competition would not seem to be in any sense a lottery. The wording of the suggested advertisement is disconnected and does not definitely say that the merits of the breakfast food, rather than its title, are to be extolled; but the general sense indicates that literary merit for advertising purposes, as it might appear to the opinions of the three judges, would be the standard of judging.

The only relief possible, therefore, would seem to be an injunction in alternative language to the effect that if the Brooklyn Daily Eagle publishes and seeks to mail an advertisement which does not appear on its face to be, or does not prove in practice to be, a lottery within the limits of this decision, the postmaster should be enjoined from refusing to accept the papers for transportation by mail, but that if the advertisement in question shall be so worded as to constitute a lottery, or is so conducted as to accomplish a lottery, then the injunction should be vacated. In the last-mentioned case, the provisions of the criminal statute would also apply.

The present action is substantially an attempt to have the court answer an academic question. It has been brought in such a way that the question must be answered; but the court cannot act as adviser of the complainant in determining how far the complainant may go before

it will offend the provisions of the criminal statute, and the court will only enjoin the defendant from refusing to accept the particular advertisement of a contest, to be judged from a definite standpoint. The wording of any advertisement or the precise application of this decision cannot be determined in anticipation of every possible change which may be made in the language of the advertisement itself. As was said in the case of School of Magnetic Healing v. McAnnulty, supra, the defendant will not be precluded from showing on the merits at a trial (which could be had upon an indictment if the grand jury finds an apparent violation of the statute) that the scheme or plan as worked out or as advertised through the mails is really a lottery; but on this record, with good faith admitted and a bona fide contest being planned for a competition in essay writing, the mere fact that it is an advertising scheme does not make the plan a lottery.

In re FRENCH.

(District Court, D. Massachusetts. July 30, 1909.)

No. 7,005.

1. BANKRUPTCY (§ 343*)—CLAIMS—PROOF—TIME.

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), provides that claims shall not be proved against a bankrupt after one year from the adjudication, or, if they are liquidated by litigation and final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment, etc. *Held*, that such section requires something more than mere making of proof of claim required by section 57a to be done within the year, and that filing or presentation of the claims in some form in the bankruptcy proceedings is essential to save the claims from the bar of the statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 343.*]

2. BANKRUPTCY (§ 381*)—COMPOSITION—CONFIRMATION—BELATED CLAIMS.

Where every requirement of Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing for confirmation of compositions in bankruptcy, necessary to bring the composition before the court for confirmation had been complied with, the court could not as a matter of law refuse confirmation on the objection of creditors whose claims, though specified in the schedule, had not been filed, presented, or allowed in bankruptcy proceedings within the year prescribed by Bankr. Act, § 57n, and were therefore barred and not provided for in the composition proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 381.*]

3. BANKRUPTCY (§ 384*) — COMPOSITION — CONFIRMATION — OBJECTIONS—APPEARANCE BY BANKRUPT.

Where certain creditors of a bankrupt who had not filed or presented their claims within the year prescribed by Bankr. Act, § 57n, opposed confirmation of a composition, which did not provide for payment of a percentage of such claims, the bankrupt had capacity to appear and oppose such objections without reference to whether the claim had been included in his schedules, or had been inadvertently omitted therefrom.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 384.*]

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

4. BANKRUPTCY (§ 385*)—COMPOSITION—RIGHTS OF CREDITORS.
Creditors whose claims are barred by failure to file or present the same within the year required by Bankr. Act, § 57n, have no standing before the bankruptcy court in composition proceedings.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 385.*]

In the matter of William A. French, bankrupt. On petition to review a referee's order disallowing claims presented by the Marblehead National Bank and the Marblehead Savings Bank, and on petition by the same creditors that provision be made for distribution on their claims before confirmation of an offer in contribution by the bankrupt. Order affirmed. Petition denied.

Lowell & Lowell, for bankrupt.
William P. Thompson, for creditors.

DODGE, District Judge. The first question is whether it is possible in any manner to "allow" these claims in these proceedings. Adjudication in this case was on December 8, 1902. Schedules were filed in which the claims of these two alleged creditors appeared. They made the statements under oath in writing which section 57a of the bankruptcy act requires on March 12 and 13, 1903. But they did not file them in court or present them to any one who could be said to have authority to receive them on behalf of the court in these proceedings. The statements, when sworn to, were left by them with their counsel, and by accident or oversight, instead of being filed, they remained unnoticed among his papers until after his death in 1905, and until after the year following the adjudication had long expired. When discovered and presented in these proceedings, a composition offer made by the bankrupt April 28, 1909, had been accepted by vote of the creditors June 2, 1909, and recommended for confirmation by the referee June 4, 1909. The bankrupt had applied for confirmation of the composition June 10, 1909, but the court had not yet acted upon the application.

The alleged creditors concede that in such a case as this, where nothing like fraud on the bankrupt's part is suggested, and there has been no liquidation by litigation, section 57n requires something more than the mere making of "proof" according to section 57a to be done within the year, and that filing or presentation in some form in the bankruptcy proceedings is also necessary to prevent a claim from being barred by the provisions of that section. I see no way in which this concession could have been avoided. See J. B. Orcutt Company v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, and among the more recent decisions bearing upon the question, Bennett v. American, etc., Co., 159 Fed. 624, 86 C. C. A. 614; In re Sanderson (D. C.) 160 Fed. 278; Re Strobel (D. C.) 163 Fed. 787. The claims, therefore, cannot be "proved against the estate" or "allowed" so far as bankruptcy proceedings, strictly speaking, are concerned, and it will be unnecessary to inquire whether, strictly speaking, their allowance ought to be refused by the referee, or by the court, upon the theory that the referee's jurisdiction terminated with his report to the court upon the composition offer.

The alleged creditors contend, however, that "when we come to composition proceedings the matter is entirely different"; that "there is no reason whatever for holding that section 57n has anything to do with composition proceedings"; that "there is no intimation in section 12 as to anything about a year being required for proof"; and that "in composition proceedings creditors may file their claims at any time before the composition is confirmed or the distribution ordered." They have filed within the time allowed for such objections a paper entitled "objections to the confirmation of the composition." In this they represent that they are scheduled as creditors, that their claims are justly due and were never disallowed prior to the time of filing said paper, and that the composition deposit now made is not enough to pay 5 per cent. on all claims, by which I understand to be meant all scheduled claims not disallowed including theirs. They ask the court to withhold confirmation of the composition until their claims are finally allowed or disallowed, that a further deposit be ordered, or, if no further deposit is to be made, that the order of distribution of the amount now deposited include a percentage to be paid them upon their claims.

It is not, nor could it be, claimed that this composition is not properly before the court for confirmation. Every requirement of section 12 necessary to bring it before the court for that purpose has been duly complied with. These petitioners have suggested nothing which according to section 12d would justify a refusal to confirm. In Re Rudnick (D. C.) 93 Fed 787, decided in this court in 1899, it was held that, "as the court has no power to confirm or reject a composition except pursuant to section 12, so it has no power to set one aside except pursuant to section 13." We are here concerned with section 12, but my opinion regarding it is the same as that expressed by the learned judge whose decision, dealing with section 13, I have just quoted.

Assuming, however, that the court might lawfully refuse to confirm, though satisfied upon all the points enumerated in section 12d, there are, as it seems to me, abundant reasons against such an exercise of discretion in this case. The circumstances seem to me such as to render it impossible to justify either of the courses of action which the court is asked to adopt.

Rule 8 of this court is:

"In cases of composition the deposit shall be sufficient to pay the proposed percentage upon all unsecured debts scheduled by the bankrupt, unless the Court should otherwise order."

The bankrupt asked the court in a petition filed July 31, 1908, that he be required in composition "to deposit a sum sufficient to pay the proposed percentage of all claims then proved and allowed only," not including four scheduled claims specified in the petition, which had been neither proved nor allowed, and he asked that said four claims be disallowed. The petition did not mention the two claims now presented. After notice ordered and served upon all scheduled creditors to show cause against the granting of this petition on or before August 17, 1908, the court granted the prayer of this petition on June 7, 1909. Two of the creditors whose claims were specified in the petition appeared to object, but withdrew their proofs of claim before the

court acted on the petition. There was no appearance by the two creditors now petitioning, although they must have had notice of the order to show cause, nor did any other creditor appear. Inasmuch as six years and a half had expired since the adjudication, there seemed no reasonable ground to suppose that any except the proved and allowed claims would have to be considered. The deposit which has been made under this composition offer is thus of an amount sufficient only to pay the offered percentage on the claims allowed, and no provision has been made in it for any payment upon the claims of the present petitioners or of any other creditors whatever.

In no event, as it seems to me, would it be proper or just to include the present petitioners in any distribution of the amount now deposited. The result of doing so would be to benefit these petitioners, who have let the time for taking action in these proceedings pass, notwithstanding repeated notices, at the expense of the creditors who have been properly diligent, and it would amount to a substitution by the court, in place of the composition agreement for a given percentage, of an agreement for a lower percentage which very probably never would have been voted.

Nor can I believe that it would be proper or just to overthrow at this stage the arrangement upon which the bankrupt and the requisite majority of his creditors who seasonably appeared in the proceedings have agreed, evidently after considerable difficulty and delay, in good faith and with good reason believing themselves the only parties now interested. Their interests appear to me to have the stronger claim to consideration. The inclination of the court is always, of course, to relieve against accident or mistake when it can be done with due regard to the rights of the other parties before it. But I do not think that such a situation here exists.

The bankrupt is the party appearing to oppose the allowance of these claims and against the objection to confirmation of the composition. That he has a standing to oppose the allowance of the claims, and would have it even if he had inadvertently omitted them from his schedules, was held by this court in Re Lane, 125 Fed. 772. He contends, not only that the claims cannot be allowed in bankruptcy proceedings, strictly speaking, but that they have lost all standing before the court for the purposes of composition. In my opinion he is right in so contending. While it is no doubt true, as stated in Re Lane, that composition is treated, even in the act, as in some respects outside of bankruptcy, I am unable to find any authority sufficient to justify a court in recognizing for the purposes of settlement in composition any creditor or any claim not entitled to recognition for other purposes under the act. In composition it is true "the consideration is to be distributed as the Judge shall direct," but this cannot mean that he may distribute the bankrupt's money otherwise than to persons entitled as the bankrupt's creditors when the distribution is made. If proof of a claim has become barred by section 57n, its owner has ceased to own any demand or claim provable in bankruptcy, and I am unable to see how he can maintain any right to recognition by the court as a creditor. That he cannot claim such recognition for the purposes of distribution in composition is held in Re Brown (D. C.) 123 Fed. 336. See, also, Troy v.

Rudnick, 198 Mass. 563, 569, 85 N. E. 177. So far as Re Fox, 6 Am. Bankr. Rep. 525, is to the contrary, the reasons against the opinion there expressed seem to me more convincing than those in its favor.

The claims presented by the two petitioners must be disallowed, and their petition denied. There being no other objections to the composition, it is to stand confirmed.

UNITED STATES v. MORGAN et al.

(Circuit Court, S. D. New York. July 15, 1910.)

1. FOOD (§ 7*)—FOOD AND DRUGS ACT—"MISBRANDING"—"SPRING WATER."
Ordinary Croton water drawn from the pipes in New York City filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water," as the term is generally understood, and the labeling of the bottles as spring water constitutes a misbranding within the meaning of the food and drugs act (Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1191]).

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

For other definitions, see Words and Phrases, vol. 7, p. 6617.]

2. CRIMINAL LAW (§ 37*)—VIOLATION OF FOOD AND DRUGS ACT—ENTRAPMENT.
The fact alone that the only interstate shipment shown of a misbranded food article by the manufacturer was secretly induced by an agent of the Department of Agriculture is not a defense to a prosecution therefor under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), the reasons for the action of such agent not appearing.

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

3. FOOD (§ 20*)—FOOD AND DRUGS ACT—PROSECUTION FOR VIOLATION—CONDITIONS PRECEDENT.
Although an indictment under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) for adulteration or misbranding is not demurrable because it contains no allegation of notice from the Department of Agriculture to the defendant of the result of the examination of the article, and that he was given an opportunity to be heard, as required by section 4 of the act, since such prosecutions may be maintained by the district attorney under section 5 without the intervention of the department, such allegations and proof are necessary in all cases where the prosecution is instigated by officers or agents of the department; and, if it appears on the trial that the case is such, there can be no conviction in the absence of such allegation and proof.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 20.*]

Criminal prosecution by the United States against John Morgan and others. On motions for new trial and in arrest of judgment. Motion in arrest granted.

Henry A. Wise and Robert Stephenson, for the United States.
Alexander Thain and Otto G. Foelker, for defendants.

HOLT, District Judge. These are motions by the defendants for a new trial and in arrest of judgment. The defendants were convicted under the act of June 30, 1906, commonly called the "Pure Food Act," for shipping from New York to New Jersey misbranded bottled wa-

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

ter. The bottles were labeled "Imperial Spring Water." They contained water which was originally ordinary Croton water, drawn from a pipe on the defendants' premises in New York City. This water was first passed through a fine sand filter, then through beds of gravel and charcoal. Then a small quantity of mineral salts was added. It was charged with carbonic acid gas, and put in thoroughly clean bottles. This water when sold was pure and wholesome. A food and drug inspector, appointed by and acting under the Department of Agriculture, whose office was in New York City, went to a druggist at Newark, N. J., and asked for Imperial Spring water. The druggist had none. The inspector thereupon asked the druggist to order some for him. He did so. In compliance with such order the defendants shipped half a dozen bottles so labeled from New York City to the druggist at Newark, N. J. He thereupon sold them to the inspector, who brought them back to New York, and reported the case to the district attorney. The defendants were thereupon indicted for such shipment. There was no evidence on the trial that any notice was given to the defendants of the examination of said water by or under the direction of the bureau of chemistry in the Department of Agriculture, or that any opportunity was given to them to be heard on the question whether the pure food act had been violated.

The defendants claim, on these motions, first, that the evidence showed that the water sold was spring water, and therefore that the bottles were not misbranded. The proof showed that ordinary Croton water, like the water of any fresh water lake or river, is partly spring, and partly rain and surface water. The water as treated by the defendants was a thoroughly filtered water, with a little mineral salts and carbonic acid gas added, which made it more sparkling, and, to many people, more attractive. It was perhaps as expensive to produce and as pure and wholesome as spring water. But it was not what is commonly understood by the public as spring water; that is, water taken directly from a natural spring. The label therefore was misleading and the bottles misbranded. The object of the pure food act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label.

The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York City. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and, if there was no other justification for the inspector's proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other states which had been voluntarily shipped there by the defendants, whatever

public evil might result from the sale of such water in New York City might wisely, in my opinion, have been left to be dealt with by the state authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and, in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained the proof itself was invalid or insufficient.

The important question on these motions is whether it was necessary for the indictment to allege and for the government to prove that notice was given to the defendants by the agents of the Department of Agriculture of the examination of the samples obtained of the water, and an opportunity given them to be heard on the question whether the law had been violated.

Sections 3, 4, and 5 of the pure food act are as follows:

"Sec. 3. That the Secretary of the Treasury, Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any territory of the United States, or which shall be offered for sale in unbroken packages in any state other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any state, territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

"Sec. 4. That the examinations of specimens of foods and drugs shall be made in the bureau of chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

"Sec. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any state, territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

The claim that the indictment was invalid on its face because it did not allege that notice of the examination and opportunity to be heard was given to the defendants is, I think, untenable. There is obviously

at least one case in which a prosecution is authorized when no preliminary investigation has been had by officers of the Department of Agriculture. The fifth section provides that it shall be the duty of the district attorney to prosecute whenever any state health officer presents satisfactory evidence of any violation of the act. Moreover, the first and second sections, making it a misdemeanor to manufacture in the territories or District of Columbia, or to ship in interstate commerce, adulterated or misbranded foods or drugs, are general in their terms. The act prohibited constitutes the misdemeanor. There is no direct reference in them to the subsequent sections providing for the notice to the owner of the samples and the opportunity to be heard; and in my opinion the district attorney can institute prosecutions under those sections upon adequate evidence without any preliminary investigation or action by the officers of the Department of Agriculture. But under the provisions of section 4 of the act, whenever an investigation is first instituted by the food and drug inspectors or other agents of the Department of Agriculture or of its bureau of chemistry, and an examination of specimens of foods or drugs had for the purpose of determining whether they have been adulterated or misbranded, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained. In my opinion a compliance with this section is a prerequisite to a prosecution in all cases in which the matter is brought before the district attorney for prosecution by the agents of the Department of Agriculture. Proof of such notice and opportunity to be heard before the indictment is therefore material in all such prosecutions; and, of course, all material facts which are necessary to sustain a conviction must be alleged in the indictment. The result is that although an indictment under the pure food act is not demurrable because it contains no allegation of such notice and opportunity to be heard, since such prosecutions can be maintained by the district attorney without the intervention of the officers of the Department of Agriculture, such allegations and proof are necessary in all cases where the prosecution is instigated by such officers; and, if it appears by evidence on the trial that the case is such, no conviction can be had in the absence of such allegation and proof. In this case the investigation and prosecution were due to such officers. I think, therefore, that the indictment should have alleged and the evidence for the government established that such notice and opportunity to be heard were given to the defendants, and that, in the absence of such allegation and proof, the motion in arrest of judgment should be granted. The motion for a new trial should be either withdrawn or denied. If granted, a new trial would result in nothing, because, in my opinion, the indictment is fatally defective.

In re MARGOLIS et al.

(District Court, D. Massachusetts. June 14, 1909.)

No. 11,977.

BANKRUPTCY (§ 414*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF GOODS AND MONEY—EVIDENCE.

On an application for a bankrupt's discharge, evidence *held* to establish specifications of objection charging concealment of goods or proceeds thereof with intent to hinder, delay, and defraud creditors, requiring a denial of the application.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

In the matter of bankruptcy proceedings of Meyer H. and Edward I. Margolis. On application for discharge. Denied.

Josiah Bon, for bankrupts.

French & Curtiss and Richard B. Coolidge, for objecting creditors.

DODGE, District Judge. These two brothers, copartners in a wholesale grocery business in Boston, were adjudged bankrupt January 7, 1907, on a creditors' petition filed December 4, 1906, alleging their insolvency and that they had preferred creditors to the petitioners unknown. They made no opposition to adjudication. Their schedules, filed March 27, 1907, showed a total firm indebtedness of $12,786.39, and firm assets amounting to $4,650, $4,300 of which consisted in book accounts. The trustee realized less than $100 from all the assets he could discover. The individual assets and liabilities scheduled by each partner were inconsiderable.

On January 4, 1908, both partners filed applications for discharge. Two creditors have objected and filed specifications. The trustee stated in a report filed June 9, 1908, among other things, that he believed the bankrupts had not accounted for all the goods purchased by them, and that, if certain cash sales of goods were bona fide, the proceeds had not been properly accounted for.

On June 15, 1908, there was a reference of the specifications for ascertainment of facts and report. In his report, filed February 16, 1909, the referee found none of the specifications sustained.

Upon consideration of the report and of the evidence before the referee, which is made part thereof, I agree with the referee in believing that the charges of destruction, concealment, or failure to keep books of account, from which the bankrupts' financial condition may be ascertained, with intent to conceal their financial condition, are not sustained, if these charges be considered independently of the further charges below mentioned. Books were kept and were turned over to the trustee. They appear to correspond in general with the schedules filed. The utmost that the evidence can be claimed to show in regard to them is that the entries in them are such as to afford indications that property has been concealed.

The case made by the objecting creditors upon the charges of concealing property from the trustee or with the intent to hinder, delay, and defraud creditors is, to my mind, much stronger than is recognized

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

by the referee in his report. It rests mainly upon what has been admitted and upon what is left unexplained by the bankrupts themselves in their own testimony. They carried on the business in which they failed, from August, 1904, to December, 1906. By their own admission, the indebtedness of $12,000 and over, which their schedules show, was substantially all contracted between June 1 and November 1, 1906, for goods bought on credit during that period, while before these purchases began the stock of goods carried had been of from $3,000 to $4,000 in amount. By their own admission they sold during the same period all the goods on hand in June and all bought by them thereafter, at a good profit. And, by their own admission, they were insolvent in November and had no goods at all in their store at the time of their bankruptcy early in December. The last of the goods, according to their statement, a few hundred dollars' worth only, were taken by an attaching officer under a writ brought by a creditor to whom they owed $50 or thereabout. This history seems to me to differ so widely from that which, according to common experience, would be expected in the case of an unsuccessful business enterprise honestly conducted, as to call for explanation and to demand a careful scrutiny of such explanation as may be attempted.

If the goods referred to or the proceeds received from them really went to pay debts other than those scheduled, or in legitimate expense of the business or living expenses of the partners, the books, together with the candid testimony of the bankrupts, ought readily to make these facts appear. As the case stands, not only do the books and the bankrupts' testimony fail to establish such a state of facts, but, to my mind, they afford strong ground for the belief that a very different disposition of the goods referred to, or their proceeds, has been made.

First as to the disposition of the goods themselves: Before October, 1906, by far the greater part of the sales made appear by the books to have been sales on credit. During May, June, July, and August, 1906, the cash sales were less than 10 per cent. of the total. But during the three months and four days from September 1st to the bankruptcy, the cash sales appear as 80 per cent. of the total. The referee accepts as a satisfactory explanation of this change the bankrupts' testimony "that their business during the summer months was dull, but that it revived late in the fall." The total of sales, cash and credit, for the four months before September 1st, is $12,822; the total for the period from September 1st to the bankruptcy is $15,193; so that it is true that the entire business done appears to have been $2,371 greater, an increase of less than 20 per cent. I am unable to see how such an increase of the business done by a wholesale grocery concern tends to explain, or render more probable, the very great increase in the proportion of cash to credit sales. A further noticeable circumstance regarding the alleged cash sales between September 1st and December 4th, as they appear on the books, is the increased amount of the several transactions. On October 4th, 19th, and 24th there are entries of cash sales exceeding $1,000 in amount; the largest being $1,418.22 on October 19th. On October 3d, 4th, 5th, 26th, 27th, November 12th and 22d there are entries of cash sales exceeding $500; the largest being $915.46 on October 27th. On October 6th and November 23d

there are entries of cash sales exceeding $400. Between May 1st and September 1st the largest cash sale entered is $97.01, and there is no previous entry of a cash sale since the business began of so large an amount as $500. The bankrupts' suggestion that the sale appearing on the books as $1,418.22 might be five or six sales in one item, as it appears in the record, has every appearance of being an afterthought. There is no evidence, and, as it seems to me, very little reason to believe, that this item or any one of the similar items was in fact so made up.

The books, in the case of cash sales, afford no means of verifying what they purport to show, because they do not, as in the case of credit sales, disclose the purchaser's name. But if the entries of cash sales represent actual transactions wherein goods were delivered to a purchaser in exchange for the amount of money stated, I do not see how, under the circumstances, the bankrupts can reasonably expect it to be believed that they are really unable to recollect in a single instance who the purchaser was. The cash sales of largest amount were made within the two months of October and November, 1906. Edward I. Margolis had before the failure been in the place of business all the time, deciding all questions which presented themselves in the business, and making practically all the sales which were made. When examined in June, 1907, he "could not remember" to whom he made the sale of $583.53 worth of goods sold October 3, 1906, for cash, according to the books, nor who the purchaser was in the case of the sales of $1,090.76 and $518.33 on October 4th, $749.11 on October 5th, $418.39 on October 6th, $1,418.22 on October 19th, $1,022.89 on October 24th, $869.44 on October 26th, $915.46 on October 27th, $543.92 on November 12th, $218.67 on November 21st, $615.76 on November 22d, $424.36 on November 23d, $298 on November 27th, $177.87 on November 28th, $156.44 on November 30th. The total of the above-alleged cash sales, made according to the books, within these two months is more than $10,000. The other bankrupt, Meyer H. Margolis, who shipped the goods, if they were sold as the books state, was equally unable to give, in the following June, any particulars regarding the purchasers or where the goods were sent. I am unable to believe that the bankrupts were honestly unable to remember anything more than they have told regarding the disposition of these goods. Considering that the purchases between June 1 and November 1, 1906, had been out of the ordinary course of their business,—that in the ordinary course of their business no such amount of goods as the books show would have been sold during October and November, 1906, nor any such amounts sold for cash,—the strong reasons found in the evidence for believing that they must have known, before October, that they would have to fail, —and their professed inability, eight months later, to remember any details which would have made verification of the book entries possible,— I consider the indications that the real facts are being withheld, because the bankrupts are afraid to let them be known, too strong to be disregarded. I am obliged to regard the book entries and the bankrupts' testimony about them as discredited, and the disposition of the goods which the entries of cash sales purport to represent as unexplained.

Although direct contradiction of the book entries is impossible, the

circumstances have thrown a burden upon the bankrupts of proving their assertion that the goods went to bona fide purchasers for the amounts set down in the books, which they have failed to sustain. The goods having disappeared, and the only attempt at accounting for their disappearance being thus unsuccessful, I think the specifications which charge transfer, removal, or concealment of goods with intent to hinder, delay, and defraud creditors sufficiently established by a fair preponderance of evidence. In re Meyers (D. C.) 96 Fed. 408; In re Leslie (D. C.) 119 Fed. 406; Seigel v. Cartel, 164 Fed. 691, 90 C. C. A. 512.

The above conclusion might be unwarranted if it were possible to say that the cash received from these goods, according to the books and the bankrupts' testimony, is satisfactorily accounted for. But, even if the entries on the books be accepted as a correct account of the disposition of the goods, and the burden to be sustained by the bankrupts be described as the burden of explaining how the large amount of money realized by these sales came to disappear before their bankruptcy, I am unable to see that they have accounted any more satisfactorily for the money than for the disposition of the goods. Only a very inconsiderable portion of the money appears to have been deposited in any bank account, and the firm's bank books, checkbooks, and checks, therefore, afford no assistance in showing what they did with by far the greater part of it. There are entries in the books which purport to account for it; but they are entries which afford little or no information in themselves, of the kind required under the circumstances, and such further information as the bankrupts are willing to attempt in their testimony seems to me subject to grave suspicion, where it is not to be regarded as wholly inadequate, in any event. According to the books, the two bankrupts withdrew in cash from the firm's funds between October 1st and December 4th the amount of $3,742.03; nearly all of it in amounts ranging between $169 and $674. Never before October 1st had their withdrawals been at anything like the same rate. They can give no account at all of the use they made of more than $700 out of this amount. The account they give of the use made of the remainder I find myself unable to regard as an honest account. Their books also show payments in October and November to Max Herman and Israel Herson, employés of the firm on salaries of $15 per week, to the amount of all of $1,220; but the evidence wholly fails, in my opinion, to show that they really owed these persons any such amounts as are said to have been paid them. Under date of November 21st is an entry in the cash book of "Expense, $118" which is unexplained, and is much larger than any item of "expense" found in the books under previous dates. $262.33 deposited in the United States Security Company and $300 deposited in a trust company were not found on deposit at the bankruptcy, and there is no check or explanation to show where the money has gone. Two notes, one of $300 and one of $500, appear by the books to have been paid December 4, 1906, the day the petition was filed. Who it was that got the money there is nothing to show, nor could the bankrupts recollect when asked about them in the following April. One of the bankrupts sold certain cut glass belonging to the firm for $106, after the bank-

ruptcy, and never accounted for the money to the trustee. He claims to have paid $6 of the amount for freight and $48 for wages due to Herman above mentioned and to another employé of the firm. If this transaction stood by itself, these statements might perhaps be accepted as true and the explanation that the bankrupt used the remaining $52 for personal expenses might be accepted as satisfactory. The view of the character of the bankrupts' testimony in general which I find myself obliged to take, as above stated, prevents me from thus accepting either the statements or the explanation.

For the reasons above given, I consider the charges of concealment of goods, or of money received for them, established by a fair preponderance of the evidence. A fair preponderance is, in my opinion, enough. In re Delmour (D. C.) 161 Fed. 589.

The application for discharge must be refused.

FARMERS' LOAN & TRUST CO. v. CENTRAL PARK, N. & E. R. R. CO. et al.

(Circuit Court, S. D. New York. September 17, 1910.)

STREET RAILROADS (§ 52*)—BONDS—PAYMENT OR PURCHASE.

Defendant railway company in 1872 issued a block of bonds payable in 30 years, and before maturity leased all its franchise property to another railway company, which subsequently became consolidated with the M. Company. In March, 1902, the M. Company executed a mortgage on all its property owned and leased to secure refunding bonds to replace bonds, including those in question, which were called "collateral bonds." The mortgage provided that after the maturity of any of the outstanding old bonds or collateral bonds, or within 12 months before such maturity, the railway company might sell refunding bonds in order to provide means to "purchase or pay" such outstanding old bonds or "to purchase" such collateral bonds as shall not have been delivered to the trustee and held by it under the mortgage and which have matured or are about to mature within 12 months, and that the trustee shall deliver to the railway company refunding bonds to the face amount of such outstanding old bonds or collateral bonds which have matured or are about to mature, provided that the par value of the refunding bonds so certified and delivered shall simultaneously be deposited in cash with the trustee in exchange therefor, and out of the cash so received by the trustee it shall on demand of the railway company and on delivery to the trustee of the outstanding old bonds or collateral bonds so paid or purchased by the railway company pay to the railway company a sum equal to the par value of the bonds so paid or purchased. Before the maturity of the collateral bonds, the directors of the M. Company requested the trustee to certify and deliver new refunding bonds to an amount equal to such 30-year collateral bonds outstanding on deposit with the trustee of an amount equal to the face of such refunding bonds in cash in exchange therefor, and directed the trustee on such deposit to pay $1,000 of the deposit for every $1,000 of the collateral bonds of the lessor company delivered to the trustee under the mortgage. *Held*, that as to the collateral bonds the refunding mortgage contemplated a purchase only, and not a payment of the bonds, so that a payment by the trustee out of the amount so deposited to the holders of the collateral bonds constituted a purchase thereof and not a payment and satisfaction of the bonds for the benefit of the lessor railway company.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 52.*]

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

In Equity. Suit by the Farmers' Loan & Trust Company against the Central Park, North & East River Railroad Company and others to foreclose a mortgage of the defendant railroad company referred to in the opinion as Central Park Company. The suit was brought while the property was in the actual custody of the court; jurisdiction not being disputed. Decree for complainant.

See, also, 175 Fed. 528.

Turner, Rolston & Horan, for complainant.

Thompson, Vanderpoel & Freedman, for defendant Central Park, N. & E. R. R. Co.

Masten & Nichols, for receivers Metropolitan St. Ry. Co.

Davies, Stone & Auerbach, for Guaranty Trust Co.

Byrne & Cutcheon, for Penn Steel Co. et al.

Bronson Winthrop, for Morton Trust Co.

LACOMBE, Circuit Judge. On December 1, 1872, the Central Park Company, in order to cancel and retire several prior issues of bonds, to pay certain other indebtedness, and to provide funds for further construction, etc., gave the Farmers' Loan & Trust Company, as trustee, the mortgage now in suit, covering all its franchises and property of every description, to secure the payment of $1,200,000 represented by an issue of 1,200 bonds of $1,000 each. These bonds, all of which were issued, were payable in 30 years, i. e., Dec. 1, 1902, and bore interest at the rate of 7 per cent. per annum, payable semiannually. The bonds were payable "at their office" in the city of New York; the context leaving it uncertain whether such "office" is that of the mortgagor or of the trustee. The validity of the bonds and mortgage is not in dispute. The bonds passed into the hands of many different holders for value. For some years the coupons were paid at the New Amsterdam Bank, but a short time before maturity of the bonds notice was given to all holders who came to the bank or elsewhere that they might present them to the Morton Trust Company to get their cash for their bonds and interest. All the bonds were there presented. Cash for the full amount, principal and interest, was paid to each holder by the Morton Trust Company, which thus came into possession of the entire issue. The fundamental question in this case is whether this transaction was a payment of the bonds or a purchase thereof.

The intervention of the Morton Trust Company as the disburser of this cash came about by reason of certain transactions hereinafter set forth.

In 1892 the Central Park Company leased all its franchises and property to the Metropolitan Crosstown Railway Company and the Houston, West Street & Pavonia Ferry Railroad Company, which last two companies with certain others in 1894 became consolidated into the Metropolitan Street Railway Company, hereinafter called the "Metropolitan." It will be more convenient to speak of the lease as if made directly to the Metropolitan. That company, itself owning many street surface railroads in Manhattan Island, leased many other railroads there located, thereby getting together a unitary railway system which included practically all surface lines. On March 21, 1902, it executed a mortgage covering all its railroad property, owned and

leased, which included this Central Park leasehold and also 3,000 shares (out of 18,000 shares) of stock of the latter company, which it then owned.

The situation at that time was this: There were bonds secured by mortgages falling due, in the near or remote future, upon lines owned by the Metropolitan and also bonds similarly secured on the various leased lines. If these were not provided for and default ensued, the unitary system might be destroyed by cutting out parts of it through sale under foreclosure. In order to provide for the preservation of the system and the financing of the obligations as they fell due, and also to provide $11,000,000 of new money for general betterments, etc., this mortgage securing an issue of $65,000,000 of bonds was executed to the Morton Trust Company as trustee. After providing for the issue of the $11,000,000 to obtain new money for the Metropolitan, the mortgage very carefully provided for the certification and disposition of bonds to take care of outstanding bonds. It first defines two classes of such bonds, viz., such as are liens on property owned by the Metropolitan, which are called "outstanding old bonds," and such as are liens on the property of lessor roads, which are called "collateral bonds." It also recites that payment of a large number of said outstanding old bonds and collateral bonds has been guaranteed by the Metropolitan. It then provides that, if the Metropolitan shall tender to the trustee any of said outstanding bonds or collateral bonds with all the unmatured coupons thereunto appertaining, the trustee shall in exchange therefor certify and deliver in exchange an equal number of bonds under this new mortgage. This method of disposing of outstanding bonds was not followed. As an alternative the mortgage provides as follows:

"At any time or times on or after the maturity of any of the outstanding old bonds, or collateral bonds, or within twelve months before such maturity, the railway company may sell refunding bonds in order to provide the means to purchase or pay such outstanding old bonds, or to purchase such collateral bonds, as shall not theretofore have been delivered to the trustee and held by it under this indenture, and which have matured, or about to mature within twelve months, and the trustee shall certify and deliver to the railway company, or upon its order, refunding bonds hereunder to a face amount equal to the face amount of such outstanding old bonds or collateral bonds which have matured, or about to mature within twelve months; provided that the par value of the refunding bonds so certified and delivered shall simultaneously be deposited in cash with the trustee in exchange therefor. Out of the cash so received by the trustee, it shall, on demand of the railway company and upon delivery to the trustee of the outstanding old bonds or collateral bonds so paid or purchased by the railway company, pay to the railway company a sum equal to the par amount of the bonds so paid or purchased."

There is a very plain and explicit distinction between the course to be pursued in relation to these two different classes of bonds. The "outstanding old bonds" are to be purchased or paid; the "collateral bonds" are to be purchased only. The reason for the distinction is manifest. Extinguishment of an "old bond" by payment would, by removing a prior lien, increase the value of the property mortgaged to the Morton Trust Company; extinguishment of a "collateral bond"

would inure solely to the benefit of the lessor company. There are also provisions providing for the cancellation, at the request of the Metropolitan, of outstanding old bonds acquired by the trustee; but there are no such provisions in relation to the cancellation of any collateral bonds acquired by the trustee, and the trustee was forbidden to cancel any bonds except as specifically provided. The mortgage also required that bonds "which shall be acquired by the trustee hereunder shall be stamped with the word 'Nonnegotiable,' held in trust for the purposes declared in the refunding mortgage of the Metropolitan Street Railway Company dated March 21, 1902, and (either with or without conversion into registered bonds at the option of the trustee) shall be held by the trustee as purchaser, as additional security for the payment of the bonds hereby secured."

The mortgage contains many other provisions which need not be recited. There is nowhere among them anything inconsistent with this carefully elaborated plan for purchasing collateral bonds at maturity with cash provided by the trustee through the sale of refunding bonds and keeping them alive as security for such new bonds. What took place as to the particular collateral bonds now in question (Central Park bonds due December 1, 1902) was as follows: On July 8, 1902, the board of directors of the Metropolitan passed a resolution requesting the Morton Trust Company, as trustee, to certify and deliver $1,200,000 face value of the new bonds under the mortgage, upon the deposit with said trust company of $1,200,000 in cash in exchange for such refunding bonds, and further requesting and directing the trust company upon such deposit in cash to pay $1,000 of the money so deposited for every $1,000 of the bonds (outstanding collateral bonds) of the Central Park Company, delivered to the said trust company as trustee under the said refunding mortgage. A great deal of testimony has been taken as to what subsequently took place, but the substance of it all is that the necessary amount of cash was furnished to the Morton Trust Company by new bondholders (under the Morton Trust mortgage) through the bankers who had underwritten the issue; that such cash was paid out to the individual holders of Central Park bonds upon the presentation of their holdings to the trustee; and that these bonds were stamped as provided for and have since been held by the trustee "as additional security" in accordance with the plan specifically prescribed, and they have never been canceled. The court is satisfied that what took place was what the parties to the refunding mortgage agreed should take place, and that these old Central Park bonds were not paid at maturity, but were acquired by the trustee by purchase from their holders. The last coupon on each bond was paid with money furnished by the Metropolitan Company, so the bonds only are now outstanding.

The terms of the lease by Central Park to Metropolitan have been discussed at great length in the briefs. This lease was included among the property mortgaged to the Morton Trust Company; but the present suit does not seek to foreclose any lien on that particular piece of property, and it would seem that its terms cannot be availed of to defeat the security created 20 years before upon which as purchaser of

the bonds thereby secured their present holder relies. It is concluded that these old bonds have never been paid, are still an outstanding obligation of the Central Park Company, and are secured by the mortgage now sought to be foreclosed.

Complainant may take the usual decree.

COLEMAN v. UNITED STATES. DUNN et al. v. SAME. TRUSS v. SAME.

(Circuit Court, N. D. Alabama, S. D. September 10, 1910.)

Nos. 1,198, 1,196, 1,197.

1. UNITED STATES (§ 127*)—CLAIMS AGAINST—TAKING OR INJURY TO PROPERTY—JURISDICTION UNDER TUCKER ACT.

Tucker Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), authorizing suits against the United States, does not authorize a recovery of damages for a consequential injury to property not amounting to a taking and for which recovery could be had only in an action of tort.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 127.*]

2. EMINENT DOMAIN (§ 98*)—"TAKING" OF PROPERTY.

In order that the flooding of lands resulting from the construction of a dam on a stream by the United States for the improvement of navigation shall constitute a "taking" of the land within the meaning of the fifth constitutional amendment, and entitle the owner to recover compensation therefor, it must amount to a permanent flooding and an actual ouster of the owner, the effect of which is the practical destruction of the value of the land. There is not such a taking where the land was previously subject to overflow each year in time of freshets, to such extent that it had not been cultivated for many years, and the only effect of the dam was to increase such overflows in extent and frequency, the land for the most part being free from water practically all the time; and in such case there can be a recovery only with respect to such portion as is permanently covered.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 252–255; Dec. Dig. § 98.*

For other definitions, see Words and Phrases, vol. 8, pp. 6851–6863; vol. 8, p. 7813.]

Actions against the United States by Thomas S. Coleman, by A. J. Dunn and J. N. Coleman, and by Martha C. Truss. Heard together. Judgment for the plaintiff Thomas S. Coleman, and for defendant in the other two actions.

Sterling A. Wood and Gardiner Green, for plaintiffs.

O. D. Street, U. S. Atty.

GRUBB, District Judge. These were suits filed by the respective plaintiffs against the United States, under the provisions of the Tucker act, to recover for the flooding, by the United States, of certain lands of the plaintiffs, located on the Coosa river, or its tributary, Broken Arrow creek, by the construction of a dam across the Coosa river. The three cases were, by agreement, tried together upon the same evidence, and the finding of facts and opinion apply in all of the cases.

The evidence showed that the plaintiffs owned and were in possession of the lands described in their respective petitions, at the time of the grievances therein complained of, and at the time of the trial; that in 1898 the United States, in improving the navigation of the Coosa river, which is a navigable stream, built a dam across the river at a point on the river about three-fourths of a mile below the land of the plaintiff Thomas S. Coleman; that in October, 1902, the United States raised the dam so constructed an additional height of 3 feet; that the dam was 700 feet in length and 15 feet in height; that the water of the river, in ordinary stage, just flowed over the dam; and that the entire length of the dam acted as a spillway. The evidence showed that the lands of plaintiff Thomas S. Coleman were on the bank of the Coosa river, about three-fourths of a mile above the dam; that the lands of the plaintiff Martha C. Truss and those of the plaintiffs A. J. Dunn and J. R. Coleman were on Broken Arrow creek, about 1½ miles from its junction with the Coosa river, which was about 1½ miles above the government dam on the river, the lands of the former lying down the creek from the lands of the latter, but close to them; that about two-thirds of the lands of Dunn and Coleman were bottom lands, and one-third hill lands; that the lands of Martha C. Truss and Thomas S. Coleman were creek or river bottom lands; that all the bottom lands were suitable for agricultural purposes, when cleared, except that they were subject to overflow in times of high water in the Coosa river; that none of the lands, except a small part of Thomas S. Coleman's, had been in cultivation since the War, and those of Dunn and Coleman and Martha C. Truss had the original timber still standing on them, when the dam was built and now, those of the latter having been cut over to some extent; that the lands of Thomas S. Coleman have no timber of any value or consequence on them; that other lands on Broken Arrow creek had been cultivated before the construction of the government dam, but their cultivation had been abandoned since the dam was built.

The evidence showed that the lands of all the plaintiffs had been accustomed to overflow in times of freshet in a way to injure crops long before the dam was built, but not to so great an extent as after its construction; that in dry seasons the bottom lands, similar to plaintiffs, would make a crop, but not in wet seasons, even before the construction of the dam; that the freshets in the river were likely to occur every month in the year, but principally from December to May or June; that the raising of the dam in October, 1902, raised the level of the water in the river at the mouth of Broken Arrow creek about three feet and caused the water to back up Broken Arrow creek to beyond plaintiffs' lands; that, except in times of freshet in the Coosa river, the backwater in the river and creek from the dam did not cause the water to get out of the bed of the creek on the lands of the plaintiffs Dunn and Coleman and Martha C. Truss at all, but did cause it to stand on about 2½ acres of the lands of Thomas S. Coleman in a slough that ran into the river; and that on this 2½ acres the backwater from the dam stood all the time. The evidence showed that both before and after the dam was built the water overflowed other parts of the lands of all of the plaintiffs in times of freshet, and that there

were low places on the lands of Dunn and Coleman and those of Mrs. Truss, into which the water flowed when the freshets came, and where it remained standing in ponds lower than the creek until it disappeared by evaporation; that when the water was just flowing over the dam, no part of the lands of any of the three plaintiffs was overflowed except the 2½ acres belonging to Thomas S. Coleman, nor was the water out of the channel of the creek as it flowed through the lands of Dunn and Coleman and of Martha C. Truss; that when the water, at the dam, was flowing over it three feet deep, there was but a half acre in the corner of Dunn and Coleman's land submerged, but the greater portion of Mrs. Truss' was under water at that stage; that when the water, at the dam, was flowing over the dam nine feet deep, practically all of the bottom land of Dunn and Coleman and of Mrs. Truss was under water.

The evidence showed that the lands on the creek and the river could only be successfully cultivated, after the dam was built, in dry seasons; that bottom lands not cleared on the creek or river were worth, at the time of the building of the dam, $15 an acre; that the timber on Dunn and Coleman's lands was reasonably worth $1,200 in its condition at the time of the trial, and that on Mrs. Truss' land $150; that a couple of acres of timber on the Dunn and Coleman land and a small amount on the Truss land had been killed by standing water; that the water neither before nor after the dam was built ever overflowed the hill land of the Dunn and Coleman tract, comprising one-third of it. The evidence showed that the effect of the dam was to back the water up Broken Arrow creek beyond the Dunn and Coleman lands, but not out of the creek banks, in times of ordinary water, and that in times of freshet on the river the effect of the dam was to back the water up the creek to a greater depth and extent than it was backed up by similar freshets before the dam was built, though such freshets had overflowed the lands on the creek, including those involved in the suits, every year since before the War. The evidence showed that there was a mill site on the lands of Dunn and Coleman which had not been used since the War, and that the building of the dam destroyed the value of the mill site, but only by deepening the water in the creek and thereby taking the fall out of it, and that the overflow on the lands of Thomas S. Coleman had destroyed one spring and had injured another. The evidence also showed that the lands of Dunn and Coleman were valuable for timber, cultivation, and milling, and those of Mrs. Martha Truss for timber and cultivation, and those of Thomas S. Coleman for cultivation only; that the values for all three purposes were impaired by overflows, both before and after the building of the government dam; that the overflows before the dam was built were due altogether to high water in the Coosa river, and after the dam was built to such high water aided by the government dam, which increased in extent and frequency the overflows on the lands above it on the river and creek, including those in suit.

Upon the forgoing facts, are the plaintiffs entitled to recover of the United States? This inquiry does not depend upon whether the lands of the plaintiffs were injured by the government dam, but upon whether the injury caused to them by it amounted to a taking of the

plaintiffs' lands, without compensation, within the meaning of the fifth amendment. For a consequential injury for which recovery could be had only in an action of tort, the Tucker act authorizes no suit against the United States. For recovery of compensation for a taking of property by the United States for an authorized improvement, the Tucker act authorizes an action. U. S. v. Great Falls Mfg. Co., 112 U. S. 645–656, 5 Sup. Ct. 306, 28 L. Ed. 846; Harley v. U. S., 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029; Manigault v. Springs, 199 U. S. 473–484, 26 Sup. Ct. 127, 50 L. Ed. 274; Bedford v. U. S., 192 U. S. 217–225, 24 Sup. Ct. 238, 48 L. Ed. 414; U. S. v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539; Mills v. U. S. (D. C.) 46 Fed. 738, 12 L. R. A. 673. These decisions also prescribe what constitutes a "taking," as distinguished from a mere consequential injury to property. In the case of U. S. v. Lynah, supra, the court quoted with approval from its opinion in the case of Transportation Co. v. Chicago, 99 U. S. 635, 642 (25 L. Ed. 336), the following:

"The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Company, 13 Wall, 166 [20 L. Ed. 557], and in Eaton v. Boston, Concord & Montreal Railroad Co., 51 N. H. 504 [12 Am. Rep. 147]. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient."

In the same case the court said:

"But as a practical matter, and for the purposes of this case, we must, under the findings, regard the lands in controversy as irreclaimable and their value wholly and finally destroyed. Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses, and that the government is under implied contract to make just compensation therefor."

In the case of Bedford v. U. S., supra, the court, distinguishing the case there under discussion from the Lynah Case, supra, and that of Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557, said (page 225 of 192 U. S., page 240 of 24 Sup. Ct. [48 L. Ed. 424]):

"In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years."

In the case of Manigault v. Springs, supra, the court said (page 483 of 199 U. S., page 131 of 26 Sup. Ct. [50 L. Ed. 274]):

"We do not think the overflow to the minor extent indicated constitutes a taking of property within the meaning of the law, when the damage can be prevented by raising the banks, or that, if the damage stated did in fact result, it would justify the interposition of a court of equity.

"The question whether the overflow of lands constitutes 'a taking' within the constitutional provision has been discussed in several cases in this court (citing cases). A recent case is that of United States v. Lynah, 188 U. S. 445 [23 Sup. Ct. 349, 47 L. Ed. 539], wherein it was held that where the government had placed dams and other obstructions in the Savannah river in such manner as to hinder its natural flow, and to raise the water so as to overflow plaintiff's lands and to cause a total destruction of their value,

the proceeding must be regarded as an actual appropriation of the land, and created an obligation upon the government to make compensation for the land."

After discussing the Mills and Bedford Cases, supra, the court said in this same case (page 484 of 199 U. S., page 132 of 26 Sup. Ct. [50 L. Ed. 274]):

"We think the rule to be gathered from these cases is that where there is a practical destruction, or material impairment of the value of plaintiff's lands, there is a taking, which demands compensation, but otherwise where, as in this case, plaintiff is merely put to some extra expense in warding off the consequences of the overflow."

A fair construction of these decisions leads to the conclusion that, in order that a flooding of lands may constitute a "taking," it must be not only a direct physical invasion of private property, but must also act as an actual ouster and cause a practical destruction of the value of the land. It is true that the words "material impairment" are used by the court in the case of Manigault v. Springs, but in association with and as equivalents of the words "practical destruction." The other cases cited clearly indicate that a taking must be such a physical invasion of land as to amount to a permanent flooding and an actual ouster of the owner, the effect of which is the practical destruction of the value of the land overflowed. The other cases cited, as well as the previous extracts quoted from the case of Manigault v. Springs, itself, show that the words "practical destruction" control the meaning of the words "material impairment," used in the same context in that case.

The cases at bar are cases of occasional, as distinguished from permanent, flooding, except as to the 2½ acres of Thomas S. Coleman. The overflows are not the direct result of water backed up from the dam, for in ordinary stages of the river no water is backed on the lands of any of the plaintiffs, with the exception indicated. The lands were accustomed to overflow in times of freshet before the dam was built, and had not been cultivated since the war, probably influenced by this fact. The effect of the dam was only to make such overflows more frequent and of greater extent. The lands were unoccupied by backwater, even after the building of the dam, practically all the time. There was no ouster, except as to the 2½ acres. The impairment in agricultural value was conjectural, in view of the fact that there had been no cultivation since before the War. The destruction of the small portion of the timber, shown by the evidence, if conceded, to be the result of the increased overflow due to the construction of the dam, would constitute an injury to and not a taking of the lands on which it stood. The major part of the timber, the reasonable value of which was $1,350, was uninjured at the time of the trial. Clearly such an injury would not constitute a taking. Injuries analogous to those to the mill site and to the springs have been held by many cases to be in their nature indirect and consequential merely. Injury to both timber and crops, from overflows, was occurring frequently, if not annually, before any dam was built. The value of the lands for both purposes was diminished and impaired by the existence of such overflows and the likelihood of their recurrence each year, even before the dam was built. It will not be contended that these prior conditions amount-

ed to an ouster of plaintiffs from their property or to a practical destruction of its value. The effect of the dam was merely to increase the likelihood and extent of similar overflows and the damage resulting therefrom, and thereby impair the value of plaintiff's property for cultivation to a greater extent. The difference was one of degree only. There was still no ouster of plaintiffs from their lands, no practical destruction of their value, nor was there a permanent flooding except of the 2½ acres.

The lands of the plaintiffs aggregate 240 acres, of which but 2½ acres were permanently flooded; 40 acres were located three-quarters of a mile above the dam; and 200, three miles from it, and on one of the tributaries of the river on which it was located. An application of the principle that would require the United States to acquire and pay for all lands similarly situated to those in controversy, equally distant and equally remotely affected by the improvement and in equal proportion to the part injured, would operate as a practical prohibition of such improvements to navigable streams; and, while this result should not be held conclusive of plaintiffs' rights, it is persuasive against the correctness of the application contended for by them.

In my opinion, the only land which can be said under the facts to have been taken by the United States and for which the government can be called upon to pay in this proceeding, is the 2½-acre tract of Thomas S. Coleman, the reasonable value of which at the time of the taking by the government I find to be $37.50, which, with interest from the date of the taking, amounts to $49.50, for which, and his costs, judgment is entered in favor of the plaintiff Thomas S. Coleman. The petitions of the plaintiffs A. J. Dunn and J. R. Coleman and that of Martha C. Truss are dismissed, at petitioners' costs.

The ANNA W.

(District Court, E. D. New York. August 22, 1910.)

1. COLLISION (§ 77*)—FAULT—ABSENCE OF LOOKOUT.

The absence of a lookout on a vessel stationed where he should be will not render such vessel in fault for a collision, where she was navigated exactly as she should have been had there been a lookout reporting the situation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140–149; Dec. Dig. § 77.*]

2. COLLISION (§ 61*)—TUG AND TOW MEETING SCHOONER—NEGLIGENCE OF TUG.

A collision between a schooner passing up the Main Ship Channel into lower New York Bay, at night, before the wind, but against an ebb tide at a speed of not more than 1½ knots and the tow of a meeting tug on a hawser 1,200 feet long, *held* due solely to the fault of the tug in failing to keep further toward the west side of the channel in view of her duty as the burdened vessel to keep out of the way and the length of her hawser, which by the set of the tide would cause her tow to sag to the eastward of her own course.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

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

8. COLLISION (§ 114*)—LIABILITY TO CARGO OWNER.

The owner of the cargo of a vessel sunk in collision which occurred through the sole fault of the other vessel is entitled to recover his damages against the vessel so in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 243; Dec. Dig. § 114.*]

In Admiralty. Suits by Jared Griffing, as owner of the schooner Daylight, and by the President and Directors of the Insurance Company of North America, against the steamtug Anna W. Decrees for libelants.

Garvan & Armstrong, for libelant Griffing.

Kneeland & Harison (Lawrence Kneeland, of counsel), for libelant Insurance Company of North America.

Carpenter & Park, for The Anna W.

CHATFIELD, District Judge. The libelant is the master of the three-masted schooner Daylight, which, on a voyage up the Atlantic Coast, entered New York Harbor, on the night of January 17, 1910. The sky was not clear, but, as all of the witnesses testified, lights could be plainly seen for a considerable distance. Between 4 and 5 o'clock in the morning, a breeze was blowing from the south, registering at Sandy Hook 9 knots an hour, but in this locality its strength was not sufficient to propel the loaded schooner against the tide at more than 1 or 1½ knots up the bay. At the point in question, which is in the neighborhood of the West Bank Light, just north of the junction of the Swash Channel with the Main Channel to the Lower Bay, the tide at the hour in question was running ebb, and setting with considerable strength to the southeast or toward the Ambrose Channel.

Under these conditions, the schooner, with her sails to starboard, was running before the wind on a course, as fixed by her captain, N. by E., which would be substantially up the channel. The lookout of the schooner was either below after a cup of coffee, or was just changing, and took no part in the proceedings. The captain was acting as lookout, from a point by the wheel; but his vision dead ahead was not as unobstructed as would have been that of the lookout, who should have been in the bow.

After leaving the Swash Channel, the schooner sighted a tow of one barge, upon a hawser 200 fathoms in length, drawn by the Anna W. This tow was seen coming down the channel shortly before 5 o'clock in the morning, at a distance of some two miles. The captain and others observed the course of the tow, straight down the channel, during all of that period, and claim to have seen both side lights of the tug. Another tow, with the tug Dubois, was slightly to the rear and to the westward of the Anna W., and the testimony of the captain of the Dubois throws considerable light upon the situation.

As the boats neared one another, the testimony indicates that the Anna W. was following a compass course approximately S. by W. ½ W.; the channel at that point being nearly S. by W. ¼ W. The tow,

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

as a whole, proceeded straight down the channel; the inclination of the tug toward the west offsetting the drift of the tide to the east, and was making some 8 knots over the ground.

The position of the various boats indicates that the Anna W. was about in the center of the channel, while her scow was further over toward the eastward, and that the Daylight was coming up just on the eastern side of midchannel. After the accident she floated well over toward the Ambrose Channel, before sinking; her position then being exactly indicated by the wreckers who raised her from where she lay. The strength and set of the tide was also observed by these wreckers in such a way as to verify the conditions above described, and the relative positions and movements of the boats are quite definitely established.

The captain of the schooner, upon reaching a point some 200 yards from the tug, observed what he thought was a turn to starboard and a shutting out of the tug's green light. As the schooner was substantially in the path of the tow at that time, it would seem that this change in the light was caused by the close approach of the tug upon its course across the tide, and not because of any substantial change of helm. But the captain of the schooner then assumed, from his observations at this point, that the tug was intending to pass the schooner to port, and he accordingly put his own helm to port so as to bear away from the tug. At this time he also noticed the three lights upon the mast of the tug, indicating a tow, and went forward to see if he could see where the tow lay. He failed to discover the lights of the tow, although the evidence showed that they were burning and in their ordinary positions. This failure to ascertain the lights of the tow may have been due to either of two causes. He may have confused the lights of the Dubois and its tow with those for which he was seeking, or he may have failed to notice the scow off to the east of the path of the tug, and hence in a direction substantially close under his bows, and where he could not locate them as readily without going to the extreme bow of his own vessel.

The effect of the ported helm carried the schooner off somewhat to the east, but not enough to bring her around to a position where her sails would jibe, or beyond a generally northeasterly course. The captain of the schooner testifies that she did not have steerage way sufficient to move more rapidly from the path of the tow, and that they passed the tug not more than 20 feet away; the crew of the tug estimating the distance between the boats at the point of passing as 100 feet. But, however that may be, it was an extremely short distance, and it would seem that the schooner did not have way enough to throw the bow around to the eastward sufficiently to avoid collision. But the schooner did work somewhat toward the east, and thus came in contact on her port bow with the forward port corner of the barge, breaking the hawser of the tow at a point near the scow, by the strain of collision.

The tug was headed S. by W. ½ W. and moving on a course S. by W. ¼ W. The schooner was headed N. by E. or N. ½ E., and proceeding N. by E. ¼ E. They were therefore moving on exactly paral-

lel courses. When approaching closely the tug would show her red light to the schooner's green light, for a time, and then, if they passed port to port, 100 feet apart, with the tow following in the path of the tug, the schooner could never have collided with the scow. But much more impossible would have been collision when the schooner fell off two points in going about 300 feet further; that is, if her bow moved a corresponding amount more to the eastward. The pilot of the tug claims that the schooner showed him her red light all the time, and that the schooner must have luffed in order to strike the scow. But the other testimony indicates nothing of the sort.

In this situation a difference of a few feet would have caused the vessels to clear; and it must be held that the captain and lookout of the schooner should have known where the scow was throughout the entire period. But the schooner had the right of way, and the presence of the lookout could not have made any difference in what the captain did after the tow crossed the schooner's bow. The captain did as he should in ordering the helm hard aport, and hence the failure to have a lookout to notify the captain that a tow was following should not be of itself considered actionable. The Farragut, 77 U. S. 334, 19 L. Ed. 946; The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519.

Under the conditions of wind and tide, the captain should have appreciated the position of the scow, in a tow coming straight down the channel for the distance covered while he was watching the tow; but a lookout on the bow of the boat might have been able to locate the scow and might have reported it before the captain found the tug would pass to port, and put his helm hard aport accordingly.

But that is pure speculation, and the burden was on the tug to so navigate as to clear the tow when holding her course and using reasonable care to avoid obvious danger. The absence of the lookout was not the proximate cause of the collision, and it is not clear proof of negligence, unless coupled with a failure to appreciate the true situation on the part of the captain of the schooner. He assumed that it was the duty of the tug to keep itself and its tow out of the way of the sailing vessel, and that therefore he was called upon to do nothing more than to indicate his own position to the tow, and to hold his course. Such would ordinarily be the rule. The Isaac H. Tillyer (D. C.) 101 Fed. 478; The Mary A. Bird (D. C.) 102 Fed. 648; The Fannie, 11 Wall. 238, 20 L. Ed. 114.

In the particular circumstances of this case, and when sailing without a lookout, the captain was bound to realize that ordinary conditions and dangerous situations could not be ignored by him, to the extent of failing to do what was proper to avoid collision, when a tow was crossing his course, when danger was imminent and when he had had full opportunity to realize, or by careful observation to ascertain, the exact necessities of the situation. But this apparently he did do. He did what he should have done if the lookout had reported the scow; and we must look to the action of the burdened vessel to see why it did not keep its tow clear.

The towboat was proceeding with a hawser 1,200 feet long. This, while not of itself forbidden at the time, was, under the conditions of wind and tide, a dangerous menace in that portion of the channel. A reference to the chart will show that upon the course indicated a hawser 1,200 feet long would sag diagonally over a considerable portion of the channel. The captain of the tugboat testified that he did not haul his boat further to the west and attempt to get out of the way of the schooner, for the reason that this would have taken him out of his course and into danger from the banks on the western side of the channel. He made no effort to do more than he did do, for the reason that he thought the tow would clear, and he would seem to have been negligent in both respects. With a hawser of this length, the burden being upon the steam vessel to keep out of the way of a sailing vessel, when the sailing vessel was fulfilling the duties required of her (The Fannie, supra, and The Isaac H. Tillyer, supra), the captain of the towboat should have so maneuvered that the length of the hawser would not of itself endanger the sailing vessel. Again, observing the condition of wind and the tide, the speed of the schooner, and the amount of steerageway at the time of passing, the captain of the towboat should have better estimated the ability of the schooner to protect herself, and also, realizing that the burden was upon him, keep out of the schooner's way; he should not have taken the chance which he did in anticipating that the schooner could clear his scow without further effort on his own part. The speed of the tow was much greater than that of the schooner, and, if the tug had stopped, the schooner could have cleared the scow, in all probability, even allowing for the drift of the tide. It is evident that, if the schooner had known what the tug was going to do, the accident might not have happened. If the tugboat had not committed acts of negligence on its part, the accident would not have happened. But the two transactions are so commingled, and the captain of the schooner did so exactly what he would have done if a lookout had been present, that the plain acts of negligence on the part of the tug must be held responsible for the result.

The president and directors of the Insurance Company of North America, suing as cargo claimants, have alleged faults on the part of the tugboat similar to those charged by the Daylight, and should recover therefor against the tugboat. The Atlas, 93 U. S. 302, 23 L. Ed. 863, and Erie R. R. Co. v. Erie Trans. Co., 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450. Even if any fault had been found on the part of the Daylight, it would not be actionable by the owners of the cargo, under the Harter act. The Chattahooche, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; Erie R. R. v. Erie Trans. Co., supra.

But the tugboat having been held at fault, the cargo libelants are entitled to hold her for their damage.

PEOPLE'S COAL CO. v. SECOND POOL COAL CO.

(District Court, W. D. Pennsylvania. September 8, 1910.)

No. 3.

1. NAVIGABLE WATERS (§ 24*)—OBSTRUCTION BY WRECK—LIABILITY OF OWNER FOR FAILURE TO MARK WRECK—ABANDONMENT.

Under Act March 3, 1899, c. 425, §§ 15, 19, 30 Stat. 1152, 1154 (U. S. Comp. St. 1901, pp. 3543, 3546), which provide that whenever any vessel or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and maintain such marks until it is removed or abandoned, and to at once commence the removal of the same, and that if not removed within 30 days, or if sooner abandoned, it may be broken up or removed by the Secretary of War, the neglect to mark a sunken craft as required is not a prima facie abandonment, nor is the failure to remove it an abandonment until the expiration of 30 days, and during all of such time it is the duty of the owner to keep the place marked, and if he does not he is liable for injuries caused to others thereby, unless there has been an actual abandonment.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. § 24.*]

2. NAVIGABLE WATERS (§ 24*) — OBSTRUCTION BY WRECK — LIABILITY FOR INJURY CAUSED TO OTHER VESSELS—"OWNER."

Respondent, a coal company, having in its possession as bailee a coal flat partly loaded with coal, moored to its float in the Allegheny river in Pittsburg, cast it loose during a flood, and it sank some distance below. The place was not marked, and some three weeks later libelant's vessel ran into it and was injured. *Held*, that respondent was the "owner," within the meaning of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), and required by such act to mark the place until the flat was removed or abandoned, and, it appearing that there had been no abandonment, that respondent was liable to libelant for the injury to its vessel.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 6, pp. 5134–5151; vol. 8, p. 7744].

In Admiralty. Suit by the People's Coal Company against the Second Pool Coal Company. Decree for libelant.

John G. Frazer and John J. Heard, for libelant.
L. C. Barton, for respondent.

ORR, District Judge. This is a libel in personam to recover damages for injuries to a steamboat, owned by the libelant, as a result of a collision with a sunken flat in the channel of the Allegheny river at Pittsburg. It appears that on March 15, 1907, a flatboat owned by the Diamond Coal Company and marked "Diamond Coal Company No. 33," being then partially loaded with coal and moored to a float of the respondent in the river at the foot of Thirty-First street, was permitted by the respondent to become separated from the float and to be carried by the current to a point near the foot of Twenty-Fifth street, where it sank in the channel of the river. There was at the

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

time very high water in the river, and great quantities of ice and other drift. Because of the action of such drift upon that flat and other flats attached to said float, it was deemed proper, in order to save the float, to cut the said flat loose and push it into the stream. On the 4th of April following, in broad daylight, the steamship W. C. Jutte, owned by the libelant, being then fully manned and in good repair and order, was proceeding down the river without a tow, when she ran upon the sunken flat and was so badly damaged by the force of the collision that she sank. No buoy or other thing had been placed over the sunken flat prior to this time to indicate the location of the obstruction, which was known to the respondent, but not to libelant. There was some evidence offered tending to show a swirl in the water immediately over the flat, such as would be caused by a sunken obstruction, and there was some evidence that there were many swirls in the water in the vicinity of this place, due to holes left by sand diggers or dredgers. After a careful consideration of the testimony, I am unable to find that there was anything above the surface of the water to give notice of the sunken flat.

A great deal of testimony was taken as to whether or not there was negligence on the part of respondent in cutting said flat from its moorings. Considering the condition of the river, and considering the obstructions upon the shore against which the float of respondent had been forced by the high water, I am of the opinion that there was no such want of care on the part of respondent as would make it liable by reason of the mere fact of cutting the flat adrift. Had abandonment (to be hereafter considered) taken place, at the time of cutting the flat adrift, the respondent might not have been liable to the libelant in this proceeding. The respondent insisted that there could be no responsibility upon it, for the reason, among others, that the respondent was not the "owner" of the sunken flat. The evidence shows that the respondent owns no boats or flats, but is in the coal business, buying coal from others, who deliver the flats, loaded with coal, to the respondent at its float, where the flats are unloaded by the respondent. When the flats are unloaded, they are removed from respondent's landing by the owners. The flat Diamond Coal Co. No. 33 had not been unloaded at the time it was cut loose, and could not then have been taken by the owner. It was in the hands of respondent as bailee. While not having the absolute, it had a qualified, property. It was a quasi owner. As such bailee the respondent was responsible to third persons for injury done by the flat. To hold otherwise would be contrary to principle.

Section 15 of the act of March 3, 1899 (30 Stat. 1152, c. 425 [U. S. Comp. St. 1901, p. 3543]), provides:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede or endanger navigation. And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately

mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Section 16 provides penalties for the violation of the provisions of the act.

"Sec. 19. That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction, shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: Provided, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed 'To whom it may concern,' in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof," etc.

It seems clear that within the meaning of this act the respondent is to be regarded as the owner of the flat and to be subject to the liabilities expressed or implied by the act for failure to buoy the sunken flat. The act itself is criminal in its nature, and imposes penalties for its violation, and does not create by its terms a liability to a party who may be injured by the violation of the statutory duty. It is true that at law, where a duty is imposed by statute, a remedy for a private wrong is not to be read into the statute, unless the duty may have existed at common law. This is not so in admiralty. There are a number of cases which hold that actual violation of a statutory rule imposes the burden upon the violating vessel to show, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Steamship Pennsylvania v. Troop, 19 Wall. 125, 22 L. Ed. 148; Taylor v. Harwood, Fed. Cas. No. 13,794. Prior to the act of Congress it was the duty of the owner of a sunken craft to put a buoy or light on it until it was abandoned. See Harwood v. Pearson, 1 Campbell, 515; White v. Crisp, 26 English L. E. 532; The Snark, 82 Law Times Reporter (N. S.) 42; B. & H. S. Co. v. The Norman C. Munson, 117 Mass. 34. There were many cases cited by the respondent in support of the proposition that the owner of a vessel which has been sunk in navigable waters is under no obligations to remove the vessel, or to answer for injuries caused thereby. But all these cases qualify the proposition, either expressly or impliedly, by the proviso that the vessel be "abandoned by the owner." A leading case cited by the respondent was Winpenny v. Philadelphia, 65 Pa. 135. In this case abandonment is emphasized by the following quotation from Shearman & Redfield on the Law of Negligence, § 583:

"If, however, instead of abandoning such wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise an ordinary,

and reasonable degree of diligence in removing it or preventing its doing injury to others."

It was urged on behalf of respondent that, because respondent had neglected its duty to mark the place of the sunken vessel and to immediately commence the removal of the same from the river's channel, that of itself constituted an abandonment, and therefore there is no responsibility. To hold this would permit the respondent to take advantage of its own wrong. The neglect to mark the sunken craft was no prima facie abandonment, and failure to remove was not abandonment until a period of 30 days had elapsed, or the Secretary of War had established the legal abandonment of the vessel within the statutory period. There is no evidence in this case that the Secretary of War had taken any steps to declare the abandonment of the vessel within 30 days, and therefore the respondent had all of 30 days to remove same before the sunken craft could be considered as having been abandoned. This seems to me to be a reasonable construction of the language of the act. In addition to this, the evidence fails to show that there was any abandonment of the vessel by the respondent. No notice of abandonment was given to the Secretary of War. Abandonment was not set up in the answer, which on the contrary, suggests retention of ownership, as appears by the following excerpt:

"When respondent was informed that said flatboat was sunken in said river, it at once took all possible steps to designate its presence by a buoy and have said obstruction removed, although it knew only by report that said obstruction was its flatboat. That it was impossible to remove said obstruction or designate its presence on account of said flood and high water, and that respondent used every effort so to do."

No person connected with the respondent in any way testified to the intention of abandoning the flat. On the contrary, while the river was still high, the superintendent of the respondent negotiated with a man named Jackson to place a buoy over the flat. Two days after the W. C. Jutte struck the sunken flat a buoy was placed over the flat by two men, one of whom had assisted in cutting the flat loose from respondent's float. The coal was taken out by some person or corporation designated by one of respondent's witnesses as "Iron City Hoist." Another witness, Gumbert, testified that Jackson raised the boat for him (Gumbert). When Jackson was on the stand as a witness for the respondent, he was not asked to explain his connection with the removal of the sunken flat, or his relations to Gumbert. It is true Gumbert testified that he removed the sunken flat for his own account, and not for the account of the respondent, with the knowledge and consent of the United States engineers in charge of the river. But Gumbert was discredited. The records of the engineers show no authorization to Gumbert for the removal, and no report that the flat had been removed. Shortly after the flat had been removed, it was seen in an unused part of the Ohio river with the name "Diamond Coal Company No. 33" painted out. Still the name and number could be read underneath the white paint. No person connected with the "Iron City Hoist" was called by the respondent, nor was the absence of the men who had buoyed the flat accounted for.

I am satisfied from the evidence that the respondent had no in-

tention of abandoning the flat, and did not abandon it. It could have been marked by a buoy by day and a light by night, as directed by the acts of Congress, at least from the time that the water fell to such level that vessels navigating the river would be likely to strike it. The evidence is uncontradicted that the flat could have been marked in 15 feet of water, which was the stage of water 12 days before the collision. As to the amount there is no serious dispute. I do not believe this is a case for apportionment, and hold the respondent liable for all of the damages suffered by the libelant, as averred in the libel, with interest and costs.

Let a decree be drawn accordingly.

BOND v. UNITED STATES.

(Circuit Court, D. Oregon. September 12, 1910.)

No. 3,162.

1. INDIANS (§ 18*)—INDIAN LANDS—ALLOTMENT—STATUTES—APPLICATION.

Act Cong. June 25, 1910, c. 431, 36 Stat. 855, provides that when any Indian to whom an allotment has been made, or may hereafter be made, dies before the expiration of the trust period, and before issuance of a patent, without having disposed of the allotment by will, the Secretary of the Interior shall ascertain the legal heirs of the decedent and his decision shall be final and conclusive. *Held*, that the act applies to any allottee who dies before the expiration of the trust period, whether the allotment has been made at the time of the passage of the act or is made in the future, and whether the death occurs before or after the passage of the act.

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

2. INDIANS (§ 13*)—INDIAN LANDS—ALLOTMENT—TITLE—TRUST PERIOD.

Under the general allotment act (Act Feb. 8, 1887, c. 119, 24 Stat. 388), providing for the allotment of lands in Indian reservations, the United States retained title and control over the allotted lands during the trust period without any right in the allottee, except to occupy and cultivate the lands under a paper or writing showing that at a particular time in the future, unless extended by the President, the allottee would be entitled to a patent for the fee.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

3. INDIANS (§ 13*)—INDIAN LANDS—ALLOTMENT—EFFECT.

An Indian allottee by accepting an allotment does not cease to be a ward of the government, but still remains in a condition of pupilage and dependency, the determination of all disputes concerning the allotment, its occupancy and possession, and the general control of the Indian remaining within the jurisdiction of the Secretary of the Interior.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

4. INDIANS (§ 18*)—INDIAN LANDS—ALLOTMENT—HEIRSHIP—DETERMINATION—JURISDICTION.

Act Cong. June 25, 1910, c. 431, 36 Stat. 855, providing that, if an Indian allottee dies before the expiration of the trust period and the issuance of a patent without having disposed of his allotment by will, the Secretary of the Interior shall ascertain the legal heirs of such decedent, and his decision shall be final and conclusive, operated to repeal Act Cong. Feb. 6, 1901, c. 217, 31 Stat. 760, conferring on Circuit Courts of the United States jurisdiction over matters growing out of the execution of the allot-

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

ment act, and deprived the courts of jurisdiction to determine such heirship, and, since the act of 1910 contained no saving clause, the authority of the courts under the repealed act of 1901 immediately ceased in so far as pending causes were concerned.

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

Suit by Frank Bond against the United States of America, as trustee for the heirs of John Calipooia, alias Calapooya Jack, deceased. Dismissed.

Thomas G. Hailey, Oscar Hayter, and W. E. Thomas, for plaintiff.
Walter H. Evans, Asst. U. S. Atty.

BEAN, District Judge. This suit was brought in 1907 by an Indian, Frank Bond, for a decree adjudging him to be sole heir of one Calapooya Jack, an Indian to whom an allotment of land was made in the Grand Ronde reservation in 1891, under the allotment act of February 8, 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 388). The government defends the suit on the ground that one Moses Lane, and not plaintiff, is the heir of the allottee and entitled to the land, and the only question for determination is which one of these parties is the legal heir of the deceased allottee. At the outset the court is confronted with the question of its jurisdiction over this controversy, or its authority to decide the question involved. After issue had been joined, but before trial, Congress passed an act approved June 25, 1910 (36 Stat. 855, c. 431), which provides:

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold; Provided, that if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor."

It has been suggested that this act has no bearing on the present suit (1) because it does not apply where the allottee had died before its passage; and (2) the jurisdiction thereby conferred on the Secretary of the Interior to ascertain the heirs of a deceased allottee is concurrent with the courts, and not exclusive The first point is concluded by the language of the act. It is made to apply to the case of any Indian to whom an allotment "has been" or "may hereafter be made," and who dies before the expiration of the trust period. In this respect it differs from the act of 1906 (Act May 8, 1906, c. 2348, 34 Stat. 183), which conferred somewhat similar powers upon the Secretary of the Interior as to allotments "hereafter" made. The later act includes any allottee who may die before the expiration of the trust period, whether the allotments had been made at the time of its passage or should be made in the future, and whether the death occurs before or

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

after the passage of the act. If, therefore, the jurisdiction thus conferred on the Secretary of the Interior is exclusive, the court should proceed no further in this suit, but dismiss it.

By the general allotment act (Act Feb. 8, 1887, c. 119, 24 Stat. 388) the President is authorized, whenever in his opinion an Indian reservation or any part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed or resurveyed and to allot the lands on such reservation in severalty to the Indians located thereon in certain specified quantities. The allotments were to be made by special agents appointed by the President and the agent in charge of the particular reservation under such rules and regulations as the Secretary of the Interior may, from time to time, prescribe, and to be certified to that officer for his action. Upon approval of the allotment by the Secretary of the Interior, he was required to cause patents to issue in the name of the allottee, declaring in legal effect that the United States does and will hold the land therein allotted for the period of 25 years in trust and for the sole use and benefit of the allottee, or, in case of his death, of his heirs, according to the laws of the state or territory where the land is located, and at the expiration of such period, unless it be extended by the President, to convey the same to him in fee, discharged of the trust. By this act, the United States retained title to and control over the allotted lands during the trust period, without any right in the allottee to do more than occupy and cultivate them under a paper or writing, showing that at a particular time in the future, unless it is extended by the President, he would be entitled to a regular patent, conveying the fee. The property did not cease, by the allotment, to be the property of the United States nor subject to its control, nor did the allottee cease to be a ward of the government. The title still remained in the government, and the allottee remained in a condition of pupilage and dependency. The determination of all disputes concerning the allotment, its occupancy and possession, and the general control of the Indian remained with the Secretary of the Interior.

The supervisory power and control of the United States over allotted lands during the trust period was pointed out by the Supreme Court in United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. This was a suit instituted at the direction of the Attorney General to restrain the collection of taxes on permanent improvements and personal property used in the cultivation of lands allotted to and occupied by certain Indians in the state of Dakota. The court held that, notwithstanding the allotment, the United States reserved such control over the allotment as was essential to cause the allotted lands to inure during the period in which they were to be held in trust "for the sole use and benefit of the allottees," and that the land, the improvements thereon, and the personal property used in their cultivation were mere instrumentalities of the government employed for the benefit and control of a dependent race, and were therefore not subject to taxation by the state, and that the government had such interest therein that it could maintain a suit to restrain the collection of such taxes. The title to the land and the consequent control thereof being in the United States, it was subsequently held in the Smith Case, 194 U. S. 401, 24

Sup. Ct. 676, 48 L. Ed. 1039, and the Kalyton Case, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566, that the sole authority for settling all controversies necessarily including the determination of the title and incidentally the right to the possession of the Indian allotments while the same were held in trust by the United States resided in the Secretary of the Interior, and were not cognizable by any court, either state or federal, except as such authority has been expressly conferred by act of Congress. It follows, therefore, that unless the court has jurisdiction to ascertain and determine disputes arising over the question of heirship of deceased allottees by virtue of some act of Congress, and especially if Congress has conferred exclusive jurisdiction over that question upon another department of the government, the court is without authority to proceed in the matter. Now the only act of Congress conferring authority upon the courts is that of February 6, 1901 (Act Feb. 6, 1901, c. 217, 31 Stat. 760), which provides inter alia, as follows:

"That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, that the right of appeal shall be allowed to either party as in other cases."

This law clearly gives the Circuit Court of the United States jurisdiction over matters growing out of the execution of the allotment act, but whether it is confined to questions concerning the right to an allotment, or is broad enough to include disputes over possession, descent, and partition of the lands after the date of the allotment and before final patent, is by no means clear. This question, so far as I am advised, has never been directly passed upon by the courts, although suits to ascertain the heirs of deceased allottees have been instituted and decided. If, however, Congress intended by the act of 1901 to confer upon the courts jurisdiction to determine questions of heirship and descent as it may affect allotted lands during the trust period, it was a jurisdiction which it could take away at any time. This it did by making the Secretary of the Interior a special tribunal to determine such questions and declaring that his decision shall be "final and conclusive," thus making the jurisdiction conferred upon him exclusive, and to that extent operated as a repeal, by implication, of the act of 1901, conferring jurisdiction on the courts. U. S. v. Tynen, 11 Wall. 88, 20 L. Ed. 153; Eckloff v. D. C., 135 U. S. 240, 10 Sup. Ct. 752, 34

L. Ed. 120. And, as there is no saving clause, the authority of the court immediately ceased over pending cases.

In my judgment, therefore, the court has no jurisdiction of this suit, but the question sought to be litigated must be determined by the Secretary of the Interior.

The suit will be dismissed.

In re KYLE et al.

In re SWEETSER.

(Circuit Court, D. Massachusetts. September 8, 1910.)

No. 690.

1. BANKRUPTCY (§ 439*)—APPELLATE JURISDICTION—ACT OF 1867.

Under Rev. St. § 4986, which is a part of Bankruptcy Act March 2, 1867, c. 176, § 2, 14 Stat. 518, giving the Circuit Court "general superintendence and jurisdiction of all cases and questions arising in the District Court * * * when sitting as a court of bankruptcy," such supervisory jurisdiction may be exercised by the Circuit Court before the District Court has taken final or even interlocutory action thereon, if the matter has been considered and an opinion rendered in the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 439.*

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

2. BANKRUPTCY (§ 273*)—ACT OF 1867—DUTY OF ASSIGNEES TO DEPOSIT FUNDS.

Under Bankruptcy Act March 2, 1867, c. 176, § 17, 14 Stat. 524 (Rev. St. § 5059), which requires an assignee to deposit any money of the estate coming into his possession in an authorized depository in his name as assignee, or otherwise keep it distinct and apart from other money, an assignee who as such has receipted for money has no right to retain the same and apply it in payment for his legal services rendered the estate or in repayment of disbursements made, but it must be deposited as money of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 273.*]

In the matter of Elbridge L. Sweetser, bankrupt. On petition for revision by Warren O. Kyle and W. B. H. Dowse. Order directed in accordance with opinion of District Court.

See, also, 168 Fed. 1018.

Warren Ozro Kyle, pro se.

Fred Joy, for petitioner W. B. H. Dowse.

Hollis R. Bailey, for John C. Hammond and others.

LOWELL, Circuit Judge. This is a case arising under the bankrupt act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). Certain creditors of the estate of the bankrupt Sweetser filed a petition in the District Court representing that Kyle and Dowse, assignees of the estate, had received from the estate certain sums of money, part of which they had not deposited in a duly designated bank; but a part of the money so received had been taken by Kyle to his own use. The creditors prayed:

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

"That said assignees may be required forthwith to return said money wrongfully taken by them as aforesaid, and for such other relief in the premises as may seem to the court reasonable and proper."

To this the assignees filed an answer stating in general that the sums taken or retained by Kyle were retained in payment of services and disbursements made by him in the conduct of the litigation which produced the money for the estate; and further that all moneys received by them as assignees are now upon deposit in a statutory repository.

The petition and answer appear to have been sent to the register in accordance with the usual procedure. In his report he says, "The facts, briefly stated, are as follows." These facts, with the register's opinion on the questions presented by the petitioners, are contained in his report, and so far as that report contains statements of fact these may be taken to be the register's findings. At the close of his report, after an expression of opinion upon the questions involved, he made the following "Rulings and Findings: Rulings":

"(1) It is the duty of an assignee receiving moneys belonging to the estate to deposit the same in some authorized depository. I find that Mr. Kyle, assignee in the Sweetser case, violated that duty by using his own unauthorized bank account for that purpose.

"(2) It is the duty of an assignee claiming compensation for services rendered to obtain, before taking the same, an order of court fixing the amount of the same and authorizing payment. I find that Mr. Kyle, the assignee, violated this duty by paying himself the sum of $4,252.76 for services, without first obtaining the approval of court.

"(3) Mr. Kyle, assignee, violated his duty in both the above acts, by doing the same without obtaining authority from his co-assignee.

"(4) An assignee, having taken money unlawfully, should be ordered to repay the same forthwith."

No further findings appear. At the respondents' request, the learned register certified and reported to the district judge "all questions raised by the foregoing report."

The learned judge of the District Court filed an opinion setting out the facts as follows:

"As the result of long-pending litigation finally determined by the decision of the United States Supreme Court in Hammond v. Whittredge, 204 U. S. 538 [27 Sup. Ct. 396, 51 L. Ed. 606], affirming the judgment or decree of the Supreme Judicial Court of Massachusetts in Whittredge v. Sweetser, 189 Mass. 45 [75 N. E. 222], the respondent Kyle received toward the satisfaction of said judgment $2,661.25 in October, 1907, and $17,446.32 in January, 1908, in all $20,107.57.

"These payments were made by the trustee under the will of Solon O. Richardson, against whom the judgment had been entered, in partial payment of the amount due from him. He delivered checks aggregating the above amounts to the respondent Kyle, who gave receipts for them on behalf of his co-assignee Dowse and himself, signing the receipt as follows:

"'William B. H. Dowse,
"'Warren Ozro Kyle,
"'Assignees in Bankruptcy of E. L. Sweetser,
"'By Warren O. Kyle.'

"Proceedings in this case are governed by the bankruptcy act of 1867 and by the general orders of the Supreme Court in pursuance thereof. Section 17 of that act requires an assignee as soon as may be after receiving any money belonging to an estate to deposit it in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession. Rev. St. § 5059. No. 28 of the general orders referred to pro-

vides for the designation by the District Court of national banks as depositories in which all moneys received by assignees shall be deposited, and that every assignee shall deposit all sums received by him on account of any bankrupt estate in one designated depository. It also provides that no money so deposited shall be drawn from such depository except upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge or register. These requirements have not been complied with in respect of all the money received by Kyle as above. $15,000 only has been so deposited. The remaining $5,127.57 has never been so deposited. Kyle has paid $500 of it to the register on account of fees due him and has used $374.81 of it in paying sundry current expenses in connection with the litigation. To the disposition made of this $874.81 the petitioners do not object. The remaining $4,252.76 Kyle has deposited to his own personal account in a bank not designated as a depository. To the disposition made by him of this $4,252.76 the petitioners do object, and they ask that he be ordered to deposit it in the same account with the $15,000.

"In their joint answer to the petition, the assignees deny that the above amount of $5,127.57 was received by them 'as assignees,' and allege that this amount was received by Kyle as their attorney, 'who had rendered professional services and made advances for the estate for very many years.' It was retained by Kyle, according to the allegations of the answer, 'in payments of services and disbursements made by him in the conduct of prolonged litigation conducted by him for the benefit of the estate, said litigation covering proceedings in the probate and Supreme Courts of this commonwealth and in District, Circuit, and Supreme Courts of the United States, prosecuted in the effort to secure the estate of the bankrupt and for the benefit of the creditors.' The answer goes on to deny that any unnecessary expense has been incurred and to allege that all moneys received by them 'as assignees' have been duly deposited. It alleges no other reason against making of the order prayed for.

"The petition and answer, having been filed in court, were referred to the register for his action thereon. After a hearing, he has found the facts and has certified and reported, at the respondents' request, all questions thereby raised. In his finding of facts are included further details in connection with the facts above recited; but these, for the most part, do not seem essentially important upon the questions to be decided. The evidence before him accompanies the report.

"Mr. Kyle offered before the register to prove that, as counsel for the assignees, he had rendered services and incurred expenses at various times, since the early part of 1901, in various proceedings relating to the estate before state or federal courts, and that a fair remuneration and reimbursement to him therefor would exceed the $4,252.76 here in question."

The learned judge then went on to render his opinion on the questions presented, and agreed with the register, except that he held that the order for the return of the money, which order was mentioned in the register's opinion but was never made, should apply to Mr. Dowse as well as to Mr. Kyle.

Messrs. Dowse and Kyle thereupon filed a petition for revision in this court against the creditors above mentioned, in which petition they assert that the district judge made rulings in his opinion on questions certified by the register, and that they are aggrieved by the following rulings of the District Court:

" 'It follows that it is wholly immaterial to the questions before the register whether Mr. Kyle has or has not made disbursements and rendered services as counsel in connection with the litigation referred, or to what amount, if to any amount. The $4,252.76, having been received by him in the manner stated, as is not denied, became at once money belonging to the estate which, under Rev. St. § 5059, he was bound to deposit in the same designated de-

pository as that in which the $15,000 has been deposited. The petitioners are entitled to have the order made, for which they ask.

" 'Mr. Kyle's disposition of the money may have been without Mr. Dowse's authority, approval, or knowledge at the time; but the answer to the petition, which undertakes to justify what Mr. Kyle did upon the grounds stated above, is in the name of and is signed by both assignees. Under these circumstances, I do not see why any order to be made should not be made against both of them.'

"Wherefore your petitioners pray that said rulings may be revised and set aside and held for naught, and that by order of this court it be decreed that your petitioners have a right to show what services had been rendered by respondent Kyle as solicitor and counsel in proceedings in equity to create, secure, and protect the fund paid over to him, as stated in 'Exhibit D,' and that the evidence offered on this point was relevant and material; that your petitioners be permitted to establish the amount and value of the services rendered by your petitioner Warren Ozro Kyle as solicitor and counsel in creating, preserving, and recovering the fund paid into his hands as the result of long and arduous litigation; that it be decreed that the amount so ascertained was and is rightfully retained out of said fund and is the property of your petitioner Warren Ozro Kyle; that it be decreed that no order should be made against your petitioner William B. H. Dowse in any event to deposit in any bank to the credit of the bankrupt estate or pay into court the whole or any part of said amount deducted by your petitioner Warren Ozro Kyle on account of his services and expenses as solicitor and counsel in relation to said fund as aforesaid; and that your petitioners be given such other relief as shall be proper."

To this petition the respondent creditors demurred.

From the matters above stated, it appears that this court is asked to revise the proceedings in the District Court in the absence of any order made therein, and especially to revise certain alleged rulings of the District Court which are rather expressions occurring in the course of the opinion of the learned district judge. This is in effect an appellate proceeding, with nothing but expressions of opinion to appeal from. Under these circumstances, appellate proceedings are ordinarily out of the question and should be immediately dismissed. Rev. St. § 4986, provides, however, that this court "shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court, * * * when sitting as a court of bankruptcy," and counsel on both sides are agreed that the section authorizes this court to pronounce upon "cases and questions," before the District Court has taken final or even interlocutory action thereon. That the law should be thus construed embarrasses this court, sitting as a court of appeal; but its exercise of jurisdiction under the bankruptcy act of 1867 has become almost obsolete, and further comment is superfluous. See In re Sweetser (C. C.) 168 Fed. 1018; also, 157 Fed. 567.

I hold that the learned judge of the District Court was right in ruling that Mr. Kyle must be deemed to have taken the money received by him as assignee in bankruptcy. Mr. Kyle contends that in obtaining the money he was in effect acting merely as the assignees' counsel and not as assignee; and that as counsel he had the right to retain the money in question in payment of his legal services. But if Mr. Kyle had the right and the desire to retain this money in his office as attorney, without regard to his office as assignee, he should, at least, have made his receipt the unequivocal expression of his intention. The receipt must be given its natural meaning, which imports a receipt by the

assignees rather than by their counsel, and the statute requires explicitly that every assignee shall deposit all sums received on account of any bankrupt estate in a designated depository. In the receipt which he gave Mr. Kyle declared that this money was so received, and therefore, at the least, he should have passed it through the statutory depository. This has not been done, and it must be done.

The learned register and the learned district judge appear also to have been of the opinion that any payment by the assignees to Mr. Kyle would be unlawful without an order of the court of bankruptcy previously obtained. I do not find it necessary to determine as a matter of law that assignees in bankruptcy, having properly deposited the money they have received, must in all cases be compelled to refund a payment made to one of their number for legal services unless an order of court for the payment has theretofore been actually made. If such a payment were accompanied by an account praying allowance of the payment, the court of bankruptcy might perhaps have a discretion not to require a formal refunding to the estate, if it was satisfied that the payment was otherwise proper. Considering the illegal act already committed in this case, I see no reason to overrule an expression of opinion by the District Court applicable only to circumstances which may never arise.

Mr. Dowse received no part of the money, but in these legal proceedings he has definitely joined Mr. Kyle. Although the name of his counsel appears upon the briefs filed, no argument has been urged to distinguish his case from that of Mr. Kyle.

The creditors herein urge that interest should be allowed upon the money which the court of bankruptcy will direct Mr. Kyle to deposit as moneys of the bankrupt estate. The learned judge has found "no reason in what appears to charge Mr. Kyle with any bad faith in what he has done," and on the question of interest neither the learned register nor the learned judge has even expressed an opinion. Perhaps they will order the payment of interest, and perhaps they will not. Even if it be true that under Rev. St. § 4986, appellate proceedings may be based upon an expression of opinion and upon so-called rulings which have not resulted in binding any one, yet I cannot think that this appellate jurisdiction extends to correct that which has never yet entered into the consideration of the District Court. At some time and in some manner Mr. Kyle may be entitled to compensation for his legal services rendered to the estate. In fixing this compensation, the District Court will doubtless take into consideration Mr. Kyle's unlawful act as assignee. It is the respondents in this proceeding who urge this correction of the supposed future action of the District Court, and the respondents are not petitioners for the exercise of this court's superintendent jurisdiction. In accordance with its opinion on file, the District Court should order the assignees to pay into the statutory depository the sums retained by Mr. Kyle. The respondents' demurrer is sustained, and the petition is dismissed, with costs.

In re GEISELHART.

(District Court, W. D. Pennsylvania. September 14, 1910.)

No. 4,005.

BANKRUPTCY (§ 252*)—ACTIONS BY TRUSTEE—POWER TO SETTLE SUIT.

An insolvent within four months prior to his bankruptcy gave to a creditor a judgment note on which a judgment was entered. Afterward the debtor sold certain real estate, and conveyed it by a warranty deed subject only to certain mortgages. The purchase money was paid except a sum retained and placed in the hands of a trustee under an agreement that it should be used to pay off certain liens, and the remainder paid over to the vendor when he satisfied or procured the discharge of the lien of said judgment. On petition of the trustee in bankruptcy, the court struck off the judgment on the ground that it constituted a preference in violation of the bankruptcy act, but its judgment was reversed by the Supreme Court of the state on the ground of irregularity in procedure, but leaving the merits of the case open to further litigation in a proper proceeding. Subsequently the trustee, with the approval of the referee, agreed to a settlement with the owner of the judgment, by which the latter was to pay the trustee a certain sum in consideration of which no further attack was to be made on the judgment. The effect of such settlement would be to leave the property sold subject to the lien of the judgment, which, with interest, exceeded the sum reserved by the purchaser by more than $1,200. *Held*, that the right of the trustee to make such settlement was no greater than that of the bankrupt; that since the latter, in view of his warranty deed, would not be permitted to make it and receive money from the judgment creditor at the expense of his grantee, it would be inequitable to such grantee to permit the trustee to do so by ratifying what was presumptively from the judgment of the state court an illegal preference, and that an offer by the grantee to pay the costs already incurred and to furnish counsel to continue the litigation should be accepted.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 252.*]

In the matter of Theodore H. Geiselhart, bankrupt. On review of order of referee. Reversed.

Way, Walker & Morris, for creditors.
Gordon & Smith, for trustee.

ORR, District Judge. This matter comes before the court upon a petition to review an order of the referee authorizing and directing the trustee to make settlement of a controversy. The matter was heard by the referee upon the petition of the trustee and answers filed. No testimony was taken. The facts as disclosed by the petition and the answers are as follows:

On January 20, 1908, a d. s. b. judgment was entered in the court of common pleas No. 1 of Allegheny county in favor of Joseph Exler and against the bankrupt for $3,219. On February 14th the said bankrupt, by deed in fee simple with covenants of warranty and against encumbrances, sold and conveyed to Anderson L. Warren and others certain real estate for a consideration of $17,000, subject to mortgages in the sum of $7,000 by former owners. At the time of the delivery of the deed the vendee retained in his possession out of the purchase money the sum of $3,475, which was placed in the hands of Way,

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

Walker & Morris, attorneys for the vendee, to hold until the bankrupt should have procured the discharge or satisfaction of all liens except the $7,000 in mortgages. The material language of their agreement being as follows:

"Which checks or the proceeds thereof we agree to hold in trust for said Theodore Geiselhart until such time as he shall have satisfied a judgment in favor of Joseph Exler against the American Box Company and said Theodore Geiselhart amounting to $3,219.30, said judgment being entered at No. 205, March term, 1908, d. s. b. When said judgment has been satisfied, we agree to turn over to said Geiselhart said checks or the proceeds thereof, less interest on mortgages referred to in said deed from September 25, 1907, to February 15, 1908, and also less whatever taxes against said property remain due and unpaid."

On March 5, 1908, Geiselhart, the vendor, was adjudged a bankrupt. Subsequently the trustee instituted proceedings in the court in which the judgment was recorded to have the judgment declared invalid as being an unlawful preference. The proceedings in the common pleas court were so proceeded with that the court struck off the judgment because the court found from testimony taken that at the time of the giving of the judgment Geiselhart was insolvent; that Exler, the judgment creditor, knew that he was insolvent; and that the judgment note was given and entered within four months of the date of the petition in bankruptcy. An appeal having been taken to the Supreme Court of Pennsylvania from that decision, the judgment of the lower court was reversed solely on the ground that the court below erred in striking off the judgment for matters dehors the record, and holding that the questions considered by the judge should be passed on by a jury. By such proceedings costs were incurred to the extent of $337.65, to pay which the trustee has no funds in hand. The trustee has entered into negotiations with the judgment creditor resulting in an offer that the creditor pay the costs and pay in addition $1,100 to the trustee, with a view of eliminating the trustee from the controversy and affirming the validity of the judgment lien upon the property of Warren. If the controversy is not settled as proposed by the trustee, it will be probably three years before there can be a final adjudication of the question along the lines suggested by the Supreme Court of Pennsylvania. There is in the hands of Way, Walker & Morris, now remaining out of the money originally left in their hands, the sum of $2,700 or thereabouts. If the controversy be successfully carried on by the trustee, he will be subrogated to the rights of the bankrupt, and there will be a fund in the hands of Way, Walker & Morris for creditors. If the controversy be settled as proposed, Warren, in order to save the property purchased by him, will have to pay more than $1,200 in addition to the money in the hands of Way, Walker & Morris. It is probable that the evidence will produce the same effect upon the minds of jurors that it did upon the mind of the judge of the court of common pleas. The purchaser Warren has offered to pay into the hands of the trustee the sum of $500 sufficient to defray the actual expenses of continuing the litigation, and has tendered the services of competent counsel to take charge of the interests of the trustee in said litigation. Certain creditors urge the con-

tinuance of the litigation and the acceptance of the offer made by the said Warren with respect to costs and counsel.

The referee was of the opinion that Mr. Warren had no standing to be heard in the proceedings, and he was further of the opinion that because of the lapse of time before the ultimate decision of the litigation, and because the issue of the litigation was doubtful, that, therefore, the settlement by the trustee with Mr. Exler on the terms proposed was proper. No briefs were furnished by counsel for either party. It was strongly urged on behalf of Warren that it was inequitable to permit such settlement.

The position of Warren is peculiar. At the time of his purchase Geiselhart, the bankrupt, by virtue of the covenants in his deed and the trust recited by Way, Walker & Morris, was bound to procure the release or satisfaction of the Exler judgment. It is true that, if Geiselhart did not procure the release or satisfaction of the judgment within a reasonable time, Warren would have been justified in applying the money in his hands to the liquidation of the judgment. Likewise the trustee, if he should procure the satisfaction or discharge of the judgment, would be subrogated to the right of the bankrupt to receive the money in the hands of Way, Walker & Morris. With that theory in mind, the bankrupt on the 14th of June, 1908, presented his petition in the court of common pleas to have the judgment stricken off, and it was not until January 3, 1910, that the Supreme Court of Pennsylvania decided that the proceedings were irregular. Now, the trustee proposes to do what the bankrupt would never have been permitted to do by a court of equity—take money from the judgment creditor, and leave the terre tenant in the lurch. It seems to us inequitable. One way, and one way only, is pointed out by which the bankrupt could have the benefit of the money in the hands of Way, Walker & Morris, and that was by procuring the release of the lien or a satisfaction of the judgment. The bankrupt could not have made any agreement with the judgment creditor by which he would profit at the expense of the vendee in violation of the contract. It seems inequitable that the rights of the trustee should be higher than the rights of the bankrupt in such a case as this. If the judgment creditor should make any pecuniary concessions, they should be for the benefit of the terre tenant, and in reduction of the amount of the lien which the bankrupt vendor agreed to remove. The proposed settlement does not contemplate any benefit to the terre tenant. Had the trustee declined originally to have the judgment set aside as a preference, Warren might have presented an equitable claim in bankruptcy against the estate of the bankrupt, because of the breach of the covenants in the bankrupt's deed to him. It is now too late for such claim to be presented. Warren seems to have relied upon the sufficiency of the evidence to set aside the judgment as an unlawful preference, and to have properly recognized himself as liable to pay to the trustee the money in his hands, when such judgment should have been set aside. He has such confidence still that he is willing to pay the sum of $500 into the hands of the trustee and to furnish counsel to proceed with the litigation.

I am also of the opinion that it is against the interests of the creditors to permit such settlement. It is for their interest that Warren's

offer be accepted. It is not necessary to consider whether or not, if the trustee did accept the settlement as proposed, the terre tenant could resist the collection of the full amount of the judgment.

The question before the court is answered in the negative, and the order of the referee must be reversed.

UNITED STATES v. ST. JOSEPH STOCKYARDS CO. (four cases).

(District Court, W. D. Missouri, St. Joseph Division. September, 1909.)

Nos. 448–451.

1. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—CARRIERS SUBJECT TO ACT—STOCKYARDS COMPANY.

A stockyards company owning stockyards and doing what is known as a terminal business, having switch tracks encircling its yards and connecting therewith and with trunk line railroads so that all cars of stock in and out of its yards must pass over its tracks, which it alone operates with its own engines and crews, which issues no bills of lading and receives no part of the freight paid the trunk line railroads, but charges a fixed price per car for all cars moved from the connection therewith to its yards or to packing houses, is a railroad company and a common carrier of freight for hire with the rights, duties, and obligations of a common carrier for hire, and subject to the provisions of Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), where it participates in the carriage of an interstate shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.*]

2. COMMERCE (§ 35*)—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

The transportation of cattle from a point in another state to the chutes at the stockyards at South St. Joseph, Mo., is a continuous shipment, all of which, including the transportation by the stockyards company over its own tracks, is of an interstate character and covered by Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 35.*]

3. CARRIERS (§ 219*)—CARRIERS OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—CONSTRUCTION.

Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), is remedial, its main purpose being to prevent cruelty to the animals shipped, and it cannot be construed as not applicable to a defendant carrier because such carrier did not know how long a connecting carrier from which it received cars of cattle had kept such cattle in confinement without food or water, but it must learn such fact at its peril.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 219.*]

4. CARRIERS (§ 219*)—CARRIERS OF LIVE STOCK—VIOLATION OF TWENTY-EIGHT HOUR LAW—DEFENSES.

That a defendant carrier, after receiving from a connecting carrier cars of cattle which had been confined without food or water beyond the prescribed period, acted promptly in unloading the same, is not a defense to an action to recover the penalty prescribed by Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), but is in mitigation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 219.*]

Four actions by the United States against the St. Joseph Stockyards Company. Judgments for plaintiff.

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

Arba S. Van Valkenburgh and Leslie J. Lyons, for the United States.

Brown & Dolman, for defendant.

SMITH McPHERSON, District Judge. In these cases, four in number, Nos. 449 and 450 being consolidated, a jury has been waived, and the cases were submitted on an agreed statement of facts. The cases are brought to recover penalties for confining cattle more than 28 hours without food or water.

Defendant is a Missouri corporation, owning stockyards at South St. Joseph, doing what is known as a terminal business. It owns 22.6 miles of single switch tracks, encircling the stockyards, and connecting therewith, and connecting with the trunk line railroads. So that all live stock in and out from the stockyards must pass over defendant's lines or switches. Over defendant's lines or switches defendant alone moves the cars. For that purpose it has six locomotives with crews of men to operate the same. The trunk line companies deliver and receive the cars at defendant's switches. When the cars are on defendant's switches the trunk line companies have nothing whatever to do with them.

The defendant issues no bills of lading, and receives no part of the freight charges paid to the trunk line companies. The defendant, regardless of weight, commodity, or value of contents of the car, receives $1 for each car moved from the connection of the trunk line to the stockyard or the packing house. The defendant owns all the land on which the stockyards and its switches are located.

One of the shipments in suit illustrates them all. A car of cattle was shipped March 14, 1907, from Wilcox, Neb., to South St. Joseph, Mo. Roy M. Strong was consignor, and Byers Bros. Commission Company, at the stockyards, consignee. The cattle were loaded at Wilcox, Neb., at 5:30 a. m. March 14th and shipped over the Chicago, Burlington & Quincy Railroad, and by that company delivered to defendant at 10:10 a. m. March 15, 1907, and unloaded by defendant at 11:15 a. m., or one hour and five minutes after they were received by defendant, and after a confinement of 29 hours and 45 minutes without food or water. This car was one of a train of 27 cars of live stock, all of which had been on the cars for more than 28 hours without food or water.

No request for extension of time of confinement of the cattle to 36 hours was made. After defendant received the cattle, as stated, it unloaded them in one hour and five minutes, which was as quickly as could be done, as they had to be weighed before being unloaded. When defendant received the cattle, as of course the Burlington Company knew how long the cattle had been in the car without food or water. The defendant company did not know; and there is no evidence that defendant company sought to learn such fact.

Without discussing them, these facts lead the court to the following conclusions:

1. Defendant is a railroad company. As such it is a common carrier of freight for hire, with the rights and privileges, duties and obligations of a common carrier of freight for hire.

2. The transportation of the cattle from Wilcox, Neb., to the chutes

at the stockyards at South St. Joseph, Mo., was a continuous shipment, all of which, including the transportation by the defendant over its tracks, was of an interstate character, and all of which was covered by the statute forbidding such confinement more than 28 hours in the absence of the written request to carry them for 36 hours.

3. The purpose of the statute is remedial, and for humane purposes. One purpose is to prevent the slaughtering of animals for food when in a feverish condition brought about by long confinement without food, water, and rest. But the main purpose is to prevent cruelty to animals shipped. These being so, the statute cannot be construed of no application, because the defendant, the connecting carrier, did not know how long the Burlington Company had the cattle in confinement without food or water. The connecting carrier must learn such fact at its peril. This conclusion is not changed, but it is emphasized, by the fact that the defendant did not seek to ascertain such fact.

4. After the defendant received the cattle, as covered by all the actions now before the court, it acted promptly and quickly. But that is not defensive; but such action is in mitigation.

5. The penalty will be imposed in each of the three cases of $100.

In re SEJO ICE CREAM CO.

(District Court, N. D. New York. September 12, 1910.)

1. INSURANCE (§ 580*)—INSURANCE AGENTS—ADVANCE OF PREMIUMS—LIEN ON PROCEEDS OF INSURANCE.

A fire insurance agent, who made advances for an insured of premiums on policies which have expired, in the absence of a definite contract therefor, has no equitable lien for such advances on the proceeds of a subsequent policy on the property which was in force at the time of a loss.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 580.*]

2. INSURANCE (§ 580*)—INSURANCE AGENTS—ADVANCE OF PREMIUMS—LIEN.

A provision of a mortgage on real estate that, if the mortgagor does not keep the property insured, the mortgagee may do so and add the amount of the premiums paid to the mortgage debt does not inure to the benefit of an insurance agent who advances such premiums for the mortgagor.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 580.*]

In the matter of the Sejo Ice Cream Company, bankrupt. On motion for order. Motion granted.

Thos. O'Connor, for petitioner, David M. Morey.
Jas. P. Hill and John Scanlon, for Eli M. Powell.

RAY, District Judge. May 20, 1910, David Morey was appointed receiver of the Sejo Ice Cream Company, and July 25, 1910, was appointed trustee of the estate of said company. May 13, 1910, the plant of said company, owned by it, was partially destroyed by fire. The Union National Bank of Troy held a mortgage on such plant, dated March 12, 1908, for $7,000 originally, due March 12, 1913, recorded March 13, 1908, in Rensselaer county clerk's office. The mortgage

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

contained the usual insurance clause whereby the company, owner, was to keep the buildings on said premises insured against fire in some solvent company in a sum not less than $700 and assign the policy to the bank. In default the bank could effect such insurance, and the premiums paid were to become a lien on the premises and be added to the amount of the mortgage. This of course meant that premiums paid by the bank were to become a lien, and had no reference to premiums paid or agreed to be paid by the company, owner.

Eli M. Powell of Waterford, N. Y., was the agent of the Liverpool & London & Globe Insurance Company, and of other companies. Prior to the fire he had insured the buildings and also the machinery, etc., in the buildings in the London & Liverpool & Globe and also in the Royal Insurance Company, the policies on the buildings being separate from those on the contents, for the Sejo Ice Cream Company, and so far as appears at its request, the policies being payable to the Union National Bank as its interests might appear. There is no allegation or proof that any of the insurance was effected by the bank, or that it became liable for the premiums. At the time of the fire the Sejo Ice Cream Company owed Powell a balance of $520.92 for unpaid premiums on such insurance effected between March 13, 1908, and December 21, 1909; payments on account having been made from time to time. This indebtedness included $176.40 for premiums on two policies of insurance on the buildings, one issued by London & Liverpool & Globe December 21, 1909, the premium being $88.20 on each, and also $111.30 premiums on insurance effected on the contents of such buildings insured at the same time by such companies. These four policies last mentioned had not been delivered by Powell to the Sejo Ice Cream Company when the fire, which damaged the buildings but not the contents, so far as appears, occurred. After the fire the policies were delivered, and the premiums on the two policies in force for insurance on the buildings were paid by the check of the Union National Bank, $176.40. Eliminating premiums for insurance on contents of buildings, there is a balance due Powell of $153.23 for premiums for insurance on the buildings during the time mentioned; but this balance is for old and expired insurance.

There is no evidence or contention of any agreement that Powell should hold the policies as security for this old indebtedness, or that there was any agreement, when they were surrendered after the fire, that this old indebtedness should be paid from the proceeds of the insurance. As I understand the contention, it is that Powell has an equitable lien or claim on the draft given to satisfy the loss by the fire mentioned and given to satisfy the policy in force when the fire occurred, for the balance due him for premiums advanced to effect the insurance on the buildings in prior years while the bank held the mortgage, and which insurance had expired when the loss occurred. If Powell has any such lien, it must arise under some statute or rule of the common law; it is not based on any contract or agreement. I know of no rule of law or equity which, in the absence of specific agreement, gives to a fire insurance agent a lien on a draft, check, or money, delivered to him by the company he represents to pay to the insured the amount of loss sustained by fire and secured by a policy

in force, for old premiums for old and expired insurance on the property advanced by such agent to his company. Clearly no such rule can be held against the mortgagee. The insurance having been effected by the owner, the mortgagee could assume the premiums had been paid so far as old and expired insurance was concerned. Clearly, if the agent gave the owner credit for such premiums, the proceeds of live insurance at the time of a fire could not, in the absence of agreement, be depleted to pay such old indebtedness. The bank here is willing that Powell be paid from this draft provided the amount so paid can be added to its mortgage lien and come back to it out of the mortgaged property. The effect of this would be to give Powell a lien on the real estate as against the general creditors on the ground he had given the owner credit for premiums on insurance obtained on the property in bygone years and kept the mortgagee, and hence the general creditors, to an extent, protected against loss by fire. I am cited to no authority holding that this can be done. In legal effect such a holding would give every fire insurance agent, by operation of law, a lien on real estate for premiums advanced by him at the request of the insured to obtain policies of insurance on the buildings on such real estate. I am not aware of any such rule of law or equity.

The draft in question is made payable to the Sejo Ice Cream Company and the Union National Bank. It must be delivered to the bank and the trustee of the Sejo Ice Cream Company. They will settle their rights to the proceeds as between themselves. It is evident that the rights of the bank are, to the extent of the amount due and unpaid on the mortgage, superior to those of the trustee. These rights, if there be any conflict, are not now before this court. Mr. Powell has delivered the draft to this court, and it will be delivered to such party as the trustee and bank agree upon.

There will be an order accordingly.

UNITED STATES v. SEVENTY-FOUR CASES OF GRAPE JUICE.

(District Court, W. D. New York. July 15, 1910.)

1. FOOD (§ 24*)—FOOD AND DRUGS ACT—PROCEEDING FOR VIOLATION.
When proceedings for violation of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), by adulteration or misbranding, are instituted at the instance of the Department of Agriculture, whether such proceedings are in personam or for a forfeiture of goods under section 10, it would seem that the notice of examination and opportunity to be heard provided for by section 4 are necessary conditions precedent and must be alleged and proved; but under section 5 a district attorney may institute such a proceeding upon complaint of any state health officer or any adequate proof without the action of the agents of the department.
[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

2. COMMERCE (§ 33*)—INTERSTATE COMMERCE—POWER OF CONGRESS TO REGULATE—FOOD AND DRUGS ACT.
Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), is within the constitutional power of Congress to regulate interstate commerce.
[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.*]

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

Proceeding by the United States for the forfeiture of seventy-four cases of grape juice. On demurrer to libel. Overruled.

John Lord O'Brien, for the United States.

Moot, Sprague, Brownell & Marcy (Adelbert Moot, of counsel), for claimants.

HOLT, District Judge. This is a demurrer to a libel filed to forfeit 74 cases of grape juice on the ground that they were adulterated and misbranded, in violation of the act of June 30, 1906, commonly called the "pure food act." The grounds of demurrer alleged are that the libel fails to allege that notice of the examination of the samples made in or under the direction or supervision of the Bureau of Chemistry in the Department of Agriculture was given to the claimants, and an opportunity to be heard afforded them, as provided in section 4 of the act, and that the act itself is unconstitutional.

This is a proceeding in rem, under section 10 of the act, for the forfeiture of the goods alleged to have been adulterated and misbranded. It has been held in United States v. Fifty Barrels of Whiskey (D. C.) 165 Fed. 966, and United States v. Sixty-Five Cases of Liquid Extracts (D. C.) 170 Fed. 449, and in some other unreported cases, that the provisions of section 4 requiring notice of the examination of the goods by federal officers to be given to the party from whom the samples have been taken, and an opportunity to be afforded such party to be heard, apply to suits in personam to recover penalties under section 5 only, and not to suits in rem to forfeit the goods under section 10. With the highest respect for the eminent judges who have reached this conclusion, it seems to me at least doubtful. Section 5, to which it is admitted that the provisions of section 4 apply, requiring such notice to be given and such opportunity to be heard afforded, does not in terms provide that the prosecutions instituted after such notice has been given and such opportunity to be heard afforded shall be prosecutions in personam only. It provides that it shall be the duty of the district attorney "to cause appropriate proceedings to be commenced and prosecuted * * * for the enforcement of the penalties as in such case herein provided." The word, "herein" here means in any part of the entire act. A statute which provides for the forfeiture of goods for a violation of law imposes a penalty just as much as a statute which provides for a fine for such violation. Moreover, the eleventh section of the act provides, in the case of imported goods, that samples shall be delivered to the Secretary of Agriculture, and that notice shall be given to the owner or consignee who may appear before the Secretary of Agriculture and give testimony, and, "if it appears from the examination of such samples that any article of food or drug * * * is adulterated or misbranded," the said article shall be refused admission, and the Secretary of the Treasury shall cause the destruction of such goods if not exported by the consignee within three months.

If Congress thought it proper to provide that an importer is entitled to a preliminary notice and hearing before his goods can be refused admission and if not exported, destroyed, I cannot see why it did not intend the same protection for a citizen whose goods it is proposed to

forfeit and destroy. But it is unnecessary to decide this question upon this demurrer, for I think it should be overruled on another point. The ground of demurrer under consideration assumes that there can be no prosecution of any kind under the pure food act without such preliminary notice and opportunity to be heard. But this obviously is not so. The fifth section authorizes prosecutions upon the complaint of any state health officer, and, in my opinion, the district attorney can institute such a prosecution, upon any adequate proof, without the action of the agents of the Department of Agriculture. When, however, the officers of the Department of Agriculture first bring the matter before the district attorney, I think that the notice must be given and the opportunity to be heard afforded provided for in section 4 before an indictment can be found. In all such prosecutions therefore the indictment or libel must allege, and the evidence establish, that such notice was given and such opportunity to be heard afforded before the prosecution was instituted. As the libel in this case may have been instituted by the district attorney without the intervention of the agents of the Department of Agriculture, I think the demurrer on the ground under consideration should be overruled.

The point that the pure food act is unconstitutional has been ably argued in the claimants' brief. If it were an original question, the claim that this act is really an attempt to exercise the police power, which resides wholly in the states, would be entitled to careful consideration. But, in my opinion, the underlying principle governing the question has been decided. The Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, held that an act of Congress prohibiting the transportation in interstate commerce of lottery tickets was constitutional. I can see no difference in principle in the two cases. So the acts providing for the humane treatment of animals transported in interstate commerce, the acts making it a criminal offense to use the United States mails in the prosecution of a fraudulent scheme, or for the transportation of obscene publications, and many similar statutes, all rest on the same basis. Congress having exclusive power to regulate interstate commerce and the postal service, it can prohibit their use for the prosecution of any fundamentally objectionable business. The selling of adulterated or misbranded articles of food, drink, or medicine is as unmitigated an evil as the sale of lottery tickets or counterfeit money or obscene publications. At all events, the pure food act is a beneficial one; many convictions have been had under it in many courts; and a court of first instance should not hold such a statute unconstitutional except upon clear grounds.

The demurrer is overruled, with leave to the claimants to answer within 20 days upon payment of costs.

PORTLAND RY., LIGHT & POWER CO. v. CITY OF PORTLAND et al.

(Circuit Court, D. Oregon. September 12, 1910.)

No. 3,650.

1. CONSTITUTIONAL LAW (§ 280*)—TAKING PROPERTY—DUE PROCESS OF LAW—CONDEMNATION BY CITY.

Where a municipal corporation without statutory authority was attempting to condemn complainant's property for a street, it was thereby attempting to deprive complainant of its property without due process of law, in violation of the fourteenth amendment of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877–890; Dec. Dig. § 280.*]

2. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL PROVISIONS—INJUNCTION.

Where a municipal corporation without statutory authority was attempting to take a portion of complainant's right of way for a street, and to deprive complainant of its property without due process of law, a federal court had jurisdiction of a suit to restrain such action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

3. EMINENT DOMAIN (§ 9*) — STREETS — CONDEMNATION OF LAND — POWER—LAND REQUIRED FOR RAILROAD PURPOSES.

Where a city had only general charter power to open, lay out, establish, widen, alter, extend, vacate, or close streets, and to appropriate and condemn private property therefor, it had no power to condemn a part of a railroad's right of way to construct a street longitudinally along the same, especially where there was no provision for joint use of the property by the railroad company and the public.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27–34; Dec. Dig. § 9.*]

In Equity. Complaint by the Portland Railway, Light & Power Company against the City of Portland and others. Demurrer to complaint overruled, and preliminary injunction issued.

Frederick V. Holman, Franklin T. Griffith and Alfred A. Hampson, for complainant.

Wm. C. Benbow, Deputy City Atty., for defendants.

BEAN, District Judge. This suit is brought by the Portland Railway, Light & Power Company against the city of Portland and its officers to enjoin the enforcement of an order of the common council of the city, opening, widening, and extending Belmont street so far as it affects the complainant's right of way. In its bill the complainant avers that it is an Oregon corporation owning and operating a street railway system in the city of Portland, and is a common carrier of passengers for hire; that it owns and uses as a part of its system a right of way and easement 30 feet wide over private property from the eastern terminal of Belmont street easterly a distance of 740 feet, and is the owner of a similar right of way through blocks S, R, and Q of Tabor Heights, and has the right to occupy and use Motor street between the two rights of way above mentioned, by virtue of a dedication and grant from the original owners of the property; that it

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

has a track along such rights of way and in such street and is constantly using the same as a part of its general system; that the defendant city has ordered Belmont street opened and extended, and Motor street widened from the present terminus of Belmont street easterly along and over the complainant's right of way and franchise, and is attempting to condemn and appropriate such right of way and franchise and will do so unless enjoined and restrained.

Upon the filing of the bill an order was made requiring the defendants to appear and show cause why a preliminary injunction should not issue, in obedience to which they have demurred to the bill on the ground that it appears therefrom that the common council of the city had jurisdiction of the subject-matter and of the parties, and proceeded regularly and in accordance with the provisions of the charter in the matter of the opening and widening of such streets and the appropriation of private property therefor, and therefore complainant's remedy is by an appeal from the award of the appraisers, or by some direct proceeding to review the action of the common council, and not by an independent suit to enjoin the enforcement of the order for the opening of the street. This argument overlooks the pith of this controversy. The complainant's position is not that the proceedings of the common council are irregular, but that it is an attempt to deprive it of its property without due process of law, in violation of the fourteenth amendment to the federal Constitution, inasmuch as the city has no power under its charter to take or appropriate its right of way or franchise for street purposes. If the order of the common council under its authority to open streets has deprived, or is about to deprive, the complainant of its property without due process of law, it is entitled to a remedy in this court, under Judiciary Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), and the federal Constitution. Iron Mt. Ry. v. City Memphis, 96 Fed. 113, 37 C. C. A. 410.

The question therefore is one of power and not of procedure. If the city has the power and authority to lay a street longitudinally along and over the complainant's right of way and to appropriate it therefor, to the exclusion of the complainant, there is an end to the controversy as far as this court is concerned. If, however, it has not such power, its proceeding is manifestly an attempt to deprive the complainant of its property without due process of law, and it is entitled to invoke the aid of this court to prevent the threatened wrong. The fourteenth amendment is a guaranty to every citizen, private or corporate, that he or it shall not be deprived of property by a state or any of its political subdivisions without due process of law, and the federal court has jurisdiction to enforce this guaranty. The taking of private property by a municipality without authority is clearly such a taking. The court therefore has a right, and it is its duty, to inquire into the charter powers of the defendant city to ascertain whether it has power to take and appropriate the complainant's property for the extension, opening, or widening of the street. The only authority of the city to open streets is a general power given it by section 347 of its charter "to open, lay out, establish, widen, alter, extend, vacate or close streets and to appropriate and condemn private property therefor." It has no express authority to condemn or appro-

priate the property of a public service corporation or property already devoted to a public use, or to lay a street along the same.

The general rule is that a municipal corporation, under general authority to condemn land for public streets, has no power to lay a street longitudinally over ground legally acquired by a railway and occupied by it for its tracks and roadbed, although it may extend streets across such right of way. 2 Elliot on Ry. § 966; 2 Abbott on Mun. Corporations, 756; 15 Cyc. 619; 10 Ency. 1096; M. & St. P. Ry. v. City Fairbault, 23 Minn. 167; St. P. Union Depot v. City St. P., 30 Minn. 359, 15 N. W. 684; N. J. S. Ry. v. Com. Long Branch, 39 N. J. Law, 28. This is on the theory that the property is already devoted to a public use, and cannot, unless the authority to do so is manifest in express terms or by necessary implication, be appropriated by procedure in invitum to a different public use, when the second use will destroy or impair the use to which the property is already devoted. Oregon Short Line v. Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663.

Now, under the language of the order of condemnation and appropriation in this case, the complainant is absolutely deprived of its property and the use thereof. The order opening the street and appropriating property therefor describes the boundaries of the proposed extension and widening of the streets by metes and bounds and includes "all that part of the Portland Railway, Light & Power Company's right of way lying within the boundaries of the proposed opening, widening and extension of Belmont street as above described." There is no exception, reservation, or proviso by which the company is to be permitted to use the street or any part thereof for railway purposes. Under the proceedings, if carried into effect, the control and supervision of the entire street will belong exclusively to the city with the right to prevent its obstruction or use by the complainant, and the complainant will be deprived of any right to use or enjoy the street or to maintain its tracks thereon or to operate its cars thereover.

The city attorney, at the argument, disclaimed any intention by the city to injure or impair the use of the proposed street by the complainant company. It may be that it did not intend to do so. But under the condemnation proceedings and the description of the property appropriated as contained in the order opening the street, the ownership and control of the complainant's right of way would pass from it to the city, and it would have no right to use it except by consent of the municipal authorities, and this, in my judgment, the city has no power or authority under its charter to do. B. & A. Ry. Co. v. Cambridge, 166 Mass. 224, 44 N. E. 140. It is probable that a city, under the general power to open streets, may lay a street along or over the right of way of a street railway company provided it does not interfere with the use of the street by the company. It is doubtful whether such an appropriation to a public use would be so inconsistent with the previous public use as to be invalid. See O. Short Line v. Postal Tel. Cable Co., supra. But, however that may be, the city, as appears from the bill of complaint, has not proceeded upon any such theory. It has attempted to condemn and appropriate the entire right of way and franchise of the complainant corporation, without

any exception or reservation, and the right to the property which, if valid, the taking would vest in the city, is not conditional but absolute.

The demurrer to the complaint will therefore be overruled, and a preliminary injunction issued.

UNITED STATES v. PSAKI et al.

(Circuit Court, S. D. New York. September 27, 1910.)

CUSTOMS DUTIES (§ 86*)—WITHDRAWAL BOND—CONSTRUCTION.

Certain packages of merchandise having been sent to the public store for examination, the remaining packages were delivered to the importers on bond conditioned that the obligors, within 10 days after the package or packages, designated by the collector and sent to the public store to be opened and examined, had been appraised and reported to him, should return the delivered packages, on demand, to the order of the collector without having been opened. *Held*, that the bond did not require the demand to be made by the collector within 10 days, but that there was no breach of the bond unless the 10 days elapsed without a compliance with the collector's demand for return of the merchandise so delivered.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 208–214; Dec. Dig. § 86.*]

Action by the United States against Nicholas Psaki and others. On demurrer to complaint. Sustained.

Henry A. Wise, U. S. Atty.

Hatch & Clute, for defendants.

LACOMBE, Circuit Judge. The action is upon a bond given upon importation of certain merchandise. Some of the packages were sent to the public store to be opened and examined; the remaining packages were delivered to the importers upon their giving the bond in question. Its condition is that the obligors "shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned upon demand to the order of the collector without having been opened." The complaint avers that defendants did not return upon demand, etc., but is silent as to whether or not the demand was made within the 10 days.

There is no breach of the bond unless the 10 days elapse without compliance being had with a demand for a return. Failure to demand within the 10 days is not a defense, as was suggested on the argument; demand and disobedience thereof must be shown to establish a breach. If the pleader had set forth the facts, viz., that the goods were appraised and reported on such a date, that demand was made on such a date, and that such demand had not been complied with, he would have stated his case with a specificness which it now lacks.

The demurrer is sustained, with leave to amend the complaint within 10 days.

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

BARKER v. SOUTHERN BUILDING & LOAN ASS'N.

In re KING & BANKHEAD.

(Circuit Court, N. D. Alabama, N. E. D. September 19, 1910.)

1. CORPORATIONS (§ 559*)—RECEIVERS—APPOINTMENT—EFFECT.
Though the appointment of a receiver for a corporation does not ordinarily dissolve it, it does deprive the corporation of the right to exercise its corporate powers in any manner inconsistent with the decree and deprives the corporation's officers of the power to bind it or its assets by contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2243, 2244; Dec. Dig. § 559.*]

2. RECEIVERS (§ 154*)—COUNSEL FEES—PAYMENT.
Where, after the appointment of a receiver for a corporation, its officers employed petitioners to represent the corporation in the litigation and to resist the court's action, and petitioners performed no service that increased or protected the fund or that brought the fund into court, they were not entitled to payment of their fees by the receiver out of the fund.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 154.*]

In Equity. Suit by Anna W. Barker against the Southern Building & Loan Association. Application by King & Bankhead for payment of attorney's fees out of the fund in the hands of the receiver appointed for defendant corporation. Demurrer to application sustained.

David A. Grayson, for petitioner.
Lawrence Cooper, for defendant.

SHELBY, Circuit Judge. This is an intervening petition filed by attorneys claiming compensation for services. The averments of the petition are as follows:

"That the original bill was filed in this cause on the ——— day of October, 1902, and that on the same day a temporary receiver was ordered, and Hon. Lawrence Cooper was appointed receiver. Petitioners shortly thereafter were employed by the defendant corporation through its president to represent the corporation in the litigation in this cause as its attorneys, and have represented and appeared for the corporation, the Southern Building & Loan Association, throughout the litigation herein. That at the time of said employment the receiver had possession of all the property, money, and effects of the corporation, and it was unable to pay, and has not paid, the attorney's fees for said services. That petitioners are advised that the funds brought into court in this cause amount to more than $75,000, and the services performed by petitioners are as follows: They prepared answers and demurrers to the original bill herein and to the ancillary bill filed in this cause by J. E. Wilkinson, and represented the corporation in the hearing held before your honor at New Orleans, and paid their own expenses to New Orleans and while there, amounting to $50. Petitioners aver that in the cause a number of references were ordered whereby certain questions were referred to Hon. R. W. Walker as special master. Among them, the master was ordered to take and state an account of the apparent assets and liabilities of said Southern Building & Loan Association, the number of its shares, the probable value of the estate, and other information relating thereto; and also a reference was ordered and held to pass upon the reports of the receiver in this cause, and on said reference there was submitted to the master numerous questions of law involving the various claimants to the

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

funds in the cause, and the method of liquidation of the affairs of the estate. Petitioners aver that the said questions were many and involved intricate and difficult questions of law, and that said reference consumed a great deal of time covering a period of several months from December, 1902, to May, 1903, and petitioners appeared for the respondent corporation at the hearing before said master and discussed the questions of law involved, and filed exceptions to certain parts of the master's report, on which exceptions petitioners appeared for the corporation at the hearing of said exceptions. Petitioners aver that they are entitled to be paid a reasonable attorney's fee out of the funds in this cause, and claim therefor the sum of $2,500 as such reasonable fee.

"Wherefore petitioners pray for an allowance of the sum of $2,500 as such reasonable attorney's fee, and that the receiver, Lawrence Cooper, be directed to pay said fee out of the funds in his hands in this cause, and for other relief to which they may be entitled."

The receiver demurred to the petition, assigning as grounds of demurrer that it appears from the allegations of the petition that the petitioners (a) "are not entitled to the relief prayed by the petitioners against the said receiver"; (b) that the services were rendered "after the appointment of the receiver of the defendant association as an insolvent corporation under the decree of this court"; and (c) that the services were rendered under a contract made with the association after the appointment of a receiver.

The question to be decided is whether or not the petitioners are entitled to compensation out of the funds in the hands of the receiver on the facts stated in the petition. It appears that they were retained by the president of the corporation after the receiver was appointed. It may be conceded, as contended by the learned counsel for the petitioners, that the appointment of a receiver does not ordinarily dissolve the corporation, and that after the appointment it continues to exist as a corporate entity. It cannot be denied, however, that the appointment deprives it of the right to exercise its corporate powers in any manner inconsistent with the decree making the appointment. Decrees appointing a receiver usually place the assets in the hands of the receiver as an officer of the court and deprive the officers of the corporation of the power to bind the corporation or its assets by contracts. The exercise of the power by the officers of the corporation to bind and charge the assets of the corporation by contracts without the assent and authority of the court making the appointment would be clearly inconsistent with the purpose of the court in appointing a receiver, the purpose being to devote the assets to the payment of the corporation's liabilities and to distribute the remaining funds, if any, to those entitled to receive them. The receiver, by the decree, was authorized and directed to take immediate possession of all the property of the corporation, and the officers of the corporation were directed to turn the same over to the receiver. The officers and agents of the corporation were "enjoined from interfering with or disposing of its property in any way except to turn the same over to the receiver." It would clearly be in conflict with this decree for an officer of the association, after the appointment of the receiver, to make a contract creating a lien or charge on the funds placed in the hands of the receiver by the decree of the court. The contention of the petitioners may be conceded, that the president or stockholders may be permitted

to intervene and seek to vacate the order appointing the receiver, or seek to have him removed and another receiver appointed; but this is far from holding that they may do so at the expense of the fund held in court. In such case, those employing counsel should themselves bear the expense. There would be nothing in the circumstances named to require a departure from the general rule that each client should compensate his own solicitor. There is no allegation of fact in the petition showing that the petitioners performed any service that increased or protected the fund that they seek to charge, nor is it alleged that they performed any service that brought the fund into court. The claim is dependent solely, on the facts as presented, on the theory that the president of the corporation, after the appointment of a receiver and after the assets are in the receiver's hands by a decree enjoining the officers of the corporation from further control, can make a contract with attorneys to resist the court's action, and by such contract fasten a lien on the corporation's assets. I cannot sustain that view.

It is contended by counsel that, as the corporation had the right to be represented after the appointment of the receiver in the effort to remove or supplant him with another, it is in the discretion of the court to allow the compensation claimed. If the court has any discretion in the matter, it is a judicial discretion, not to be exercised except in cases where the facts, in view of equitable principles, would justify the court's action.

On the facts stated in the petition, I am of opinion that the petitioners are not entitled to the relief prayed.

The demurrer is sustained.

BARKER v. SOUTHERN BUILDING & LOAN ASS'N.

In re SPRAGINS.

(Circuit Court, N. D. Alabama, N. E. D. September 19, 1910.)

RECEIVERS (§ 154*)—FEES OF COUNSEL—CHARGE ON FUND.

A solicitor, employed by complainant in a suit to wind up the affairs of a building and loan association, after the original bill had been filed and a receiver had been appointed, and who performed no service at the instance of the complainant that increased or protected the fund, or in any way benefited the creditors or stockholders of the corporation, was not entitled to payment of his fees by the receiver out of the fund.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 154.*]

In Equity. Bill by Anna W. Barker against the Southern Building & Loan Association. Petition by R. E. Spragins to charge funds in the hands of a receiver with attorney's fees. On demurrer to bill. Sustained.

R. E. Spragins, for petitioner.

Milton Humes and Lawrence Cooper, for defendant.

SHELBY, Circuit Judge. This is an intervening petition seeking to charge funds in court with attorney's fees.

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

The petition is as follows:

"That the original bill was filed in this cause on the ——— day of October, 1902, and that on the same day a temporary receiver was ordered, and Hon. Lawrence Cooper was appointed receiver. Petitioner shortly thereafter was employed by the complainant as her attorney to represent her in the litigation in this cause, and petitioner has appeared and represented her in said litigation. That at the time of said employment, the receiver had possession of all the property, money, and assets of the corporation, and petitioner is advised that said receiver has received more than $75,000 in funds brought into court in this cause, and the services performed by the petitioner are as follows: He prepared answers and demurrers to the ancillary bill filed in this cause by J. F. Wilkinson, and represented her in the hearing held before your honor at New Orleans, and paid his expenses there, amounting to $50. Petitioner says he prepared a number of papers relative to the original bill in which the respondent sought to have said original bill dismissed. Petitioner avers that in the cause a number of references were ordered whereby certain questions were referred to Hon. R. W. Walker as special master. Among them, the master was ordered to take and state an account of the apparent assets and liabilities of said corporation, the number of its shares, the probable value of the estate, and other information relating thereto; and also a reference was ordered and held to pass upon the reports of the receiver in this cause, and on said reference there were submitted to the master numerous questions of law involving the various claimants to the funds in the cause, and the method of liquidation of the affairs of the estate. Petitioner avers that the said questions were many and involved intricate and difficult questions of law, and that references consumed a great deal of time covering a period of several months from December, 1902, to May, 1903, and petitioner appeared for the complainant at the hearing before the master and discussed the questions of law involved. Petitioner avers that he is entitled to be paid a reasonable attorney's fee out of the funds in this cause, and claims therefor the sum of $2,500 as such reasonable fee.

"Wherefore petitioner prays for an allowance of the sum of $2,500 as such reasonable attorney's fee, and that the receiver, Lawrence Cooper, be directed to pay said fee out of the funds in his hands in this cause, and for other relief to which he may be entitled."

The receiver demurred to the petition, assigning, with specifications, that the petition shows that the petitioner is not entitled to the relief prayed for.

It appears that the petitioner is claiming compensation for services rendered as the solicitor for the complainant, but that he was not retained until after the original bill was filed and the receiver appointed. Before his employment, the fund had been brought into the custody of the court, and was in the hands of the receiver. No fact is alleged showing that the petitioner performed any service at the instance of the complainant that increased or protected the fund, or that in any way benefited the creditors or stockholders of the corporation. The facts stated show that the petitioner is entitled to compensation from his client; but there is no averment that shows that the sum due the petitioner is a charge or lien on the fund in court. The principle upon which compensation for services rendered by a solicitor for one jointly interested with others in trust funds may be made a charge on such funds has been frequently announced by the courts. Lamar v. Hall & Wimberly, 129 Fed. 79, 63 C. C. A. 521. The facts stated in the petition do not bring the case within the rule.

The demurrer must be sustained.

In re POTTEIGER.

(District Court, E. D. Pennsylvania. September 10, 1910.)

No. 3,815.

BANKRUPTCY (§ 117*)—ACTS OF BANKRUPT—CONTEMPT.

It was a contempt of court for the bankrupt, after the filing of the bankruptcy petition and service of the subpœna, to deliver property in his possession to a third person on the claim that the latter was the owner and that the bankrupt was only a bailee; such alleged owner's remedy being by application to the bankruptcy court for surrender of the property by the receiver or trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 117.*]

In the matter of bankruptcy proceedings of A. F. Potteiger. On receiver's rule to punish the bankrupt for contempt. Granted.

Grover C. Ladner, for trustee.
Alvin J. Smallwood, for bankrupt.

J. B. McPHERSON, District Judge. When the petition was filed against the bankrupt, and when the subpœna was served, he was in possession of a horse and wagon and was using them in his business. Asserting that he was only a bailee and that a third person was the real owner, he delivered the property to such person two or three days afterwards, and failed to comply with a subsequent order of the court directing him to turn it over to the receiver. It needs neither discussion nor citation to establish the proposition that a bankrupt has no lawful authority thus to deal with goods in his possession after a petition has been filed and a subpœna has been served. If the horse and wagon really belonged to another person, application to the court would have brought immediate protection, and complete relief after his ownership had been proved; but it was not for the bankrupt and the claimant to decide the question of ownership summarily, and dispose of property that was in the bankrupt's exclusive possession when the proceedings were begun. It may be that the claimant is in fact the owner; but the title was apparently in the bankrupt, and his creditors have a right to be heard upon the question whether he was the owner as he seemed to be, or was only a bailee for hire.

It is therefore adjudged, after hearing testimony and argument, that the bankrupt has been guilty of contempt in delivering to John C. Kunberger the horse and wagon in dispute. And it is ordered that the bankrupt deliver the horse and wagon to the receiver on or before September 15th, or in default thereof that he pay a fine of $25. If he shall fail to comply with one or the other of these alternatives, the marshal is directed to take him into custody and commit him to the county jail for a period of 10 days.

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

In re REESE-HAMMOND FIRE BRICK CO.

SOISSON v. FIRST NAT. BANK OF PITTSBURGH.

(Circuit Court of Appeals, Third Circuit. September 21, 1910.)

No. 1,357.

1. BANKRUPTCY (§ 165*)—VALIDITY OF LIENS—COLLATERAL SECURITY PLEDGED GENERALLY FOR INDEBTEDNESS.

A note given by a corporation more than four months before its bankruptcy, reciting that the maker had deposited "as collateral security for said sum, or for any other liability or liabilities of ours to the holder hereof, now due or to become due," certain property, including assigned accounts, *held* to entitle the bank to hold such accounts as security for a prior note given to it by the bankrupt and then unpaid; the good faith of the transaction being unquestioned.

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

2. BANKRUPTCY (§ 165*)—"VOIDABLE PREFERENCE"—SUBSTITUTION OF SECURITIES.

The assignment by a corporation within four months prior to its bankruptcy of accounts receivable to a bank to secure a prior indebtedness did not constitute a voidable preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), although the corporation was known to be insolvent, where such accounts were merely substituted for other valid accounts held by the bank, which had been paid, for the purpose of keeping the security good.

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

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of the Reese-Hammond Fire Brick Company, bankrupt. On appeal by William F. Soisson, trustee, from an order of the District Court in favor of the First National Bank of Pittsburgh. Affirmed.

Roland D. Swoope and James S. Beacom, for appellant.

William M. Hall and George C. Bradshaw, for appellee.

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

LANNING, Circuit Judge. The question in this case is whether certain accounts assigned by the bankrupt to the First National Bank of Pittsburgh, and certain moneys collected by Soisson, trustee in bankruptcy, on other accounts assigned by the bankrupt to the bank, belong to the bank or to the trustee in bankruptcy. The referee decided that they belong to the trustee. The District Court, on a petition to review the referee's findings, decided that they belong to the bank.

The second assignment alleges error on the part of the court in finding that "no evidence was offered on behalf of the trustee or any creditor." This is an erroneous statement by the court, and is probably explained by the fact that there is nothing in the record showing for which of the parties the witnesses were respectively called, except as we observe which of the counsel conducted the direct and which

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

the cross-examinations. The error, however, is harmless. The evidence was all before the court, and was all considered by it.

The third assignment alleges error in that the court found that a certain promissory note for $37,500, dated April 27, 1903, made by the bankrupt and secured to the bank by a deposit, as collateral, of bonds of the bankrupt of the par value of $60,000, was further secured to the bank by book accounts by reason of the terms of a later promissory note, dated February 27, 1907, made by the bankrupt to the bank, for the sum of $86,791.01. By the terms of this later note it was declared that the bankrupt had deposited therewith, "as collateral security for said sum, or for 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," amongst which is named "assigned accounts." The president of the bankrupt company, who signed the later of the notes, testified that the accounts were not assigned as collateral for the note of $37,500; but his testimony cannot overcome the effect of the language of the later note. Neither is that language ineffective by reason of the fact that the board of directors of the bankrupt company did not authorize an assignment for that purpose in a certain resolution passed by the board nearly a year before the later note was given. The later note was given more than four months before the bankruptcy proceedings were commenced, and there is nothing to show that its execution to the bank was not duly authorized, or that its language should not have its natural effect.

The first, sixth, and seventh assignments of error are general and indefinite. They are simply to the effect that the court erred in reversing the referee. We have considered them, however, in the light of the arguments based thereon. We think no error has been shown, unless it be in the findings of the court specifically mentioned in the fourth and fifth assignments of error. We pass therefore to their consideration.

These assignments of error present the question whether the assignments of the book accounts gave to the bank a preference, contrary to section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). It appears that on October 3, 1903, a receiver for the Reese-Hammond Fire Brick Company had been appointed by a state court. The ground for the receivership was insolvency. The bank then held the above-mentioned note for $37,500, which had been reduced to $31,304.29. In March, 1906, the receiver was discharged, the property restored to the company, and its business put into the hands of a creditors' committee. This committee managed the business of the company until July 22, 1907, and then filed the petition which was the commencement of the present bankruptcy proceedings. On April 20, 1906, two of the members of the creditors' committee were elected directors of the company, and on the same day the directors passed a resolution authorizing its president to assign to the bank "any or all book accounts of the Reese-Hammond Fire Brick Company and allied interests" as collateral security for such moneys as the bank should loan to the company, not exceeding $100,000. Subsequently notes were given by the company to the bank for loans made, and on February 27, 1907, the outstanding

notes, excepting the one of April 27, 1903, for $37,500, and another dated February 20, 1907, for $9,500, were consolidated in the one note above mentioned for $86,791.01. During the period from April 20, 1906, to February 27, 1907, as assigned accounts were paid off, other accounts were substituted for them, and thus the bank's collateral was preserved in a form satisfactory to it. This practice continued after February 27, 1907, but for what period does not appear. It does appear that on May 13, 1907, and July 16, 1907, the company delivered to the bank lists of accounts receivable, with assignments thereof.

These transactions were within the period of four months next before the commencement of the bankruptcy proceedings. They are vigorously attacked by counsel for the trustee in bankruptcy as amounting to voidable preferences in favor of the bank. But it is found as a fact by the court below, and the evidence amply supports the finding, that before these lists were prepared the invoice for each account mentioned in the lists had, on its date, been separately assigned to the bank. For aught that appears, each of the invoices was dated and assigned before the commencement of the four months' period. However that may be, the weight of the evidence supports the court's finding that the accounts assigned took the places of accounts paid, and that these transactions did not impair the rights of the general creditors, for the reason that the substitutions of new for old securities did not in any wise diminish the debtor's estate available for those creditors. "It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it." Sawyer v. Turpin, 91 U. S. 114, 120, 23 L. Ed. 235. See, also, Stewart v. Platt, 101 U. S. 731, 742, 25 L. Ed. 816.

We find no error in the decree of the District Court, and it is accordingly affirmed, with costs.

THE VOLUND.

(Circuit Court of Appeals, Second Circuit. July 26, 1910.)

Nos. 279–282.

1. COLLISION (§ 39*)—STEAM VESSELS MEETING—FAULT.

A collision on the Hudson river between the steamer Volund, passing up, and the steam yacht Normandie, passing down, *held*, in accordance with the finding of the commissioner, confirmed by the District Court, due solely to the fault of the steamer (1) in attempting to pass to the left under a two-blast signal without having obtained the assent of the yacht, (2) in not keeping to her own starboard side of the channel, (3) in not sounding alarm signals, but keeping on at full speed and repeating her two blasts when her first signal was not answered, (4) in crossing the one-blast signal of the yacht, (5) in not stopping and reversing when danger

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of collision should have been obvious, and (6) in not maintaining a competent and sufficient lookout.

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

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. COLLISION (§ 115*)—TIME CHARTER—LIABILITY FOR COLLISION.

A time charter by which the owner is to provide and pay the master and crew, although providing that the master shall be under the orders of the charterer as regards "employment, agency and other arrangements," does not amount to a demise of the vessel, but leaves the owner responsible for her navigation. Nor is the charterer liable for a collision for which the vessel was in fault because she was at the time being navigated by a supercargo employed by the charterer as provided by the charter party who was acting as pilot with the consent of the master.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 115.*]

3. DEATH (§ 99*)—EXCESSIVE AWARD.

An award of $12,000 for the death of an engineer 31 years old, in good health and of good habits, who was earning from $1,300 to $1,500 a year and left a wife and child, *held* not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

4. COLLISION (§ 154*)—COSTS—PREMIUM PAID FOR STIPULATION FOR COSTS.

On recovery for collision, it is proper to allow the libelant as a part of his costs the premiums paid to a surety company for furnishing his stipulation for costs.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 154.*]

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

Suits in admiralty by Charles W. Dumont against the steamship Volund and the Higginson Manufacturing Company and by Eugenie Gracie, as administratrix of Stewart Gracie, deceased, Eliza S. Dodge, as administratrix, etc., of Gladys Dodge, deceased, and Joseph M. Hanigan, respectively, against O. Irgens and A. Irgens and the Higginson Manufacturing Company. Decrees for libelants against the Volund and the Higgins Manufacturing Company, and they appeal. Reversed as to the Higginson Company, and affirmed as to the Volund.

The following is Commissioner Herbert Green's report on reference to try the issues:

"To the District Court of the United States for the Southern District of New York:

"An order was entered in each of the above causes August 2, 1906, upon consent of the parties, referring it to me, as commissioner, to hear the testimony and report my conclusions upon the issues of law and fact.

"I hereby report that the proctors for the respective parties attended before me and offered testimony with the exhibits, as filed herewith; and I further report as follows:

"In the evening of July 11, 1905, at about 8:30 o'clock, the Norwegian steamship Volund and the steam yacht Normandie collided in the North River opposite a pier which is referred to in the testimony as the 'brewery' dock, and which is something more than a quarter of a mile above the railroad station at Dobbs Ferry. The tide was the first of the ebb, the atmosphere somewhat hazy, and the wind light from the south. The ship, bound up, was on a voyage from Windsor, Nova Scotia, with a cargo of plaster consigned to the Higginson Manufacturing Company, at Newburgh. The

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yacht was owned by Charles W. Dumont, and had beeen chartered by him to John A. Rudd, who lived near Yonkers and was aboard at the time of the collision. She left Yonkers between 7 and 8 o'clock in the morning, after lying there overnight, and then went down the river to a pier at Seventy-Ninth street, New York, where she took on a Mr. Green, who contemplated hiring her from Mr. Rudd for a cruise, and went aboard for a trial trip, accompanied by a Miss Gladys Dodge. The yacht went up the river to Tarrytown, stopped there for a time, then continued on as far as Peekskill, where she turned without stopping, and then came down until she met the ship and collided with her. The collision resulted in the immediate sinking and total loss of the yacht, and the death of her master, William H. Storms, her engineer, Stewart Gracie, and Miss Dodge. The suit of Dumont, which was brought to recover the value of the yacht and her equipment, was originally against the ship alone, but the latter's owners and claimants, O. Irgens and A. Irgens, of Bergen, Norway, filed a petition bringing in the Higginson Manufacturing Company as a respondent. The Higginson Company had the ship under charter at the time of the collision. The other suits were originally against the Messrs. Irgens alone, but on their petition the charterer was joined as a respondent, as in the Dumont Case. The suits of the administratrix of Gracie and the administratrix of Miss Dodge were brought under the New York statute to recover for the loss of the lives of Gracie and Miss Dodge, and the suit of Hanigan, who was steward and general utility man on the yacht, is for personal injuries and lost property.

"The ship was 235 feet long and 32 feet beam, her tonnage, 1,087 gross and 670 net, and at the time of the collision she drew 13 feet 8 inches forward and 16 feet 2 or 3 inches aft. By the charter, the charterer was to provide and pay for all pilotages, and there was also the following clause: 'That the charterers shall have permission to appoint a supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost despatch.' The charterer employed one Nelson to sail on the ship, and he says that he 'supposes he was put there as pilot and supercargo,' and that he piloted over Nantucket Shoals, and the Sound, and the Hudson river. He was 65 years old, had made the same voyage with the ship on four previous occasions under the charter, and was on the bridge directing the navigation at the time of the collision. He held no American license, had never been licensed by local inspectors, and apparently the only license he held at this time was issued by the Province of Nova Scotia, and was an ordinary master's certificate for seagoing steam vessels. He testified that he had followed the sea since he was 11 years old, had been 'around here' 25 or 30 years, and was a member of the American Shipmasters' Association before getting the Nova Scotia certificate. It does not appear what his experience had been in navigating steam vessels in the inland waters of the United States; he merely says that he had been up the Hudson a great many times, and was familiar with it. The ship's captain was not aboard, having been landed at the Battery on the way up, along with a Hell Gate pilot who had charge of the navigation in coming down the East River. The captain's object in going ashore was to enter his ship at the Custom House, and he did this at the request of the charterer, to save time. The chief officer was 22 years old, and held a Norwegian mate's certificate only. Excluding the captain and Nelson, there were 16 men in the ship's crew. There was no one aboard licensed to pilot steam vessels in the Hudson river, and, according to Nelson, none but himself who knew the river.

"The yacht was 65 feet long and 14 feet beam, and her crew consisted of the captain, the engineer, and Hanigan, with Rudd lending assistance. The captain and the engineer were licensed men, experienced and competent for their position. Hanigan, a young man of 20 or 21, had joined the yacht the night before, and says that this was the first time he had served on a steam vessel. Neither he nor Rudd was competent to navigate the yacht, or knew the pilot rules, although both had had experience with launches, motor boats, and other small craft on the Hudson, and had picked up some of the knowledge required by navigators. Rudd had attened to the yacht's lights on the evening of the collision, according to his own and Hanigan's testimony. There is no doubt

that the lights had been properly set and were burning, and the yacht can be charged with no delinquency in that respect. The ship, also, had her regulation lights set and burning.

"After the collision the ship came to anchor, and sent out boats to look for those who had been on the yacht. Green, Rudd, and Hanigan were picked up after they had been in the water a considerable time, but no traces were discovered of Capt. Storms, or of Engineer Gracie, or of Miss Dodge, although all reasonable efforts were made to find them. The answers allege that the rescued persons were 'in varying degrees of intoxication,' and among the allegations of fault against the yacht is a charge that 'her officers, crew, and passengers were in a disorderly and incompetent condition.' The ship presented testimony on this subject concerning the rescued men, but I do not consider it sufficient to establish the charges as against either Rudd or Hanigan, and it is against both the testimony and the probabilities as to the captain and the engineer. It appears from the testimony of Rudd and Hanigan that Green brought three pint bottles of champagne aboard at New York, and when the yacht stopped at Tarrytown Hanigan went ashore by order of Rudd and bought three more bottles, in quarts. They state that there were no intoxicants aside from the champagne, and Hanigan, who had charge of the supplies, says that when he cleared away the things after supper the three quart bottles remained untouched in the ice box. Rudd, also, says that none of that lot had been used. Both Rudd and Hanigan testify that neither the captain nor the engineer drank any of the champagne, and Hanigan states that he himself had never tasted liquor. Rudd claims to have taken only one glass. The captain was over 60 years of age, and according to Hanigan had taken nothing but water and coffee during the day; and testimony from those who had abundant opportunity to know was to the effect that he was of irreproachable habits, and for a great many years had advocated and practiced total abstinence from alcoholic beverages. He had a long experience as commander of yachts, among them vessels of considerable size, had a pilot's license for the Hudson river, which he had navigated the greater part of his life, his reputation as a navigator was high, and he had handled the yacht for some time. There is also testimony that the engineer never drank.

"While the respondents were able to produce seven witnesses from the ship as to the occurrences immediately preceding the collision, libelants were of necessity limited to Rudd and Hanigan, as Green, who had nothing to do with the navigation, was able to contribute no useful information as to the movements and courses of the vessels, their relative positions, the lights they exhibited to each other, and the signals they gave. The account of the collision which Rudd and Hanigan give contains contradictions and inconsistencies, and is somewhat confused in details; but I saw no indication of an attempt or disposition to misrepresent the facts, and in its main feature their account is in accord with that set forth in the libels, and is confirmed in important particulars both by disinterested witnesses and the testimony for the ship.

"The libels allege that when the yacht was a short distance above Dobbs Ferry, proceeding at slow speed, near the mid-stream, she sighted the white and red lights of the ship, bearing on the yacht's port bow, and apparently headed so as to pass her port to port; that the yacht thereupon gave a single blast of her whistle, but the ship did not at once reply, and apparently continued her general course until within a short distance, when she opened her green light, gave two blasts, and swung rapidly to port, as though under a starboard helm; that the yacht's helm was ported and her engine reversed full speed, but the ship came on at high speed, apparently under a starboard helm, and her stem struck the yacht on the latter's port side about amidships, turned her over, cut her into two pieces, and caused her to blow up and sink almost instantly.

"The answers allege, in subsance, that at about 8 o'clock, while the ship was proceeding well inshore on the east side, she came within range of the light on Kingsland Point and steered generally for it, and when in the vicinity of Dobbs Ferry the bright light and the green light of the yacht, and for a moment the shimmer of her red light, were observed a little on the starboard bow; that the red soon disappeared, leaving the masthead light and the green light on the ship's starboard bow; that prior to this the speed of the ship had

been reduced, and she was making about five knots; that the ship gave a signal of two blasts, and slightly starboarded, and later, hearing no response, although the yacht continued to exhibit her green light on the ship's starboard bow, the ship repeated her signals of two blasts; that the yacht made no response to this, but continued to broaden slightly on the starboard bow of the ship, until, when broad on that bow, she swung across the course of the ship, as though under a port helm, and exhibited her red; that thereupon the ship reversed her engines and blew repeated danger signals, but the collision could not be thereby avoided, and the yacht fell across the stem of the ship, was overturned, and sunk; that after she had changed her course under a port helm, and at about the instant of collision, the yacht gave a sound, but this could not be identified as a signal; that owing to the condition of the atmosphere it was difficult to estimate distances accurately, but it is believed the vessels were about one mile apart when the ship gave her first signal of two blasts, about half a mile when she gave her second, and about 200 yards when the yacht ported; that the speed of the yacht was apparently in excess of 10 knots an hour, and was not reduced at any time before the collision.

"Rudd and Hanigan testify that all the way down from Peekskill the yacht kept west of wid-stream, and Hanigan says that when passing Nyack, which is some 4 miles above Dobbs Ferry, on the west shore, they were headed for the long pier at Piermont, just below Nyack, and were going slow, or, as he puts it, quarter speed, and, as far as he knows, the speed was not increased afterwards. Rudd says that they were going half speed, between 9 and 10 miles, but later changes his estimate to 8 miles, stating that he judged the yacht's full speed to be 10 or 12 miles, and, so far as he knew, no change of speed had been made since leaving Peekskill. Hanigan estimates that they passed 100 yards off the Piermont Pier, and Rudd ⅛ of a mile, and both testify that no change of course to the east was made before the collision, that the captain was at the wheel, and continued there up to the end, that Rudd was also in the pilot house, and Hanigan outside at the pilot house door, on the starboard side, where he had stationed himself by order of the captain to keep a lookout. They admit that there had been a period when the captain was absent from the pilot house, and that during his absence Hanigan steered, and that Green, Miss Dodge, and Rudd were in the pilot house at that time; but they assert that the captain returned, that Green and Miss Dodge then left the pilot house and went to the after deck, and the captain resumed the wheel. Hanigan states that this absence of the captain was not more than from 5 to 8 minutes, and was occasioned by his going to the toilet, that he came back with a tray containing his supper, which he ate on the seat in the pilot house, about 7:45, when the yacht was off Nyack, that Hanigan steered while the captain was eating, and then went aft, had his supper at about 8:15, cleared off the table, and returned to the pilot house, and that, although the sun was already down, it was not quite dark, both shores being visible. He says that he was forward fully 15 minutes before the collision. Rudd testifies that the captain ate his supper in the cabin, and was not absent more than a very few minutes, but other testimony of Rudd is to the effect that he was in doubt whether the captain ate his supper in the cabin, or merely went to the toilet. He also says that after he, Green, and Miss Dodge had had their supper, and were on their way to the pilot house, they passed the captain, bound from the pilot house to the cabin, that this was about a quarter to 7 or 7, that Hanigan was then alone in the pilot house, having left the cabin a minute before, that they were then 10 or 15 miles above Nyack, that the captain returned to the pilot house at least an hour before the collision, and after this he (Rudd) went to the after deck and talked with Green a minute or so, and then went back to the pilot house, getting there about 20 minutes before the collision and remaining until the vessels were almost together. Rudd further states that he had lighted the side lights before the captain left the pilot house. It was then twilight, and the collision occurred about 8 o'clock or a little later, or 20 minutes or half past 8. The almanac shows that the sun set at 7:28.

"I am satisfied that at the time of the collision Capt. Storms was in the pilot house at the wheel, directing the navigation of the yacht, that he had been thus employed at his post continuously from a time prior to the moment when either vessel could have sighted the other, that Hanigan was outside, at the

pilot house door, acting as lookout, and that the engineer was at his post, attending to his duties.

"Rudd and Hanigan testify that the captain first called attention to the ship, which was then showing a red light and a white light, about 1 or 1½ miles away, close in to the east shore, and bearing on their port side, apparently on a course parallel with the shore. Rudd says that this was 10 or 12 minutes before the collision, and Hanigan states that the ship was then about off Hastings, and the yacht about off Ardsley, heading for Forest Field Grove, a resort for excursionists on the west shore where lights are displayed, about opposite Hastings. According to the chart, Ardsley is about three-quarters of a mile north, and Hastings something more than one mile south, of Dobbs Ferry. On his cross-examination, Hanigan says that the yacht had just passed Piermont Pier. Piermont Pier is on the west shore about 1¾ miles north of Dobbs Ferry. Hanigan also states that a schooner had been ahead of the yacht, near mid-stream, and this vessel, which crossed to the easterly shore, showing her red light, shut out the ship until the schooner got in towards the easterly shore, and then the ship was opened up about 1¼ miles away. The presence of this schooner also appears from the ship's testimony. Hanigan says that there was another schooner, bound down, about one-quarter of a mile astern of the yacht, and no vessels were in sight other than these two. He further testifies that, when a mile or a mile and a half away, the ship showed only a glimmer of her white light in the bow, her red still showing strong, and, as the white had previously been strong, he judged she had veered to the east. His knowledge of light was not sufficient, he said, to enable him to tell how the diminishing of the white showed that she had turned away from the yacht; but he and Rudd both testify that the captain suggested that the vessel was a lighter bound for the brewery dock at Dobbs Ferry. Hanigan states that the captain said, 'I will give her a blast anyway,' that the blast was given, and the ship then 'turned round and opened her green on to us.' Rudd also testifies to the yacht's signal before the ship's turn to the west, and says that it was one whistle, was clear and distinct, and should have been heard aboard the ship. Rudd's attention being called to the fact that at a coroner's inquest he testified that the ship was only half a mile away when the yacht gave this signal, he said that he would abide by that testimony; the facts being fresher in his memory at that time. Hanigan is positive that this signal was not given after the ship's green light became visible, and also says that he is under the impression that later the captain pulled the whistle cord again; but elsewhere he says that he does not remember about this. Further testifying as to the ship's change of lights, Rudd says that after her red had been visible for a period which he variously states as a few seconds and a minute or so, and when she was half or three-quarters of a mile away, the white became stronger and stronger, and then he saw the green as well as the white; and he also refers to the red as disappearing, and the green becoming very prominent, when she was about three-quarters of a mile away. Hanigan says that the ship 'threw a slant,' and showed her green when 150 or 200 yards away, that she was then coming for them half the distance from the center of the river to the east bank, that the white came out full again, that all three lights were 'good and bright,' that she was then possibly three-quarters of a mile away, further down the river, to the southeast of the yacht, with her stem headed for the yacht's beam, and that he continued to see all three lights up to the time of the collision. Rudd says that she seemed to be coming towards them fast, and when her green had been visible not over 2 minutes, or 3 to 5 minutes, she blew two whistles, being then one-quarter of a mile away, 'right upon' them, heading for their port side. Subsequently he said that this estimate of distance was a mistake, and it should have been 150 or 200 feet. He also states that this was the first signal the ship gave, and that on receiving it their captain seized the cord, gave alarms, and rang to reverse, that the alarms continued until the yacht sank, and that the order to reverse was obeyed at once. He further says that when the alarms were given the ship was 100 or 200 feet away, but it was hard to judge in the excitement. He states that he is under the impression, has a faint recollection, that the captain repeated his single blast 30 or 45 seconds before he gave the alarms and the bell to reverse, was sure he did, but he himself ran

out of the pilot house to the cabin deck as soon as he heard the two blasts. and then the ship was 'right upon' them. He further says that the ship struck the yacht aft of amidships, turned her sideways, 'almost turtle,' pushed her over, cut her nearly in two, and he was thrown into the water, that when struck the yacht was headed down river, and that the ship came into her at an angle of about 45 degrees. Hanigan, also, testifies to the two blasts from the ship after she had made the change of course to the west, and this, he says, was her only signal, and was given when she was 100 or 200 yards away. He states that the captain rang bells to the engineer, but he did not know what they meant. The yacht 'was shivering,' however, and from that he inferred she was backing. The captain 'threw the wheel around, and just at that moment the steamer got right on us, and I left the pilot house, and our whistle was blowing, and I got up on top of the pilothouse, trying to get the boat loose, and before I had a hand on the boat I was in the water. * * * She kept shoving us against the tide, and she kept turning towards her. * * * In the engine room it looked to me as if the whole thing was on fire just in one flash. As soon as she hit the water it was just a flash.'

"Rudd, as well as Hanigan, refers to two schooners; but his testimony concerning them is not very clear. He states that both were bound up, and one, which was 'way down the river,' in towards the west shore, passed between the ship and that shore, was about three-quarters of a mile from the yacht when the ship was first sighted, and was just passing the ship when he saw the latter's lights change. She was just a little on the yacht's port bow; her course being between the ship's and the yacht's. The other schooner, Rudd says, was also 'way down the river' on the east side, about 10 minutes before the collision, and when the ship was sighted was 'dead ahead' of the yacht, about a mile below and about abreast of the ship, going towards the east shore. He could not see her lights. She had passed the yacht when the latter gave her first whistle, was on the west side about mid-stream when the ship's two whistles were given, was a little below the ship when the latter changed her course, and at that time she and the ship had already passed each other. He further says that the schooner which the yacht passed was about abreast of the yacht when the ship was sighted, and his impression is that she drove the ship over towards the east shore, and that was why the ship altered her course and came out towards mid-river when she had passed.

"Rudd stated that the place of collision was about a quarter of a mile west of mid-stream, but subsequently said that he was not sure of this, although it was west of mid-stream. Hanigan judges that the collision was about 150 yards west of mid-stream, but says that when the yacht was raised she was picked up still further west, which he accounts for by her being carried along by the ship.

"According to the ship's testimony, Toresen, the chief officer, was on the bridge with Nelson when the collision took place, and both had been there from the time they left New York at about 6:30 that evening, except that Toresen had gone below at about a quarter before 8 to get his supper; but he says that he merely had a cup of tea, and his absence lasted only about five minutes. It was also testified that Andersen, an experienced seaman, was at the wheel from 8 o'clock until the collision, and Hernsen, deck boy, a youth of 16, was lookout. The latter had joined the ship 4½ months before, but prior to that had spend 5 months on a training ship. He states that it was he who set the side lights at 10 minutes past 8, that he looked at the clock at that time, and immediately afterwards went on lookout, at about 8:15; that at the time of the collision he had been on duty about half an hour. Mikelsen, the chief engineer, says that he went off duty at 8 o'clock, and from that time until the collision was sitting on the saloon skylight, forward of the bridge, on the starboard side.

"Nelson testifies that, when the yacht was first sighted, there was sufficient light to see the outlines of houses on the shores, and both he and Toresen say that they were then a little below Dobbs Ferry, and their course N. ½ E. Toresen says that they had maintained this course for about 2 miles. Nelson, Toresen, Andersen, and Mikelsen all state that they were about one-fourth of the way across from the east shore, and, according to Nelson, they were going half speed, which he says was about 4½ knots. There is a light off Tarry-

town, 4 miles above Dobbs Ferry, referred to in the testimony as Kingsland Point Light, and Nelson says that it bore ½ point, and Andersen ¼ of a point, on the starboard bow, and they were steering for it. Nelson testifies: 'The man on the lookout said, "A light! A white light, and a red light"—no, "a white light and green light," at least, "on the starboard bow." And the red light glittered, he said. That was the mate. I said, "What did he say?" He said, "He says the red light flickered."' Nelson further says that this red light was Kingsland Light flashing out; but this is contrary to the answers, and to the testimony, of other witnesses for the ship. Nelson states that he saw 'a green light and a little masthead light, no ways off, because she was skimming right down close on us,' bearing 1½ or 2 points on the starboard bow, 1 or 1½ miles away, and between ¼ and ½ a mile inshore of the ship. Hernsen testifies that, while he could not state the distance at which he first saw the yacht, she showed a white light a little on the starboard bow, which he reported as 'a bright light right ahead on the starboard bow.' One or two minutes later, the ship being then about three-eighths of the way from the New York shore, he saw both side lights, the green brighter than the red, bearing a little on the starboard bow, and he reported 'green and red light forward.' The red then gradually disappeared, the green only being visible, and bearing one point on the starboard bow. Toresen states that he saw a bright headlight 2 or 3 miles away, bearing a little on the starboard bow, and Hernsen reported it ahead, that the vessel was all lighted up, and for that reason he took her to be a yacht; but Hernsen says that he could not make out what kind of vessel she was until she was about 600 feet away. Toresen states that Nelson used the glasses, and after a while he, also, used them, and saw the green light and a glimmer of red for a second or two, and Hernsen again reported, but he could not state what the report was. The deck log of the ship reads: 'At 8:15 we observed a small steamer under way, it headed right on us, so we could see both side lights; immediately afterwards we could see the green light full and just a little shimmer of the red light.'

"Nelson testifies that, when he saw the lights he describes, there was a schooner on his port bow, bound up, which had been with them all the way from New York, and was then not more than one-fourth of a mile away, about as far up the river as the yacht, perhaps not quite so far; that this schooner was hauling to the eastward across the ship's bow, to clear a tow coming down on the westerly side of the ship; that this brought the schooner right ahead, and he starboarded a little to go astern of her if he got up to her, began to do that "when she got getting across her bow"; that this schooner had been wing-and-wing until she thus hauled across, and then her foresail went over to her port side. He also says that the schooner's change of course could not interfere with the yacht's navigation, because the yacht was too far to the eastward; that he did not pay much attention to the westerly side of the river, because it was all foul with vessel bound up and down; that there were also boats quite a little distance ahead, coming down. Toresen and Hernsen also testify to the presence of other vessels in the vicinity. Toresen says that, when the yacht was sighted, a little schooner, presumably the same referred to by Nelson, was pretty close on their port bow, going up wing-and-wing, and that there was another little schooner, coming out from Kingsland Light on the port tack, headed for the west shore, showing a red light a little on their port bow, not making speed, but pretty nearly still, about 1½ miles away, not as far up the river as the yacht. At another time he says that he first saw the schooner with the red light after seeing the yacht, and she was then about a mile away; again, that he saw her light and the yacht's lights at the same time. Hernsen also refers to this schooner, and he, also, says that she was on their port side, on the port tack, but further up than the yacht, and he did not notice any lights on her. He mentions a third schooner, coming down and showing her red, bearing one point on their port bow, and sighted by him before he saw the yacht. He says that there were no other vessels there, but when he was setting the lights at 8:10 they passed a tow.

"Although Toresen and Andersen say that there was nothing to starboard, Nelson testifies that, because it was impossible for him to keep inshore of the yacht, he blew two whistles; the yacht being then about a mile away. He received no answer, and 'walked across the roof to see how things were there;'

the ship's wheel being steady. He then blew two whistles again; the yacht being between one-quarter and one-half a mile away, about four points on the starboard bow, bearing northeast, and the schooner under the ship's bow. He also slowed the ship, 'because I couldn't run over the vessel underneath our bow.' He says that he used his glasses, saw nothing but the yacht's green and white, and 'a lot of lights all over her'; and under his orders the wheelman starboarded a little. At the inquest he testified that he starboarded a little after giving his first two whistles, that he then kept steady on his course, except that he starboarded as the case required up to the time of the collision, and he was going half speed when he gave his second two whistles.

"Toresen, in describing what was done after sighting the yacht, says that by order of Nelson he gave two whistles to her; she being then about 1 or 1½ miles away, ½ or ¾ of a point on the starboard bow, and showing green and white, but no red. The wheel was starboarded a little, by order of Nelson but after the ship had gone to port about ½ point her wheel was steadied. Toresen says that the ship was prevented from going much to port by the presence of the winged schooner, which was being overhauled by the ship; and that when the signal was given the red light of the crossing schooner he described was on their port bow, and the winged schooner was about one-half a mile ahead, about 2 points on the port bow. He also testifies that no answer to the ship's signal was given by the yacht, and soon after when the two vessels were about one-quarter of a mile from each other, still showing green to green, Nelson remarked that he guessed the other vessel did not hear the signal. Then, by Nelson's order, the 2 blasts were repeated. Hernsen and Mikelsen also testify to 2 whistles twice from the ship, but Andersen could remember only one such signal, and says that when this was given he was ordered by Nelson and Toresen to starboard as much as the green light of the yacht 'was clear on the starboard side,' which at that time was about ¾ of a point. He could see the bright white light and the green a good mile away, pretty near ahead, about ¼ of a point to the starboard. Mikelsen says that on hearing the ship's first signal of 2 blasts he looked up and saw bright and green forward, a good way off, bearing about 1 point on the starboard bow, and could see no other light on the yacht; but, because his eyes were not good at night, he could not see how far away she was. He watched her from that time on, looking over the starboard side, for 6 or 7 minutes, and saw the red at no time until she made the sheer which he and the other witnesses on the ship testify to. He heard calls from the lookout, but did not notice what they were. He judges that the yacht was about a quarter of a mile further up river than the ship when the second signal of 2 blasts was given; the yacht's green light and headlight then bearing on their starboard bow.

"In describing the collision, Nelson says that the shore makes out along there, and, as the yacht came straight down on her course, she drew a little nearer to the ship, going like a race horse, 10 or 12 knots; that when she was at a distance which he at one time estimates as between 500 and 600 feet, and at another time as the length of the ship (235 feet) or a little more, and 1½ or 2 points abeam of the ship, 'just forward of the beam from amidships,' and while the ship was going slow, 1½ or 2 knots, the yacht 'just flickered around' towards the ship, then 'turned a little again to starboard, and then all at once he just made a flash for to cross our bow. And of course I went "toot, toot, toot." Then I reversed the engines full speed astern, and blew three blasts that my engines were going astern. * * * Just before he fetched up against our stem there was something went "puff" '—the yacht being then not 4 feet off. He states that this was the first sound that came from her, and at this time he noticed a man and a woman standing right forward of the pilot house. Hernsen says that he, also, saw a man and a woman; But they were on the after deck. The woman seemed excited and caught hold of the man, and the man took hold of the rigging. Nelson states that after being struck the yacht ran 1½ or 2 lengths to the westward, and gradually went down. He also says that the ship had stopped her headway at the time of the collision, and that immediately after it she anchored. At the inquest, he said that when she began to sheer the yacht was nearly abreast of his stem, just a little forward

of it, and between 300 and 400 feet to starboard. Toresen testifies that when the yacht was pretty nearly abreast of the ship, perhaps 100 feet further up river, about 7 points on the starboard bow, and about the ship's length away, she suddenly turned and tried to cross the ship's bow, but the distance was too short. He 'heard a little sharp whistle,' when she was coming over, her light changed, and he saw the red. She 'turned around like a cup,' and Nelson ran to the telegraph, rang to stop, and for full speed astern, ordered the wheel hard aport, and alarms to be blown, but the ship struck the yacht on the port side, about amidships. He says that he did not think there was danger of collision until the yacht took her sudden turn. Hernsen, Andersen, and Mikelsen say they heard no signal from the yacht, and they place the vessels in the same relative positions as Toresen when the alleged sheer was taken, giving the same distances, except that Hernsen says that the yacht was about a quarter of a ship's length further up the river than the ship, which would be about 60 feet, and Mikelsen about a ship's length further up. Andersen states that he, also, saw no change in the yacht's lights until she took the sheer; the pilot and the chief officer ordered him to lay his helm hard aport, and he put it as far over as he could, but did not get it hard over before the collision. Mikelsen says that he heard the bells to the engines and ran to the engine room, and when he got there he found the indicator standing at full speed and the engines reversing full speed.

"Toresen testifies that both the schooners he referred to were further up the river than the ship at the time of the collision, the winged schooner about the ship's length ahead, he says at one time, and, at another, two or three lengths, bearing about six points on their port bow. The other schooner he mentioned had passed their bow and crossed under the stern of the winged schooner, and was pretty near abreast of the ship, about 50 feet off. Hernsen says that at the time of the collision the two schooners he mentioned were on the ship's port side, a couple of lengths off. Andersen says that there was a schooner on the port side, far away.

"Two young ladies, Miss Mosher and Miss Shand, passengers on the ship, were sitting in front of the skylight under the bridge, and state that from this position they could see on both sides. Although she had previously seen the yacht, Miss Mosher says that her attention was not called particularly to her until the ship gave a signal which she said she could not describe more definitely than to state that it was more than one blast; that from that time on she kept her eyes on the yacht, which she describes as racing straight down on a line to the ship's right, quite close to the ship, not changing at all, showing a bright masthead light and lights all over her; and that she could not remember about the colored lights. Miss Shand also says that the yacht was to the right, quite far away, coming very quickly, showing her masthead and green lights, and being otherwise brightly lighted. She says that she, also, watched the yacht from that time on, and heard three sets of signals from the ship, the first two being more than one blast, but how many she could not state; that the ship seemed to turn to the left to make more room for the yacht, and just before the last signal there was an order from the pilot, and the ship kept going towards the left. Miss Mosher testifies: That a second signal was given by the ship, like the first. She heard an order from the pilot. The ship seemed to head over towards the left-hand shore, and she noticed that the yacht was not going to get out of their road, but seemed to be drawing closer. That, just as the yacht got up close to the ship, she went straight across their bow, the ship gave some little quick toots, and the pilot called out to the yacht to get out of the way or she would be run down, and ordered full speed astern on the ship. That she herself ran to the bow on the left side, and could see that the yacht did not get past at all, but when struck went right down bow first, and did not come to the surface again. Miss Shand says that when almost abreast of the ship's bow, not more than one of her own lengths away, the yacht turned very quickly to cross in front, and struck the ship just as she had gotten about half way across. Neither of these witnesses saw any other vessels there.

"The testimony from those aboard the ship that the yacht gave no passing signal whatever is contradicted by Bystrom, a resident of Dobbs Ferry, who was called as a witness for the ship. His house is on the bluff overlooking the river, and he says that it stands about 100 feet above the railroad, and 300 feet back from the river; that the trees in front have been cleared away for a space of 300 or 400 feet, and this gives an open view up and down the river for a much greater distance. He testifies that he saw the collision from his piazza, and describes the night as cloudy, but moonlight, and says that he could see over to the opposite shore; that the trees are very thick on both sides of the opening, but through those on the upper side he saw a red light going south, very close to the line of the terrace and about 200 feet off shore, and later, through the trees on the lower side, saw a green light about 100 feet further out in the river; that when the vessels were at a distance from each other which he estimates as about 400 feet, not more than a minute or two before the collision, the descending vessel gave a shrill whistle of one blast, which he likened to that of an auto boat, and this was followed by a signal from the other. On the reference he testified that the ship's signal was more than one blast; he could not say how many. At the coroner's inquest, held shortly after the collision, he said that the vessels were about heading for each other, that not only was he positive that he heard the yacht blow her signal first, but there was no question in his mind that the ship's signal, which he then said came a few seconds after the yacht's, was two blasts, and that the green light did not move as far as he could see, was in the same position as long as he followed it, was steering the same course exactly. If the positive testimony of Rudd and Hanigan that the yacht gave one whistle before there was danger of collision is credited, this testimony would confirm Rudd's that a second signal of one blast was given by the yacht. Although Nelson says on the reference that the yacht was from one-quarter to one-half a mile away when he gave his second signal, at the inquest he testified that the ship was then a little above Dobbs Ferry. This would be about the place of collision, and indicates that he gave the signal when the vessels were almost together, confirming not only Bystrom's, but Rudd's, testimony that the ship was 'right upon them,' and Hanigan's, that she was 100 or 200 yards away, when she gave two whistles. Bystrom further testifies that when the red came into view he saw that it was on a yacht, that both vessels appeared to hold their course until about 100 feet apart, and then the red and all the cabin lights of the yacht suddenly disappeared, the ship struck her about the middle with a tremendous crash, the red light came out astern of the ship as the latter moved forward, and then suddenly disappeared. Before the coroner he testified that 'the little boat must have been some on the land side, but that couldn't be seen from where I sat.' He further says that before the collision the yacht was going the faster, the steamer so slowly that he at first thought she was a tow, that neither vessel changed her speed, and that all the incidents he describes occurred within a space of 500 feet. But his estimates of distance are of doubtful value. He says the river is almost two miles across, and admits that because he viewed the occurrence from a position above the river, and back some distance from it, his estimates may be at fault; but he states that the ship was surprisingly close to the shore; vessels of her size usually going further out.

"Nelson's testimony that the ship was below Dobbs Ferry when he first saw and signaled the yacht, and the yacht from 1 to 1½ miles away, would indicate, if accepted, that the yacht was not going at any such relative speed as he and the other witnesses for the ship represent, since to reach the place of collision the ship must have traveled about as far as the yacht. This exaggeration of the yacht's speed is accentuated by Nelson's testimony at the inquest that the collision took place 15 or 20 minutes after the first signal he claims to have given her, and by the entry in the deck log that the yacht was sighted at 8:15, when the entry is considered in connection with the fact that the collision took place at 8:30. But it is improbable that any such period intervened. Mikelsen testified that as far as he knew the ship was going full speed ahead at the time the yacht made the alleged

sheer; and that entries in the engine log indicate the same thing. Toresen says that he could not be certain, but judges that they were going full speed up to the time of the yacht's sheer, and full speed was between 8 and 9 knots; that, except when they slowed for the other vessels, they went up the river at full speed, but because of the head tide they were not going between 8 and 9 knots. At the time of the collision, however, there was not sufficient tide to have a considerable effect on the ship's headway. I find, therefore, that the yacht was not proceeding at excessive speed, that her speed did not exceed that of the ship, that the ship was not going half speed either at the time Nelson says the yacht was sighted and he gave the first whistles, or when he says he gave the second 2 whistles, and that he did not slow after giving the second 2 whistles, as he testifies, but that full speed was maintained until the moment of collision.

"If the ship had been an American vessel, the employment of Nelson to navigate her on the Hudson river would have been unlawful under section 4438 of the Revised Statutes (U. S. Comp. St. 1901, p. 3034). It has been held that the fact that one of two colliding vessels is navigated by an unlicensed man, in violation of this statute, should be regarded as an important circumstance in determining which vessel is at fault when there is a conflict of testimony. The John F. Tolle (C. C.) 12 Fed. 444; The Robert Jenkins (D. C.) 22 Fed. 797; The Eagle Wing (D. C.) 135 Fed. 826; The Henry O. Barrett, 161 Fed. 481, 88 C. C. A. 423. In The Eagle Wing, the court held that there is a presumption that this circumstance caused or contributed to the collision, and the vessel so navigated has the burden of proving that it could not have done so. That Nelson's navigation excited some apprehension on the part of Toresen, the chief officer, is apparent from the latter's testimony. He testified at the inquest, according to the stenographic report, that at about 8:15 he saw a little bright light right ahead, 'a little aport from the starboard bow, and when he comes on I see a red light and green light, and so I tell the pilot to keep off a little, red light forward and a white light.' Although Toresen denies that he so testified at the inquest, he testified on the reference that, when he first saw the yacht, he suggested to Nelson to give a signal; that Nelson did not adopt the suggestion, said, 'Oh, he is all right,' went over to the port side of the bridge and back before giving the order for two whistles; that a little while after this signal had been given, 5 or 6 minutes before the collision, he said to Nelson, 'That fellow is coming green,' and Nelson answered, 'Yes, that is all right'; that Toresen saw they would 'pass him close,' and suggested to take the ship over a little, by which he says he meant to port side, a starboard wheel; that Nelson said, 'No, he is all right,' and went to the port side of the bridge again, and then said, 'Tell them to go astarboard a little'; and that no other order was given to starboard. According to this, the first signal of two whistles was given when the vessels were meeting end on, or nearly so, and the wheel was not starboarded until the signal was repeated, when they were at a distance which Nelson estimates as between one-quarter and one-half a mile, and Toresen one-quarter of a mile, with the yacht approaching at a speed of 10 or 12 miles, as they assert. And if the courses of the vessels were so close together that the yacht could suddenly whip across the other's bow in the manner asserted, it would seem that the vessels must have continued end on, or nearly so, notwithstanding the ship's claim that green was opposed to green. Although the testimony of Nelson, Toresen, Mikelsen, and Hernsen that the red had been shut out and did not appear again until the sheer was made is corroborated by Miss Shand so far as she testifies that she saw the green after her attention was drawn to the yacht, she does not state that the red was not visible at any time, but does say that the yacht was not more than one of her own lengths away when she sheered. If that was so, it would seem that the red must have been visible as the yacht approached. Miss Mosher says that both before and after the ship's second signal she thought that if the yacht did not get out of their way she would hit them, would skim past, but strike the ship about the middle of the latter's right side, and that her course was so close that it seemed as if a person could almost have touched her from the ship's bow. Nelson says that the vessels would have passed 1½ lengths

clear of each other if the yacht 'hadn't flopped around.' This is only about 350 feet.

"Under these circumstances, whatever the faults of the yacht may have been, the ship's testimony indicates fault on her part in failing to go to the right and pass on the yacht's port side, there being no assent from the yacht to a departure from the rule; yet she went ahead at full speed even after giving her second signal of 2 blasts, starboarding her helm with each signal, according to Nelson. But whether the vessels were or were not end on, or nearly so, the ship was at fault on her own testimony for violating rule 3 of article 25, which directs that 'if when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle'; and she was also at fault for violating the inspectors' rule which provides that if, in the situation quoted from the statute, the vessels have approached within half a mile of each other, 'both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered and understood, or until the vessels have passed each other.'

"It is a perplexing problem to determine the facts of this collision from the two utterly discordant and irreconcilable accounts referred to above; but, if the place of collision be ascertained, we have a circumstance which should be decisive of other questions as to which there is a sharp conflict. Although Toresen testifies that the collision took place a quarter of a mile, or a little more, from the east shore, and Andersen a good quarter of a mile from that shore, Andersen himself, on his cross-examination, when asked whether the ship's wheel was shifted first one way and then another to hold his course, said, 'She went pretty steady because she was in the middle of the stream.' If the place of collision was in fact in or near mid-stream, and the yacht, when first sighted, was close in to the east shore, between a quarter and a half a mile inside of the ship, as Nelson alleges, she must have traveled diagonally across the river to reach the place of collision, and displayed her red light continuously to the ship. Nor could she have been any such distance to the east of the ship unless the ship was in or near mid-stream, or the yacht high and dry on the land. Miss Mosher testifies that it appeared to her that they were nearer to the east shore than to the west, both before the collision and when they weighed anchor later in the evening; but Miss Shand thought that they were going up near the middle of the river, as she says they had been doing all the way from New York. Miss Mosher said that at first the yacht seemed to be coming straight, and then volunteered a statement which raises a doubt as to the accuracy of her recollection or observation that the yacht was to the starboard of the ship. She said that, at the time the yacht seemed to draw towards the ship, 'it may have been because we moved over to the left a little after I thought we shifted.' Unless the yacht was on the ship's port hand, showing red, it is difficult to see how this movement of the ship could have brought the courses of the vessels closer together. The testimony of Hanigan and Rudd that the yacht was not traveling on the east side is corroborated by Tom Dumont, a cousin of libelant Dumont and master of a tug. He knew the yacht, and testifies that, when he was coming down the river with his tug and a tow of barges late in the afternoon of the day of the collision, the yacht overtook and passed him on his starboard hand, off Hook Mountain, between Rockland Lake and Tarrytown lights, and that at that time the tug was a little east of mid-channel, and the yacht very nearly in mid-river, going about 8 miles an hour. According to this, the yacht was then well on the westerly side of the deep-water channel; and the place where they passed is about 7 miles above the place of collision. Cochran, captain of the wrecking vessel Champion, which went to the scene two or three days after the collision, testifies that when he found the yacht she lay west of mid-stream from shore to shore, opposite the brewery dock, at a depth of about 50 feet at high water, according to his judgment, and this depth is confirmed by a diver who took soundings. The rise of the tide there is from 4½ to 5 feet, and the chart soundings show a low-water depth of 45 feet opposite the brewery dock, a little west of the middle of the deep-water channel. He says he took ranges, and,

after making fast to the wreck, the flood tide, which sets in towards the east shore, shifted the wreck up the river about one-fourth of a mile, and carried it in so as to reduce the distance from the east shore about one-third. Christie, captain of the wrecking boat Reliance, which relieved the Champion and raised the wreck and took it ashore, says that when he took hold it lay somewhere near the middle of the river, favoring the east shore slightly, that in getting it up it moved 400 or 500 feet further in towards the east shore, and that the line he then ran to the shore was 1,500 to 2,000 feet long; the diver already referred to says 1,800 to 2,000 feet. Another diver, who went down to the wreck the day after it was located, judges that it lay about mid-channel. The ship's testimony is that she anchored in 6 fathoms, immediately after striking the yacht. This depth of water would be on the westerly side of the channel.

"I do not accept the ship's account of the collision, but regard it as inconsistent, contradictory, and improbable, and find that the collision took place on the westerly side of the deep-water channel, which extends from a little west of mid-stream to the easterly shore, or close thereto; and I also find that, although the yacht was not as far in towards the west shore as Hanigan and Rudd estimate, she was on the port hand of the ship coming straight down on the westerly side of the channel and showing her red light to the ship; that she continued on this course until danger of collision became imminent; that the ship, showing her red light to the yacht, was well in on the east side of the river when sighted by the yacht, and then worked over to the west side of the channel and ran the yacht down. As appears in the above abstract of the testimony, Nelson testifies on the reference that they starboarded when the second signal of two whistles was given by the ship, and on the inquest that they also starboarded when the first signal was given, and then 'kept steady except starboarding as the case required' up to the time of collision, and that they also starboarded to go astern of the schooner which had been wing-and-wing, but which changed her course to the east and was crossing the ship's bow and being overtaken by the ship. This last change of helm was made after the ship's second signal; Nelson states, although he adds that he 'could not say just how that worked.' I also find that the yacht twice gave a signal of one whistle to the ship, the first signal at or about the time stated by Hanigan, before there was any danger of collision, and the second after the schooner had crossed the ship's bow, and when the ship was 500 or 600 feet away, had suddenly opened up her green light, and was headed for the yacht; that the yacht ported on giving her second signal; that the ship answered this second signal of the yacht with two blasts; and that the yacht immediately gave danger signals and reversed. It may be, as libelants' counsel suggests, that the small yacht was not seen until the ship had gone out to mid-stream to keep clear of the various sailing vessels which, as hereinbefore shown, her crew testify were ahead, and then, in a moment of indecision and alarm, her helm was starboarded instead of being ported. It will be seen by reference to the testimony of Nelson, set forth above, that, although he testifies that the yacht was from 1 to 1½ miles away when he sighted and first signaled her, he at one time states in effect that she was about one-quarter of a mile away. Miss Mosher says that the interval between the ship's first signal and the collision was about 3 minutes; and Miss Shand, as appears above, testifies that just before the ship's second signal Nelson gave an order, and the ship kept going to the left. But whether the suggestion made by libelants' counsel is or is not well founded, I find that, the vessels being red to red, the ship, if she actually gave two signals of two blasts each to the yacht, was at fault (1) for attempting to pass to the left under a two-blast signal without having obtained the assent of the yacht, (2) for not keeping to her own starboard side of the channel, (3) for not sounding alarm signals, but keeping on at full speed and repeating her two blasts when her first signal was not answered, (4) for crossing the one-blast signal of the yacht, (5) for not stopping and reversing when danger of collision should have been obvious, and (6) for not maintaining a competent and sufficient lookout. Because of his youth and limited experience, I do not consider that Hernsen was a competent lookout.

"Most of the allegations of fault which the answers make against the yacht have been disposed of adversely to the ship, such as the charge of intoxication

on the part of the crew, of excessive speed, of proceeding down on the wrong side of the river, of porting the helm to head across the course of the ship when on the ship's starboard bow, and of not stopping and reversing prior to the collision. Other charges are that the yacht was not properly manned and equipped, did not maintain a good and sufficient lookout, and did not respond to the two-blast signals of the ship. As to the first two of these charges, the men engaged in navigating the yacht were sufficient for the purpose, and, although Rudd and Hanigan lacked experience on steam vessels, this contributed in no respect to the collision under the facts found above. The captain himself, and Hanigan, the lookout, sighted the ship when she was a long distance away, and watched her up to the time of the collision. The yacht was a small vessel, and Hanigan's position by the pilot house was but a short distance from the bow. As to the charge that the yacht did not answer the ship's signals, she did answer the second by blowing alarms and reversing, and this was proper under the circumstances; and, if the first was given, it was when the vessels were about a mile apart, according to the ship's claim. Libelants argue that, assuming the signal was given, it is probable that it was overlapped by the yacht's first signal. The Victory, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519. But whether that was so or not, the signal being given when the vessels were a mile apart and when there was apparently no danger of collision, the yacht would have been justified in disregarding it and presuming that the ship would comply with the rules, even if she had heard it. The Victory, supra. On the facts as I have found them, the fault of the ship was so conspicuous that proof of fault on the part of the yacht should be clear and convincing to make a case of mutual fault, and all doubts as to the management of the yacht or her contributory negligence should be resolved in her favor. The Victory, and cases there cited, page 423 of 168 U. S., 18 Sup. Ct. 149, 42 L. Ed. 519.

"Damages.

"1. The yacht was a wooden vessel, and had been last inspected June 26, 1905, when a certificate was issued by the steamboat inspectors at New Haven, permitting her to navigate Long Island Sound, the bay and harbor of New York, and tributary waters. Her license of July 6, 1905, issued at New York, gives her dimensions as 44 feet length, 10.7 feet breadth, and 5.2 feet depth, and her tonnage is stated to be 13 gross, 8 net. The license also shows that she was built at Middletown, Conn., in 1889. Her owner testified that she had always passed inspection since he bought her in 1899, when he traded an alcovapor launch for her and paid $1,000 in addition. He said that he had paid $1,400 for the launch when it was about six months old, had run it two seasons, and valued it at $1,300 at the time he bought the yacht. He testified to quite extensive repairs, renewals, and alterations to the yacht after his purchase, and additions made to her equipment, including the overhauling of her machinery at an expense of $1,000; and he stated that when he had completed this work she had cost him about $5,000. He produced many bills for work done to her, covering the period of his ownership, and said that her condition was first class, and in his judgment she was worth $4,000 at the time of the collision. In his charter to Rudd, the latter was given an option to purchase at $3,000, but in explanation of this the owner stated that his family had gone to Europe that summer, he had no use for the yacht, wished to save the expense of carrying her through the summer, and also needed the money. His experience with vessels was quite limited. It appears that in the spring he had tried to sell the yacht through brokers for $2,800 or $3,000, but received no offers, and had also tried to sell her in 1900, although he could not remember his asking price at that time. Tom Dumont testifies that he had charge of putting her in commission in 1902, as much as $1,000 was spend on her, and she was then sound and in first-class condition. He estimated her value at $4,000 or $5,000 at the time of her loss, assuming she had been kept in good condition in the meantime, and said that it would cost $9,000 to replace her in 1905. Carll, who has a shipyard at Northport, Long Island, did work on the yacht from time to time, and testified that he partly rebuilt her the first and second seasons Dumont had her; that she was made practically new above water, and it appeared to him that a new bottom had been put in

her before he did any work. He considered her worth from $4,500 to $5,000, and said it would cost $5,000 or more to build a new hull like hers. The owner claims $4,000 for the loss of the yacht, but I do not think she was worth that amount. His offer to sell to Rudd for $3,000, and the fact that he had previously put her on the market for $2,800 to $3,000 without success, would indicate that she was not worth more than $2,800. She was 16 years old, and a yacht of that age must have suffered a heavy decline in value. I think that $2,500 would fairly compensate libelant Dumont for the loss of the yacht.

"2. Gracie was 31 years old at the time of his death, and left a wife, Eugenie, 36 years old, to whom he had been married about 4 years, and one child, Etta Eugenie, about 3 months old. This child was alive at the time the wife testified in March, 1907. The wife describes her husband as 6 feet 2 inches in height, weighing from 150 to 160 pounds, enjoying perfect health, and never indulging in liquor. He at times worked as a stationary engineer, but was generally employed on steam yachts. He was chief engineer on Mr. Edwin Gould's yacht for three years, and left that employment only when the yacht was sold, and subsequently he went to Europe as engineer on another steam yacht. Mrs. Gracie testifies that her husband never had difficulty in getting a position, and had taken correspondence courses in marine, stationary, and locomotive engineering, at the time of his death was studying to fit himself to take charge of a power house, and was also working on some devices he expected to have patented. Her testimony is that he was a good, kind husband, never earned less than $100 a month, and in addition received tips from his employers amounting to from $40 to $50 a month for making good speed; and as his board, lodging, and clothes were furnished him, he needed little money, and turned over to her from $100 to $125 a month. He was her sole support, she says, and since his death she has lived on money saved during his lifetime, and her earnings as a seamstress. Libelant's counsel maintains that an award of $25,000 should be made, basing his argument mainly on Gracie's expectations of life as shown by the mortality and annuity tables, in connection with the sums which the wife testifies he was in the habit of turning over to her. The deceased was apparently a man of intelligence, enterprise, and ambition, and these are circumstances which should not be overlooked in determining the value of his life to his wife and next of kin. But the interest alone on the amount claimed would exceed his annual earnings at the time of his death. There would seem to be some exaggeration in the wife's testimony as to the sums she received, in view of his earnings; but his earnings may be assumed to have been $100 a month, and, considering his qualities, it is not improbable that this would have been increased; and it is clear that he provided liberally for his wife in proportion to his means. But his physical strength and earning capacity would have declined with years, even if he had met with no accidents, and it is probable that he or his wife or the child would have died before the expiration of his or her mortality period. To base the award on the mortality tables, regardless of the many vicissitudes of life, would, to quote the language of Judge Simonton in The William Branfoot, 48 Fed. 914, 'be securing for libelant compensation for a certain period when we are dealing with the most uncertain thing in the world—human life.' In Cheatham v. Red River Line, 56 Fed. 248, the court, in discussing this subject, remarked that it is 'purely problematic how long the most productive life will continue so,' and added:

" 'The fluctuations in business, and its opportunities; the liability to form bad habits; the development of disease which, without ending life, may make its possessor incapable of earning money; the uncertainty which there must be as to the continuance of physical capacity; and the mental and moral purposes requisite for the earning of wages, as well as that as to the existence and continuance of the necessary external conditions—all these elements make the problem of how long a man's productive life shall be estimated to be one of the greatest uncertainty. There are no tables of productive lives. It is human experience that some lives are almost worthless to those dependent upon them, and some which are, and which promise to be, support and comfort, come to produce nothing but shame and sorrow. In fixing the value of a human life, and in trying to be just alike to the injured and the injurer, no

chimerical estimate should be made, but rather should there be a resort to sober judgment.'

"In that case deceased was a deck hand on a steamboat, was 38 years old, and left 3 children, but no wife; the children being 5 and 2½ years, and 6 months old, respectively. The court allowed $2,500, stating that it gave great weight to the fact that the amount of recovery was limited to $5,000 in many of the states, and by the only act of Congress allowing a recovery in such cases. This case was decided in 1893, and since then these limitations have been quite generally repealed, and the tendency has been towards much larger awards. In MacMahon v. Brooklyn, etc., Ferry Co., 10 App. Div. 376, 41 N. Y. Supp. 1026, the deceased was 34, earning from $1,800 to $1,900 a year, and left a wife and 2 children, 10 and 8 years of age, respectively. All of these facts do not appear in the report of the case, but have been ascertained from an examination of the record. The jury gave a verdict for $21,000, and the court affirmed the judgment, observing in regard to the amount: 'The verdict was quite large in amount, but in view of the age, character, habits, and business capacity of the deceased as they appeared by the evidence to have been, of the age of his children, and of the income derived from his services and business occupation, it cannot well be seen that the damages were excessive or more than the jury were warranted in finding that his widow and next of kin, who were dependent upon him for their support and education, had sustained pecuniarily by the death of the plaintiff's intestate.' In Schmitt v. Met. Life Ins. Co., 13 App. Div. 120, 43 N. Y. Supp. 318, the deceased was a foreman of a gang of men engaged in repairing an elevator shaft when he was killed. It does not appear from the report how old he was, what his earnings were, or what family he left. The jury gave a verdict for $25,000, which the court reduced to $15,000, stating that this would 'really represent the maximum measure of damages.' In Beecher v. L. I. R. R., 53 App. Div. 324, 65 N. Y. Supp. 642, the deceased was a telegraph operator and collector of stock news, was 61 years old at the time of his death, earned $1,070 a year, and left a wife but no children. There was a verdict for $10,000, which the court regarded as liberal, but not excessive. In Reilly v. Brooklyn Heights R. R., 65 App. Div. 453, 72 N. Y. Supp. 1080, the deceased was a coachman 36 years old, and left a wife and seven children. The court refused to set aside as excessive a verdict for $15,000. In Hock v. N. Y. & Queens Co. Ry., 74 App. Div. 52, 77 N. Y. Supp. 200, the deceased was 34, and left a wife and four children, for whose support he had been contributing $20 a week besides paying the rent. There was a verdict for $15,000. The court affirmed the judgment without comment on the amount. In Lane v. Brooklyn Heights R. R., 85 App. Div. 85, 82 N. Y. Supp. 1057, the court said that a verdict of $25,000 was large, but not excessive, where the deceased, a chief of battalion in the fire department, was 38 years old, left a wife and two children, aged 8 and 12, and had been receiving a salary of $3,300. In Coolidge v. City of New York, 99 App. Div. 175, 90 N. Y. Supp. 1078, where there was a verdict for $22,000 which the court reduced to $15,000, the deceased was 37 years old and left a wife and four children, the oldest 4½ years and the youngest a few months. The wife testified that her husband gave her from $20 to $25 a week for the support of herself and children. In Hoffman v. N. Y. Cent. R. R., 42 Misc. Rep. 579, 87 N. Y. Supp. 617, the court at Trial Term reduced to $12,000 a verdict for $18,000 where the deceased was a driver of a brewery wagon, earned $720 a year, and left a widow and three children, the oldest of whom was 12 years. In The Saginaw and The Hamilton, 139 Fed. 906, Judge Adams reduced to $6,000 an allowance of $7,500 made by a commissioner where the deceased was chief officer of a steamship, was 60 years old, and earned $67 a month with board. The reduction was made 'in view of the decedent's age and limited earning capacity.' In affirming the decree, the Circuit Court of Appeals considered this and other awards to be 'fair and conservative.' 146 Fed. 724, 77 C. C. A. 150. I think that $12,000 would be a proper award to the administratrix of Gracie, considering his age, the amount he earned, his qualities, and prospects. This is not excessive in comparison with the award last cited, and is moderate when compared with the recoveries sanctioned by the Appellate Division of the New York Supreme Court.

"3. The parties stipulated that in the event of my finding that there was a liability on the part of the claimants of the ship or of the Higginson Company, or both, for the death of Miss Dodge, I should award as damages the sum of $2,250. I therefore find that the administratrix of Miss Dodge is entitled to recover $2,250.

"4. Hanigan testifies that, while it was difficult to say how long he was in the water, he judges that he was swimming from three-quarters of an hour to an hour before he was picked up. He states that he had a life preserver, but gave it up to Green. There were no serious results from his experience. He says that the only inquiry he received was a blow from some object in the water, and this made his side 'all blue,' and he could hardly walk the next day, was nervous, and consulted a doctor. I think that $100 would be a sufficient allowance for this part of his claim, with $5 paid to the doctor. He also testifies to lost property, says that he was expecting to spend the summer on the yacht, and had a trunk aboard filled with wearing apparel and personal articles. The principal things he mentioned are two diamond rings, one with two stones, on which he put a value of $70, and the other with one stone, which he valued at $50. The two-stone ring he says he bought of a young man whose name he gives, and who lived in Cheyenne and wanted to raise money to pay his expenses back, and asked $90 for the ring. He states that he bought the ring for $70 to assist his friend, without having had it valued. The other ring was a present from his mother, and he says that people he showed it to told him it was worth $50, and a railroad station agent once offered him that amount for it. So far as appears, neither ring was ever submitted to a jeweler for appraisal. He also mentions a gold watch, Elgin make, open face, which he bought two years before for $35 from a man who said it was new; also a gold fob chain, which he says he acquired in about the same way, and which had a gold yacht-club pin on it bought by him of a jeweler in Yonkers. He put a value of $25 on this chain and pin. The testimony as to the values of these articles is unsatisfactory. The value of a diamond is a matter peculiarly within the knowledge of an expert, and depends upon its kind, size, and quality, and Hanigan furnishes no particulars on these points. It would be mere guesswork to give a value to the rings upon his testimony. The testimony as to the value of the watch and chain is not much better, but as most people have some idea, more or less accurate, as to the value of such articles, I allow $25 for both, since the probability is they were worth at least that amount. He also testifies as to three suits of clothes which had been made for him, one a month, another one and one-half months, and the third two months before, costing $35, $30, and $25, not much worn. I allow $75 for these, $22 for a new waterproof coat, $15 for shirts, collars, cuffs, and underwear, $5 for shoes, $5 for a new pair of rubber hip boots, and $2.50 for a new suit of oil skins. He also claims for a silk umbrella with a silver-headed stick, which he says was a present from his father two years before, and which his father told him was worth $15. There is nothing to explain this large value for an umbrella. I allow $2.50 for it. He says that he also lost a set of books of the International Correspondence School, 14 volumes, covering courses he had taken in chemistry, electric engineering, and mechanical engineering. He states that he had finished these courses, and the books had been paid for one at a time as he received them. He does not remember what he paid for the instruction, and at one time says that he cannot tell what he paid for the books, and at another time that they cost at least $50. I allow him $25 for these books, in the absence of more definite testimony as to what they were, what they cost, and their condition. The foregoing sums allowed him aggregate $282.

"5. The owners of the ship maintain that, if the ship was at fault, the liability for any damages arising therefrom should rest upon the Higginson Company, on the ground that, because Nelson was not a pilot imposed by law, he was the agent of the Higginson Company by virtue of the terms of the charter. On the other hand, the Higginson Company contends that the charter created no liability on its part for the negligent navigation of Nelson, citing Bramble v. Culmer, 78 Fed. 497, 24 C. C. A. 182, and Hammond v. The Hathor, reported in the Law Journal of October 16, 1908. The latter was a case of compulsory pilotage, and I do not regard it as applicable; but in the

former case the court, after reviewing a number of authorities, said: 'No case has been cited, and our researches have not disclosed any, where the mere appointment of a pilot has been held to operate so as to change legal ownership and responsibility. The pilot is considered as the servant or agent of the owner. The fact that he was selected and paid by the charterers cannot alter his relations to the ship.' The action there was by the owners against the charterers for the loss of the vessel while being piloted by a pilot selected and paid by the charterers. But the agreement between the owners and the charterers was merely that the charterers should pay for the pilotage, not that they should provide the pilot, and the owners were at liberty to take him or not, as they chose, 'and in taking him he became their servant,' the court held. The provision in the charter upon which the owners base their contention in the present case is the stipulation that 'the charterers shall provide and pay for all * * * pilotages.' Judge Holt has recently held, in The Prince Line v. Munson Steamship Line (D. C.) 166 Fed. 139, where the action was also by the owners against the charterer, and the charter was substantially the same as in this case, and the provision as to pilotage identical, that this provision did not make a pilot appointed and paid by the charterer the agent of the charterer, adding: 'The acts of the pilot were acts of navigation. The owners were responsible for the entire navigation of the ship'—citing, among other cases, Bramble v. Culmer. If this is the effect of the provision as between the parties to the charter, the owners are certainly liable as to third parties.

"Aside from this, the maintenance of a competent and sufficient lookout was a duty that would rest upon the owners, even if Nelson was the agent of the Higginson Company, and I have found that this duty was not performed. And, in any event, the owners, as claimants of the ship, are liable in the action of Dumont, which is in rem. The circumstances here are different from those in the case before Judge Holt. Here the action is by third persons against both owners and charterer. There a tug was employed by the charterer to take the ship from a pier in the East River into Newtown creek, and the captain of the tug was aboard the ship, acting as pilot, when the ship grounded. Here Nelson was employed by the charterer at a salary which covered his services not only as a pilot in Nova Scotia waters, over Nantucket Shoals, through the Sound, and through the Hudson River, but as supercargo, apparently for the term of the charter; at any rate, this was his fifth trip. The captain put him on the ship's articles as coast pilot and supercargo; but, if the owners had been dissatisfied with the way he performed his services, they could not have removed him, the Higginson Company alone having the power to do that. It was because the captain and the other officers did not have the requisite knowledge to navigate in certain waters that the Higginson Company assumed and attempted to perform the obligation of supplying a person who should do this navigation. And if, through its employé, it performed this service in such a way as to damage other vessels and third persons through negligence, I fail to see why an action cannot be maintained against it for such negligence. At the request and for the convenience of the Higginson Company the captain left the ship at New York, and Nelson was thereby deprived of the assistance and counsel of the captain. The chief and the other officers were under Nelson's command, and he was to every intent and purpose the master of the ship. I do not see that the situation was at all different from what it would have been if the charter had in express terms stipulated that the owners' appointed master should withdraw, and the charterer take command of the ship by a master of its own appointment, while she was navigating the Hudson river. According to the chief officer, Nelson disregarded suggestions of his which, if adopted, might have prevented the collision. If Nelson had injured a third person while acting in his capacity as supercargo, the Higginson Company as his employer would have been liable, and I do not see why it should not be equally liable for his injuries to third persons while he was acting as pilot, whatever the legal situation might be as between the owners and the Higginson Company. There can be no question that Nelson would be personally liable for his negligence resulting in a collision with another vessel, and under the doctrine of respondeat superior it would seem that

his employer should also be liable. I therefore think that both the owners and the charterer are liable for the damages hereinbefore mentioned.

"I therefore find as follows:

"1. In the action of Charles W. Dumont, the libelant is entitled to a decree against the steamship Volund and her claimants, and against the Higginson Manufacturing Company, for the sum of $2,500, with interest from July 11, 1905.

"2. In the action of Eugenie Gracie, as administratrix, etc., the libelant is entitled to a decree against all the respondents for the sum of $12,000, with interest from July 11, 1905.

"3. In the action of Eliza S. Dodge, as administratrix, etc., the libelant is entitled to a decree against all the respondents for the sum of $2,250, with interest from July 11, 1905.

"4. In the action of Joseph H. Hanigan, the libelant is entitled to a decree against all the respondents for $282, with interest from July 11, 1905.

"All of which is respectfully submitted."

The following is the opinion of Adams, District Judge, in the court below:

"These actions arose out of a collision of the steamship Volund and the steam yacht Normandie, which took place in the Hudson river about 8:30 p. m., July 11, 1905, between Dobbs Ferry and Irvington. The yacht was sunk and became a total loss. Three of the persons on the yacht were drowned. William A. Storms, her master, Stewart Gracie, her engineer, and Gladys Dodge, a guest on board. The first of these actions was brought by Charles W. Dumont, the owner of the yacht, the second by the administratrix of Stewart Gracie, the engineer; the third by the administratrix of Miss Dodge; and the last by Joseph M. Hanigan, deck hand of the yacht—for personal injuries and loss of personal effects. By petition of A. and O. Irgens, the owners of the Volund, the Higginson Manufacturing Company, the charterers of the Volund, was brought into all of the actions. An action on behalf of Storms, the master of the yacht, was brought but has not been pressed for trial and is therefore not included. The four actions which are included here were referred to Herbert Green, Esq. After hearing the testimony, he reported in favor of the yacht on the merits of the collision, allowing $2,500, with interest, for her loss, recoverable against the Volund and her claimants and against the charterer; in favor of the administratrix of Gracie, for $12,000 with interest, against all the respondents; in favor of the administratrix of Miss Dodge for $2,250, with interest, against all of the respondents; and in favor of Hanigan against all of the respondents for $282, with interest. He also reported, in conformity with a stipulation, that the damages for the death of Miss Dodge were $2,250.

"The libelants, except the administratrix of Miss Dodge, and all of the respondents have excepted to the report, and the matter is now before me to pass upon its correctness. Before proceeding to the consideration of the exceptions, it is proper I should say that my recent decision in the case of Luckenbach v. Delaware, Lackawanna & Western Railroad Company, decided March 25th last (168 Fed. 560), has no bearing upon this case, as has been suggested. I held there that the court had no supervisory powers over the report of a commissioner to whom the case had been referred 'to hear and determine the issues in dispute, raised by the libel and answer.' Here the reference was to the commissioner, 'with instructions to hear the testimony of the parties and to report his conclusions on the issues of law and fact.' The distinction is obvious. In the one the commissioner was to hear and determine the issues, and in the other he was to hear the testimony and to report his conclusions to this court. No final determination of the issues, as far as this court was concerned, was contemplated here by the order of reference, and the whole matter remains in the control of the court.

"The libelant Dumont filed an exception to the report: That the allowance of $2,500 for the loss of the yacht is insufficient.

"The commissioner said in this connection: (Extract A Commissioner's Report, pp. 34–36.)

"This statement amply explains and justifies the award. The administratrix of Gracie excepts to the allowance of $12,000 for his death.

"The commissioner said in this connection: (Extract B Commissioner's Report, pp. 36–40.)

"He gives full reasons for his award, and they seem to be sound.

"Hanigan excepts to the allowance of $282 to him.

"The commissioner said in this connection: (Extract C Commissioner's Report, pp. 41–43.)

"The explanation seems to be reasonable.

"The owners of the Volund except in detail to (a) all alowances against her and because the commissioner did not find her wholly free from fault; (b) that he assessed the damages on account of the death of Gracie at the sum of $12,000, and in that, if the libelant was entitled to recover at all, he assessed them at any sum in excess of $5,000; (c) that, if there was any liability on the part of the Volund, he did not hold the Higginson Company alone for it.

"(a) With respect to the merits of the collision, the principal dispute was whether the Volund or the yacht was navigated on the wrong side of the channel; each charging the other with fault in this respect.

"The testimony is voluminous and directly in conflict in many important particulars. The solution of the controversy depends very largely, if not entirely, upon the credit to be given to the statements of the witnesses. There is evidence to support both sides of the dispute, and, in view of the great advantage the commissioner had in that all of the witnesses testified before him, I should hesitate to disturb his conclusions, even if I thought that different ones should be reached. I do not so think, however, but I consider it more probable that his results are sound and just.

"(b) If I were disposed to alter the finding with respect to the damages in this regard, it would be to increase them. I think, however, that the report should stand as it is.

"(c) With regard to the respective liability of the vessel or the charter, the commissioner has reported as follows: (Extract D Commissioner's Report, pp. 43–46.)

"The Higginson Company has also excepted in detail to the commissioner's report with respect to the collision; that he did not find the Volund and her owners solely liable; that he found the pilot Nelson negligent and charged the Higginson Company therewith. It then proceeds to except to the findings with respect to the allowances for the deaths and personal injuries.

"With respect to Nelson it appears that he was on board as supercargo and pilot, paid by the charterer. He had had considerable sea experience and had navigated the river several times, but had no license of any kind for local waters, although he had an English certificate, also one from the American Shipmasters' Association. On this occasion he was acting as pilot of the Volund and was in charge of her navigation. In his lengthy examination his testimony was very contradictory and confused. He was no doubt largely responsible for the faults of his vessel in this collision. Being the agent of the charterer, it should be held for his negligence. The commissioner's conclusion with respect to the Higginson Company's liability was correct.

"The other matters have been considered in the treatment of the exceptions of the Volund and need not be repeated.

"The commissioner's findings seem to be correct.

"All of the exceptions are overruled, and the report is confirmed."

This controversy comes here upon appeals from four decrees of the District Court, Southern District of New York. It arose out of a collision between the Norwegian steamship Volund and the steam yacht Normandie in the Hudson river off Dobb's Ferry about 8:30 p. m. on July 11, 1905. The steamer was bound from Nova Scotia to Newburg, N. Y., with plaster; the Normandie was bound down the river to land a pleasure party at Yonkers. The steamer practically cut the yacht in two and she sank at once. Her master and engineer and one of her passengers were drowned. Libels were filed by the owner of the yacht, by the personal representatives of the engineer and of

the passenger who were drowned, and by the deck hand of the Normandie for personal injuries and loss of personal effects. Issues being joined, each cause was by consent of parties referred to Herbert Green, Esq., as commissioner to hear the testimony and report his conclusions upon the issues of law and fact. He found the yacht free from fault and that the steamer was improperly navigated. The Volund being under charter at the time of the collision, her owners brought in the charterer on petition, and the master held both the owners and the charterer liable for all the damages.

Exceptions were duly filed to the commissioner's report. They were all overruled by the district judge and the four decrees duly entered. Both the shipowners and the charterer are appealing on the ground that the Normandie and not the Volund should have been held responsible for the collision. They are also appealing as against each other on the ground that, even were libelants entitled to the awards given them by the District Court, the burden of paying these awards was not correctly apportioned by the District Court. The shipowners contend that, if the collision were in any event due to the fault of the Volund, the fault in question was solely that of pilot Nelson in starboarding the steamer's helm and not in the lookout which was kept by the crew of the Volund other than pilot Nelson. The charterer contends, on the other hand, that Nelson, although appointed by it, became, as a matter of law, the servant of the shipowners for the purpose of navigation of the Volund, and that for any negligence of Nelson the shipowners, and not the charterer, ought to be held liable.

Wallace, Butler & Brown (F. M. Brown, of counsel), for shipowners.

Avery F. Cushman, for cargo owners.

Convers & Kirlin (J. Parker Kirlin, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). All the testimony as to the collision was taken before the commissioner. He has most carefully epitomized the statements of the different witnesses and discussed in great detail the various problems presented for solution. It is unnecessary to repeat here even a summary of the transactions. He found the steamer at fault (1) for attempting to pass to the left under a two-blast signal without having obtained the assent of the yacht, (2) for not keeping to her own starboard side of the channel, (3) for not sounding alarm signals, but keeping on at full speed and repeating her two blasts when her first signal was not answered, (4) for crossing the one-blast signal of the yacht, (5) for not stopping and reversing when danger of collision should have been obvious, and (6) for not maintaining a competent and sufficient lookout. The district judge says:

"The testimony is voluminous and directly in conflict in many important particulars. The solution of the controversy depends very largely, if not entirely, upon the credit to be given to the statements of the witnesses. There is evidence to support both sides of the dispute, and, in view of the great advantage the commissioner had in that all of the witnesses testified before him, I should hesitate to disturb his conclusions, even if I thought that different ones should be reached. I do not so think, however, but I consider it more probable that his results are sound and just."

We fully concur in this conclusion. The only subject left to be discussed is the controversy between shipowners and charterer as to their respective liabilities.

The Volund at the time of the collision was under a time charter to the Higginson Manufacturing Company of Newburgh, which provided that:

"The said owners agree to let and the said charterers agree to hire the said steamship from the time of delivery for the period of six months, steamer to be placed at the disposal of the charterers at Windsor, Nova Scotia, to be employed in carrying lawful merchandise, between safe port or ports, as the charterers or their agents shall direct and on the following conditions."

The form of charter is a familiar one, and the following clauses may be quoted:

"(1) The owner shall provide and pay for all provisions, wages and consular, shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"(2) That the charterers shall provide and pay for all coals, fuel, port charges, pilotages, agencies, commission, consular charges (except those pertaining to the captain, officers or crew) and all other charges whatsoever, except those before stated."

"(10) That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with the same."

"(11) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointments.

"(12) That the charterers shall have permission to appoint a supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost despatch."

Counsel also refer to the clauses which provide that hire shall commence on the day of delivery and continue until day of redelivery; that for nonpayment of hire the owners may withdraw the steamer from service of the charterers; that cargo be laden and discharged at any dock, wharf, or place that charterers may direct; that the whole reach of the vessel's holds, decks, etc., reserving only proper and sufficient space for ship's officers, crew, etc., shall be at the disposal of charterer; that all steam winches shall be at charterer's disposal during loading and discharge, and steamer to provide men to work the same; that derelicts and salvage shall be for owner's and charterer's equal benefit. Clauses 4, 6, 7, 8, 9, 23, and 24.

Under clause 12 the charterer appointed as supercargo one Capt. Nelson, who held a master's certificate for seagoing steam vessels issued by the Province of Nova Scotia. He testified that he had followed the sea since he was 11 years old, had been "around here" 25 or 30 years, and was a member of the American Shipmasters' Association before getting the Nova Scotia certificate; that he had been up the Hudson a great many times and was familiar with it. He had made the same voyage with the ship, from Nova Scotia to Newburg and return, on four previous occasions under the charter. He said he supposed he was put on the ship as pilot and supercargo, and that

he piloted her over Nantucket Shoals and the Sound and the Hudson river. The ship's captain, Lassen, was not on board, having landed at the Battery along with the Hell Gate pilot who had charge of the navigation down the East River. The captain's object in going ashore was to enter the ship at the Custom House and save time; he intended to rejoin her at Newburg. Capt. Nelson was on the bridge and navigated the Volund from New York until collision.

The owners found their contention that the charterers are liable—

"(1) upon the proposition that any pilot other than the one imposed by law became the charterer's agent by virtue of its express agreement, which made the piloting of the steamer in pilotage waters its work, and (2) upon the proposition that, irrespective of the charter party, Capt. Nelson was an ordinary servant employed by the Higginson Company and acting within the scope of his employment, and that said company was therefore liable for his acts."

In two recent cases we have had a similar charter before us and held that it did not amount to a demise of the vessel, and that consequently the navigation of the ship during the time of the charter is in the hands of the owner. The Santona, 169 Fed. 275, 94 C. C. A. 551; Dunlop S. S. Co. v. Tweedie Trading Co. (C. C. A., April 18, 1910) 178 Fed. 673. Since the navigation remains in the hands of the owner, all instrumentalities (human or other) which he uses to conduct it are his own while thus employed, no matter from what source he obtains them. We have no question here as to navigation in waters where the law compels the employment of some local pilot. For the consequences which may result from the failure of any of these instrumentalities properly to do the work the owner who is employing them may be liable; he cannot escape liability for damages done by his vessel in consequence of her being improperly navigated because the person in fault was temporarily assigned by some one else to assist him in doing the work which was distinctively his own. Nor can we assent to the proposition, which is earnestly contended for, that under charter parties of this sort there is some joint, two-headed navigation of the vessel which will put both parties in control. The provisions (clauses 8, 10) that the captain shall be under the orders and direction of the charterers as regards employment and other arrangements merely authorize the charterer to designate the safe port, and the berth therein to which the ship shall proceed. How she shall be navigated to get there is a matter entirely within the owner's hands. Nor are we persuaded to the conclusion that the phrase "charterer shall provide and pay for pilotages" entitles him to insist that the vessel shall be navigated in pilotage waters by an individual of his own selection, although in the best judgment of the master some other person should be intrusted with that operation. We must not be understood as deciding more than the case now before us. If upon arrival in some foreign country, with which the master is unfamiliar, he should request the charterer's agent to secure him a local pilot, and the agent should refuse to do so, or if the agent should assign him some pilot known to the agent to be incompetent, or whose personal habits were known to be such as to make him an unsafe person to be intrusted with responsibility, questions might arise which would have to be determined when presented. In this case there is nothing to indicate that

Capt. Nelson was incompetent or unfit to act as a pilot up the Hudson river. The happening of this collision does not establish any such proposition. Many competent and proper navigators have at times committed faults in handling their vessels.

Nor are we persuaded that, although the Higginson Company selected Nelson as its supercargo and paid his salary, it remained his responsible employer when he was engaged in the operation of navigating the vessel for the shipowners, especially since, as we construe the charter, the master need not have allowed him to conduct the navigation unless he was satisfied to intrust it to him, and if dissatisfied could have removed him. The Slingsby, 120 Fed. 753, 57 C. C. A. 52. We find no error in assessment of damages.

We do not think the award of $12,000 as damages for the loss of life of the engineer, Gracie, was excessive. He was 31 years old, in perfect health, and never indulged in liquor. He was earning from $1,300 to $1,500 a year and left a wife and child.

We find no error in allowing the taxation of the premiums on libelant's stipulations for costs. It was quite proper to present their claims in the admiralty court, and the present custom of obtaining security from some insurance company instead of from personal friends is too well settled to be disturbed.

The decrees should be so modified as to hold the Volund solely in fault for the collision, with half costs of appeal to the libelants against the Volund and interest. Causes remanded to the District Court for appropriate action.

In re ROTH & APPEL.

(Circuit Court of Appeals, Second Circuit. August 2, 1910.)

No. 246.

1. BANKRUPTCY (§ 318*)—PROVABLE DEBTS—RENT ACCRUING AFTER BANKRUPTCY—"FIXED LIABILITY."

The consideration for rent is the use of the land, and a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as "a 'fixed liability' * * * absolutely owing at the time of the filing of the petition," within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447); both its existence and amount being at that time contingent upon uncertain events.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

2. BANKRUPTCY (§ 255*)—EFFECT ON LEASE—FUTURE INSTALLMENTS OF RENT.

The bankruptcy of a lessee does not sever the relation of landlord and tenant, and the tenant's obligation to pay rent under his lease is not discharged as to the future, unless the trustee elects to retain the lease as an asset.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 255.*]

3. BANKRUPTCY (§ 318*)—PROVABLE DEBTS—COVENANT FOR INDEMNITY AGAINST LOSS OF RENT.

A provision in a lease that in case the lessees should be declared bankrupt the lease should terminate, and the lessor should have the right to re-enter, and that in such case the lessees should indemnify the lessor

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

for any loss of rents during the remainder of the term, paying the same monthly as upon rent days, does not create "a fixed liability * * * absolutely owing at the time of the filing of the petition" against the lessees, within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), which can be proved as a claim against their estate; but the liability is altogether contingent, because of the uncertainty as to whether the lessor will re-enter and terminate the lease, and, if he does, whether there will be any loss, and its amount; nor is such claim provable as "a debt founded upon an express contract," under section 63a (4), which must be read in connection with, and as limited by, subdivision 1, and cannot be construed as permitting the proof of claims which are contingent both as to liability and amount at the time of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

4. LANDLORD AND TENANT (§ 181*)—"RENT."

"Rent" is a sum stipulated to be paid for the use and enjoyment of land.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 730; Dec. Dig. § 181.*

For other definitions, see Words and Phrases, vol. 7, pp. 6087–6091.]

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

In the matter of Roth & Appel, bankrupts. From an order of the District Court (174 Fed. 64) expunging a claim, Adolph Boskowitz appeals. Affirmed.

On August 14, 1907, Adolph Boskowitz, the appellant, entered into an indenture of lease with the firm of Roth & Appel, the present bankrupts, wherein he let to them certain premises in the city of New York for the term of five years from February 1, 1908, at the annual rental of $3,000, payable quarterly in advance. The lease contained the following provision:

"In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

On January 20, 1908, a petition in involuntary bankruptcy was filed against said Roth & Appel, and on May 27, 1908, they were adjudicated bankrupts. On April 29, 1908, prior to the adjudication, the appellant relet the premises for the remainder of the term to another tenant, who entered into possession on July 1, 1908. The rental under the new lease was at the rate of $175 per month from July 1, 1908, to February 1, 1909, and at the rate of $250 per month thereafter. On July 14, 1908, the appellant filed his claim made up in substance of the following items:

(1) Full rent from February, 1908, to July, 1908.....	$1,250
(2) Difference between rent reserved and rent stipulated in new lease from July, 1908, to February, 1909.....	525
	$1,775

The trustee moved to expunge the claim upon the ground that it was not provable in bankruptcy. The referee expunged from the claim so much as embraced the difference in rents arising subsequent to the time of filing the claim, and allowed the balance. The trustee and the appellant both filed

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

petitions to review the referee's order and the District Court expunged the entire claim. The opinion of the District Judge is printed in 174 Fed. 64.

Levy & Rosenthal and C. J. Hermann (Gerald B. Rosenheim, of counsel), for appellant.

James, Schell & Elkus (R. P. Levis and James N. Rosenberg, of counsel), for appellee.

A. Leo Everett, amicus curiæ.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lesssee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of debitum in præsenti solvendum in futuro. On the contrary, the obligation upon the rent covenant is altogether contingent. Watson v. Merrill, 136 Fed. 362, 69 C. C. A. 185, 69 L. R. A. 719. See, also, Coke on Littleton, 292b; Wood v. Partridge, 11 Mass. 492; Bordman v. Osborn, 23 Pick. (Mass.) 299.

It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against his bankrupt estate as "a fixed liability * * * absolutely owing at the time of the filing of the petition," within the meaning of section 63a (1) of the bankruptcy act of 1898.[1] It is not a fixed liability, but is contingent in its nature. It is not absolutely owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events. Watson v. Merrill, supra; Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118. Also In re Rubel (D. C.) 166 Fed. 131; In re Mahler (D. C.) 105 Fed. 428; In re Hayes, etc., Co. (D. C.) 117 Fed. 879; In re Arn-

[1] The relevant portions of section 63 of the bankruptcy act follow:

"Sec. 63. Debts Which may be Proved.—(a) Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account or upon a contract express or implied. * * *

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).

stein (D. C.) 101 Fed. 706; In re Jefferson (D. C.) 93 Fed. 948; In re Inman & Co. (D. C.) 171 Fed. 185.

Even under the bankruptcy acts of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) and 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which, unlike the present act, expressly permitted the proof of contingent demands, claims for unaccrued rent were not provable. Ex parte Houghton, 1 Low. 554, Fed. Cas. No. 6,725, In re May, 9 N. B. R. 419, Fed. Cas. No. 9,325, and Bailey v. Loeb, 11 N. B. R. 271, Fed. Cas. No. 739, were cases under the act of 1867. Bosler v. Kuhn, 8 Watts & S. (Pa.) 183, was under the act of 1841.

The authorities are not entirely in accord upon the question whether a lease, containing the usual provisions, is terminated by bankruptcy. In some cases it has been held that bankruptcy destroys the relation of landlord and tenant and practically annuls the lease. In re Jefferson, supra; In re Hayes, etc., Co., supra. See, also, Bray v. Cobb (D. C.) 100 Fed. 270, reversed in Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369. In other cases it is held that bankruptcy does not sever such relation, that the tenant remains liable, and that the obligation to pay rent is not discharged as to the future, unless the trustee elect to retain the lease as an asset. Watson v. Merrill, supra; In re Hinckel Brewing Co. (D. C.) 123 Fed. 942. See, also, In re Ells (D. C.) 98 Fed. 968.

In our opinion the latter view is the correct one. We think the early law, as stated in Ex parte Houghton, supra, is the law under the present bankruptcy statute, applicable in the case of leases having the usual covenants and conditions. In that case the court said:

"The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event."

This reasoning leads by another course to the same conclusion already reached. If the lessee remain liable upon the lease after his bankruptcy in cases where it is not assumed by the trustee, it necessarily follows that his estate is not liable thereon. With a few exceptions, not applicable here, that which is not dischargeable in bankruptcy is not provable in bankruptcy.

The claim in this case was regarded in the report of the referee as a demand for installments of rent falling due according to the terms of the lease subsequent to the time of filing the petition in bankruptcy, and the question considered in such report was whether demands of that character are provable in bankruptcy. So the claim was assumed to be of that character by the District Judge, and was ordered expunged upon that assumption. Regarding, then, the claim as one for unaccrued rent, it is clear, upon the principles already examined, that it was not provable against the bankrupt estate under the first clause of section 63a of the bankruptcy act.

But, while there may be a question whether the demand as covering the period prior to the re-entry by the lessor might not be considered a claim for rent as such, it is clear that the demand for the difference between the rent reserved and the rent stipulated in the new lease is not such a demand, but is based upon the indemnity provision in the lease shown in the foregoing statement of facts.

The lease in the present case is not a lease containing the usual covenants and conditions. It contains unusual provisions. As we have seen, it expressly provides that in case the lessee is declared bankrupt the lease shall terminate and the lessor shall have the right to re-enter. Under such a lease as this the trustee could not adopt the lease against the lessor's objection. The lessor had the right to terminate it, and did terminate it, by re-entry. And when he terminated it the obligation of the bankrupts as lessees terminated. The question in this case—at least with respect to a large part of the claim—is not, in its essence, whether rent to accrue in the future is provable against a bankrupt estate, but whether a claim founded upon an agreement to indemnify a landlord for loss of rents following bankruptcy is provable.

Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable. In such a case, the installments may be regarded as consolidated by the contract, or, perhaps, as falling due by way of penalty. Not improbably claims based upon such leases are provable in bankruptcy. Thus in the case of In re Pittsburg Drug Co. (D. C.) 164 Fed. 482, where a lease provided that, on default in the payment of any rent, the rent for the entire term should at once become due and payable, it was held that, on the bankruptcy of the lessee while in default, the entire rent was "a fixed liability absolutely owing," and provable against the bankrupt estate. But the covenant of indemnity in the present lease was of a very different nature. It called for the payment of no fixed and certain sum. Its purpose was merely to guarantee against possible loss.

The inquiry, then, is as to the status of the lessor's demand upon this indemnity covenant at the time when the petition in bankruptcy was filed; for it is held that that is the time when the provability of claims against the estate of a bankrupt is fixed. Thus in the case of In re Pettingill (D. C.) 137 Fed. 145, it was said:

"Under that act the provability of a claim depends upon its status at the time the petition is filed. If, at that time, the claim is provable, within the definition of section 63, it may be proved. If, at that time, it does not fall within that definition, but does so at some later time, it cannot be proved."

See, also, Swarts v. Fourth National Bank, 117 Fed. 5, 54 C. C. A. 387; In re Bingham (D. C.) 94 Fed. 796; Watson v. Merrill, supra; In re Adams (D. C.) 130 Fed. 381; In re Swift, 112 Fed. 320, 50 C. C. A. 264.

Now, when the petition was filed, the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow; but, if it did follow, the lessor would have the right to re-enter and terminate the lease. Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and

the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. In re Ells (D. C.) 98 Fed. 967. But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties. Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:

(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

The case of In re Ells (D. C.) 98 Fed. 967, already referred to, is in point. In that case the lease contained a provision that the landlord might re-enter and resume possession if the bankrupt should be "declared bankrupt or insolvent according to law," and the lessee covenanted that in case of such termination of the lease he would "indemnify the lessor against all loss of rent or other payments which he may incur by reason of such termination during the remainder of the term," and the landlord re-entered upon the bankruptcy of the tenant. It was held that the claim of the landlord for the difference between the present letting value of the premises and the rent reserved for the remainder of the term could not be proved against the bankrupt estate of the lessee. Judge Lowell said (page 968):

"The contract was one of indemnity for loss of rent and other payments, and would be broken only after, and so far as, rent had been lost and payments had been made. * * * At the time of the adjudication the claim in this case was contingent, first, upon the determination of the lease by the lessor for breach of the covenant; and, second, upon a subsequent loss of rent by the lessor. If the lessor permitted the lease to continue, or if the rent subsequently obtained by him equalled or exceeded that provided in the lease, the claim would not arise. * * * The provisions of the act of 1898 concerning the proof and allowance of contingent claims differ materially from those contained in the acts of 1841 and 1867. * * * Even under the broad provisions of the act of 1867 above referred to, it was held that a provision in a lease that the lessors might re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the sums actually realized, did not give rise to a provable contingent claim. Ex parte Lake, 2 Low. 544, Fed. Cas. No. 7,991. The provision above quoted of the lease here in question, though not identical with that in Ex parte Lake, yet resembles it so closely as to be essentially similar. If the contingent claim arising in Ex parte Lake could not be proved under the act of 1867, it is clear that the contingent claim arising in this case cannot be proved under the act of 1898."

See, also, In re Shaffer (D. C.) 124 Fed. 111.

For these reasons, we are satisfied that the claim in question as based upon the indemnity covenant is contingent, and not provable against the bankrupt estate under the first clause of section 63a of the bankruptcy act.

But this does not dispose of all of the appellant's contentions. It is urged, in effect, that the claim, whether regarded as a demand for rent or as based upon the indemnity provision, is "a debt founded upon

an express contract," and provable under the fourth clause of section 63a, irrespective of the question whether it is of such character as to be provable under the first clause.

The principal cases cited in support of this contention are In re Smith (D. C.) 146 Fed. 923, and Moch v. Market St. Nat. Bank, 107 Fed. 897, 47 C. C. A. 49, which hold that the liability of a bankrupt indorser of commercial paper, which does not become absolute until after the filing of the petition, is a debt founded upon contract within section 63a (4), and provable against the bankrupt estate after it becomes fixed within the time allowed for proving claims.

It is not necessary for the purposes of the present case that we should go so far as to dispute the conclusions reached in these decisions. While a contract of indorsement is contingent, the extent of the liability is at all times ascertainable, and it might be that such a contract would be provable without it following that an indemnity contract covering possible loss of rents—both the existence and extent of the liability upon which are uncertain and contingent—would be provable.

The present bankruptcy statute, unlike—as we have seen—the acts of 1841 and 1867, does not provide for the proof of contingent claims. Taking the fourth subdivision of section 63a as being independent of the first subdivision, still there is nothing to indicate that it was intended to embrace wholly contingent demands. Indeed, it is only by reading section 63b—which permits the liquidation of unliquidated demands—in connection with said fourth clause of 63a, that any ground is shown for contending that a claim like the one in question can be proved. But this construction expands the provisions of section 63a by those of 63b, and it is well settled that such a construction cannot be adopted. Section 63b adds nothing to the class of debts provided under 63a. It merely permits the liquidation of an unliquidated claim provable under the latter provision. In Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, the Supreme Court of the United States said:

"Section 63a provides for debts which may be proved, which, among others, are: (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest'; (4) 'founded upon an open account, or upon a contract express or implied.' In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct. We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

In Dunbar v. Dunbar, supra, the case of Moch v. Market St. Nat. Bank, supra, was distinguished.

But, while it is not necessary, in order to reach a decision in this case, to determine whether 63a (4) is subject to the limitation con-

tained in 63a (1)—that debts to be provable must be absolutely owing at the time of filing the petition—we think it the better view that it is so limited. If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a "contract express or implied" under the fourth clause, if no limitations are attached to the latter. We cannot regard this interpretation as tenable. We think that the different clauses of 63a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause. This interpretation of the section is supported by authority. Thus in Re Swift, 112 Fed. 316, 50 C. C. A. 270, already referred to, the Circuit Court of Appeals for the First Circuit said:

"That part of the present bankruptcy act which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did thus repeat them."

And in Re Adams (D. C.) 130 Fed. 381, the court said:

"But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. This appears from the analogy of section 63a (1), (2), (3), and (5), as applied to the interpretation of clause (4). In clauses (1) and (4), for example, the limit of time must be the same, inasmuch as clause (4) includes clause (1), and, if clause (4) were less limited in point of time, the limit imposed upon clause (1) would become nugatory."

For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4), and was properly expunged by the District Court.

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

In re HAYS.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1910. On Rehearing.)

No. 1,970.

1. MORTGAGES (§ 281*)—CHARACTER OF MORTGAGE—PURCHASE-MONEY MORTGAGE.

Where one purchased certain property subject to a mortgage, which he assumed and agreed to pay as a part of the purchase price, the mortgage, as to him, became a purchase-money mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 281.*]

2. BANKRUPTCY (§ 267*)—ASSETS—DOWER INTEREST—WHAT LAW GOVERNS.

The dower interest of a bankrupt's wife in mortgaged premises sold as a part of the bankrupt's estate must be determined in accordance with the state law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 267.*]

3. BANKRUPTCY (§ 267*)—ASSETS—DOWER.

The dower interest of a bankrupt's wife in mortgaged real estate, sold as a part of the bankrupt's estate, was no part of the bankrupt's assets

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

since Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting title of the bankrupt in his trustee, does not purport to affect the wife's interest.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 267.*]

4. DOWER (§ 45*)—ASSIGNMENT FOR CREDITORS.

Under Ohio Rev. St. §§ 5719, 6348, 6350f, 6350g, regulating dower, and voluntary general assignments for the benefit of creditors, the dower right of an insolvent's wife in his real estate is not impaired.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 45.*]

5. BANKRUPTCY (§ 267*)—MORTGAGED REAL ESTATE—SURPLUS—DOWER.

Ohio Rev. St. § 4188, provides that a widow who has not relinquished, or been barred of the same, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seised as an estate of inheritance at any time during marriage, and in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder. *Held*, that where land of a bankrupt, subject to a purchase-money mortgage, was sold by the bankrupt's trustee, the bankrupt's wife, as against his general creditors, was only entitled to dower in the surplus, and not in the whole proceeds, payable out of such surplus.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 267.*]

In the matter of bankruptcy proceedings against Otho L. Hays. On petition of Carrie E. Hays to review an order awarding her dower in the surplus of the proceeds of mortgaged premises. Affirmed.

H. M. Roberts, for petitioner.

W. J. Geer and J. N. Van Deman, for respondent.

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

WARRINGTON, Circuit Judge. The single question in this case is whether, as respects proceeds of sale derived from real property located in Ohio and sold to pay a purchase-money mortgage of a husband, and as against the husband's creditors except such mortgagee and his privies, the wife's contingent right of dower extends merely to the surplus remaining after payment of such mortgage indebtedness or to the whole proceeds and payable only out of the surplus.

On April 29, 1904, Otho L. Hays made a general assignment for the benefit of his creditors under the laws of Ohio. His assignment was subsequently charged against him as an act of bankruptcy, upon which he was adjudged a bankrupt under an involuntary petition. Thereupon the trustee in bankruptcy filed a petition for sale of the bankrupt's real estate, including parcel 4, situated in Columbus, Ohio. Prior to his assignment, Hays had purchased this parcel subject to mortgage in favor of the Bank of Westerville for $16,000, and had assumed and agreed to pay the same as part of the purchase price. Whether the mortgage debt was due either on the date of Hays' assignment or of the adjudication in bankruptcy does not definitely appear, though it may, we think, be reasonably inferred that it had matured prior to the first date alluded to. Hays' assignee paid out of the income of the estate enough to reduce the mortgage to $14,431.67. The trustee in bankruptcy sold the property for $32,005, and out of

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

this sum he paid the balance due on the mortgage. The surplus is in his hands.

For the purposes of the sale Mrs. Hays waived assignment of dower in this property by metes and bounds. She claims that her inchoate right of dower extends to the entire proceeds of sale in the sense that the value is to be estimated on that hypothesis, but that as against the mortgagee it is payable only out of the surplus. In the court below her right was restricted to the surplus. This is complained of as error. The surplus is greater than the amount of Mrs. Hays' claim. She has brought the case here on petition for review.

The dower interest must be determined by the law of Ohio. The wife's right of dower was no part of the estate of her husband; and the operative words of clause 5, section 70a, of the present bankruptcy act, vesting title of the bankrupt in his trustee, do not purport to affect the wife's interests. Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451). Porter v. Lazear, 109 U. S. 84, 86, 3 Sup. Ct. 58, 27 L. Ed. 865. The decision in that case was made under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). No allusion was in terms made in the act to the right of dower. The only reference made to this right in the present act is in section 8. In the proviso of that section the widow's right of dower is preserved to her as fixed by the "law of the state of the bankrupt's residence" in the event of his death. This evinces at least a precautionary purpose not to interfere with any right of dower. But, after all, it was only declaratory of an interpretation which the act would have received without the precaution.

When speaking of a proviso contained in the bankruptcy act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440), forbidding any construction that would "annul, destroy or impair any lawful rights of married women, which may be vested by the laws of the states respectively," Justice Gray in Porter v. Lazear said (page 89 of 109 U. S., page 61 of 3 Sup. Ct. [27 L. Ed. 865]):

"* * * The proviso * * * was not in the nature of an exception to or restriction upon the operative words of the act, but was a mere declaration, inserted for greater caution, of the construction which the act must have received without any such proviso, and that the omission of the proviso in the recent bankruptcy act does not enlarge the effect of the assignment or of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt, but to his wife."

See, also, comments upon provision relating to dower in the present act; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 190, 22 Sup. Ct. 857, 46 L. Ed. 1113; In re McKenzie, 142 Fed. 383, 386, 73 C. C. A. 483, 486; Thomas v. Woods, 173 Fed. 585, 595, 97 C. C. A. 535, 545.

It is not claimed, as plainly it could not be, that the general assignment made by Hays impaired his wife's right of dower. Sections 5719, 6348, 6350f, 6350g, Ohio Rev. St. On the contrary, it is admitted that Mrs. Hays' right of dower is vested in and is to be determined upon the basis either of the surplus or entire proceeds of sale. The right of dower in Ohio at the dates in question in this case was, as it now is, regulated by statute. Section 4188, Rev. St., provides:

"A widow or widower who has not relinquished or been barred of the same shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seised as an estate of inheritance at any time during the marriage, and in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder. * * *"

It is settled in Ohio that:

The "contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial (and ascertainable) value." Mandel v. McClave, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627.

When determining the value of this right in mortgaged property, difficulty is met in trying to ascertain the precise meaning of the phrase, "real property of which the deceased consort was seised as an estate of inheritance at any time during the marriage." Is the value to be estimated, say in the present case, according to the legal estate alone or according to the legal estate and beneficial estate together, which the husband held in his own right in real property at any time during the marriage? In considering this question, it is to be observed that no claim is made that the right of dower can prevail against the right of the mortgagee or those claiming under him, where the wife either has or has not released dower in case of a purchase-money mortgage, or where she has released dower in case of a mortgage made subsequently to acquisition of title by her husband to secure his individual debt; but the contention is that her right in either case is superior to that of any one else.

We agree with the court below in treating the mortgage in this case as a purchase-money mortgage; for, under the rule prevailing in Ohio, the promise of Hays to assume and pay the mortgage inured to the mortgagee bank and those claiming under it. Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. Indeed, we do not understand that there is any controversy as to the nature of the mortgage. Is the value, then, of Mrs. Hays' right of dower to be estimated as though she were dowable of the whole proceeds or of the surplus only? In Culver v. Harper, 27 Ohio St. 464, the material facts were analogous to the facts disclosed in the present record. Harper had prior to his marriage bought the property in question and at the time of the purchase had given a mortgage to secure balance of purchase price. At the time of his marriage no part of the debt was due; but the mortgage note and interest matured more than a year before his death. He died testate, the widow refused to take under the will, and the executors found it necessary to sell the property to pay the balance due under the mortgage. After paying the debt, a surplus remained. The question was stated in the opinion thus: "Is Lucinda Harper dowable of this surplus alone, or of the whole sum for which the mortgaged premises sold?" The judges of the court concurred in holding, as stated in the syllabus:

"The widow of a purchase-money mortgagor, mortgage given before marriage, and property sold by executors to pay the mortgage debt, is not dowable of the whole proceeds, but only of the surplus remaining after satisfying the mortgage."

The principle of Culver v. Harper was followed and the case itself was approved in Fox v. Pratt, 27 Ohio St. 512. The judges concurred in holding, as stated in the syllabus:

"A widow is dowable of the surplus remaining after the payment of a purchase-money mortgage."

If these were the only decisions of the court of last resort in Ohio upon this subject, our task would be ended. But it is urged by counsel for Mrs. Hays that those cases are inconsistent with and in effect overruled by Kling v. Ballentine, 40 Ohio St. 391, and Mandel v. McClave, supra. The ground of the claim is that the first-named cases were founded on State Bank v. Hinton, 21 Ohio St. 509, and that that case was overruled in Mandel v. McClave. It is true that in the Culver and Fox Cases reliance was placed on the decision in State Bank v. Hinton, but, in view of the reasoning of the court and of other citations made in the decision of the Culver Case, we think it is a mistake to say that the State Bank Case alone was relied on.

It is important next to consider State Bank v. Hinton and Mandel v. McClave. The widow in the former and the wife in the latter case claimed dower interests in lands of the respective husbands which had been mortgaged in each instance by the joint action of husband and wife. Neither mortgage involved purchase money, but each had been given to secure a loan made exclusively to the husband. In the former case the widow was held (as against persons claiming under the mortgagor's grant of the equity of redemption without joinder of his wife) to be dowable only in the surplus remaining after payment of the mortgage indebtedness; while in the other case the wife was allowed (as against judgment creditors of her husband) to recover according to an estimate based upon the total proceeds of sale. If in the later decision State Bank v. Hinton was not overruled, it was limited and declared to be simply a rule of property to be applied to cases coming within its exact terms.

The last two paragraphs of the syllabus in which the judges concurred in Mandel v. McClave are as follows:

"Where the wife has joined in a mortgage of the husband's lands to secure his debt, upon a judicial sale of the premises, she may have the value of her contingent right of dower in the entire proceeds ascertained, and the husband's entire interest therein shall be exhausted to pay the debt before resorting to the interest of the wife therein.

"The release, in such mortgage, of her contingent right of dower, does not inure to the benefit of the husband's subsequent judgment creditors, and, as against them, the ascertained value of her contingent right of dower in the entire proceeds of the sale will be paid to her out of the balance left when the mortgage debt is paid, before any part thereof will be distributed to them on their judgment."

Kling v. Ballentine was approved in Mandel v. McClave and, so far as pertinent to the present discussion, is like that case, except that in the former the widow's right of dower was allowed against claims of devisees. The decision in Mandel v. McClave has been approved in several cases, but not under circumstances requiring more than the statement that they show adherence to the doctrine that when the dower right once exists it cannot be affected except through release

of the wife, and then only by the person in whose favor the release is made and those claiming under him. Finley v. Bank, 52 Ohio St. 624, 44 N. E. 1135, for report of which see 32 Wkly. Law Bul. 382; Joyce v. Dauntz, 55 Ohio St. 538, 552, 45 N. E. 900; Jewett v. Feldheiser, 68 Ohio St. 523, 534, 67 N. E. 1072.

Thus Culver v. Harper and Fox v. Pratt on the one hand, and Mandel v. McClave and Kling v. Ballentine on the other, disclose two distinct classes of decisions affecting the right of dower. One embraces purchase-money mortgages, and the other mortgages executed by husband and wife to secure his debts. Under the first class, the dower right is limited to the surplus remaining after payment of the mortgage; under the other, that right extends to the entire proceeds. The controlling principle of all of the decisions we have considered, except that of State Bank v. Hinton, would appear to be that the dowable interest of the wife or widow must be measured by the beneficial interest of the husband in the real property of which he was seised in his own right at the date of the mortgage, and, of course, during the marriage. If the husband's legal (or inheritable) estate in the property was held subject to a purchase-money mortgage, the dowable interest is likewise limited. If the husband possessed an unincumbered fee-simple title, the dowable interest extends to the whole estate; and a mortgage of such property by the husband with release of dower by the wife to secure a debt of his own entitles her to the rights of a surety, and to her original dowable interest in the whole property or its proceeds when the debt of the husband is paid.

There is still another case that must be considered before determining whether this classification still subsists. In Hickey, Adm'r, v. Conine, 71 Ohio St. 548, 74 N. E. 1137, the Supreme Court of Ohio affirmed without report the decision of the Ohio Circuit Court reported in 6 Ohio Cir. Ct. R. (N. S.) 321, affirming the decision of the Common Pleas, 3 Ohio N. P. (N. S.) 209. The facts of the case are not sufficiently reported below to disclose the precise grounds upon which the decisions below might have been affirmed by the Supreme Court. It appears, however, that Conine died seised of property which he had purchased subject to a mortgage and that he had assumed and agreed to pay it as part of the purchase price. His administrator filed a petition in the probate court making the widow a party for the purpose of selling this real estate to pay debts of the deceased. The property was sold and the widow was held to be dowable of the whole proceeds, and entitled to be paid out of the surplus accordingly. The widow claimed a right of subrogation to a certain sum which she had paid on account of the property, but this was denied in both of the courts below. Thus the only question determined in her favor in any of the courts was the one stated in respect of the dower. If we are right in our interpretation of the mortgage involved in the case under review, it is plain that the mortgage in question in the Conine Case was a purchase-money mortgage.

It would seem at first blush that the Conine Case abrogated the classification before pointed out, and so placed purchase-money mortgages in the class established for loan mortgages. But is this the necessary

consequence of that decision? It is true that in the opinion of the common pleas court the cases of Culver v. Harper and Fox v. Pratt are criticised, and that the trial judge could see no distinction between the right of dower held under a purchase-money mortgage and that held with release of dower under an ordinary loan mortgage. While approval of the common pleas opinion is expressed in the Circuit Court opinion, yet in the latter much stress is laid on the fact that the conditions of the Conine mortgages were not broken at the time of his decease. The dower interest had thus become consummate and in that sense had vested. What force may be rightfully ascribed to this fact we do not undertake to say. It is enough to state, as before pointed out, that no such fact appears in respect of the Hays mortgage. Furthermore, it does not appear in the Conine Case, as it does in the present case, whether the estate was solvent or insolvent; in other words, it does not appear whether extending the basis of dowable interest in the widow beyond any beneficial interest ever held in the property by Conine, in fact, operated prejudicially or not to others.

But it is to be observed above all other things that the Supreme Court must have found some facts in the record to distinguish the Conine Case from Culver v. Harper and Fox v. Pratt; because it cannot be presumed that the court would have suffered those cases to be overruled without mentioning the fact. More than this, there must have been in the estimation of the judges concurring in the decision of Mandel v. McClave and approving the Kling Case and overruling State Bank v. Hinton a substantial distinction between those cases and the cases of Culver v. Harper and Fox v. Pratt; for neither of the latter cases is even mentioned in the Mandel Case. The extent alone of beneficial interest residing in the husband at the date of an ordinary loan mortgage, when compared with the extent of interest of a husband under a purchase-money mortgage as before pointed out, is a distinction plainly to be deduced from the Mandel decision. The fact also that neither the Culver Case nor Fox Case was mentioned in the Kling Case likewise indicates that the concurring judges in that case did not regard their decision as in conflict with the underlying principle of the Culver and Fox Cases.

It will not escape attention, moreover, that there was no room for distinction between the Mandel Case and the cases of Culver and Fox upon any theory of the difference between a contingent and a vested dower right; for the reason that the facts for the application of such a distinction were present when State Bank v. Hinton was overruled. True, this is suggestive of closer analogy between the Conine Case and the present case; but this only strengthens the presumption, as before stated, that there must have been some facts in the record of the Conine Case to distinguish it from the Culver and Fox Cases. We are thus constrained to believe that the rule of decision laid down in those cases has not been overthrown, and that the present case is governed by that rule. It is therefore unnecessary to pass upon the contention that in respect to estates of insolvent debtors section 6350g, Rev. St. Ohio, was enacted for the purpose of changing the rule of Mandel v. McClave, and in effect restoring that of State Bank v. Hinton. To be

sure, if that statute is open to that contention and the construction placed upon it in Holmes Co. v. Book, 1 Ohio N. P. 58, the present case is obviously distinguishable from the Conine Case. But, while recognizing that the act is somewhat persuasive of what the Legislature thought the law to be, we prefer to rest our conclusion on the grounds before stated.

The decision below must therefore be affirmed, with costs.

On Rehearing.

Petition for rehearing denied, on the ground that analysis of the record in Hickey, Adm'r, v. Conine, accompanying the petition, confirms the fact relied on by the state circuit court as to the conditions of the Conine mortgages.

LYONS v. WESTWATER.

(Circuit Court of Appeals, Third Circuit. September 28, 1910.)

No. 1,332.

1. ESTOPPEL (§ 63*)—NATIONAL BANKS—SUBSCRIPTIONS TO STOCK—LIABILITY OF STOCKHOLDERS.

Officers of a national bank may not hold themselves out to the Comptroller of the Currency, the bank examiners, and the business public as original subscribers for and holders of its capital stock, which they have never paid for, and yet escape liability on obligations given for such stock by a secret agreement among them that the stock shall be considered as belonging to the bank, and not to the one to whom it is issued.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 63.*]

2. BILLS AND NOTES (§§ 49, 537*)—ACCOMMODATION NOTES—LIABILITY TO BANK AS INDORSEE.

A national bank desired to increase its capital stock, and, having failed to sell the entire issue, which was necessary before it could do business on the increased capital, in accordance with an agreement between the officers, a third person gave his note for the price of the remaining shares to one of the directors, who indorsed and delivered the same to the bank; the shares being issued in his name. The maker having become insolvent, defendant was induced by such director to execute his accommodation note to the director's uncle, who indorsed it, and it was substituted for that of the first maker. The notes were carried and reported as assets of the bank until its failure; but neither maker paid any interest, the dividends on the stock being applied thereon. The cashier gave defendant a letter assuring him that he would not be held liable on his note. *Held*, in an action by the receiver on a renewal of defendant's note, that such note was collectible, if given for the accommodation of the director and his associates, and not of the bank, and that such question was one of fact for the jury, under the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 66, 1862; Dec. Dig. §§ 49, 537.*]

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

Action by Robert Lyons, receiver of the Cosmopolitan National Bank of Pittsburgh, against James Westwater. Judgment for defendant (173 Fed. 111), and plaintiff brings error. Reversed.

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

F. F. Oldham and John S. Wendt, for plaintiff in error.
E. Y. Breck and James G. Westwater (James M. Butler, of counsel), for defendant in error.

Before LANNING, Circuit Judge, and ARCHBALD and CROSS, District Judges.

LANNING, Circuit Judge. This action is on a promissory note for $37,500. The Circuit Court instructed the jury to render a verdict for the defendant, Westwater. The plaintiff, Robert Lyons, receiver of the Cosmopolitan National Bank, assigns the instruction as error. It appears that about January 1, 1905, the Cosmopolitan National Bank decided to increase its capital stock from $200,000 to $500,000. The 3,000 shares of the increase were offered to subscribers at $125 per share. After all but 300 of the shares had been taken, one J. D. Lyon made his promissory note for $37,500 (the value of the 300 shares at $125 per share), dated July 5, 1905, and payable on demand to the order of F. H. McKinnie. McKinnie indorsed the note and delivered it to the bank. The bank thereupon discounted it, entered the proceeds ($37,500) to the credit of its increased capital stock account, and in due course issued certificates for the 300 shares either to McKinnie, John McClurg, or A. L. Richmond—to which of them is not clear. On July 13, 1905, upon a report to him by the bank that the increased capital stock of $300,000 had all been paid in, the Comptroller of the Currency issued his certificate to that effect, and the bank thereupon commenced to do business on the basis of a paid-up capital of $500,000. McKinnie, McClurg, and Richmond were members of the board of directors of the bank, and had agreed amongst themselves, and with the cashier and certain other officers of the bank, that the certificates for the 300 shares should be issued to one of them and delivered to the cashier for sale to such persons as might be induced to purchase them. No purchasers were ever found. The note was held by the bank until February 24, 1907, when, Lyon having failed in business, a new note, made by the defendant, James Westwater, and indorsed by H. R. Bean, was substituted for the Lyon note. The Westwater note was several times renewed, and the last renewal is the one now in suit. The Lyon note and the Westwater notes were carried as assets of the bank on its books continuously from July 5, 1905, until the appointment of the receiver on or about September 5, 1908. They were also always included as a part of such assets in the bank's reports to the Comptroller. During all of the period from July 13, 1905, to September 5, 1908, the dividends on the 300 shares were returned by the record holder of the shares to the bank and applied by it to the interest on the notes.

It is contended here by counsel for the defendant, Westwater, that on the facts above stated the 300 shares were always the property of the bank, and, consequently, that the Westwater note now in suit was in the hands of the bank, and now is in the hands of its receiver, mere accommodation paper and without consideration. We think this view is erroneous, for the reason that it assumes that the officers of a bank may hold themselves out to the Comptroller of the Currency,

the bank examiners, and the business public as original subscribers for and holders of a part of its capital stock, which they have never paid for, and yet escape liability on obligations given for such stock, provided there is a secret agreement amongst the officers that the stock shall be considered as belonging to the bank, and not to the one to whom it is issued. Such a rule of law would open a wide door to fraud. We think there is nothing in principle or authority to support it. Of course, a bank may hold paper, issued for its accommodation, on which it can never recover. But the Lyon note was given for stock issued. The certificates for the stock were probably issued to McKinnie himself, who was a party to the Lyon note. The cashier testifies that he thinks the certificates were issued to McKinnie, and McKinnie testifies that they may have been issued to him.

Section 5210 of the Revised Statutes (U. S. Comp. St. 1901, p. 3498) requires the president and cashier of every national bank to keep at all times a full and correct list of the names and residences of all the shareholders, and the number of shares held by each, in the office where its business is transacted, for the inspection of all shareholders and creditors of the bank. Presumably such a list was kept by the president and cashier of the Cosmopolitan National Bank in its office, and that the list showed that certificates for 5,000 shares had been issued. Section 5142 of the Revised Statutes (U. S. Comp. St. 1901, p. 3462) provides that "no increase of capital stock shall be valid until the whole amount of such increase is paid in." The provision of section 5210 was designed to furnish to the public dealing with the bank a knowledge of the names of its corporators and to what extent they might be relied on as giving safety to dealing with the bank. Waite v. Dowley, 94 U. S. 527, 534, 24 L. Ed. 181. The primary object of the provision of section 5142 was to prevent the "watering" of stock; that is, to prevent banking business being done upon the basis of an increased capital which did not in fact exist. Scott v. Deweese, 181 U. S. 202, 210, 21 Sup. Ct. 585, 45 L. Ed. 822.

By a trick McKinnie and his associates induced the Comptroller of the Currency and the bank's creditors and other stockholders to believe that the whole of the $300,000 of increased capital had been paid to the bank in cash. As a fact $37,500 of that sum was not paid in cash. The Lyon note was given as a substitute for the cash, and was, we doubt not, a valid asset in the hands of the bank. But whether the circumstances under which Westwater signed the note now in suit sustain his defense that he is a mere accommodation maker for the bank is, as we view the case, not a question of law for the court, but a question of fact for the jury. That he was an accommodation maker, either for the bank or for McKinnie and his associates, is certain. If his accommodation was to McKinnie and his associates, the receiver is entitled to recover; and if to the bank, there can be no recovery. There is evidence in the case on which the jury might have rendered a verdict either for or against the receiver. The testimony of McKinnie and of Westwater concerning their interview at the time Westwater signed the first of the series of Westwater notes is so ambiguous that, if the jury had been left free to draw their inferences in the case, they might have concluded that Westwater understood himself

to be an accommodation maker and Bean to be an accommodation indorser for McKinnie and his associates, and not for the bank.

This conclusion leads to a reversal of the judgment. There is in evidence a letter from the cashier of the bank to Westwater, dated February 23, 1907, concerning the first of the Westwater notes, in which the cashier said:

"It is explicitly understood that there is no liability attached to you [Westwater] for this note; the same being used by Mr. McKinnie as a substitute for another note."

The plaintiff in error objected to the admission of this letter, and error is assigned thereon. But it is not necessary to the decision of the case to pass upon this question. If no proper basis was laid for its admission, it may possibly be done on a new trial.

The judgment will be reversed, and the record remanded, with instruction to award a venire de novo. The plaintiff in error is entitled to costs in this court.

ELKIN et al. v. DENVER ENGINEERING WORKS CO.

(Circuit Court of Appeals, Third Circuit. September 21, 1910.)

No. 12, March Term, 1910.

REFERENCE (§ 103*)—REFERENCE BY CONSENT—POWERS OF FEDERAL COURT OVER REPORT.

A federal court, on the coming in of the report of a referee to whom a common-law action has been referred by consent "to report his findings of fact, together with his conclusions of law thereon, subject to confirmation by the court, exception, and appeal," has no power to set aside such report, find new facts, and enter judgment thereon, but on the refusal to confirm the report the case stands for a new trial.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 203; Dec. Dig. § 103.*]

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

Action by the Denver Engineering Works Company against John P. Elkin and T. L. Eyre. Judgment for plaintiff (179 Fed. 922), and defendants bring error. Reversed.

John M. Freeman (Harry F. Stambaugh, of counsel), for plaintiffs in error.

Martin Conboy, for defendant in error.

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

LANNING, Circuit Judge. By a stipulation filed December 2, 1907, the attorneys in this case agreed, pursuant to section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525), that the case should be tried and determined by the court, without the intervention of a jury; each party reserving the right of review by writ of error under the provisions of section 700 of the Revised Statutes (U. S. Comp. St. 1901, p. 570). Pursuant to a second stipulation of the attorneys,

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

filed December 13, 1907, the Circuit Court ordered the issues in the case referred to a referee, who was, by the order, directed "to take proofs of all and singular the issues herein and to report his findings of fact, together with his conclusions of law thereon, subject to confirmation by the court, exception, and appeal." The referee took the evidence, and subsequently filed his report of facts and law. His conclusion was that the defendants John P. Elkin and T. L. Eyre were not liable. Under the provisions of a general rule existing in the trial court, exceptions to the report were filed, argued before the referee, and overruled by him. The report, the exceptions thereto, the referee's reasons for overruling the exceptions, and the evidence taken before the referee were thereupon filed, and a rule entered confirming the report unless exceptions thereto should be filed within 10 days. Within said 10 days the plaintiff, Denver Engineering Works Company, refiled the same exceptions that had been argued before the referee. Upon argument before the Circuit Court the exceptions were sustained, the findings of the referee overruled, and judgment entered for the plaintiff against the defendants for the sum of $12,536.85.

We find it necessary to consider but a single question, and that is whether a federal court, after having refused to confirm the report of a referee to whom a common-law action has been referred by consent, may set aside the report, find new facts, and enter judgment on its own findings of fact.

Whatever may be the practice as to references of common-law actions in the courts of the state of Pennsylvania, in a federal court the reference of such a case can be made only on consent of both parties. The seventh amendment to the Constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right may be waived; but the waiver, to be effective, must be by both parties. In the present case there was such a waiver. The order of reference, based on the waiver, necessarily superseded the previous order that the case should be tried by the court without a jury. Previous to the act of March 3, 1865 (13 Stat. 500, c. 86), in which sections 649 and 700 of the Revised Statutes first appeared, the parties could submit the issues of fact in an action at law to be tried by a court without a jury, but they could not have the judgment of the court reviewed. Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395. Now, under the provisions of section 700, where a case is tried before the court without a jury, exceptions may be taken to the rulings of the court, and a review of the judgment may be had. But in the present case the agreement to try the case without a jury before the court had been abrogated by the subsequent agreement to try it before a referee. The order of reference required the referee "to report his findings of fact, together with his conclusions of law thereon, subject to confirmation by the court, exception, and appeal." The only power possessed by the court concerning the report was the power to confirm it or to reject it. It could not, in the absence of an agreement to that effect, decide questions of fact, and thus exercise a power over the referee's report greater than it could exercise over the verdict of a jury.

It is true that judgment cannot be entered upon the report of a referee before the parties have had an opportunity to except to the report; but after exceptions have been filed and argued the duty of the court is simply to confirm or to refuse to confirm the report. It was so declared in Hecker v. Fowler, 2 Wall. 123, 133, 17 L. Ed. 759, Dundee Mortgage Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, 31 L. Ed. 357, United States v. Ramsey (C. C.) 158 Fed. 488, and Kilduff v. John A. Roebling's Sons Co. (C. C.) 150 Fed. 240. In the Dundee Mortgage Company's Case, there was a reference of a common-law action by consent to a referee, who was directed to report to the court his conclusions of fact and law. Upon the coming in of the report each of the parties excepted, and the court, after argument, set aside the findings of the referee, made new findings, and entered judgment on the new findings of fact. The Supreme Court said:

"It is undoubtedly true that under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject, and if the report be set aside the cause stands for trial precisely the same as if it had never been referred."

In that case, however, there was no bill of exceptions in the record, and it did not appear that any exception had been taken to the action of the court or in giving the judgment. The proceeding before the court, in the nature of a new trial, was declared by the Supreme Court to have been in accordance with the understanding of the parties. The judgment was therefore affirmed. But in the case now under consideration we have a bill of exceptions and assignments of error presenting the question of the power of the court to substitute new findings of fact for the findings of fact by the referee, and to enter judgment on the new findings. That question, as it is regularly presented, we must answer. We think it clear that the court exceeded its power, and that its judgment, entered on its own findings of fact, must be reversed.

The plaintiffs in error ask that we not only reverse the judgment, but that we confirm the report of the referee. This we cannot do. The practical effect of the action of the Circuit Court was to refuse to confirm the report. Had such an order been entered, the case would have stood for a new trial. We think our duty is to reverse the judgment and direct the cause to be remanded to the Circuit Court, with instructions to that court to enter an order confirming or setting aside the referee's report. If it be confirmed, judgment will be entered in favor of the plaintiffs in error. If it be set aside, the cause will stand for a new trial.

Such will be the order. The plaintiffs in error are entitled to costs in this court.

PHILADELPHIA & R. RY. CO. v. McGRATH.

(Circuit Court of Appeals, Third Circuit. September 29, 1910.)

No. 14, March Term, 1910.

RAILROADS (§ 350*)—ACTION FOR INJURY AT CROSSING—QUESTIONS FOR JURY.

In an action against a railroad company to recover for an injury to plaintiff at a crossing, where there was substantial evidence in favor of plaintiff on the issues of defendant's negligence and plaintiff's contributory negligence, the court properly submitted such issues 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 Eastern District of Pennsylvania.

Action by Theresa McGrath against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 173 Fed. 736.

John M. Vanderslice, for plaintiff in error.

William Clark Mason, for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below Theresa McGrath sued the Philadelphia & Reading Railway Company, and recovered a verdict for injury to her caused by the defendant's train striking her and cutting off her hand. On the entry of judgment thereon the railroad company sued out this writ of error, and assigned for error the denial of its point that "Under all the evidence in this case your verdict must be for the defendant."

We have reviewed all the proofs, and are of opinion the facts were such that the court was bound to submit the case to the jury. While there was contradictory evidence, the case as presented by the plaintiff and her witnesses showed the plaintiff was injured between 9 and 10 o'clock on the night of May 22, 1908, while attempting to pass the defendant's road at a grade crossing on Willow Grove avenue, Philadelphia. She and a young woman companion came along the avenue; the crossing gate was down, but, as there were no lights either on the gate or avenue, the plaintiff and her companion were unable to see it, and so groped along, feeling their way as best they could. The plaintiff's companion was in the roadway, and got hold of the lowered gate in the darkness. The plaintiff, however, was on the sidewalk, and either through the wing of the gate being so high over the depressed sidewalk that the plaintiff walked under it, or owing to its not extending over the whole width of such sidewalk, she walked past the other end of it and so onto the track, where she was struck by the train.

It is contended by the defendant that the plaintiff did not stop, look, and listen as she drew near the track, but walked on in full view of

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

the headlight of the locomotive of a properly lighted passenger train engine which she could have seen approaching for a considerable distance up the track. But the difficulty with this contention is that it assumes plaintiff was struck by the particular train to which the defendant's proof is directed. On the contrary, she says the train that struck her was an unlighted train of box cars. The plaintiff's testimony was that when she got near to the crossing she stopped and looked, and seeing nothing, went forward and was immediately struck. Her companion says she was in the middle of the road, and stumbled against the gate in the darkness, and immediately a dark object, what "appeared to be just box cars," passed and struck the plaintiff. The defendant called no one to prove that no freight train passed about this time, and the proof on the defendant's side was fairly open to the contention that the plaintiff was not struck by the passenger train. The passenger train engineer and fireman say they knew nothing of the accident, that they saw no one on or near the track, and that their train stopped at Wyndmore Station, about 90 feet beyond Willow Grove avenue, while the plaintiff's companion says that the train that struck the plaintiff did not stop and she saw no lights on it.

In view of these proofs and of the different inferences that could be drawn therefrom by different men, we are of opinion it was not the province of the court to become a trier of facts, which it would have to do, in saying that plaintiff was struck by a passenger train carrying a headlight, and that therefore the plaintiff was guilty of contributory negligence in walking on the track in the face of it. The situation was summed up by the trial judge in refusing the defendant's motion for judgment non obstante veredicto, and thereto we agree:

"I do not see how the questions of the defendant's negligence and of the plaintiff's contributory negligence could have possibly been withdrawn from the jury. * * * In my opinion there is sufficient direct and positive testimony in support of the plaintiff's claim to prevent the court from undertaking to decide the two vital questions for itself."

The judgment is affirmed.

PIONEER LACE MFG. CO. v. DODD.

(Circuit Court of Appeals, Third Circuit. June 27, 1910.)

No. 1,375.

COURTS (§ 407*)—APPELLATE JURISDICTION OF CIRCUIT COURT OF APPEALS—ORDER "CONTINUING" INJUNCTION.

An order denying a motion to dissolve a preliminary injunction is not one "continuing" the injunction, within the meaning of Act March 3, 1891, c. 517, § 7, 26 Stat. 828 (U. S. Comp. St. 1901, p. 550), and is not appealable thereunder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. § 407.*

Orders, decrees, and judgments reviewable in Circuit Court of Appeals, see notes to Salmon v. Mills, 13 C. C. A. 374, Taylor v. Breese, 90 C. C. A. 566.]

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

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

Suit in equity by the Pioneer Lace Manufacturing Company against John A. Dodd. From order granting a preliminary injunction, defendant appeals. On motion to dismiss appeal. Motion sustained.

W. W. Watson, for appellant.

Percival H. Granger and J. Howard Reber, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

PER CURIAM. On February 18, 1910, the Pioneer Lace Manufacturing Company filed in the United States Circuit Court for the Middle District of Pennsylvania its bill of complaint, praying for an injunction against the defendant, James A. Dodd, to restrain him from continuing in the employment of the Lehighton Lace Company. On February 24th the Circuit Court, after due notice and a hearing on bill and affidavits, granted a preliminary injunction pursuant to the prayer of the bill. On March 21st the defendant filed a written motion, asking the court to grant a rehearing of the plaintiff's motion to show cause why a preliminary injunction should not issue, to the end that, if the court should see fit, the injunction should be dissolved and vacated. Upon the filing of the motion the Circuit Court made this order:

"That a rehearing be had upon the plaintiffs' application for a preliminary injunction before this court at a term to be held on Thursday, the 24th day of March, 1910, at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard, in the courtroom in the Post Office Building in the city of Scranton, Pennsylvania, to show cause why the preliminary injunction heretofore granted and issued should not be dissolved and vacated."

On the return day of the above rule the hearing was continued until April 4th. After argument on the last-mentioned day, the court entered the following order:

"An application for a rehearing having been granted herein, and the motion having come on to be heard this 4th day of April to dissolve the injunction granted herein on February 24, 1910, now, after hearing W. W. Watson, for defendant, in favor of said motion, and Percival H. Grooger, in opposition thereto, and due deliberation having been had, it is ordered that said motion to dissolve said injunction be and the same is hereby in all respects denied."

An appeal to this court from the order granting the preliminary injunction was allowed on April 20, 1910.

The above statement of facts shows conclusively that the appeal was not taken within the time prescribed by the seventh section of the act entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]). That section requires an appeal from an interlocutory order granting an injunction to be taken within 30 days from the entry of the order. The argument in this case that the 30 days did not begin to run until after the court had made its order on the motion to dissolve the in-

junction is unsound. It has frequently been decided that an order refusing to dissolve a preliminary injunction cannot be construed as an order continuing an injunction, so as to bring the case within the operation of section 7 above mentioned. Dreutzer v. Frankford Land Co., 65 Fed. 642, 13 C. C. A. 73; Rowan v. Ide, 107 Fed. 161, 46 C. C. A. 214; Heinze v. Butte, etc., Consolidation Mining Co., 107 Fed. 165, 46 C. C. A. 219; Lewis v. Hitchman Coal & Coke Co., 176 Fed. 549, 100 C. C. A. 137.

In accordance with the rule established by these precedents, the present appeal must be dismissed; and it is so ordered.

In re LESAIUS.

(Circuit Court of Appeals, Third Circuit. September 28, 1910.)

No. 50, March Term, 1910.

BANKRUPTCY (§ 468*)—REVIEW ON APPEAL—REVERSAL OF ORDER—PROCEEDINGS AFTER REMAND.

Where an order of a District Court in bankruptcy has been reversed by the Circuit Court of Appeals on appeal, it is annulled for all purposes, and cannot afterward be amended by the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 468.*]

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Pennsylvania.

In the matter of F. P. Lesaius, bankrupt. On petition to revise order of District Court; Henry Goodman, as trustee, being respondent Reversed.

For prior proceedings, see 163 Fed. 614; 165 Fed. 889, 91 C. C. A. 567.

R. L. Levy, for petitioner.

C. A. Van Wormer, for respondent.

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

PER CURIAM. When this case was first before this court (Lesaius v. Goodman, 165 Fed. 889, 91 C. C. A. 567), we reversed the order of the District Court and remanded the case without prejudice to such further proceedings as justice might demand. After the case had been remanded it was then before the District Court on the petition of the trustee to review the order of the referee. Either of two courses might then have been pursued: First, the trustee might have applied to the court to remand the case to the referee to take additional proofs and rehear the case; or, second, he might have applied to the court for a rehearing on the petition to review. He did neither of these things. He asked the court, by a petition, to amend the order which this court had reversed. But there was no order of the District Court to be amended. It had been annulled by the order of this court, and stood for nothing. The order now before us is the so-called amenda-

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

tory order of the court made upon the petition of the trustee. We do not see how it can be affirmed. We regret the necessity of sending the case back a second time.

The order will be reversed; but, in view of the grave charges of fraud against the bankrupt, the case will be remanded with leave to the trustee to apply to the District Court, either for an order remanding the case to the referee for further proofs and a rehearing before the referee, or for a rehearing by the court on the trustee's petition to review the referee's order. No costs will be allowed to either party in this court on this proceeding.

AMERICAN BAR LOCK CO. v. OLD et al.

(Circuit Court of Appeals, Third Circuit. September 21, 1910.)

No. 20, March Term, 1910.

PATENTS (§ 328*)—INFRINGEMENT—VAULT-LIGHT CONSTRUCTION.

The Caldwell patents, No. 741,010 and No. 760,728, each for improvements in vault-light construction, as limited by the prior art, *held* not infringed.

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

Suit in equity by the American Bar Lock Company against Robert H. Old and others. Decree for defendants (175 Fed. 113), and complainant appeals. Affirmed.

Hector T. Fenton, for appellant.

Charles M. Catlin, for appellees.

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

PER CURIAM. This suit involves the question as to whether the defendants, appellees here, have infringed the two patents of the complainant, appellant here. Each of the patents is for improvements in vault-light construction, and each was issued to William L. Caldwell, No. 741,010 on October 13, 1903, and No. 760,728 on May 24, 1904. The Circuit Court concluded that there was no infringement (see opinion, 175 Fed. 113). A decree was thereupon entered dismissing the bill. We agree with the conclusions of the court below, and adopt the opinion of that court as the opinion of this.

The decree is affirmed, with costs.

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

BERYLE v. SAN FRANCISCO CORNICE CO.

(Circuit Court, N. D. California. July 22, 1910.)

No. 14,776.

1. PATENTS (§ 18*)—INVENTION.
   A change produced in a process or combination is not to be rejected as obvious or wanting in inventive thought because it tends to simplicity of action, but the simplifying of a device or process may in itself amount to invention.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. § 18.*]

2. PATENTS (§ 230*) — INFRINGEMENT — IMPROVEMENT PATENTS — DOCTRINE OF EQUIVALENTS.
   Secondary or improvement patents, equally with those of a primary character, are entitled to be protected against infringement from equivalents to the full extent that a fair and reasonable construction of their claims will warrant.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 367; Dec. Dig. § 230.*]

3. PATENTS (§ 26*)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
   If a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention, and such result need not be new and useful in a primary sense, but only approximately so.
   [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.]

4. PATENTS. (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF PUTTING METAL FACING ON WOOD.
   The Beryle patent, No. 887,995, for a method of casing wooden mouldings, etc., while for an improvement on the prior art, was not anticipated, and discloses invention, and is of such merit as to entitle it to a construction sufficiently broad to give it protection against a method using palpable equivalents. Also, *held* infringed.

In Equity. Suit by Andrew Beryle against the San Francisco Cornice Company. On final hearing. Decree for complainant.

G. E. Harpham, for complainant.
F. J. Kierce and James P. Sweeney, for defendant.

VAN FLEET, District Judge. This is a bill to enjoin the infringement of letters patent issued to complainant for a device for covering wooden mouldings and others forms of wood with metal casing, and for damages ensuing to complainant from the infringing acts of the defendant.

The defenses interposed are want of invention and noninfringement. Complainant's device consists of a table, bench, or other convenient base on which is arranged a bed-plate with a die or series of dies and proper securing means to hold the material while in course of being acted upon; the process of putting on the casing being aptly and clearly described in the claims of the patent alleged to have been infringed, as follows:

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

"1. The herein described method of putting on a metal facing on wood consisting in first securing the front ends of the metal and wood so they will travel together, and then simultaneously pushing the wood and metal for the facing of the same through a die by pushing means applied to the rear end of the wood.

"2. The herein described method of putting on a metal facing on wood consisting in securing the front ends of the metal for the facing, and the wood to be faced so that they will travel together and then applying pushing means to the rear end of the wood and simultaneously pushing the wood and the metal for the casing through a succession of dies adapted to form the metal upon the wood and imbed the edge of the metal in the wood whereby it is locked thereon."

The alleged infringement is accomplished by means of two certain unpatented devices or machines admittedly used by defendant which are thus described in a stipulation in the record as to their construction and operation:

"In one machine the sheet metal with which the wood moulding is to be cased and the wood moulding were secured together at their front end, and were placed together on a table which contained a forming die or series of dies on the top thereof. The wood moulding and the metal to case the same were then forced or pulled through the die or series of dies by means of a piece of iron which was hooked on to the rear end of the wood. This piece of iron which was hooked on to the rear end of the wood was attached to an iron rod which extended beneath the table to the forward part of the same and was connected up to mechanism which drew the rod forward, thereby causing the wood and metal to be forced or pulled through the forming dies."

In the second:

"The wood and the metal for casing the same were secured together at their front end and were placed on a table which had situate thereon a forming die or series of dies. A push-bar in the form of a wooden scantling about 3 inches square and of the necessary length was brought into contact with the rear end of the wood. This push-bar was operated by mechanism beneath the table which moved the push-bar forward, and caused it to push the wood and metal through the forming die or dies."

1. As to the defense of want of invention, which is based on the theory of anticipation, the evidence shows that there existed at the time of complainant's application for patent a process for incasing wood with metal commonly called the "pulling process," evidenced by certain existing patents. This process consisted substantially of a device whereby it was necessary in preparing the material to be processed that the moulding or other wood be first cut down or reduced in size at the introductory end, and the casing metal so cut at that end as to permit of the insertion of the wood and metal into the die for such distance as to enable the reduced end to pass through and project beyond the die so as to be seized and held by a pair of tongues or clamps attached to a chain extending in front, whereupon, power being applied, the material would be forcibly pulled through the die by the chain and the forming process of compressing the metal around the wood thus accomplished. By this process, as the evidence establishes, much time was consumed in first preparing the material for insertion into the die, and, after it had been processed, more time was consumed in cutting off by hand the reduced end of the wood and metal which was of no value in the finished product; while the material thus cut off and

thrown away entailed, with the time consumed, a very material percentage of loss to the manufacturer.

The evidence shows that the complainant's process eliminates this consumption of time and waste of material. No preparatory forming up of the material for processing is required. The wood and metal are cut in lengths suitable for the use to which the finished product is to be put. They are then secured or fastened so as to "travel together," are simultaneously forced through the dies and emerge in a completed state ready for use in the structure for which they are designed. The evidence also shows that by this process, if the work requires the ends of the moulding to be cased, it is accomplished while passing through the dies by the simple means of leaving the metal long enough to turn up over the ends, and, by the use of spacing blocks, the ends are incased as perfectly as the body, thus avoiding the necessity of doing it by hand. The evidence further tends to show that, by this process, the casing material is more closely compressed and fitted upon the wood than by the former, and gives a better result in the finished work. As a result of these differences in the two processes, it very clearly appears, notwithstanding some conflict in the evidence, that there is a considerable percentage of value to the manufacturer in the work done by that of the complainant over the one previously existing. Defendant's contention is in substance that these differences in the working of complainant's process, if of any considerable merit at all, constitute a mere improvement in degree resulting from mechanical differences in method of treatment, and grow out of simple and obvious changes which in the light of the existing art, were all anticipated and in common knowledge before the date of his patent; that they are therefore entirely wanting in novelty, and involve no inventive thought which will sustain his patent.

As to the prior art, all of the anticipating references put in evidence are based more or less closely upon the idea embraced in the so-called pulling process as above described. One of them, the Appleyard device, had a feature not common to the others, whereby through the instrumentality of a toothed roller upon which the material traveled its course through the dies was facilitated; but in other respects the device worked on substantially the same plan as the others and avoided none of their defects. Moreover, the evidence tends to show that this device could not be successfully used where all four sides of the wood were to be incased, owing to the fact that one face of the material would be injured by the teeth of the roller in passing over it. I am satisfied that there is nothing so distinctive in the working of this device as to effect an anticipation of complainant's patent if the other references do not.

If complainant were making the broad claim of novelty in the mere function of forcing the material to be processed through a die or dies, these references would undoubtedly constitute an anticipation. But he makes no such claim. What he is claiming as new in the process is, first, the feature of so securing the initial ends of the wood and metal together that the moulding and casing metal will travel together; and, secondly, forcing the material thus combined through the dies by pushing means through power applied to the rear end. These are the dis-

tinctive claims of his patent. As mere structural differences in the device from those previously existing, it may be conceded that they are simple; but whether they are obvious changes, suggested by the prior art, must depend upon considerations other than their mere simplicity. Simplicity in mechanics is not a vice, but rather a virtue—a strength, not a weakness; and this is especially true in the field of invention. A change produced in a process or combination is not to be rejected as obvious or wanting in inventive thought because it tends to simplicity of action. In Dececo Co. v. Gilchrist Co., 125 Fed. 293, 298, 60 C. C. A. 207, it is held that simplification of a mechanical device, when of a substantial character, by the elimination of features which are expensive and burdensome, may amount to invention; and it is aptly said that "to obtain absolute simplicity is the highest trait of genius." And whether the change is of a substantial character is to be determined not so much from its apparent simplicity in a mechanical sense as from the results produced. As stated in United Fastener Company v. Bradley, 149 Fed. 222, 79 C. C. A. 180, the test of patentability in an improvement of an existing art is "not the simplicity of the device, but the difficulties overcome and the result accomplished."

The same test is to be applied in determining whether the changes effected are so obvious as to evidence the use of mere mechanical skill rather than invention. It is a very common and usual thing in cases involving the validity of patents for improvements in a prior art, where all the elements are old, to interpose the defense of want of invention based upon the claim that the improvements wrought are merely obvious mechanical changes suggested to the mind of the skilled artisan from existing devices or processes. As stated by Judge Wallace in International Tooth Crown Co. v. Richmond (C. C.) 30 Fed. 775, in answering a like claim:

"It is not difficult, after the fact, to show by argument how simple the achievement was, and, by aggregating all the failures of others, to point out the plain and easy road to success. This is the wisdom after the event that often confutes invention, and levels it to the plane of mere mechanical skill."

But, as there indicated, the court should be chary in giving ear to this siren song that seeks to deprive the worthy of well-earned effort. Mr. Justice Bradley in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, has this to say upon the same subject:

"At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now, that it has succeeded, it may seem very plain to any one that he could have done as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

And such result need not be new and useful in a primary sense, but only approximately so. In St. Louis St. F. Co. v. Am. St. F. Mac. Co., 156 Fed. 574–576, 84 C. C. A. 340, in sustaining a patent introducing an improvement in the old method of flushing or cleaning

streets, the Circuit Court of Appeals of the Eighth Circuit, in answer to the same defense under consideration here, say:

"The new and useful result claimed is the effective loosening up of dirt and material on the street and washing them off into the gutter by one action without injury to the street. To accomplish a new and useful result within the meaning of the patent law (section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way. If the value and effectiveness of a machine are substantially increased, the new combination of old elements, which does it, is patentable. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Cantrell v. Wallick, 117 U. S. 689–694, 6 Sup. Ct. 970, 29 L. Ed. 1017; Anderson v. Collins, 58 C. C. A. 669, 122 Fed. 451, and cases cited."

Tested by these principles, it cannot be said that the changes in the process disclosed in the patent are so obvious as to have been anticipated by the prior art. It is true that, regarded purely from a mechanical point of view, it appears at first glance a simple thing in the one instance to merely change the method of securing the ends of the material for process, and in the other to change the point of contact in the application of the propelling power; but, when we regard the material difference in result, the fact that the old process had been in practice for a number of years without the elimination of the cumbersome methods characterizing all previous efforts in the art, it furnishes very persuasive, and we have seen competent, proof of the presence of the inventive faculty. It must be borne in mind that the line which divides invention from mere mechanical improvement is indefinite and sometimes shadowy, and the result produced by the change is frequently the one potent factor in determining on which side of the line a particular claim falls. Here we have something in the way of substantial results which makes just the difference between success in the art and comparative failure; a process which brings forth a finished product as against one which leaves it incomplete; and this difference is sufficient evidence of invention.

2. With reference to the defense of noninfringement not much need be said. It was conceded at the argument by counsel for defendant, as is apparent, that, if complainant's patent is valid to the extent claimed, the devices practiced by defendant embody the equivalent of those claims and are an infringement. But defendant's contention is that the patent not being a primary one, but for a mere improvement, and that not a broad one, is so limited by the prior art as to narrow its construction to the precise form of device claimed by the inventor, and is not entitled to invoke the doctrine of equivalents; that, as defendant's devices are structurally different, they cannot be held to infringe. This contention is in line with what was supposed at one time to be the doctrine of the Supreme Court; that none but pioneer inventions were entitled to the protection of the so-called doctrine of equivalents. But the idea that any such doctrine ever in fact existed under the decisions of that court, when properly construed, has been exploded; and it is now settled that secondary or improvement patents equally with those of a primary character are entitled to be protected against infringement from equivalents to the full extent that a fair and reason-

able construction of their claims will warrant. Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

It is held in that case, after an exhaustive review of all the previous rulings of the court, that those cases "are not to be construed as holding that only pioneer patents are entitled to invoke the doctrine of equivalents, but that the range of equivalents depends upon the degree of invention, and infringement of a patent not primary is therefore not averted merely because defendant's machine may be differentiated;" that "the claims measure the invention; and that, while the inventor must describe the best mode of applying the principle of his invention, the description does not necessarily measure the invention." (Quotations from syllabus.) Within these rules I think the patent in question, as indicated by the discussion of its character and the results produced, is clearly entitled to a construction sufficiently broad to give it protection against devices so palpably violating its claims as do those of the defendant.

As suggested in Albright v. Langfeld (C. C.) 131 Fed. 473:

"When the Patent Office has granted a patent to an inventor, the court should not be ready to adopt a narrow or astute construction fatal to the grant, and, in cases where there is any doubt, the test of practical success is always persuasive evidence of novelty, and has great weight in solving the question favorable to the invention."

3. There is but one objection to evidence noted in the defendant's brief—that to the introduction of complainant's Exhibits B to G, on the ground that no sufficient foundation had been laid. But the specification is not in accordance with our rule in that the place where the objection is to be found in the testimony is not referred to. Rule 53 governing final hearings in equity provides:

"Each brief shall contain a distinct specification of any objection relied on to the admission of evidence offered by an adverse party, which specification shall distinctly refer to the particular questions or evidence objected to, and the places where such objections are to be found in the testimony. Any objection not so noted in the brief shall be deemed to be withdrawn."

The specification, not being in form to require notice from opposite counsel, must be ignored by the court.

As a result of these considerations, a decree may be entered in favor of complainant as prayed, and providing for a reference to the master to ascertain the damages.

CONROY v. PENN ELECTRICAL & MFG. CO.

(Circuit Court, W. D. Pennsylvania. August 4, 1910.)

No. 50.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR CHIPPING GLASS.

The Conroy reissue patent, No. 12,789 (original No. 723,139), for a machine for chipping the edges of glass articles, *held* valid and infringed.

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

In Equity. Suit by John M. Conroy against the Penn Electrical & Manufacturing Company. On final hearing. Decree for complainant.

See, also, 155 Fed. 421, 425; 159 Fed. 943, 87 C. C. A. 149; 173 Fed. 299.

Christy & Christy and Paul Synnestvedt, for complainant.

J. M. Nesbit and Edward Rector, for defendant.

ORR, District Judge. This matter comes before the court on final hearing upon a bill charging the defendant with the infringement of a reissued patent, No. 12,789, originally granted to the complainant March 17, 1903, and reissued to him May 5, 1908, for an improvement in ornamenting glass. Some time since this court overruled a demurrer to the bill, for the reasons stated in Conroy v. Penn Electrical & Manufacturing Company, 173 Fed. 299. Since then the defendant has answered, and proofs have been taken by both parties. The questions raised by the demurrer were reargued upon final hearing, especially the question as to the validity of the reissue; but nothing has been presented which has convinced the court that there was error in holding the reissue to be valid, or in other conclusions as expressed in the opinion overruling the demurrer.

The proofs show that all the material allegations of the plaintiff's bill are true. Complainant's title to the patent and the utility of the invention are not disputed in any way. Nor is it seriously contended by the defendant that infringement, after notice given of the existence of complainant's patent and after the filing of the bill, has been and is a fact. The claim of the reissued patent is as follows:

"A machine for chipping the edges of glass articles, comprising in combination a rest or support for said article and a carrier movable relative to said support and provided with projecting means arranged to strike the said glass an angular glancing blow at a point adjacent its edge and in a direction away from the edge, substantially as described."

The defendant employs a machine for chipping glass which is within the claim of said patent. Defendant's own expert says that the language of the claim of the reissued patent in suit would accurately apply to defendant's structure. As has been said, the only real question raised is the validity of the reissue. The complainant is entitled to the relief prayed for.

Let a decree be drawn in accordance with this opinion.

NEWELL v. BALTIMORE & O. R. CO.

(Circuit Court, W. D. Pennsylvania. September 16, 1910.)

No. 87.

1. COURTS (§ 272*)—FEDERAL COURTS—JURISDICTION—ACTION BASED ON FEDERAL STATUTE—EMPLOYER'S LIABILITY ACT.

Where after suit brought March 5, 1910, in the federal Circuit Court, sitting in Pennsylvania, by a citizen of Pennsylvania against a Maryland corporation, to recover damages for injuries resulting from defendant's negligence, in which federal jurisdiction rested exclusively on diverse

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

citizenship, plaintiff so amended his original statement as to allege a cause of action for injuries to a servant while engaged in interstate commerce, under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), so that jurisdiction did not depend solely on diversity of citizenship, the court was thereby deprived of jurisdiction; the suit not having been brought in the district of defendant's residence.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 272.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249, Mason v. Dullagham, 27 C. C. A. 298.]

2. COURTS (§ 256*)—FEDERAL COURTS—JURISDICTION—STATUTES.

Act Cong. April 5, 1910, c. 143, 36 Stat. 291, amending the employer's liability act (Act April 22, 1908, c. 149, § 6, 35 Stat. 66 [U. S. Comp. St. Supp. 1909, p. 1173]), providing that actions may be brought thereunder in the Circuit Court of the United States in the district of the residence of the defendant, or in that in which the cause of action arose, or in which defendant shall be doing business at the time of the commencement of the action, has no application to suits brought prior to the amendment, which could only be brought in the district of the defendant's residence, as provided by Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508); jurisdiction not being founded solely on diversity of citizenship.

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

Action by Frank A. Newell against the Baltimore & Ohio Railroad Company. On motion to rescind an order dismissing the action for want of jurisdiction. Denied.

W. W. Stoner and F. H. Guffey, for plaintiff.

J. W. McCleave, for defendant.

ORR, District Judge. This matter comes before the court upon a motion of plaintiff's counsel to rescind an order of this court dismissing the action for want of jurisdiction. The plaintiff is a citizen of Pennsylvania. The defendant is a corporation (and therefore an inhabitant) of Maryland.

The action is brought to recover damages for personal injuries alleged to have resulted from the negligence of the defendant. The suit was brought on March 5, 1910. The statement then filed set forth nothing from which an inference could be drawn that the action was not an ordinary common-law action. This being so and there being a diversity of citizenship alleged, this court clearly had jurisdiction at the time suit was brought. It is true that in the original statement of the plaintiff's case the words "interstate traffic" were used, but their use was apparently for the purpose of describing certain cars by which the plaintiff alleged he was injured, and not as descriptive of the employment of the plaintiff. After the general issue had been pleaded, and after the case was upon the trial list, the court permitted the plaintiff to amend his original statement by the addition of the following words:

"Plaintiff avers that on May 6, 1909, and for some time previous thereto, he was employed by the defendant in the capacity of a freight brakeman, and, being so as aforesaid in the service of defendant, he was on said date engaged in the performance of his duties as such in interstate commerce work, and, while he was as aforesaid engaged, it became necessary in conducting the de-

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

fendant's business for the crew of which he was a member to place several freight cars used and engaged in interstate traffic on a certain siding or side track of defendant's situate in its railroad yards in the borough of Connellsville, Fayette county, Pa."

It will thus be seen that what had been the common-law action of the plaintiff became by the amendment an action under the act of Congress approved April 22, 1908, commonly called "Employer's Liability Act," entitled "An act relating to the liability of common carriers to their employés in certain cases." Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171).

When the case was reached for trial and before the jury was selected and sworn, counsel for the defendant moved the court to dismiss the action for want of jurisdiction upon the ground that it appeared from the pleadings that the controversy is one arising under the Constitution and laws of the United States. It was urged by plaintiff's counsel at that time, and at the time of the argument of this motion, that the suit was brought for the purpose of having the benefit of the federal statutes, that the question of jurisdiction should have been raised at once by the defendant, and, that not having been done, the jurisdiction was waived. To this assent could not be given because the original statement of claim gave no notice of plaintiff's intention to have the benefits of the federal act, and the defendant at the first convenient time after the amendment, which for the first time set out the plaintiff's purpose, raised the question of jurisdiction. It was clear that the general proposition, that, even if there be a common-law cause of action between parties by reason of diverse citizenship, yet if there be another ground of jurisdiction the suit should only be brought in the residence of the defendant, has long been settled. See Macon Grocery Company v. Atlantic Coast Line, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. ——. That there is another ground of jurisdiction than diversity of citizenship appears from the amended statement and from the assertions of counsel for the plaintiff. See the following cases which are similar to the case at bar and appear to be directly in point: Smith v. D. T. & S. L. R. R. Co. (C. C.) 175 Fed. 506; Whittaker v. Illinois Central (C. C.) 176 Fed. 130; Cound v. A. T. & S. F. R. R. Co. (C. C.) 173 Fed. 527. The plaintiff's counsel have cited many cases to sustain their position that suit under the employer's liability act is not one arising under the laws or Constitution of the United States, but the majority, if not all, of these cases are petitions for removal from state courts, and were decided upon the ground that the facts necessary to raise the federal question did not appear in plaintiff's statement of claim or declaration, but by the petition for removal or otherwise.

The plaintiff insists that jurisdiction should be sustained by reason of the act of Congress approved April 5, 1910 (Act April 5, 1910, c. 143, 36 Stat. 291), passed to amend the employer's liability act, and particularly by the amendment to section 6, wherein it is provided among other things:

"Under this act an action may be brought in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

The very fact that such enactment was deemed necessary by Congress is persuasive that prior thereto such action could only be brought in accordance with the acts conferring jurisdiction upon the Circuit Courts of the United States, to wit, the act of March 3, 1887 (Act March 3, 1887, c. 373, 24 Stat. 552), as corrected by the act of August 13, 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), the material part of which is as follows:

"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."

In addition, the amendment of 1910 does not confer jurisdiction upon pending suits. The use of the words "may be brought" clearly indicates that it refers to actions to be commenced after its passage. In addition, also, it is a general proposition of law that statutes will not be given a retroactive effect or apply to pending cases unless they relate to procedure merely, or are so expressed in the act. As said by Mr. Justice Clifford in Twenty Per Cent. Cases, 20 Wall. 187 (22 L. Ed. 339):

"Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

I am of the opinion that the amendment of 1910 was not retroactive, and did not confer jurisdiction upon this court over the defendant. Had plaintiff elected to proceed without amendment of his statement or declaration, the benefits which he hoped to have by reason of the employer's liability act, which are unnecessary to be stated, might have been lost to him. He insisted upon the amendment, and as well asserts that the original statement sets forth a cause of action under the statute. The jurisdiction sought was not founded only upon diverse citizenship.

The motion of the plaintiff is overruled.

In re DUNN.

(District Court, N. D. New York. September 29, 1910.)

BANKRUPTCY (§ 348*)—DEBTS ENTITLED TO PRIORITY—SUFFICIENCY OF CLAIM.

A statement in a claim filed against the estate of a bankrupt that it is for "wages due deponent as clerk and manager and is a preferred claim" is not sufficient to entitle the claimant to priority of payment, in the absence of either statement or proof that such wages were earned within three months before the filing of the petition.

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

In the matter of John F. Dunn, bankrupt. On motion to vacate order of referee, and for allowance of claim as a preferred claim. Motion denied.

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

Motion to vacate and set aside the order of the referee allowing the trustee's report and discharging him, and for an order requiring the referee and trustee to pay Louis C. Peck, claimant, his claim of $82.76 in full as a preferred claim.

A. L. Graff, for claimant.
Lewis, Watkins & Titus, for trustee.
F. J. De La Fleur (A. G. Senior, of counsel), for referee.

RAY, District Judge. The petition of Louis C. Peck states that by an order of the referee the first meeting of creditors was directed to be called and held on the 16th day of October, 1908, and that a notice of such meeting was duly published, and that September 30, 1908, the "said referee mailed to each creditor a notice of said first meeting of creditors"; that such meeting was held October 16, 1908, and Clarence D. Stetson, Esq., was selected as trustee and his bond fixed at $1,500. December 22, 1908, said Peck filed his claim for $82.76 with the clerk of this court, alleging therein as follows:

"That the said J. F. Dunn, the person by whom a petition for adjudication of bankruptcy has been filed, was at or before the filing of said petition, and still is, justly and truly indebted to said Louis C. Peck in the sum of eighty-two $^{76}/_{100}$ dollars (82.76). That the consideration of said debt is as follows: Wages due deponent as clerk and manager and is a preferred claim. That the date of maturity of said debt is about August 24, 1908. That no note has been received nor judgment recovered therefor. That no part of said debt has been paid. That there are no set-offs or counterclaims to the same. That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever."

There was no suggestion in such claim that it was for "wages due" to him as a clerk and manager which had "been earned within three months before the commencement of" (bankruptcy) "proceedings," and on this motion no proof of that kind is produced or offered. The "wages due deponent as clerk and manager" may have been earned a year before or two years, and may have been earned while in the employ of some other person as affidavits presented in behalf of the trustee and referee indicate the fact was.

The statement, "and is a preferred claim," is a mere conclusion, and not equivalent to a statement that he was clerk and manager for John F. Dunn or in his employ, or that the "wages" were "earned within three months before the date of the commencement of proceedings." Section 64 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) tells what claims have priority, and subdivision "b" says:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt's estates, and the order of payment shall be, * * * (4) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant," etc.

Proof of claim must state facts which show the claim to be entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or a "preferred claim." Even on this motion it is not stated that Peck was in the

employ of Dunn in any capacity within the three months of the filing of the petition, or that the wages claimed were earned within such three months. July 5, 1910, the trustee filed his final account, and the final meeting of creditors was called for August 2, 1910, and notice given to this claimant, Peck, in the manner prescribed by law. At that meeting the order of distribution, etc., was made. Peck did not appear.

As it was not made to appear to the trustee or referee or to this court, and has not on this motion been made to appear, that Peck had or has a claim against the estate of John F. Dunn entitled to priority of payment, and, so far as appears, the final dividend ordered was and is right and was mostly paid before this motion was made, and during the pendency of the proceedings Peck made no effort to ascertain whether his claim had been allowed as one entitled to priority, and as the facts shown by the trustee and referee establish that Peck was not in the employ of Dunn at the time of the commencement of the bankruptcy proceedings, and that the store where he was employed was owned and in the possession and being run or conducted by another person, the motion is denied.

In re FOSTER.

(District Court, D. Vermont. September 5, 1910.)

BANKRUPTCY (§ 258*)—SALE OF PROPERTY—MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

Property of a bankrupt incumbered by mortgage liens given in good faith and duly recorded more than four months prior to the filing of the petition, which it is provided by Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), "shall not be affected by this act," should not be ordered sold by the trustee, unless it appears that the liens will not be affected, and that the sale will benefit the estate. Where such liens were nearly twice the appraised value of the property and the mortgagee made no claim against the estate, a sale was not justified and should be set aside, nor can the mortgagee be charged with the expense thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 258.*]

In the matter of Fred G. Foster, bankrupt. On review of orders of referee. Orders set aside.

V. A. Bullard, for petitioner.

Henry Brockway, trustee, in pro. per., and F. H. Clark, for trustee.

MARTIN, District Judge. Petition by G. E. Smith for review of the orders made by the referee relating to the sale of certain real estate in which the petitioner is interested as mortgagee, and the assessment of expenses thereon to said petitioner. This cause came on for hearing at chambers, Brattleboro, Vt., August 29, 1910, at 2 o'clock p. m. V. A. Bullard, Esq., appeared for G. E. Smith, and Henry Brockway, the trustee, appeared in person, with F. H. Clark, Esq., his attorney.

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

It appears that the real estate in question was sold by a copartnership, of which the said Smith is surviving partner, to one Tucker for about $7,300, and practically no purchase money was paid, notes being given by said Tucker therefor and payment secured by two mortgages, one on the land for about $5,300 and the other on the mill for the balance. Subsequently the said Tucker gave the bankrupt a bond for a deed covering the major part of said property. The conditions of the bond were never performed by the bankrupt, yet the property was appraised by the appraisers in bankruptcy proceedings as the property of the bankrupt for the sum of $4,000. Notwithstanding the value was found to be more than three thousand dollars less than the mortgages and that the conditions of the bond had never been performed, the trustee of said Foster's estate petitioned the referee for leave to sell the same free of mortgage liens or claims thereon.

On hearing on review before me I inquired of the trustee under what process of reasoning he concluded that such a sale would be beneficial to the bankrupt estate. His only answer was that the petition was sent to him by the referee with a request that he sign it. Notice was given of the pendency of said petition. No one appeared in opposition thereto, and the referee ordered said real estate to be sold free and clear of mortgage liens thereon. On the day fixed for the sale said Smith appeared and announced his interest in the property, whereupon the sale was postponed and a petition made by the trustee, upon the advice of the referee, to the judge to restrain said Smith from interfering with the sale. No restraining orders were issued, but the said Smith did not further object to the sale. I think he was justified in the course he pursued. On the day to which the sale was postponed the property was sold at public auction to the highest bidder, who was the said Smith, for about $1,700, and thereafter said sale was confirmed by the referee and said Smith assessed to pay about $120 of the expenses of said sale; and the referee further ordered that the price for which the property was bid off by the said Smith should be applied on the mortgage indebtedness of the said Tucker to him, and that said Smith might present his claim against the bankrupt estate for the balance due upon the mortgage lien which was for the purchase price of the premises on the sale by said Smith to Tucker.

It further appears that said Smith made no claim against the bankrupt estate for any part of the amount due upon said mortgage notes so executed by the said Tucker, and, so far as the bankrupt estate was concerned, he made no claim for an allowance from said estate. He simply asked to be let alone as the mortgagee under the mortgages given by said Tucker. No claim was made but what these mortgages were made in good faith and duly recorded more than four months preceding the filing of the petition in bankruptcy.

Said Smith now asks this court to set aside said sale and the order for the payment of expenses thereon, and still makes no claim against the bankrupt estate for the balance due upon these mortgages. If the orders of the referee are to stand, there must be allowed against the bankrupt estate about $5,500 as a balance due on the mortgages; or, in other words, the referee has ordered a sale of mortgaged real estate, which brought less than $2,000, that was incumbered for over

$7,000, and against the protest of the mortgagee, thus attempting to force the secured creditor to prove a claim of upwards of $5,000 against the bankrupt estate, when the creditor is willing to take the mortgaged property and make no claim against the bankrupt. Section 67d, Bankr. Act July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Such was the reading of section 67d at the time of adjudication of bankruptcy in this case. The amendment under Act June 25, 1910, c. 412, § 12, 36 Stat. 842, does not change it so far as it is applicable to the case at bar. It is self-evident that Congress intended by using the words "shall not be affected by this act" that a vigilant creditor (proper vigilance is always to be commended) should not be affected; that is, should not be injured by bankruptcy proceedings. The amendment above referred to inserts the words "to the extent of such present consideration only." That is, the security that a creditor has obtained to the extent of the original consideration shall not be affected. Besides, the power of the court in ordering a sale of mortgaged property should never be exercised unless the bankrupt estate will be benefited thereby, or the mortgagee proves his secured claim.

I am unable to see how either the trustee or the referee could have formed that conclusion. The trustee set out these mortgages, the amount due thereon at $7,300, and the appraised value of the property at $4,000 in his petition for leave to sell the same unencumbered, and it was on that petition that the referee acted in making the order of sale. Property of a bankrupt, incumbered by mortgage liens given in good faith and duly recorded more than four months before the filing of the petition in bankruptcy, should be carefully inquired into before an order of sale is made, and it should appear that such liens will not be affected by the sale and the bankrupt estate will be benefited thereby provided, as in this case, the mortgagee makes no claim against the bankrupt estate.

I am unable to find any evidence before the referee tending to show that the estate would be benefited by making the order of sale. The mortgagee contends that he is injured by the proceedings of said sale in that he is assessed to pay about $120 of the expenses thereof. I am satisfied from the facts reported that these expenses were uselessly incurred.

The order of sale and the order confirming the sale is reversed, and the trustee is directed not to execute and deliver a deed of said property; and the order of the referee taxing costs against the mortgagee of the real estate in question is also reversed.

CLABAUGH v. SOUTHERN WHOLESALE GROCERS' ASS'N et al.

(Circuit Court, N. D. Alabama, S. D. September 15, 1910.)

No. 1,279.

1. TORTS (§ 22*)—JOINT WRONGDOERS—SATISFACTION.
   Where two parties are jointly responsible to a third party for one wrong, while the wronged party may sue either or both, and recover judgments against either or both, he can have but one satisfaction for the same wrong.
   [Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

2. ACCORD AND SATISFACTION (§ 3*)—CONSTRUCTION AND OPERATION—SETTLEMENT WITH ONE OF TWO JOINT WRONGDOERS.
   Plaintiff brought suit in a state court against the president of a wholesale grocers' association to recover damages for an alleged wrongful interference with his business. He subsequently commenced an action in a federal court against the association to recover damages for the same injury, alleged to have been caused by a conspiracy in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). Pending such action he settled the suit in the state court, and received payment of the agreed sum from the defendant therein. *Held*, that such settlement was an accord and satisfaction of his entire claim, and a bar to the second suit, and that, not being entitled to recover actual damages in such suit, he was not entitled to recover the threefold damages or attorney's fees provided for by section 7 of the act.
   [Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 22–31; Dec. Dig. § 3.*]

Action by Hinton G. Clabaugh against the Southern Wholesale Grocers' Association and others. On motion by defendant for direction of verdict. Motion sustained.

Campbell & Johnston, for plaintiff.

Wright & Wright, Caruthers Ewing, and Cabaniss & Bowie, for defendant.

GRUBB, District Judge. This is a suit instituted by Mr. Clabaugh against the Southern Wholesale Grocers' Association, a corporation, for damages to his business, alleged to have been caused by interference with it by the Southern Wholesale Grocers' Association by preventing the manufacturers from selling goods to him, by him to be sold to retailers. The action was brought under what is known as the "Sherman Anti-Trust Law," enacted by the Congress of the United States. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). Whether there has been a violation of that act by the Southern Wholesale Grocers' Association is not necessary, in my judgment, to be determined in this case, for the reason that the defendant has pleaded that, conceding that there was any violation of the act which entitles the plaintiff to damages, the plaintiff in this case has, before the trial, settled for those damages with another party, who is jointly liable with this defendant.

Before I enter on the facts, I might say that it is a well-recognized principle of law that where two parties are jointly responsible to a

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

third party for one wrong, while that third party, the wronged party, can sue either or both, and get judgments against either or both, he can get but one satisfaction for the same wrong. Otherwise he would be getting paid twice. So, if he has been paid by one wrongdoer his full damages, then he has no right to look to the other wrongdoer for any damages, even though that wrongdoer was jointly responsible with the one who pays.

In this case the plaintiff, Mr. Clabaugh, sued in the state court Mr. James A. Van Hoose, who was president of the association, which is now defendant in this court, alleging that these same acts of interference which broke up his business, as he claims, were done by Mr. Van Hoose as president of this same association. Of course, if the president did them, he would be liable personally, because he could not do wrong for his principal, and not be responsible for that wrong himself. Therefore he would be responsible, and he would also make his principal responsible, if he acted within the scope of his authority as president. Therefore it may be said, for the sake of argument, that both of them were responsible for the wrongs that have been charged in the state court in the suit against Mr. Van Hoose, which, as I construe it, are the same exactly as Mr. Clabaugh here sues for, and for which he asks damages against the Southern Wholesale Grocers' Association.

Now, after the suit had been brought in the state court, and after there had been a trial, which resulted in a disagreement of the jury, Mr. Clabaugh and Mr. Van Hoose came to an agreement which is represented by the documents which have been presented here to settle that case. This agreement provided for the payment of $10,000 by Mr. Van Hoose, stipulating that, if all the money was not paid by a certain date, a judgment should be entered for that amount in the circuit court, a jury being waived. Had that judgment been rendered according to agreement, it would have been a full satisfaction of the wrongs complained of in that case. The agreement providing for that method of remedy, I think it is a fair construction of the agreement that the parties intended, in settling the case, to settle Mr. Clabaugh's full damages against Mr. Van Hoose—the full damages for the injuries alleged in the complaint against Mr. Van Hoose.

Giving the agreement that construction, Mr. Clabaugh had no right to sue anybody else, even though he attempted to reserve that right in his agreement with Mr. Van Hoose, because, having once been paid in full for his damages, he had not the legal right to make any agreement which would give him a right to sue any other person for the same damages, upon the idea that a man cannot recover twice for the same damages, and that if one wrongdoer pays him in full he has no right to look to the other, even though he seeks to reserve that right in the agreement with the party who pays. In this case the agreement of settlement was in writing, and it is the duty of the court to construe it. The court construes it as constituting an accord and satisfaction of the damages Mr. Clabaugh claimed in the Van Hoose suit in the circuit court. That being true, the law makes the same agreement and its full performance by Mr. Van Hoose a full accord and satisfaction of the cause of action sued on by Mr. Clabaugh against

the association in this case. Therefore the plea is made out by the undisputed evidence, the documents in the case.

It is true Mr. Clabaugh said he did not agree that the costs paid him by Mr. Van Hoose were the full costs; but I think he cannot be heard to say this after he took the check and paid the clerk, and the clerk received it without objection, and he made no further demand until after this trial was entered upon. I think he is to be treated as having accepted that as performance of the agreement, whether it was full performance or not. So the verdict in this case should be for the defendant, on the idea that the cause of action, conceding it existed, has been settled by Mr. Clabaugh's receipt of $10,000 from Mr. Van Hoose, which I construe to have been received by him in full satisfaction of the damages he claimed in the suit against Mr. Van Hoose, and which are the same damages he claims in this suit.

There is one other thing which I should have said. The act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that act by the Supreme Court in the case of Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, is to the effect that threefold damages are only recoverable when the plaintiff has a cause of action that would entitle the jury to award single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages. And the same is true as to the attorney's fees. I think they are merely an incident to a judgment for the plaintiff. If no such judgment is obtained, then there can be no allowance for attorney's fees, though the settlement was made after this suit was commenced.

MARTIN et al. v. CARROLL.

(District Court, D. Massachusetts. January 16, 1909.)

No. 139.

SEAMEN (§ 17*)—FISHERMEN SHIPPING ON THE LAY—SHARE IN EARNINGS.

Members of the crew of a fishing schooner shipping on the half lay, to be paid by shares in the catch, have the rights of seamen claiming wages as regards recovery of the amounts of their shares, and a member of such a crew who without his fault became separated from his vessel, and was unable to rejoin it during the season, is entitled to the same proportion of his share of the proceeds of the whole catch as the time of his actual service on board bears to the time occupied by the whole voyage, the remainder of his share to be distributed between the other members of the crew.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 17.*]

In Admiralty. Suit by John Martin and others against John J. Carroll. Decree for libelants.

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

M. Francis Buckley, for libelants.
William A. Pew, Jr., for respondent.

DODGE, District Judge. The 16 libelants were fishermen on board the schooner Massachusetts during a fishing trip made by that vessel from Gloucester to the fishing grounds of Labrador and back during the summer of 1908. The respondent was master of the schooner and has in his hands a part of the net proceeds of her catch, which the libelants say he ought to divide among them.

The facts are not disputed. There were no articles signed for the voyage in question, but the 16 libelants, the master and 2 other men, Keefe and Mara, 19 men in all, agreed to go in her on "half lay." This means, according to Gloucester usage, that from the gross proceeds of the catch certain general charges are deducted, and what then remains goes one half to the owners of the vessel, and the other half to her master and crew in equal shares.

The 16 libelants and the master made the entire voyage, leaving Gloucester on or about May 21st, and returning there on or about September 18th. Keefe and Mara, however, having left the vessel as usual in a dory on June 21st to attend to their trawls, got lost in a fog, were unable to find their way back to the schooner, finally reached the Labrador coast in their dory, and from there made their way home to Gloucester. They were unable to rejoin the schooner in time to take any further part in her voyage. At the time they became separated from her about 8,000 pounds of fish in all had been taken.

Should there be, under these circumstances, 19 equal shares in that part of the proceeds which belongs to the captain and crew, or 17 only? Each of the libelants has received one-nineteenth, but contends that he ought to have one-seventeenth, and that Keefe and Mara ought not to participate at all. Keefe and Mara contend that it was due to no fault of theirs that they did not complete the voyage, and that they have not lost their right to share equally with those who did. The question has been submitted without argument.

A seaman, serving for wages in the usual manner, who becomes separated from his vessel during the voyage without fault on his own part, is entitled to wages up to the time of leaving the vessel, but not for any further period. Hanson v. Rowell, 1 Spr. 117, Fed. Cas. No. 6,043. Members of the crews of fishing or whaling vessels who are paid by shares in the catch have the rights of seamen claiming wages as regards the recovery of the amounts of their shares, and Judge Sprague in Lovrein v. Thompson, 1 Spr. 355, Fed. Cas. No. 8,557, applying the principle of his earlier decision in Hanson v. Rowell, above cited, held that one of the crew of a whaling vessel who becomes justifiably separated from her before the voyage is ended is entitled to the same proportion of his share in the proceeds of the whole voyage as the time of his actual service on board bears to the time occupied by the whole voyage. This decision was followed by Judge Lowell in Antone v. Hicks, 2 Low. 383, Fed. Cas. No. 493. All these are decisions made in this court, and they seem to me to govern this case. I find no others bearing upon the question. It appears that the entire voyage for which the libelants shipped occupied four months (or

within three days of that time), and that Keefe and Mara served on board one month out of that time. Keefe and Mara, therefore, should each receive one-fourth part of one-nineteenth share in crew's part of the catch, and what then remains to be divided should be shared equally among the seventeen other members of the crew. The figures can, I suppose, be agreed on. If not, there may be a reference to ascertain them. An interlocutory decree for the libelants may be entered.

ST. LOUIS & S. F. R. CO. v. ALLEN et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. August 18, 1910.)

1. COMMERCE (§ 8*)—INTERSTATE COMMERCE—REGULATION—POWER OF STATES.
While the states may enact valid legislation incidentally affecting interstate commerce in many ways, when Congress has acted in any matter pertaining to the regulation of such commerce, no state can by legislation interfere with, burden, or control it.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

2. COMMERCE (§ 61*)—STATE REGULATION—CONSTITUTIONALITY—INTERSTATE COMMERCE.
Rule 44 of the Railroad Commission of the state of Arkansas, which provides that, "in case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate," as applied to interstate shipments, is unconstitutional as an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

3. COURTS (§ 303*) — JURISDICTION OF FEDERAL COURTS — "SUIT AGAINST THE STATE."
A suit against the members of a State Railroad Commission and the prosecuting attorney for a district of the state to enjoin the enforcement of an order made by the commission which is unconstitutional and without authority of law is not a "suit against the state" within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court of equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 844, 844½; Dec. Dig. § 303;* States, Cent. Dig. §§ 191, 192.

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.

Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

4. COURTS (§ 508*) — FEDERAL COURTS — EQUITY JURISDICTION — INJUNCTION STAYING ACTION IN STATE COURT.
Under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), which prohibits the granting of an injunction by a federal court to stay proceedings in any court of a state except in matters relating to bankruptcy proceedings, a Circuit Court has no power to grant an injunction to stay an action, civil or criminal, pending in a state court when the bill is filed, and based on a state statute, although such statute as therein sought to be enforced is unconstitutional and an invasion of property rights.

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

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank of Providence, 16 C. C. A. 90; Central Trust Co. of New York v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

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

5. EQUITY (§ 233*)—PLEADING—GENERAL DEMURRER.

In federal courts of equity, the rule is established that a demurrer to a whole bill must be overruled, if the bill, taken altogether, entitles complainant to some kind of relief.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 233.*]

In Equity. Suit by the St. Louis & San Francisco Railroad Company against R. P. Allen and others, constituting the Arkansas Railroad Commission, and D. B. Horsley, prosecuting attorney for the Fourth judicial circuit of Arkansas. On demurrer to bill. Demurrer overruled.

The facts alleged in the bill are substantially as follows: The complainant is a corporation organized under the laws of the state of Missouri, and is a citizen of that state. The defendants R. P. Allen and W. A. Falconer and J. W. Crockett, are citizens and residents of Arkansas, and constitute the Railroad Commission of the state of Arkansas. D. B. Horsley, prosecuting attorney for the Fourth judicial circuit of Arkansas, including the counties of Washington and Benton, is a citizen and resident of the Western district of Arkansas, and the amount in controversy includes, exclusive of costs, $2,000. The bill then alleges that complainant owns and operates a line of railroad extending from the city of St. Louis, in the state of Missouri, in a southwesterly direction to Seligman, in the state of Missouri, near which point it enters the state of Arkansas, passing through the counties of Benton and Washington, in which latter county the station of Johnson is located; thence through Crawford and Sebastian counties, in the state of Arkansas, to the city of Ft. Smith, in the latter county; thence in a southerly direction, crossing and re-crossing the line between the state of Arkansas and the state of Oklahoma, to a point at or near the town of Jenson; thence, continuing in the state of Oklahoma, to the town of Poteau, Okl., at which point freight destined to De Queen in Sevier county, Ark., is transferred to the Kansas City Southern Railway Company, a connecting line, and is by said line transported to a point on the Oklahoma and Arkansas state line near the northwest corner of Polk county in the state of Arkansas, where it crosses the Arkansas state line into the county of Polk, in the state of Arkansas, and through said county into the county of Sevier to De Queen, in the state of Arkansas.

The bill alleges: That the Railroad Commission prior to the filing of the bill adopted what is known as rule 44, in the words and figures as follows: "In case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate." Plaintiff alleges that the object of the Commission in passing said rule was to compel plaintiff and other railroads to ship freight which would naturally and properly be shipped by interstate shipment according to the rate fixed by the Interstate Commerce Commission under the laws of the United States a much greater distance without allowing the freight to pass beyond the state limits, and at a rate fixed by the State Commission far below the rate fixed by the Interstate Commerce Commission for the same class and character of freight between the same points, and to make a state rate in competition with the rates fixed by the Interstate Commerce Commission far below the rate fixed by the Interstate Commerce Commission at points where the state rate comes which was in competition with the rates so fixed for interstate shipments. That in pursuance of said determination, after having adopted and promulgated said rule, the said Railroad Commission on the 8th day of December, 1908, caused D. B. Horsley, the prosecuting attorney for the Fourth judicial district, to bring suit for a penalty of $3,000 against this plaintiff in the Washington circuit court, alleging and claiming that this plaintiff had incurred a liability in the sum of $3,000 for a failure to observe said rule, in that it on the 30th day of October, 1907, received a shipment of lime from the Ozark White Lime Company at Johnson, aforesaid, which was billed to and to be shipped

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

to De Queen in Sevier county, Ark., a point on the Kansas City Southern Railway Company's line, and to which point plaintiff's line did not extend, alleging and claiming that the shipper did not give routing instructions, and alleging and claiming that it was the duty of this plaintiff to have routed said shipment from Johnson, Ark., to Van Buren, Ark., a distance of 63 miles, there to have been transferred and delivered to the St. Louis, Iron Mountain & Southern Railway Company, and by it transported to Little Rock, Ark., a distance of 158 miles, and there to be transferred to the main line of the St. Louis, Iron Mountain & Southern Railway, to be by it transported to the town of Hope, in Hempstead county, Ark., a distance of 112 miles, there to be delivered to the St. Louis, San Francisco & New Orleans Railway Company, and by it to be transported to Ashdown, in Little River county, Ark., a distance of 32 miles, there to be delivered to the Kansas City Southern Railway Company to be by it transported in a due north direction, a distance of 35 miles to De Queen, in Sevier county, Ark., the total distance to be transported over a very circuitous route being 400 miles for a rate fixed for the entire distance by the State Railroad Commission of 12 cents per hundred pounds. That the act of this plaintiff which was complained of by said Commission was the transportation of said shipment from Johnson, in Washington county, Ark., by interstate lines on an interstate rate to Poteau, in the state of Oklahoma, a distance of 97 miles, where it delivered said shipment to the Kansas City Southern Railway Company, to be by it transported a distance of 107 miles to De Queen, in Sevier county, in the state of Arkansas, at a rate of 23 cents per hundred pounds, which was the rate fixed by the Interstate Commerce Commission under the act of Congress for that class of shipments for the entire distance, which rate was posted by plaintiff at its various stations, according to the act of Congress and rules prescribed by the Interstate Commerce Commission.

Plaintiff alleges that De Queen is almost in a direct line south from Johnson, and by the route which shipment moved was 204 miles from the point of origin to destination; that the route selected by plaintiff for said consignment was the usual and ordinary route for the shipment of freight between said points; that there was no other route by which the plaintiff could reasonably have made said shipment; that the defendant Railroad Commission is insisting that, instead of sending said shipment by said route, this plaintiff should have routed said shipment to Van Buren, Ark., in a southerly direction, a distance of 63 miles, from Van Buren to Little Rock in an almost easterly direction, a distance of 158 miles, from Little Rock to Hope in a southwesterly direction, a distance of 112 miles, from Hope to Ashdown in a northwesterly direction, a distance of 32 miles, and from Ashdown to De Queen in an almost due north course, and in direct line toward the point of origin of said shipment, a distance of 35 miles.

Plaintiff alleges that no shipment had ever been made between said points over this circuitous line of which it is aware; that no shippers, to plaintiff's knowledge, have desired that any shipment should move over such line; and that the only object that the Commission could have in trying to force the shipment to be made in this way was to bring the interstate rate of 23 cents per hundred pounds for this shipment, a distance of 204 miles, in direct competition with the rate fixed by this Commission on lines 400 miles in length, requiring many changes, at the rate of 12 cents per hundred pounds, thereby compelling the railroads to perform nearly double the service for a fraction more than one-half of the rate fixed by the Interstate Commerce Commission as a reasonable rate for the performance of this service.

Plaintiff alleges that said Railroad Commission has been insisting upon and pressing the trial of said suit by D. B. Horsley, prosecuting attorney, and endeavoring to force the collection of a penalty of $3,000 for the failure of this plaintiff to observe said rule; that the said Railroad Commission is insisting and claiming that said rule is a valid rule in full force and effect, and that plaintiff should observe the same in all shipments, and plaintiff alleges, if it should comply with said rule, it would thereby violate the act of Congress requiring it to ship at no greater or less rate between said points than that fixed for that class of freight.

Plaintiff alleges that no authority has been conferred upon said Commission to make, promulgate, and enforce said rule either by state or national legislation, and that said Commission does not possess such authority; that the rule is in direct conflict with the laws of the United States and the regulations of the Interstate Commerce Commission, and is void.

Plaintiff alleges that there are a large number of points upon its line within the state of Arkansas that are similarly situated, and that said rule, if enforced, would compel it to make constant shipments contrary to the rates established with the approval of the Interstate Commerce Commission, under the interstate commerce law, with which law the said rule directly conflicts, and plaintiff alleges that, should it not conform to said rule, it is threatened with innumerable suits for shipments made under like circumstances for penalties which are so severe that the complainant, in the event the rule is upheld, must suffer great and irreparable damages; that said rule was intended to deter plaintiff from obeying the interstate commerce law, and deter it from a compliance with the rules and rates fixed, and which have been approved by the Interstate Commerce Commission, and which rates had been posted by plaintiff as required by the interstate commerce act.

Plaintiff alleges that it has its regular rates which have been approved by the Interstate Commerce Commission of the United States and are posted in all of its offices; that the rates so fixed have been found by said Commission to be reasonable; that the rate fixed by the State Railroad Commission in competition with such rates is confiscatory and unreasonable, and that the service cannot be performed for the rate so fixed by said State Railroad Commission; that the amount allowed by the State Railroad Commission for this shipment (a carload) around this circuitous route with its divers changes only amounted to $36, whereas the penalties which are being sued for, for the failure to ship by this route, are insisted to be $3,000, and are entirely disproportionate to the failure of compliance, and are unreasonable and exorbitant.

Plaintiff alleges that said Commission and said prosecuting attorney are attempting to execute said rule and to compel the observance of the same by this plaintiff, and that this plaintiff will be involved in a multiplicity of suits and expensive litigation, unless defendants are restrained and enjoined from enforcing said rule.

To the end, therefore, that the plaintiff may have relief which it can only obtain in a court of equity, and that said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by plaintiff, and that the said defendants who are prosecuting the said action at law and threatening to prosecute other actions may be perpetually enjoined from further prosecuting said action and from instituting and prosecuting other like penalty suits, or taking any other steps to enforce said rule, and that said rule shall be declared to be null and void. And for such further and other relief as the nature of this case shall require and to your honors shall seem meet.

B. R. Davidson, for complainant.
Falconer & Woods, for defendants.

ROGERS, District Judge (after stating the facts as above). This bill contemplates two purposes:

(1) To enjoin the enforcement of rule 44 of the Arkansas Railroad Commission quoted above, as applied to interstate commerce.

(2) To restrain defendants from prosecuting a certain penalty suit now pending in the circuit court of Washington county, Ark., against the complainants.

The case now pending in the circuit court of Washington county, Ark., was originally here on removal, and was remanded on the ground that, while civil in form, in its nature it is penal, and not therefore removable. See 173 Fed. 572, where the history of the case will be found. This bill was then filed and a hearing had, and a temporary

restraining order was granted. It is now here on demurrer, upon which elaborate argument has been had, assailing the jurisdiction of the court. The language of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257, quoted with approval in Ex parte Young, 209 U. S. 143, 28 Sup. Ct. 447 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932), is most appropriate in this case:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as Legislatures may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

It goes without saying that the power of Congress, under the commerce clause of the Constitution, is plenary, and without limitations other than those found in the Constitution itself. That question was somewhat elaborately discussed by this court in Smelzer v. St. Louis & San Francisco Railroad Company (C. C.) 158 Fed. 649, and the views of this court on that subject need not be repeated here. It is admitted that, notwithstanding this plenary power in Congress, the states may enact valid legislation incidentally affecting in many ways interstate commerce (Globe Elevator Co. v. Andrew [C. C.] 144 Fed. 879), but it is equally clear that, when the Congress has acted in any matter pertaining to the regulation of interstate commerce, no state can by legislation interfere with, burden, or control it, and any legislation purporting to accomplish that result perishes before the federal Constitution or legislation enacted in pursuance thereof. On the threshold of the question now to be determined, counsel for defendants, though called upon, has not ventured to cite any statute or other authority vesting in the Arkansas Railroad Commission power to promulgate rule 44 as applicable to interstate commerce, and the court knows of none. In the absence of such authority, the rule falls to the ground for want of any power to promulgate it. It follows that, there being no power to enact, there is no authority for enforcing it. The suit pending in the circuit court of Washington county, Ark., to enforce this rule was instituted under section 6813 Kirby's Digest of the Laws of Arkansas, which is as follows:

"Sec. 6813. If any person or corporation operating a railroad or express company in this state, or any receiver, trustee, or lessee of any such person or corporation as aforesaid, shall violate any of the provisions of this act, or aid or abet therein, or shall violate the tariff of charges, as fixed by said Commission, or any of the rules regarding railroads or express companies, as made by said Commission, and for which there is no other penalty prescribed in this act, such person or corporation, or receiver, trustee or lessee, shall be liable to a penalty not less than five hundred nor more than three thousand dollars for each violation of this act, or such tariff charges or rules and regulations, and such penalty may be recovered by an action to be brought in the name of the state of Arkansas, in the county in which such violation may occur. The Commission shall institute such action, and actions for the recovery of the penalties prescribed in this act, through the prose-

cuting attorney of the proper district, and no such suit shall be dismissed or compromised without the consent of the court and of said commissioners; and the prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five per cent. of the amount collected; and if any prosecuting attorney shall neglect for fifteen days after notice to bring suit, the Commission may employ some other attorney at law to bring the same, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five per cent. of the amount collected, and in such case the prosecuting attorney shall not interfere; provided, that in all trials of cases brought for a violation of any tariff charges by said Commission, it may be shown in defense that such tariff so fixed was unjust. Nothing in this section shall be so construed as to in any manner interfere with the action for damages as provided in section 6808."

This statute does not pretend to confer authority to make rules. It provides for the punishment of the violation of rules already made. In the absence of a rule, valid because made by authority conferred on the Commission, this statute is dormant, and utterly unenforceable in any court. But, assuming rule 44 was made by authority conferred on the Arkansas State Railroad Commission when applied to intrastate commerce, what is its effect when applied to interstate commerce? Does its enforcement simply incidentally affect it so as to fall within the purview of the discussion in the case of Globe Elevator Co. v. Andrew (C. C.) 144 Fed. 871, or does it impose a burden on interstate commerce within the commerce clause of the Constitution and within the purview of admitted decided cases on that subject? The shipment set forth in the bill began at Johnson, Washington county, Ark., and passed through three counties of this state, then entered the state of Oklahoma, all on complainant's own line, and continued thereon to a point in Oklahoma, where it was turned over to a connecting line, the Kansas City Southern, and carried back into Arkansas, and on through that state to its point of destination at De Queen, Ark. That such shipment is interstate commerce is res adjudicata. Hanley v. Kansas City Southern, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. When does interstate commerce begin? In United States v. Boyer (D. C.) 85 Fed. 435, this court in a carefully prepared opinion, in which the authorities are carefully reviewed and cited, said that:

"When the (interstate) commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, not by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of Congress attaches and continues, until it has reached another state, and become mingled with the general mass of the property in the latter state. That neither the production or manufacture of articles or commodities which constitutes subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured prior to the commencement of the actual transfer or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress."

When the shipment of lime in controversy was delivered to complainant for shipment at Johnson, in Washington county, Ark., eo instanti it became interstate commerce. When the delivery was made, rule 44, if valid, eo instanti attached, and compelled compliance with

its provisions. It could not attach before delivery, for until delivery there was no shipper, and no shipment, and no relation of carrier and shipper subsisted. Rule 44, therefore, was, in effect not simply an interference with interstate commerce, but, if valid, it took complete control of an article of interstate commerce, and directed its routing and its freight rate. It deprived the complainant, not only of its right to charge and collect interstate rates fixed by law, but it compelled it, under heavy penalties, to disobey the laws of Congress, which it could not do without also incurring heavy penalties. The logic of defendants' contention is that the State Railroad Commission of Arkansas has the power to deprive an interstate carrier of its property by means of an illegal and unauthorized rule of its own, and compel it to disobey the laws of the United States, which have full and plenary power under the Constitution over all interstate carriers and interstate shipments. The contention is a reductio ad absurdum. This question is practically decided against the enforcement of rule 44 as applicable to interstate commerce by the Supreme Court of Arkansas in Porter v. St. Louis & Southern Railroad Company, 78 Ark. 182, 95 S. W. 453, where other cases are collated and cited to sustain that court. In that case Judge McCulloch quoted the following section of the interstate commerce law:

"That it shall be lawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act." Act Feb. 4, 1887, c. 104, § 7, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).

Commenting on that section he said:

"This section clearly prohibits the carrier from doing, either directly or indirectly, what the shipper has attempted to do in this case, and we see no reason why it should not be a protection to the carrier as well as a limitation upon its acts. As we understand them, the federal statutes providing for the regulation of interstate commerce, as well as the statutes of this state providing for the regulation of intrastate railroad traffic rates, are designed for the protection of shippers, each covering a separate field of operation, the latter yielding to the former, where there is possible conflict. The rate fixed under state legislation cannot be used to affect or frustrate the rate fixed under the superior power. To permit that would be a regulation of interstate commerce by state laws, a power conferred solely by the Constitution upon Congress. Louisville & N. R. Co. v. Eubank, 184 U. S. 47, 22 Sup. Ct. 277, 46 L. Ed. 416."

This statement of the law is sound. It recognizes the principle so admirably stated by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 429, 4 L. Ed. 579, where, in discussing the question of the respective powers of the state and the United States government, he sums up the argument by saying:

"We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from inter-

fering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve."

The question may well be put that, if Congress has the exclusive and plenary power to regulate interstate commerce, how shall it be contended that the state can do the same thing? Such a doctrine necessarily involves a clash of sovereignties—an assertion of the right of the state to destroy what the United States have the constitutional right to build up. This notwithstanding, as Chief Justice Marshall said, "that the Constitution and the laws made in pursuance thereof are supreme, that they control the laws of the respective states, and cannot be controlled by them."

But it is said the bill shows no substantial equity in behalf of said complainant, and that the suit is one against the state. Eliminating from consideration for the moment the pendency of the suit in the circuit court of Washington county, Arkansas, and considering the bill as one seeking relief solely from the operation of rule 44 as applied to interstate commerce which is one of the primary purposes of the bill, we need not go further than the case of McNeill v. Southern Railroad Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142. That case arose out of an order promulgated by the North Carolina State Railroad Commission requiring that company to place certain cars containing interstate commerce on a certain spur track of the consignee at Greensboro, N. C., which was the point of destination of the shipment. The railroad company refused to obey the order and tendered the cars elsewhere, and the consignee refused to receive them unless placed on their spur track as the said Railroad Commission had directed. The state of North Carolina had a penalty statute similar to that of Arkansas quoted above, which authorized the shipper to recover any damages he might sustain by reason of the railroad company refusing to obey the orders of the State Railroad Commission, and also giving the Commission the right to recover a penalty of $500 for every disobedience of its rule. The statute will be found quoted in McNeill v. Southern Railroad Co., 202 U. S. 545, 26 Sup. Ct. 722, 50 L. Ed. 1142. The penalties were not so great as those of the Arkansas statute. Before any suits were brought against the railroad company, it filed a bill to perpetually enjoin the bringing of actions by the Commission to recover the penalties provided for in the statute because of the noncompliance of the railroad company with the order of the Railroad Commission. As ground for the relief prayed, it was averred that the railway company had a common defense based upon the commerce clause of the Constitution of the United States, the provisions of the act of Congress to regulate commerce, and the due process clause of the Constitution, and also because the State Corporation Commission was an illegal body. Answers were filed and the case referred to a master, and the Circuit Court concluded that the order of the State Corporation Commission was repugnant to the commerce clause of the Constitution, and entered a decree in favor of the railroad granting a perpetual injunction, enjoining the enforcement of the order of the State Corporation Commission, and the bringing of actions to recover

penalties, or damages, for a violation of that order. Treating the suit now pending in the circuit court of Washington county, Ark., as eliminated from consideration, it will be found impossible to distinguish the facts of that case from those of the case at bar. The circuit court granted a perpetual injunction, and both parties appealed to the Supreme Court of the United States, where the judgment of the lower court was affirmed as to the injunction. Mr. Justice White in that case said:

"We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not in any proper sense one against the state. Scott v. Donald, 165 U. S. 107, 112 [17 Sup. Ct. 262, 41 L. Ed. 648]; Fitts v. McGhee, 172 U. S. 516, 529, 530 [19 Sup. Ct. 269, 43 L. Ed. 535.]"

Further on in the case, at page 561 of 202 U. S., at page 725 of 26 Sup. Ct. (50 L. Ed. 1142), he said:

"Without at all questioning the right of the state of North Carolina in the exercise of its police authority to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the state or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States. Houston & Texas Central Ry. Co. v. Mayes, 201 U. S. 321 [26 Sup. Ct. 491, 50 L. Ed. 772]; American Steel & Wire Co. v. Speed, 192 U. S. 500 [24 Sup. Ct. 365, 48 L. Ed. 538]."

And still further on in the opinion, at page 562 of 202 U. S., at page 726 of 26 Sup. Ct. (50 L. Ed. 1142), he said:

"It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

It will be observed from the first quotation that Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, so strenuously urged by counsel as sustaining the contention that this is a suit against the state, is cited by Mr. Justice White in that case to show that it was not a suit against a state. The fact is Fitts v. McGhee is easily differentiated from McNeill v. Southern Railway Co., and, also, the case at bar; but it is unnecessary. A careful reading of Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, will disclose the principle which governs the determination of the question as to whether a suit is against a state or not. The syllabus of that case sufficiently indicates the distinction. It is as follows:

"The cases reviewed in which suits at law or in equity against officials of a state, brought without permission of the state, have been held to be, either

suits against the state, and therefore brought in violation of the eleventh amendment to the Constitution; or, on the other hand, suits against persons who hold office under the state, for illegal acts done by them under color of an unconstitutional law of the state, and therefore not suits against the state."

In Ex parte Young, 209 U. S. 155, 156, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, Mr. Justice Peckham distinguished the case of Fitts v. McGhee from McNeill v. Southern Railway Co., supra, and other cases in line therewith and which are referred to in that opinion.

I have said enough to show that this is not a suit against the state, and that it sets forth a case of equity cognizance; but, independent of what I have already said, in Ex parte Young, 209 U. S. 124, 28 Sup. Ct. 441 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932), it was decided (I quote the syllabus):

"Although the determination of whether a railway rate prescribed by a state statute is so low as to be confiscatory involves a question of fact, its solution raises a federal question, and the sufficiency of rates is a judicial question over which the proper Circuit Court has jurisdiction, as one arising under the Constitution of the United States. Whether a state statute is unconstitutional because the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts for the purpose of determining the validity of the statute, and are thereby denied the equal protection of the law, and their property rendered liable to be taken without due process of law, is a federal question, and gives the Circuit Court jurisdiction. Whether the state railroad rate statute involved in this case, although on its face relating only to intrastate rates, was an interference with interstate commerce, held to raise a federal question which could not be considered frivolous. A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed. It is within the jurisdiction, and is the duty, of the Circuit Court to inquire whether such rates are so low as to be confiscatory, and, if so, to permanently enjoin the railroad company, at the suit of one of its stockholders, from putting them in force, and it has power pending such inquiry to grant a temporary injunction to the same effect. The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to its officer immunity from responsibility to the supreme authority of the United States. It is not necessary that the duty of a state officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it. If by virtue of his office he has some connection with the enforcement of the act, it is immaterial whether it arises by common general law or by statute. No adequate remedy at law sufficient to prevent a court of equity from acting exists in a case where the enforcement of an unconstitutional state rate statute would require the complainant to carry merchandise at confiscatory rates if it complied with the statute and subjected it to excessive penalties in case it did not comply therewith and its validity was finally sustained. While a common carrier sued at common law for penalties under or on indictment for violation of a state rate statute might interpose as a defense the unconstitutionality of the statute on account of the confiscatory character of the rates prescribed, a jury cannot intelligently pass upon such a matter. The proper method is to determine the constitutionality of the statute in a court of equity in which the opinions of experts may be taken and the matter referred to a master to make the needed computations and to find the necessary facts on which the court may act."

All that I have now said relates to the bill, without reference to the suit pending in the circuit court of Washington county, but it shows that the remedy at law is inadequate in such a case as that. I now come to consider the bill in two other aspects:

(1) Is the granting of an injunction to stop the proceedings in the circuit court of Washington county, Ark., prohibited by section 720, Rev. St. U. S.?

(2) Can a United States Circuit Court under the conditions stated in the bill enjoin the prosecution of a criminal proceeding pending in a state court at the time the bill was filed?

It is broadly conceded that the general rule clearly established by repeated decisions of the court is against the doing of either, and therefore decisions establishing the rule need not be cited. Are there exceptions to the rule, and, if so, does the case at bar fall within the rule or within the exceptions? The two questions may be considered together, and for the present the proceedings pending in the circuit court of Washington county, Ark., will be treated, but not decided, as if it were a criminal proceeding.

The complainant urges that the case at bar falls within the exception announced in Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778. In that case Mr. Justice Brown accepted, as the established law of that court, the rule laid down in Re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, to the effect that a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law. In the discussion of that case he said:

"It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

This language must be considered, however, with reference to the precise facts before the court. It does appear in that case that criminal proceedings had been instituted in certain courts, but it does not appear that they were pending at the time the bill was filed; nor does the bill seek to enjoin any proceedings pending in the state court. In that case the bill was dismissed, however, because the complainants failed to show that they had any legal interest in that litigation, or that there was any lack of a complete and adequate remedy at law. Notwithstanding the language quoted, that was all that was decided in that case. Later Mrs. Dobbins filed a similar suit against the city of Los Angeles growing out of the same transaction, and she averred the same facts in her complaint contained in the Davis & Farnum Manufacturing Company complaint, and there was no lack of interest in the subject-matter of the litigation so far as she was concerned; but a careful analysis of the facts in that case will also show that at the time the bill in the Dobbins Case was filed it does not appear that any suit was pending in any municipal or state court of California, or that

the object and scope of the bill was to enjoin proceedings of any character then pending in any state court. A demurrer was interposed to her bill, and was sustained and the bill dismissed and the question then presented on appeal to the Supreme Court of the United States upon the demurrer. The case was reversed by the Supreme Court and remanded to the Circuit Court, with leave to the city to answer. The court said in Dobbins v. Los Angeles, 195 U. S. 241, 25 Sup. Ct. 22 [49 L. Ed. 169]:

"It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which by the enforcement of the ordinances in question would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ. It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218 [23 Sup. Ct. 498, 47 L. Ed. 778], and cases therein cited."

This language, unless carefully analyzed with reference to the precise facts before the court, might easily mislead, but a careful analysis will show that the court did not intend, and did not in fact decide, that an injunction would be granted to stay criminal proceedings pending in a state court. It did not decide it because the question was not before it; it not appearing that, when the bill was filed, any suits were pending in the state court. These cases, therefore, are not authority for the support of the doctrine that a federal court will under any circumstances (except in bankruptcy cases) enjoin proceedings pending at the time the bill was filed in a state court, and I have been unable to find any authority which does. When this case was before the court on a motion to dissolve the injunction, it was thought at the time that these cases did support the complainant's contention in this case, but a more careful reading and analysis of the cases has convinced the court that the conclusion reached at that time was erroneous. The power of a federal court to enjoin state officers who attempt to get shelter under the unconstitutional acts of a state legislature to invade property rights of a citizen by threatening suits, civil or criminal in state courts, must not be confused with the provisions of section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), which provides that:

"Sec. 720. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The two things are entirely separate and distinct.

It was held in Prentis v. Atlantic Coast Line, 211 U. S. 228, 229, 29 Sup. Ct. 67, 70 [53 L. Ed. 150], that:

"A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391 [14 Sup. Ct. 1047, 38 L. Ed. 1014]; Smyth v. Ames, 169 U. S. 466, 517 [18 Sup. Ct. 418, 42 L. Ed. 819]. See McNeill v. Southern Railway Co., 202 U. S. 543 [26 Sup. Ct. 722, 50 L. Ed. 1142]; Ex parte Young, 209 U. S. 123;

165 [28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932]. Other cases further illustrating this point are Chicago & N. W. Ry. Co. v. Dey [C. C.] 35 Fed. 866 [1 L. R. A. 744]; Northern Pacific Ry. Co. v. Keyes [C. C.] 91 Fed. 47; Western Union Telegraph Co. v. Myatt [C. C.] 98 Fed. 335."

This court under these decisions has the unquestioned right to declare void (as being unconstitutional) rule 44, and the section of the statute under which the defendants are proceeding to enforce that rule, and to enjoin the institution of all civil or criminal proceedings in a state court, when that rule and statute are applied or sought to be applied to interstate commerce; but it has no power to disregard section 720, which prohibits it from staying, by injunction, proceedings already pending in court of a state, except in matters relating to bankruptcy proceedings. Unauthorized and unwarranted as is the assertion of authority upon the part of the State Railroad Commission in instituting the suit in the Washington circuit court under the statute and rule referred to, nevertheless, the Congress, which has the undoubted right, saw fit by section 720 to deny a United States court of equity the right to interfere with it, and it is the duty of this court to conform to the provisions of that statute. It may be admitted for the sake of this argument, but it is not decided, that the statute under which the defendants are proceeding in the suit now pending in the Washington circuit court, and rule 44, upon which such action is based, are both constitutional, as applied to commerce within the state, and yet, they are void as applied to interstate commerce. As said in Dobbins v. Los Angeles, 195 U. S. 240, 25 Sup. Ct. 22, 49 L. Ed. 169:

"This court in the case of Yick Wo v. Hopkins, 118 U. S. 356 [6 Sup. Ct. 1064, 30 L. Ed. 220], held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

So in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 390, 14 Sup. Ct. 1051 (38 L. Ed. 1014):

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In Cunningham v. Macon & Brunswick Railroad, 109 U. S. 446, 452 [3 Sup. Ct. 292, 296 (27 L. Ed. 992)], it was said: 'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See Mitchell v. Harmony, 13 How. 115 [14 L. Ed. 75]; Bates v. Clark, 95 U. S. 204 [24 L. Ed. 471]; Meigs v. McClung, 9 Cranch, 11 [3 L. Ed. 639]; Wilcox v. Jackson, 13 Pet. 498 [10 L. Ed. 264]; Brown v. Huger, 21 How. 305 [16 L. Ed. 125]; Grisar v. McDowell, 6 Wall. 363 [18 L. Ed. 863].' Nor can it be said in such a case

that relief is obtainable only in the courts of the state; for it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal court. Mercer County v. Cowles, 7 Wall. 118 [19 L. Ed. 86]; Lincoln County v. Luning, 133 U. S. 529 [10 Sup. Ct. 363, 33 L. Ed. 766]; Chicot County v. Sherwood, 148 U. S. 529 [13 Sup. Ct. 695, 37 L. Ed. 546]."

It is a matter therefore of no importance, so far as this bill is concerned, whether the suit pending in the Washington circuit court is a civil or criminal suit. This court is not at liberty to interfere with it.

This brings us to the consideration of a question of practice in this court. The demurrer in this case is a general demurrer, and goes to the whole bill. The rule is established that a demurrer to a whole bill must be overruled if the bill, taken altogether, entitles complainant to some kind of relief. Livingston v. Story, 9 Pet. 632, 9 L. Ed. 255; Powder Co. v. Powder Co., 98 U. S. 126, 25 L. Ed. 77; Hilliard et al. v. The Good Hope (D. C.) 40 Fed. 608; Merriam et al. v. Holloway Pub. Co. et al. (C. C.) 43 Fed. 450; Buerk v. Imhaeuser (C. C.) 8 Fed. 457; La Croix v. May (C. C.) 15 Fed. 236; Mercantile Trust & Deposit Co. et al. v. R. I. Hospital Trust Co. et al. (C. C.) 36 Fed. 863; Pac. Live Stock Co. v. Hanly (C. C.) 98 Fed. 327; Failey v. Talbee (C. C.) 55 Fed. 892; N. Pac. R. Co. v. Roberts (C. C.) 42 Fed. 734, affirmed in 158 U. S. 11, 15 Sup. Ct. 756, 39 L. Ed. 873.

In view of what has been already said, it is unnecessary to consider the remaining grounds of demurrer.

In this case the demurrer will be overruled with leave to answer on next rule-day; but an order must go, modifying the injunction heretofore granted, in conformity with this opinion.

UNITED STATES, for Use of CHOCTAW AND CHICKASAW NATIONS, v. McMURRAY et al.

(Circuit Court, E. D. Oklahoma. June 6, 1910.)

No. 605.

1. INDIANS (§ 16*)—LEASES OF COAL LANDS—VALIDITY OF REGULATIONS MADE BY SECRETARY OF THE INTERIOR.

Act June 28, 1898, c. 517, § 29, 30 Stat. 505, ratifying a previous agreement made with the Choctaw and Chickasaw Tribes of Indians April 23, 1897, provided, inter alia, that the coal lands of the tribes should be under the control and supervision of two trustees, who should perform their duties under rules prescribed by the Secretary of the Interior; that each lease should include 960 acres and be for a term of 30 years; that royalty should be paid on all coal produced by the lessees at the rate of 15 cents per ton, with power in the Secretary to reduce or advance such royalty where deemed to the best interest of the Indians; that on each lease there should be paid annually in advance $100 for each of the first

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

two years, $200 for the third and fourth years, and $500 for the fifth and each following year, to be treated as advance royalty and credited on royalties when the mine was developed, and that, on default in any such payment for 60 days, the lease should become null and void, and the payments made should be the property of the Indians. On May 22, 1900, and December 6, 1907, the Secretary promulgated amended regulations requiring lessees to mine on each lease 3,000 tons the first year, 4,000 tons the second, 7,000 tons the third, 8,000 tons the fourth, and 15,000 tons the fifth and each succeeding year, or pay the royalties on such quantities if not mined, and prescribing that a failure to do so would subject the lease to cancellation. *Held*, that the Secretary had no power to so add to the specific requirements of the act, which act of his was not a regulation, but in effect an amendment of the statute, and that an action could not be maintained against a lessee to enforce payment of royalties so unlawfully imposed.

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

2. INDIANS (§ 16*)—LEASES OF COAL LANDS—VALIDITY OF REGULATIONS MADE BY SECRETARY OF THE INTERIOR.

While such act by implication probably authorized the trustees for the Indians to insert in a lease the usual provision requiring diligence in the prospecting and mining operations, such a provision conferred no authority on the Secretary to arbitrarily determine by a regulation such as that promulgated what would constitute reasonable diligence which could only be determined by a court on consideration of the facts and circumstances of the particular case.

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

Action by the United States, for the use of the Choctaw and Chickasaw Nations, against John F. McMurray, James M. Lindsay, Fisher A. Tyler, Jr., and John L. Simpson. On demurrer to complaint. Demurrer sustained.

Wm. J. Gregg, U. S. Dist. Atty.
A. A. Richards, for defendants.

CAMPBELL, District Judge. In Act Cong. June 28, 1898, c. 517, 30 Stat. 495, entitled "An act for the protection of the people of Indian Territory and for other purposes," there was incorporated the agreement made by the Commission to the Five Civilized Tribes with commissioners representing the Choctaw and Chickasaw Tribes of Indians on the 23d day of April, 1897. This agreement was ratified and confirmed by this act, and, subject to its subsequent ratification by the tribes, was to be in full force and effect. It was subsequently ratified by the tribes, as provided for in the act. The act provided (section 29) that, when ratified, the other provisions of the act should only apply to said tribes "where the same do not conflict with the provisions of said agreement" (except as to section 14 of the act, which relates to city and town governments).

With regard to the coal and asphalt lands of the Choctaw and Chickasaw Nations, this agreement provided:

"It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations shall remain and be the common property of the members of the Choctaw and Chickasaw Tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole, and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be neces-

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

sary, shall be used for the education of the children of Indian blood of the members of said tribes. Such coal and asphalt mines as are now in operation, and all others which may hereafter be leased and operated, shall be under the supervision and control of two trustees, who shall be appointed by the President of the United States, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood, whose term shall be for two years, after which the term of appointees shall be four years. Said trustees, or either of them, may at any time be removed by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties, under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their respective nations, each of whom shall make full report of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary. All coal and asphalt mines in the two nations, whether now developed or to be hereafter developed, shall be operated, and the royalties therefrom paid into the Treasury of the United States, and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior. All contracts made by the national agents of the Choctaw and Chickasaw Nations for operating coal and asphalt with any person or corporation which were, on April twenty-third, eighteen hundred and ninety-seven, being operated in good faith, are hereby ratified and confirmed, and the lessee shall have the right to renew the same when they expire, subject to all the provisions of this act. All agreements heretofore made by any person or corporation with any member or members of the Choctaw or Chickasaw Nations, the object of which was to obtain such member or members permission to operate coal or asphalt, are hereby declared void: Provided, that nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interests shall continue unimpaired hereby, and shall be assured by new leases from such trustees of coal or asphalt claims described therein by application to the trustees within six months after the ratification of this agreement, subject, however, to payment of advance royalties herein provided for. All leases under this agreement shall include the coal or asphaltum or other mineral, as the case may be, in or under nine hundred and sixty acres, which shall be in a square as nearly as possible and shall be for thirty years. The royalty on coal shall be fifteen cents per ton of two thousand pounds on all coal mined, payable on the 25th day of the month next succeeding that in which it is mined. Royalty on asphalt shall be sixty cents per ton, payable same as coal: Provided, that the Secretary of the Interior may reduce or advance royalties on coal and asphalt when he deems it for the best interests of the Choctaws and Chickasaws to do so. No royalties shall be paid except into the United States Treasury, as herein provided. All lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made and shall be a credit as royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advance payments; and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped: Provided, however, that should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw Nations."

Pursuant to the terms of the act, and prior to the date of the leases hereinafter referred to, the Secretary of the Interior promulgated cer-

tain rules and regulations relative to coal and asphalt leases and the operation of mines thereunder, wherein it was provided:

"That all lessees shall be required to pay advanced royalties, as provided in said agreement, on all mines or claims, whether developed or not, to be 'a credit on royalties when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments,' as follows, viz.: One hundred dollars per annum in advance for the first and second years, two hundred dollars per annum in advance for the third and fourth years, and five hundred dollars in advance for each succeeding year thereafter; and that, should any lessee neglect or refuse to pay such advanced royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which said default is made shall become null and void, and all royalties paid in advance shall be forfeited and become the money and property of the Choctaw and Chickasaw Nations."

On March 15, 1899, the defendant J. F. McMurray entered into four separate contracts of lease with Napoleon B. Ainsworth and Lemuel C. Burris, as mining trustees of the Choctaw and Chickasaw Nations of Indians, whereby said nations leased to the said McMurray for the term of 30 years four different tracts of land for the purposes of prospecting for and mining coal therefrom. The terms of the several leases were identical, except as to the description of the property leased. Each lease provided that McMurray should pay to the United States Indian agent, at Union Agency, Ind. T., the sum of 10 cents per ton for all coal produced from said leases passing over a one-inch screen. Each lease contains, among others, the following provisions:

"And the party of the second part further agrees and binds himself, his executors, administrators, and assigns, to pay or cause to be paid to the United States Indian agent for Union Agency, Indian Territory, as advanced royalties on each and every mine or claim within the tract of land covered by this lease, a sum of money as follows, to wit: One hundred dollars per annum in advance for the first and second years; two hundred dollars per annum in advance for the third and fourth years; and five hundred dollars per annum in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be a credit on royalties should the party of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceeds such sum paid as advanced royalties as above set forth. * * *

"The party of the second part further covenants and agrees to exercise diligence in the conduct of the prospecting and mining operations and to open mines * * * and to operate the same in a workmanlike manner to the fullest possible extent on the above-described tract of land. * * *

"And the party of the second part agrees that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed under the said act of Congress of June 28, 1898, by the Secretary of the Interior relative to mineral leases in the Choctaw and Chickasaw Nations."

On May 22, 1900, after the execution and approval of the foregoing leases, the Secretary of the Interior promulgated amended rules and regulations relative to such coal leases, wherein there was added to the rule or regulation above quoted the following:

"All advanced royalties as above defined shall apply from date of approval of each lease, and, when any mine or tract leased is operated, royalty due shall be paid monthly as required until the total amount paid equals the first annual advanced payment, after which royalty due shall be credited on such payments; and the lessee shall operate and produce coal from each and every

lease in not less than the following quantities: Three thousand tons during the first year from date of approval of lease; four thousand tons during the second year; seven thousand tons the third year; eight thousand tons the fourth year, and fifteen thousand tons the fifth and each succeeding year thereafter."

On December 6, 1907, the Secretary again amended said rules and regulations as to the minimum amount of coal that must be produced each year to read as follows:

"Each lessee shall produce coal equal to the aggregate of three thousand tons for each lease held by him, during the first year from date of approval thereof; four thousand tons during the second year; seven thousand tons during the third year; eight thousand tons during the fourth year; and fifteen thousand tons the fifth and each succeeding year during the term of such lease, or pay royalty as if such amounts had been produced; provided, that any amount paid in excess of that required by actual production shall be held as a credit to be applied in payment of royalty on subsequent actual production, and a failure to meet this requirement will subject the lease or leases as to which default shall occur, to cancellation."

The United States, for the use of the Choctaw and Chickasaw Nations, has filed its complaint at law against McMurray and his bondsmen for the recovery of certain unpaid royalties claimed to be due the Choctaw and Chickasaw Nations, based upon the annual tonnage required to be produced by the foregoing regulations. The royalties claimed to be due on each lease are covered by a separate count in the complaint, and the following paragraph from one of the counts is typical of the claim made upon each lease:

"That under the provisions of the regulations of the Secretary of the Interior approved May 22, 1900, and December 6, 1907, and now in force and now a part of the original coal lease contract between the Choctaw and Chickasaw Nations and the said defendant, John F. McMurray, there has become and is now due to the Choctaw and Chickasaw Nations of Indians under said lease the sum of eight thousand eight hundred and twenty dollars ($8,820.00), accruing as follows: $100 for the first year; $320 for the second year; $560 for the third year; $640 for the fourth year; and $1,200 per annum for each of the succeeding six years thereafter, making a total amount due of eight thousand eight hundred and twenty dollars ($8,820.00) less a credit of sixteen hundred dollars ($1,600.00) paid by the defendant, John F. McMurray, on account of advanced royalties on said lease, leaving a balance now due of seven thousand two hundred and twenty dollars ($7,220.00) as shown by an itemized statement of royalties due on lease No. 3 hereto attached, marked 'Exhibit B.'"

To this complaint the defendants have filed their demurrer, challenging the capacity of the complainant to sue, asserting that there is a defect of parties plaintiff, and that the complaint does not state facts sufficient to constitute a cause of action against the defendant. As the demurrer must be sustained upon the last-mentioned ground, it will not be necessary to pass upon the other questions.

The leases as originally entered into, it will be noted, did not require that McMurray should actually produce any given amount of coal in any one year. The only requirement relating to the activity he should exercise in developing a mine was his agreement to "exercise diligence in the conduct of the prospecting and mining operations and to open mines and to operate the same in a workmanlike manner, to the fullest possible extent." Should he violate this or any other stipulation

or agreement in the lease, it was provided that, in that event, the Secretary of the Interior should be at liberty in his discretion to avoid the lease and cause the same to be annulled. But such annulment for alleged failure to exercise diligence in development cannot be accomplished by mere fiat of the Secretary, especially if the lessee were resisting and denying the charge of lack of diligence. Under such circumstances, the forfeiture of these leases, like the forfeiture of any similar contract, could only be accomplished by proper court proceedings, and the question as to whether due diligence had been exercised would depend upon the facts and circumstances of the particular case and what could constitute due diligence as to one lease might fall far short of that as to another lease differently situated.

Now, turning to the act from which these leases derive their authority for existence, we find Congress has made definite provision with regard to certain essentials. The coal lands shall be under the supervision and control of two mining trustees. The leases shall each contain 960 acres, in as nearly a square form as possible, and shall extend for a period of 30 years. The royalty shall be 15 cents per ton, and shall be payable on a certain date fixed by the act, but the Secretary may reduce or advance royalties when he may deem it to the best interest of the Indians to do so. On each lease, whether developed or not, the lessee must pay $100 the first and second year; $200 the third and fourth years, and $500 for each succeeding year thereafter, which payments are to be treated as a credit upon the royalty when the mine shall become a producer; "provided, however, that should any lessee neglect or refuse to pay such advance annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalty paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw Nations." It will hardly be contended that the Secretary could by any rule or regulation change any of the above positive provisions of the law, except the royalty per ton, which he is specifically authorized to change under stated conditions. Certainly the power to make such change would not be conceded to the Secretary except by language in the act clearly conferring such power, and the fact that Congress has lodged in the Secretary the power to change the amount of royalty emphasizes the intention of Congress by its silence as to conferring the power to change any other feature of the act to withhold such power from him. The leases made pursuant to this act have embodied in them the foregoing provisions. It was contemplated by Congress that there would be in some instances at least a considerable time elapse between the execution and approval of the leases and actual development and production. It might be five years, or even longer. In order to secure to the tribes in the meantime some revenue from the land, and probably to incite more speedy development, Congress provided these advance royalties, and determined that the amounts fixed should be compensation the lessee should pay the tribes pending the opening of producing mines. While nothing is said in the act about the diligence the lessee shall exercise in development, I think it may be assumed that Congress in granting the authority to the mining trustees

to make leases contemplated that one of the terms thereof should be the requirement of due diligence in development, a provision universally incorporated in such leases. And I think that provision is properly in the leases under consideration. So that a lessee cannot excuse an unconscionable delay by relying upon the fact that he had paid the advance royalties provided by the act, but, as said before, the question as to whether due diligence has been exercised in a controverted case is for the courts. But the act does provide that the mines shall be operated and the royalties therefrom paid into the Treasury of the United States, and drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior, and the lessee McMurray agrees in his leases that the lease "shall be subject in all respects to the rules and regulations heretofore or that may hereafter be prescribed under said act * * * by the Secretary of the Interior."

The complainant insists that the regulation promulgated by the Secretary after the execution of the lease, which imposes upon the lessee the duty of mining a fixed amount of coal the first and each succeeding year, is authorized by the provision of the act empowering the Secretary to prescribe rules and regulations for the operation of the mine, and is agreed to by McMurray in the lease. The defendants, on the other hand, contend that it is not a mere rule or regulation, such as the act and the lease contemplate, but is an unwarranted attempt to change the terms of the lease, and the imposition upon McMurray of an additional burden not contemplated by the law or the lease, and outside the Secretary's power to make rules and regulations.

In the case of Midland Oil Co. et al. v. Susan Turner et al. (decided by the Circuit Court of Appeals for this Circuit on April 11, 1910) 179 Fed. 74, the question of the Secretary's power to change by rule or regulation the terms of an existing lease was involved. Individual citizens of the Cherokee Nation were by act of Congress authorized to lease their allotments for mineral and oil purposes, subject to the Secretary's approval and under rules and regulations to be prescribed by him. Susan Turner, by her guardian, executed to the Midland Oil Company an oil lease upon her allotment upon a form prescribed by the Secretary of the Interior, providing, among other things, that it should not be assigned without the written consent of the lessor. Subsequently the Secretary promulgated a regulation providing for assignment of such leases upon consent of the Secretary of the Interior. The Midland Company, without the consent of the lessor, executed a written assignment of the lease to a third party, which assignment was approved by the Assistant Secretary of the Interior acting for the Secretary. As to the validity of this assignment, the court say:

"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."

The extent to which departmental rules and regulations may go is clearly defined in Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267, a leading case and since followed in numerous decisions. The reporter briefly states the case as follows:

"Section 2505 of the Revised Statutes provides, among other things, that 'animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe.' Article 383 of the Treasury Customs Regulations provides that before a collector admits such animals free he must, among other things, 'be satisfied that the animals are of superior stock, adapted to improving the breed in the United States.' Jones imported certain animals, which were entered at the port of Portland, Me., and he claimed that they should be admitted free, as they were 'specially imported for breeding purposes.' Morrill, the collector, though the importation was for breeding purposes, demanded the duties because he was not satisfied that the animals were of 'superior stock.' The duties were accordingly paid under protest, and this suit was brought to recover the amount so paid."

Jones recovered a judgment against the collector for the duties paid, and, in affirming this judgment, Chief Justice Waite said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes. The Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. This is not the office of a treasury regulation."

Is not the present case an attempt to put in the body of the statute a limitation or provision which Congress did not think it necessary to prescribe? Congress has said that the mining trustees and the lessee might enter into a lease-contract covering 960 acres to extend for 30 years at a royalty per ton which the Secretary was authorized to change, with the provision that, until actual operation and mining which would result in an output royalty, the lessee should pay an annual advance royalty of certain sums fixed by the act, and inferentially, I think, authorizing a provision in the lease for diligent operation. The leases in question were drawn pursuant to and contained all these provisions. It is not contended that McMurray has not paid the advance annual royalties. In fact, the complaint alleges that he has paid a considerable portion of them, and it is allowed as a credit. It is not contended that McMurray has not under the circumstances exercised diligence in development of them. The lapse of time since the

execution of the leases might strongly support such a contention, but the penalty for negligence in that respect fixed by the lease is its forfeiture, which, as we have said, in a controverted case, is a question to be finally determined by the courts, and not by the Secretary. But the Secretary by the regulation challenged has fixed the measure of diligent operation at 3,000 tons during the first year, 4,000 tons during the second year, 7,000 tons during the third year, 8,000 tons during the fourth year, and 15,000 tons during the fifth and each succeeding year, and this to apply to any and all leases, regardless of the varying circumstances attendant upon different leases arising from natural and artificial conditions. If he may arbitrarily fix this tonnage, why may he not fix any tonnage, even that which would be prohibitive of operation, and thus defeat the very object of the act itself? Such a power will not be presumed to exist except it be clearly granted. Congress did grant him the power to change the per ton output royalty to such extent as he might deem to the best interests of the tribes. If it had intended that he might also arbitrarily fix the minimum amount of coal to be mined, regardless of existing conditions, that too could and should have been clearly granted, and the fact that it was not persuades me that it was not intended, especially when it is considered that Congress contemplating more or less delay in beginning operations provided for stipulated advance royalties pending such delay.

I consider the regulation unauthorized, and the demurrer will be sustained. It is so ordered.

In re GODLOVER.

(Circuit Court, N. D. California. September 20, 1910.)

ALIENS (§ 68*)—NATURALIZATION—RESIDENCE—PROOF.

Naturalization Act June 29, 1906, c. 3592, § 4, subd. 2, 34 Stat. 597 (U. S. Comp. St. Supp. 1909, p. 478), declares that the petition shall be verified by 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 at least five years continuously, and of the district in which the application is made for at least one year preceding the filing of the petition. *Held* that, while the verification must show that petitioner has resided continuously in the country for at least five years, such showing need not be made by the same witnesses for the entire period, and that so long as there are at least two credible witnesses testifying as to each fraction of the period, so as to cover the whole, the statutory requirement is satisfied.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

In the matter of the petition of Hugh Bliss Godlover, to be admitted a citizen of the United States. On objection to the petition. Overruled.

Carlos G. White, for petitioner.

P. W. Blazer, Naturalization Examiner, for the government.

VAN FLEET, District Judge. This is a petition for naturalization under Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp.

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

1909, p. 477). Full and satisfactory proof was made at the hearing that the petitioner was possessed of the necessary good character, intelligence, and general fitness required under the act to entitle him to admission, and that he had resided continuously in the state for more than the statutory period of five years immediately preceding his petition. But objection was made by the government to the sufficiency of the petition upon which the application is based upon the ground that the same is not verified in the manner required by the statute; and for that reason it is contended that the court is without jurisdiction to grant the application.

The petition was filed March 4, 1910, and was verified by the affidavits of five witnesses. The affidavit of two of the witnesses, Meyer and Schulz, is to the effect that each has personally known the petitioner "to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the state of California, and of the Northern district thereof, for a period of over five years immediately preceding the date of filing his petition, and that he has personal knowledge that the said petitioner is a person of good moral character attached to the principles of the Constitution of the United States, and that he is in every way qualified in his opinion to be admitted as a citizen of the United States, provided, however, that said affiant, Meyer, has no recollection of having personally seen said petitioner subsequent to May or June, 1905, until about May, 1906, nor thereafter until about May, 1909, and said affiant Schulz has no recollection of having personally seen said petitioner subsequent to July, 1905, until about May, 1909, but each of said affiants knows through business and personal relationships and dealings, through communications, and from private and public sources of information, that said petitioner has resided continuously in California since at least December, 1904, down to and including the present time, first, at San Francisco, and thereafter as a student, both independently and in the University of California, at Berkeley, and that during all of said time petitioner has behaved as a man of good moral character attached to the principles of the said Constitution."

This affidavit is supplemented by that of three other witnesses to the effect that they have each known the petitioner to be a resident of the United States and of the state of California for a period of four years and ten months "immediately preceding the date of filing his petition, and that he has personal knowledge that the said petitioner is a person of good moral character attached to the principles of the Constitution of the United States, and that he is in every way qualified in his opinion to be admitted a citizen of the United States." The act provides (section 4, subd. 2) that the petition shall 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."

It is the contention of the government that the proper construction of this provision requires that each of the verifying witnesses in his statement of his personal knowledge of the residence, character, and fitness of the petitioner shall cover the full statutory period of five years, that the verification cannot be made piecemeal by two witnesses making affidavit as to one portion of the period and other witnesses to another, thus making up the whole; and it is claimed that the verification in this instance does not conform to this requirement, and is therefore insufficient.

I find myself unable to sanction any such narrow construction of the act. As contended by the petitioner, well-established principles of statutory construction require that a statute be construed with reference to its spirit and reason, and in such construction it is to be presumed that the legislative body was consistent in its purpose throughout, and did not intend to work injustice or hardship in any of its provisions. The very obvious purpose of the act under consideration is to permit every alien, eligible under the law, of good moral character and sufficient intelligence, who has made his declaration of intention, to become a citizen of the United States so soon as he has resided here the prescribed period, and any construction of the statute which would nullify that purpose should be avoided unless the clear terms of the act require otherwise. It will be observed that the provision of the act quoted does not require in terms that each witness shall state in his affidavit knowledge of the residence for the full period, but simply that there shall be two or more witnesses "who shall state in their affidavits," etc. To sustain the contention of the government, it would be literally necessary to insert in the language of section 4 above quoted the word "each" between the words "shall" and "state"—a word which Congress has seen fit to omit from that part of the paragraph, but has inserted later in the same sentence in requiring that "each have personal knowledge" of the petitioner's moral character and general qualifications.

And, as further suggested, if the construction contended for were necessary, it would be impossible for one (as the evidence shows was the case with petitioner) to be admitted to citizenship after living for two years of the period in one part of the state and the remaining three years in a different part of the same state, where it should happen, as here, that no two of them had personally known him continuously in both places of his residence. Such construction would seem to be out of harmony with the liberal spirit of other features of the act, especially section 10, which by its express terms provides the means of facilitating the naturalization of those who have removed from one state to another by authorizing the verification of the petition by two witnesses covering the period of the alien's residence in the state in which the petition is filed, and then establishing by the depositions of other witnesses the portion of the statutory period of residence elsewhere in the United States.

I think it may fairly be presumed from the general tenor and purpose of the act that Congress by providing in section 4 for a verifica-

tion by "at least two credible witnesses" had in view instances like that of the petitioner, where, by reason of his removal from one part of the state to another before the completion of his period of residence, he is unable, although residing continuously for the full period of five years in the same state, to make the necessary verification and proof by two witnesses who had known him personally throughout the full period. Such construction would avoid the injustice that must otherwise result to one so situated if the view contended for by the government were to obtain. In the absence of some obvious reason, the idea is not to be readily indulged that Congress intended to make a distinction so clearly to the disadvantage under the law of one situated like the petitioner in favor of one whose residence for the necessary period has been in different states. It may be conceded that the language of section 4 above quoted is not as free from ambiguity as could be desired; but, as stated in Re Polsson (C. C.) 159 Fed. 283, in construing the act to which the present act is amendatory:

"It must be borne in mind that we are dealing with a statute which grants a right or privilege in the nature of a franchise, and it is a familiar rule that in construing such a grant, where an ambiguity arises, that construction is to be indulged which is most favorable to the persons or class for whose benefit the act was made."

From these considerations my construction of the statute is that, while it is intended that the verification must show that the petitioner has resided continuously in the country for at least five years, such showing need not be made by the same witnesses as to the entire period; that, so long as there are at least two credible witnesses testifying as to each fraction of such period so as to cover the whole, the requirement of the statute is satisfied.

It may not be out of place to observe that I have considered the question as to the sufficiency of the verification involved solely upon the theory upon which the same has been argued and presented; that is, as a piecemeal verification or one which required the affidavit of the witnesses Meyer and Schulz to be supplemented by those of the other witnesses to bring it within the law. If it were necessary, however, to decide the question, I am not prepared as a matter of first impression to say that the affidavit of the first two witnesses is not in itself sufficient to satisfy the statute. A reading of it will disclose that in its affirmative statements that affidavit contains all that the statute calls for in a verification of the kind; and the only question arises out of the qualifying statements as to periods during which those witnesses have not personally seen the petitioner. It seems to have been assumed by counsel on both sides that these statements detracted from the sufficiency of the affidavit and rendered necessary the supplementing affidavits of the other witnesses. I am inclined to regard this view as erroneous; but, as the question has not been argued and its determination, in view of the conclusion reached on the question discussed, unnecessary, it need not here be further considered.

Let an order be entered admitting the petitioner to citizenship.

CENTRAL TRUST CO. OF NEW YORK v. BODWELL WATER POWER CO. et al.

(Circuit Court, D. Maine. September 16, 1910.)

No. 617.

1. MECHANICS' LIENS (§ 173*)—TIME OF TAKING EFFECT—MAINE STATUTE.
Under Rev. St. Me. c. 93, § 29, giving a mechanic's lien for labor or materials furnished in erecting, altering, or repairing a house, building, or appurtenance by virtue of a contract with or by consent of the owner, as construed by the Supreme Judicial Court of the state, the lien relates back and becomes effective as of the date of the contract under which the labor or materials are furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 304; Dec. Dig. § 173.*]

2. MORTGAGES (§ 183*)—"CONSENT"—"OWNER"—MECHANICS' LIENS.
Under Rev. St. Me. c. 93, § 29, which gives a lien for labor or materials furnished in erecting, altering, or repairing a house, building, or appurtenances by virtue of a contract with or "by consent of the owner," as construed by the Supreme Judicial Court of the state, in order that the interests in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily, or reasonably, or ordinarily, resulted in the furnishing of labor and materials for which the lien is claimed. A mortgagee out of possession is not an "owner" within the meaning of the statute, nor can he be held to have consented to the displacement of his own lien merely because he may have knowledge of the making of the improvements.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 442; Dec. Dig. § 183.*

For other definitions, see Words and Phrases, vol. 2, pp. 1437–1441; vol. 8, p. 7612; vol. 6, pp. 5134–5151; vol. 8, p. 7744.]

3. CORPORATIONS (§ 473*)—BONDS—RIGHTS OF BONA FIDE HOLDERS.
Under the rule of the federal courts, any holder of negotiable bonds of a corporation secured by mortgage who acquired the same in good faith for a valuable consideration before maturity is affected only by what he actually knew, and not at all by what he might have known by the use of ordinary diligence; and this applies, not only to the bonds themselves, but to the security by way of mortgage which each bond assumes to carry with it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. § 473.*]

4. CORPORATIONS (§ 478*)—MORTGAGES SECURING NEGOTIABLE BONDS—LIEN AND PRIORITY—MECHANICS' LIENS.
A water power company executed a mortgage to secure an issue of $1,000,000 in bonds. Later it made a contract for the construction of a power plant, and on the same day delivered to the contractor in payment $700,000 of the bonds, which the contractor on the same day sold, and within a few days forwarded to the mortgage trustee to be certified and delivered to the purchasers. Subsequent to all this, and after the mortgage had been recorded, the contractor made contracts with subcontractors for portions of the work, which under Rev. St. Me. c. 93, § 29, entitled the subcontractors to mechanics' liens as of the dates of their several contracts on the property. *Held*, that the $700,000 of bonds had been, under the rules prevailing in equity, in legal effect sold and delivered

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

before any of the subcontracts were made; and that as to them, the lien of the mortgage was superior to that of the subcontractors, who were charged with notice of the mortgage when they made their contracts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 478.*]

In Equity. Suit by the Central Trust Company of New York against the Bodwell Water Power Company, James B. Mullen, the Stanley Manufacturing Company, the Grady Construction Company, and the Allis-Chalmers Company. Decree for complainant.

Joline, Larkin & Rathburn and Libby Robinson & Ives, for complainant.

Charles H. Bartlett, for Bodwell Water Power Co., Milford Construction Co., and receivers.

Joseph F. Gould and Charles F. Johnson, for James B. Mullen.

Edward P. Murray, for Grady Construction Co.

Martin & Cook and Benjamin Thompson, for Allis-Chalmers Co.

H. M. Verrill, for bondholders' committee.

PUTNAM, Circuit Judge. This is a bill in equity brought by the complainant against the Bodwell Water Power Company to foreclose a mortgage running to the complainant as trustee. The other parties respondent are James B. Mullen, Stanley Manufacturing Company, Grady Construction Company, and the Allis-Chalmers Company, who are joined because they claim statutory liens on the property involved, which is certain lands and water rights connected therewith, situate on the Penobscot river, in the city of Old Town and town of Milford, in the county of Penobscot. The mortgage grew out of the undertaking on the part of the Bodwell Water Power Company to develop the water rights in question, commencing in the year 1905, by the erection of a dam and a power house located therewith. The contract for the entire development was a single one, between the Milford Construction Company and the Bodwell Water Power Company, entered into on the 19th day of July, 1905. The parties named as respondents, aside from the Bodwell Water Power Company, were all subcontractors, claiming under section 29 of chapter 93 of the Revised Statutes of Maine, which reads as follows:

"Whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building or appurtenances,—by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs."

Section 30 of the same chapter reads as follows:

"If the labor or materials were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor or materials not then performed or furnished by giving written notice to the person performing or furnishing the same, that he will not be responsible therefor."

The principal questions in the case are those which we will particularly explain; and, although it is possible there may be some doubt whether the statute would attach a lien to all the property described in the bill, and perhaps some other questions, we will not consider them,

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

because the complainant concedes that for the purposes of this litigation everything is established in favor of the lien claimants except priority. That question arises in the following manner:

On the 1st day of July, 1905, the Bodwell Company, as already stated, executed and acknowledged the mortgage which the complainant is now seeking to foreclose. It was duly recorded on the 24th day of July, 1905; its acceptance by the complainant having been acknowledged by the complainant on the 21st day of the same July. It does not appear on what precise day it was accepted by the complainant. The date of acknowledgment is, of course, unessential. The date of acceptance may be essential. But, in the absence of a more definite statement, it must be held to have been accepted on the day of the acknowledgment by the complainant.

The mortgage provides for the issue of negotiable bonds to the amount of $1,000,000. To make it perfectly clear, it may be stated that these bonds were of such a character that they showed on their face that they were secured by the mortgage referred to; and altogether they were of such a character that in the hands of any bona fide holder they, and the apparent security given them by the mortgage, were free from all undisclosed claims.

On the 19th day of July, 1905, a contract was executed between the Bodwell Company and the corporation known as the Milford Company, by virtue of which the Milford Company contracted to install all the work out of which every claim made by the respondents in this case arose. All the respondents making such claims were subcontractors under the Milford Company. The contract with the Milford Company stipulated to receive in part payment for its work $700,000 of the bonds secured by the mortgage in controversy. These bonds were all subsequently delivered to the Milford Company or on its order. The Milford Company, of course, is estopped from making any claim adverse to the mortgage, or to any title thereunder, and makes no such claim. In fact, it has been quite fully, if not entirely, paid for all the work done and materials furnished by itself or subcontractors. The subcontract with the respondent Mullen was executed on the 29th day of June, 1905, and the first work done by him was on the 7th day of August, 1905. On the 19th day of July, 1905, the Milford Company had sold in advance the $700,000 of the bonds to be delivered to it under the contract; and on the 28th day of July, 1905, $500,000 of these bonds had been delivered to the Milford Company, which on the 29th day of the same July had the same certified by the complainant, and sold and delivered the same to brokers at New York at 90 per cent. and interest. We will refer again to some important details relating to the disposition of the bonds.

As the statutes have been interpreted, it cannot be doubted that each lien claim of each respondent here relates back to the day when each contract for labor and materials was made, notwithstanding the work was commenced later. For example, the lien claim of respondent Mullen relates back to the 29th day of June, 1905. This arises from the fact that it is settled that the statutes establishing lien claims are to be liberally construed, and that the principles relating to their nature

are governed by equitable rules. Shaw v. Young, 87 Me. 271, 274, 32 Atl. 897; Hill v. American Surety Company, 200 U. S. 197, 202, 26 Sup. Ct. 168, 50 L. Ed. 437; Mankin v. United States, 215 U. S. 533, 537, 30 Sup. Ct. 174, 54 L. Ed. —. More particularly as to this, it is said in Ouelette v. Pluff, 93 Me. 168, 176, 44 Atl. 616, 619, referring to proceedings for enforcing lien claims, that "an in rem process like the present is really an equitable process largely governed by equitable principles." It must be said that it is on this account that lien claims get the benefit of the equitable doctrine of relation, and more particularly of the equitable doctrine that what is agreed to be done is held as done, by virtue of which the lien claim becomes effective from the date of the contract out of which it arises. It follows that, inasmuch as the holders of lien claims thus avail themselves of equitable rules, they are bound to submit to them whenever they may work against them, an observation which we will apply as we go on.

Inasmuch as all the respondents who hold lien claims are subcontractors under the Milford Company, and inasmuch as the Milford Company is, as we have shown, estopped from setting up any title which will depreciate the mortgage, it would ordinarily follow according to the proper and strict rules of equity that, as the stream cannot rise higher than its source, all subcontractors under the Milford Company would be estopped to the same extent as the Milford Company is estopped. Apparently, however, this fundamental principle of equity is shut out by the decision of the Supreme Judicial Court of Maine in Norton v. Clark, 85 Me. 357, 27 Atl. 252. That would seem to be a sweeping decision to the effect that the respondents in this case are not estopped simply because the Milford Company is estopped, in that it squarely holds that an agreement between the principal contractor and the owner of a building that there should be no liens incurred for labor and materials with reference to its construction does not estop a subcontractor from establishing a lien for what he contributed to the result. As the opinion in this case was passed down in 1893, 12 years and more before the initial steps in the present controversy were taken, and as it concerns the construction of a statute of the state of Maine, it is binding on us. Nevertheless, it does not reach another equitable doctrine to which we have already referred, and to which we will refer again more fully.

Starting with this general description of the case, one point on which the respondents rely is that the interests which the mortgage represents have given their "consent" within the purview of the statute. As to this, we are compelled to observe that the Supreme Judicial Court of Maine has shown a special disposition to soften off the meaning of the word "consent" in Shaw v. Young, 87 Me. 271, already cited, at page 276, 32 Atl. 897. The opinion passed down in behalf of the court in that case points out the origin and development of the statutes which we have cited. It observes that prior to 1868 a lien could arise only by virtue of a contract "with the owner." Then, in 1868, were introduced the words "by the consent of the owner"; but in the latter statute it was provided that such "consent" should not be inferred unless notice was first given to the owner that a lien would be claimed. The opinion then observes that by the act of 1876, now in-

corporated in the Revised Statutes, which we have quoted, the requirement of notice to the owner was stricken out; but the provision that the owner might give notice of dissent was retained, or substituted, whichever may have been the fact. The opinion reasons that this change materially modified the effect of the word "consent" in favor of the lien claimant, and points out circumstances of a somewhat doubtful character from which the "consent" may be inferred. It cannot be said, however, that the proper lexicographical meaning of the word "consent" was changed by these modifications of the statute. All that can be maintained is that, in view of the modifications, the inferences in favor of "consent" by the owner may be more easily drawn. Applying this, the Supreme Judicial Court of Maine has given more or less effect to the inferences, but in every instance having relation to the questions of fact and not to the questions of law. The latest of these decisions is York v. Mathis, 103 Me. 67, 68 Atl. 746, in which the lien was sustained from rather weak circumstances of fact. Nevertheless, it is there said that something more than "mere acquiescence" is required to constitute a statutory consent. It may be said that the fair description of what may ordinarily be required as amounting to "consent" by the owner is found in Baker v. Waldron, 92 Me. 17, 42 Atl. 225, 60 Am. St. Rep. 483, where, in connection with the delivery of possession of certain real estate by the owner to another party, there was an express stipulation that the other party should make certain improvements on the property. There the owner did not take part in making the improvements; yet he purposely set in motion a train of circumstances out of which the improvements necessarily arose. Consequently in that case he may be fairly said to have consented; and a fair construction of the statute and of the decisions of the Supreme Judicial Court of Maine in reference thereto must come back to something of that nature, that is, to the proposition that, in order that the interests in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily, or reasonably, or ordinarily, resulted in the furnishing of labor and supplies for which a lien is claimed.

As to the relation of the mortgagee to this just rule of the construction of these statutes, we are first to consider the fact that a mortgagee out of possession is not in equity, and in the state of Maine in law, "owner" of the property. The statute does not apply to him by its terms in using the word "owner." There is no just reason why it should be extended by construction to apply to him; and the Supreme Judicial Court of Maine has never held directly that it does apply to him. If he takes possession of the property, receives its income, and directs its management, then, of course, he becomes an "owner," both in equity and at the common law of Maine. Until he does all that, he holds in fact only a lien, as he would in name under the laws of the state of New York and the laws of other states. For all practical purposes, he is no more than the holder of a lien. Having this fact in view as a leading fact, we find no circumstances in this case arising from the claim, to some extent supported by proofs, that the mortgage lienors, whether the trustee or the bondholders, to a certain extent had knowledge of the intended improvements, or of the fact that the im-

provements were being made, or acquiesced therein, or assisted therein by advancing funds to the Bodwell Company for the purpose of making payments to the Milford Company, or placed themselves in a position other than the normal and ordinary position of a mortgagee. Therefore, without going into any questions with reference to the fact that, under some limited circumstances, to a very limited extent, notice to the trustee, like the complainant here, or the knowledge of such trustee, or the qualified acquiescence of such trustee, may or may not bind the holders of negotiable bonds secured by a mortgage to such trustee, we hold that there is not sufficient here to turn aside the fundamental rule affecting mortgagees which we have stated. Therefore we hold that it is not proven here that "consent" has been given, as required by the statutes referred to.

Each respondent further claims that, so far as bonds secured by the mortgage had not been actually disposed of to bona fide holders prior to the contract out of which his lien claim arose, he would be compelled to redeem only to the extent of the bonds so outstanding. Of course, it is understood that in the federal courts any holder of any of these bonds who acquired the same in good faith for a valuable consideration is affected only by what he actually knew, and not at all by what he might have known, or by what he was put on the point of discovery by the use of ordinary diligence. The rule of the federal courts is strict in these particulars. This applies not only to the bonds themselves, but to the security by the way of mortgage which each bond assumes to carry with it.

Mullen claims that no bonds had been disposed of at the time his contract was made, so that, so far as he was concerned, there was no mortgage security affecting him. We think we can dispose of the case by investigating its relations to him, thus covering once for all the whole body of respondents. We have given some of the dates affecting his contract; but we will repeat them in order to give the whole story consecutively.

The trust mortgage was signed and acknowledged by the Bodwell Company on the 1st day of July, 1905. The contract with the Milford Company was executed on the 19th day of July, 1905. This contract provided for payment to the Milford Company of $700,000 of the bonds secured by the mortgage in controversy. The contract with Mullen was made on the 29th day of July, 1905. On the 19th day of July, 1905, the Milford Company accepted an offer from Farson, Leach & Co. to deliver to them this $700,000 of bonds at 90 per cent. and interest. On the 28th day of July, 1905, the Milford Company voted to forward to the complainant for certification $500,000 of these bonds, at which time it had received from the Bodwell Company the entire mass of $700,000 of bonds which were to be delivered to it according to the contract we have spoken of. Therefore at that time it was in the power of the Milford Company to have the bonds certified by the trustee, and to deliver them to Farson, Leach & Co. in accordance with the contract made with them. On the 29th day of July, 1905, which was the same day that the contract was made with Mullen, the Milford Company forwarded $500,000 of the bonds to the com-

plainant for certification and delivery to Farson, Leach & Co.; and the certification was completed on the 31st day of July, 1905, and the bonds actually delivered to Farson, Leach & Co. on the 8th day of August, 1905. As already said, the trust mortgage had been acknowledged and recorded on the 24th day of July, 1905, which was before the contract with Mullen was executed. Therefore, in law Mullen is assumed to have had knowledge of the mortgage at the time his contract was made; the mortgage having been duly executed by all the parties and recorded prior thereto. The bonds were not complete in form, but the sale of them had been perfected; and in equity what was agreed to be done must therefore be held to have been done, notwithstanding the lack of certain formalities which were afterwards completed; so that in equity the sale of the bonds was perfected to Farson, Leach & Co. on the 19th day of July, 1905, 10 days before the contract with Mullen was executed. The certification and delivery of the remainder of the bonds, namely, $200,000, making a total of $700,000, in accordance with the agreement of the 19th day of July, 1905, and the previous contract with the Bodwell Company, was subsequently duly completed; so that the whole transaction took effect as of the 19th day of July, 1905. Thus in equity and for our purposes the whole mass of $700,000 of bonds were delivered to bona fide purchasers before the contract was made with Mullen, and Mullen must therefore certainly, for the reasons already stated, redeem this $700,000 and accumulated interest before his lien can be made of any value.

As all the other respondents maintaining claims for liens are subsequent in priority to Mullen, what we have already said closes the case in favor of the complainant so far as the bonds to the amount of $700,000 disposed of as already described and interest thereon are concerned. Nevertheless, this leaves $300,000 of the bonds which were neither disposed of nor negotiated until after Mullen's lien claim attached, nor, of course, until the other lien claims held by the respondents also attached. On account of this, therefore, the respondents raise a question the answer to which would dispose of the whole case in favor of the complainant, notwithstanding the prior negotiation of the bonds agreed to be paid to the Milford Company in the manner we have determined. The respondents base their answer to this question on a ruling of the Circuit Court of Appeals in the Eighth Circuit, made on November 15, 1897, in Reynolds v. Manhattan Trust Co., 83 Fed. 593, 599, 27 C. C. A. 620, which they maintain decides that each lien claim here has priority as against any bond not actually sold before each respective lien claim attached. That would seem to be the effect of the reasoning of the opinion in that case, although there no bond whatever had been disposed of at the time of the origin of the lien claim in question; and the only authority cited by the court was Peninsular Iron Co. v. Eells, decided by the Circuit Court of Appeals for the same circuit on May 6, 1895 (68 Fed. 24, 15 C. C. A. 189), but the opinion in that case at page 34 of 68 Fed., at page 189 of 15 C. C. A., shows that the mortgage there had been discharged, no bonds having been issued when it was discharged, so the only question was as to the authority to discharge vested in whoever did discharge it. It is not at all the proposition we have before us. On the other

hand, to yield to the decision in Reynolds v. Manhattan Trust Company would be to subvert the universal practice of the federal courts in this particular, disregard all the authorities of any value bearing on the question, and destroy the commercial value of this class of securities. In Central Trust Company v. Louisville Ry., decided by the Circuit Court in the District of Kentucky on October 1, 1895 (70 Fed. 282), the reasoning of the previous authorities stated at page 288, as opposed to the respondents here, seems to be unanswerable. Mr. Chief Justice Waite in Claflin v. South Carolina R. Co. (C. C.) 8 Fed. 118, 125, also explains the position in favor of the complainant here very forcibly. This was in 1880, and the rule as there stated has been followed by the federal courts when it came directly in point. Also, in New Jersey in two suits in favor of the same complainant who appears here on February 26, 1894, in equity (Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539), and on November 14, 1894, at law (Central Trust Co. v. Bartlett, 57 N. J. Law, 206, 30 Atl. 583), the same rule in behalf of the mortgagee and the holders of the bonds secured by the mortgage was positively stated. The proposition seems a simple one. As we have said, the several lienholders here are assumed to have had knowledge of the mortgage from the date it was recorded, which was prior to any time as of which any lien claim accrued, and from that mortgage they are presumed to have known that it secured negotiable bonds which passed by delivery, and so that each became indisputable in the hands of every person acquiring it for a valuable consideration and in good faith. As we have said, any rule other than that which the complainant here maintains would destroy the general negotiability of this class of securities; and, as the principles of estoppel operating in favor of the holders of negotiable securities are sufficient to obviate this evil, we do not hesitate to apply those principles here, without at the present undertaking to determine what the result would be if the obligations secured by the mortgage were not negotiable in character.

We therefore hold that the respondents and each of them must redeem against the outstanding $700,000 of bonds which we have especially described, with interest, and against any other portions of the issue of $1,000,000 of bonds which came into the hands of bona fide holders for a valuable consideration before the Bodwell Company defaulted on its interest payments accruing thereon. We are advised by the record that at least a portion of the remaining $300,000 of bonds, making up the $1,000,000, had been negotiated in the manner we have described. We have not such information from the record as to enable us to determine satisfactorily what portion is covered by this statement. This must go to a master for an accounting in reference thereto.

The complainant will on or before the 21st day of September, 1910, in accordance with rule 21, file a draft decree for a foreclosure and accounting, according to the opinion passed down this 16th day of September, 1910, and the respondents will file corrections thereof on or before the 26th day of the same September; and all questions of costs are reserved.

THE LEADER.

(District Court, W. D. Pennsylvania. · September 23, 1910.)

No. 5.

1. TOWAGE (§ 4*)—RELATION AND DUTIES OF TUG TO TOW—LIABILITY FOR INJURY TO TOW.

One engaging to perform a towage service is neither an insurer nor a common carrier, and his obligation is only to use reasonable care and diligence and ordinary skill in the performance of the work.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. TOWAGE (§ 11*)—INJURY TO TOW—NEGLIGENCE OF TUG.

Libelant, a dredging company, engaged respondent's steamer to tow its dredge and two scows down the Ohio river from one place of work to another. The water was low, and the tow only proceeded after a consultation between the officers of libelant, who were on board the dredge, and the captain of the steamer, which was in charge of a competent pilot. The dredge and scows were placed in front of the steamer, and while proceeding the dredge, which was in front, struck some obstruction under the water, the nature of which was not known, and was injured. *Held*, that the risk from the low stage of the water was assumed by libelant, and that the evidence was insufficient to show that the injury to the dredge was due to any negligence on the part of the steamer, which rendered her liable therefor.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

3. ADMIRALTY (§ 62*)—CROSS-LIBEL—SEPARATE SUITS.

A separate suit, filed by the owner of a steamer against a dredge to recover for towage and for services rendered in raising the dredge after she had sunk, cannot be treated as a cross-libel in a pending suit by the dredge owner against the steamer for injury to the dredge through alleged negligent towing.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 507; Dec. Dig. § 62.*]

In Admiralty. Suit by the Enterprise Contracting Company against the steamer Leader; S. W. Carpenter, claimant. Decree for respondent.

L. C. Barton, for libelant.
Albert Y. Smith, for respondent.

ORR, District Judge. The libelant seeks to recover damages for injuries to a tow, alleged to be the result of negligence on the part of respondent and her officers, who were doing the towing.

It is proper to consider first the measure of duty arising from towage service. In Steamer Webb, 14 Wall. 406, 20 L. Ed. 774, Mr. Justice Strong says:

"It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show, either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, the damage sustained by the tow does not ordinarily raise a presumption that the tug has been at fault. The contract requires

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

no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

The degree of diligence is stated in the cases to be "reasonable diligence," and the degree of skill is stated in the cases to be "ordinary skill." See The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The Samuel E. Bouker (D. C.) 141 Fed. 480; The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Oak, 152 Fed. 973, 82 C. C. A. 327. It is necessary, therefore, to consider whether or not there is sufficient evidence on the part of the libelant to sustain the burden imposed upon it; in other words, whether the evidence produced satisfies the court that the respondents were wanting in reasonable diligence and ordinary skill, and that by reason of such want the injury complained of resulted.

The libelant is a corporation owning a dredgeboat called the Enterprise and two scows, which had been at work at Sewickley, above lock No. 6 on the Ohio river, and were needed at lock No. 11 on said river, some miles below Steubenville, where the libelant had undertaken to perform a contract. An arrangement was made whereby the steamer Leader should tow said Enterprise and scows from Sewickley to the place where they were required. Accordingly, on the 31st day of October, 1909, the steamer Leader left Sewickley with the dredgeboat and scows in tow. In making up the tow the two scows were lashed to the head of the steamboat, and the dredgeboat was lashed to the head of the scows, with her dredge or dipper hanging over the scows. The end of the dredgeboat next to the scows was the perpendicular end or bow of the boat. The other end of the scows was the rake end, the latter being the stern, so that, as the tow proceeded, the rake end or stern of the dredgeboat was forward. No question is raised as to that arrangement. The men in charge of the dredgeboat, representing the libelant, remained thereon until the time of the accident. They were Albert Klicker, the president and general manager, Charles Austin, vice president of the corporation and captain of the boat, Frederick Weaver, watchman, and several other employés. The steamer Leader was fully manned and in charge of a skillful and licensed pilot. It was apparent to any person acquainted with the river that the water was low. According to the testimony of Klicker, the dredgeboat and steamer needed the same amount of water and the dredgeboat required 3½ feet. The steamer and its tow left Sewickley at noon, and proceeded as far as dam No. 6. Klicker says there were only 2.2 feet of water below the dam, which was not enough to proceed with, and there did not seem to be any possibility of getting down the river. They tied up and waited until the next morning, when, according to Klicker, there were 4.2 feet of water. This additional water below the dam appears to have been due to the lowering of several wickets in the dam. There was a consultation between Klicker, Austin, and Capt. Keller, the pilot of the steamboat, with regard to the possibility of getting through. The two former seemed to be anxious to get their boat down, and the latter was willing to proceed, and the result was that they decided to go ahead, and they left dam No. 6, according to the testimony of Austin,

at 3:50 p. m. on November 1st. They all knew they had very little water. Weaver testified that Austin remarked, after leaving lock No. 6, "We have scant water." He further says that the men on the dredgeboat expected something to happen. A few hours later, when near Phillis Island, the rake end of the dredgeboat struck something, and the dredgeboat was so injured and damaged that she filled and sunk. No one seems to know what it was the dredge struck. Austin says he does not know what the dredgeboat hit. Klicker does not know whether the boat hit upon rocks or some other obstruction. The character of the injury suggests its cause. The bottom of the dredgeboat consisted of planks laid crosswise. A number of these planks were injured and broken. The breaks in the planks were all upon a line practically parallel with the side of the dredgeboat. It is probable that an obstruction was hit by the dredgeboat as it was moving, and perhaps was rolled under the boat breaking the successive planks. What it was no one knows, or at all events has not informed the court. The steamboat laid by the dredgeboat and assisted in pumping her out, after the owners of the dredgeboat had made repairs. On the 5th of November the steamer and her tow reached Midland, a few miles below the place of the accident. Austin says they laid at Midland from the 5th to the 12th of November for want of water, and on the night of the 12th of November they got a slight raise, and the next morning they started for Steubenville, and got there that night. From that point the owners of the dredgeboat allowed her to drift down to lock No. 11. That is practically all of the evidence of negligence, saving and excepting some as to the seamanship of Capt. Keller of the Leader.

I am of the opinion that the evidence discloses that the owners of the dredgeboat assumed the ordinary risks of navigation arising from the low water in the river. They knew that the shallower the water the nearer its surface would be unknown and unexpected obstructions. The evidence is clear that there was nothing on the surface of the water to indicate the obstruction against which the dredgeboat struck. Had the dredgeboat been thrust against the bank or a visible obstruction to navigation, or been grounded upon a bar, then, notwithstanding the low water, the respondents might be answerable in damages for their want of seamanship.

The evidence produced on the part of the libelant for the purpose of showing bad seamanship of Capt. Keller is uncertain and indefinite. It rests largely upon the testimony of a discharged employé, who was engineer on the steamer at the time of the accident, to the effect that when there was a jar felt by him, then, although they had been working ahead on a slow bell, the pilot immediately gave him bells to go ahead at full speed. In this he is contradicted by the fireman, who was near him at the time, and by other evidence which satisfies the court that the steamer was backing to steady its tow, as it was proceeding with rapid current. Some other evidence was offered tending to show that the pilot of the steamer did not have his steamer and tow at the proper angle in order to enter and pass through the channel; but the evidence is wholly insufficient for that purpose. It is very doubtful whether any of the parties connected with the li-

belant believed at the time of the accident that the respondent or anybody connected with her was negligent. It appears from the testimony of the secretary of the libelant that the libelant after the accident paid Capt. Carpenter, the owner of the steamboat, moneys due for other services, and when Capt. Carpenter presented his bill for towage did not say to him that they had a defense or a counterclaim by reason of the damages done to the dredgeboat. The dispute with respect to the bill for towage was with regard to the amount, and that only.

After a careful consideration of the evidence, the court is convinced that there was no negligence on the part of respondent.

At the argument it appeared that at No. 8 of May term, in this court (infra), S. W. Carpenter, the owner of the steamboat Leader, had filed a libel against the dredgeboat Enterprise, its master and owner, and it was argued that such libel was a cross-libel in the present case. The court cannot so consider it. A cross-libel is filed in the same proceeding as the original libel, and even an agreement of counsel will not permit that to appear as a cross-libel which is not in fact such. See Ward et al. v. Chamberlain, 62 U. S. (21 How.) 572, 16 L. Ed. 219. But, even if a libel filed at another number and term might by agreement and the permission of court be treated as a cross-libel, it could not be so treated if the matters in the pretended cross-libel were not the proper subject of a cross-libel. Carpenter in his libel seeks to recover for towage and for diving expenses in the matter of raising the dredgeboat. That these are not proper matters of cross-libel in such case as the present appears from a consideration of The Teresa Wolf, 4 Fed. 152, C. B. Sanford, 22 Fed. 863, and Southwestern Transportation Company v. Pittsburg Coal Company, 42 Fed. 920. The matters in the pretended cross-libel, particularly the claim for diving, are distinct from the matters in the present controversy.

As to the libel of Carpenter, the court has this day disposed of that in the proper proceeding. As for the libel in this case, the same should be dismissed, at the cost of the libelant.

Let a decree be drawn accordingly.

THE ENTERPRISE.

(District Court, W. D. Pennsylvania. September 23, 1910.)

No. 8.

1. TOWAGE (§ 7*)—COMPENSATION—CONTRACT.

Where the owner of a steamer, on being asked his charge for towing a dredge and two barges between two points on the Ohio river, answered that he was paid $150 by another company for a similar service, and was thereupon engaged, there was an implied contract for that sum, and he cannot afterward charge by the day for the service, because of delay on account of low water.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 6, 7, 10; Dec. Dig. § 7.*]

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

2. MARITIME LIENS (§ 19*)—PENNSYLVANIA STATUTE—DREDGEBOAT.

Act Pa. April 20, 1858 (P. L. 363), which gives a lien for repairs or supplies furnished on "all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio in this state," does not apply to a dredgeboat without motive power; and in the absence of statute there is no lien on such a boat for towage, or for services rendered in raising her after sinking, under contract with the owners at the place where she was owned.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 24, 25, 27; Dec. Dig. § 19.*

Created by state laws, see note to The Electron, 21 C. C. A. 21.]

In Admiralty. Suit by S. W. Carpenter against the dredgeboat Enterprise; the Enterprise Contracting Company, claimant. Decree for respondent.

Albert Y. Smith, for libelant.

L. C. Barton, for respondent.

ORR, District Judge. This in a libel in rem to recover for towing and for services and expenses in respect to diving, for the benefit of the respondent. The home port of the dredgeboat, if any she has, is where the services were rendered.

The facts with respect to the employment of the libelant, and with respect to the occasion for diving, appear in an opinion this day filed dismissing a libel by the Enterprise Contracting Company, the owners of the dredgeboat, against the steamer Leader, owned by said Carpenter. 181 Fed. 743.

The claim of Carpenter for towing was in the sum of $504, for 12⅔ days. The time expected to be used in towing, at the time of undertaking the same, according to the testimony, was from 2 to 3 days. The additional days were due to standing by the dredgeboat after she had sunk as the result of an accident, until she was put in shape for navigation, and also because of insufficient water to proceed with the tow.

The evidence is clear that the libelant is not entitled to receive over $150 from the respondent for said services. The secretary of the Enterprise Construction Company told Capt. Carpenter that his company wanted the dredgeboat and two scows to be taken from Sewickley to lock No. 11 in the Ohio river, and asked him what he wanted for the service. Capt. Carpenter replied that the Monongahela & Western Company paid him $150 for a similar service. The secretary then asked him if that was what he wanted, and Capt. Carpenter replied, "That is what we get." On notice from another officer of the Enterprise Construction Company, Capt. Carpenter took the dredgeboat and the two scows in tow, without saying anything else as to the price he would demand for the service. The respondent properly had a right to rely upon the figures given him by the libelant, and to suppose that no more would be asked of it than was asked of others for a like service. The additional bill for diving, etc., to the amount of $111.82, is not disputed by the answer, except as to the right of the libelant to a lien therefor.

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

Respondent also raises the question as to the right of a lien for the several services. The right to lien is dependent upon the Acts of Assembly of Pennsylvania. It is insisted by the respondent that there is no act of Pennsylvania which gives a lien for services rendered in a diving and towing contract, and, even if any of the Pennsylvania acts did give a lien for such service, these acts do not apply to dredgeboats. This is true, according to the construction of these acts given in the Court of Appeals for the Third Circuit in The Northern, 135 Fed. 730, 68 C. C. A. 368. It follows, therefore, that the libel must be dismissed, not on its merits, but because otherwise it cannot be maintained.

The libel is dismissed, at the cost of the libelant. Let a decree be drawn accordingly.

BINGHAM AMALGAMATED COPPER CO. v. UTE COPPER CO.

(Circuit Court, D. Utah. August 22, 1910.)

No. 1,018.

1. MINES AND MINERALS (§ 20*)—MINING CLAIMS—MARKING BOUNDARIES ON THE GROUND.

Where stakes were set to mark the boundaries of a mining claim and proper notices posted, it was a sufficient marking upon the ground, even though the corner stakes were not inscribed with the name of the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40–44; Dec. Dig. § 20.*]

2. MINES AND MINERALS (§ 27*)—MINING CLAIMS—CONFLICTING LOCATIONS.

The fact that a mining claim which has gone to final entry without adverse claim includes the original discovery on which a prior claim was based does not necessarily defeat the right of the prior locator to the remainder of his claim, provided other veins have been discovered on such portion, and it appears that there was no actual intent to abandon the claim.

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

3. MINES AND MINERALS (§ 27*)—MINING CLAIMS—CONFLICTING LOCATIONS.

A failure to perform the required annual assessment work on a mining claim does not in and of itself work a forfeiture, but only permits a relocation, and cannot aid an adverse location which was made prior to the year in which the failure occurred.

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

Suit by the Bingham Amalgamated Copper Company against the Ute Copper Company. Decree for plaintiff.

Young & Snow, for complainant.
Dey & Hoppaugh, for defendant.

MARSHALL, District Judge. The defendant applied for a patent for the Abraham lode, and the plaintiff, claiming to be the owner of the Copper Belt No. 1 and the Copper Belt No. 2 lodes, filed its adverse claim to that application, and brought this suit in its support. The claims of the plaintiff include the entire claim of the defendant. The Copper Belt No. 1 and Copper Belt No. 2 were located on De-

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

cember 20, 1905, the Abraham on February 25, 1906; so that, if the plaintiff's claims were validly located, its superiority in right is apparent. It is not denied that an attempt was made by miners of some experience to locate the Copper Belt claims on the date mentioned; so that, being first in time, all reasonable intendments are in favor of the plaintiff's right. It is first objected to these locations that they were not so marked upon the ground that their boundaries could be readily traced. The evidence for the plaintiff is somewhat confusing and contradictory; and I am asked to disbelieve it. No affirmative evidence on the point is introduced by the defendant. The evidence for the plaintiff does not raise any suspicion that it has been concocted. The lack of memory as to the character of the staking, and of entire agreement between the witnesses, rather justifies the inference of honesty in witnesses who are somewhat lacking in business accuracy, rather than a prearranged conspiracy to establish a false claim. Besides this, the evidence as to the existence of the stakes is so corroborated that I am not justified in disbelieving it. Granted the staking and the placing of the location notices, I think the claims were sufficiently marked upon the ground, even if the corner stakes were not inscribed with the name of the claim. Smith v. Newell (C. C.) 86 Fed. 56.

The most serious objection is that, since this suit was brought, the Ute mining claim and the Winnifred mining claim have gone to final entry without any adverse claim on the part of the plaintiff; and, as so entered, the Ute includes the discovery of the Copper Belt No. 1, and the Winnifred a point which the defendant contends was the discovery of the Copper Belt No. 2. It is therefore argued that the claims, losing their discoveries, have ceased to exist. The Ute and Winnifred claims were located May 18, 1907, by Thomas Weir, an officer of the defendant company, and passed to final entry on December 31, 1908. Assuming, without deciding, that a final entry is the equivalent of a patent with respect to this issue, the question arises: What has been finally determined by the entry? It must be held to have been conclusively decided that, so far as those claims included parts of the plaintiff's claims, the owner of the Ute and Winnifred had the better right, and the plaintiff no valid adverse claim thereto; in other words, that on May 18, 1907, when the Ute and Winnifred were located, the ground covered by them was open to location and not owned by the plaintiff. Unless this be entirely inconsistent with the plaintiff's right to the remainder of the claims, it is no bar to this action. If the Ute and Winnifred had been prior in time to the plaintiff's locations, no right would have accrued to the plaintiff from a discovery on ground not open to location (Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348) but if thereafter, and before the intervention of other rights, the plaintiff had discovered a vein within the parts of its claims open to appropriation, its locations would have been good, so far as the ground was so open to appropriation. In other words, loss of the titular discovery is not necessarily loss of the claim. Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482.

In 1906, before the location of the Ute, but after the location of the Abraham, the Copper Belt No. 1 had discovered and worked a vein in the Bullock tunnel, situated in that part of the claim not covered by the Ute. Is this superiority in right of the Ute conclusive of the fact that no valid location was made by the plaintiff's grantor on December 20, 1905? It is evident that the plaintiff ought not to be precluded from showing any fact not necessarily inconsistent with the validity of the Ute. The superiority of the Ute can be supported by an abandonment of that part of the plaintiff's claims conflicting with it, and its failure to adverse the Ute application itself worked that abandonment, but left the residue of the Copper Belt No. 1 claim unaffected, provided a vein had been discovered on that residue. This was the decision in Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11, and is not inconsistent with any other case, except where, as in Colorado, the state statute requires a formal discovery shaft. If this be so, there is no insuperable objection to the evidence that the plaintiff's claims were validly located and in force when it was attempted to locate the Abraham; and hence that the latter location never had any effect. Even if the abandonment of the plaintiff's discovery as of the date of the location of the Ute May 18, 1907, worked an abandonment of the entire claim, this would not operate to validate the Abraham which was located before that abandonment, and when the ground was not open to location. It is true that an abandonment of the part of the claim which includes the discovery is evidence of an intent to abandon the entire claim, but, when the vein had been discovered on the remainder, it will not necessarily have that effect; and as to such remainder it will be a question of intent. When the evidence shows, as in this case, that the failure to file an adverse claim was due to ignorance of the application for patent, the intent to abandon the remainder cannot properly be inferred.

With respect to the Copper Belt No. 2, I think the evidence justifies the conclusion that the original discovery was at a point within what was afterwards located as the Abraham and excluded from the Winnifred.

The further objection that, when the Copper Belt claims were located, the ground was not open to location because of the existence of the Panama claim, is sufficiently answered by the suggestion that the evidence fails to show a valid location of the Panama. Smith v. Newell (C. C.) 86 Fed. 56.

The contention is also made that, because the plaintiff failed to affirmatively show the performance of assessment work for its claim for the year 1908, it must be denied relief. A failure to perform the required annual labor does not in and of itself work a forfeiture. It only permits a relocation. As the Abraham claim was located February 25, 1906, it cannot be considered a relocation of the plaintiff's claims based on the failure to perform the annual labor for 1908. The performance of such annual labor was irrelevant here and evidence thereof was properly omitted.

It follows that a decree must go for the plaintiff for that part of its claims in conflict with the Abraham lode.

KARNS v. W. L. IMLAY RAPID CYANIDE PROCESS CO. et al.

(Circuit Court, E. D. Pennsylvania. October 3, 1910.)

No. 477.

COURTS (§ 357*)—COSTS (§ 136*)—SECURITY FOR PAYMENT—POWER OF FEDERAL COURT OF EQUITY TO REQUIRE—WAIVER OF RIGHT.

A federal court of equity has power to require a nonresident plaintiff to give security for costs; without any statute or rule of court specially providing therefor; but the exercise of such power is discretionary, and security will not be required where the nonresidence of plaintiff was disclosed by the bill, but defendant made no motion therefor for several months, during which the issues have been made up and a large part of the testimony has been taken.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 357;* Costs, Cent. Dig. §§ 531–536; Dec. Dig. § 136.*]

In Equity. Suit by B. F. Karns against the W. L. Imlay Rapid Cyanide Process Company and others. On motion that plaintiff enter security for costs. Motion denied.

J. H. McCreery, for plaintiff.

W. H. G. Gould, for defendants.

J. B. McPHERSON, District Judge. The Circuit Court of this district has no general rule requiring a nonresident plaintiff in equity to enter security for costs, although such a rule exists on the law side of the court. Neither has the subject been dealt with either by a rule of the Supreme Court or a federal statute, or by an act of assembly in Pennsylvania or a rule of the appellate court of the state. The authority of the Circuit Court to require the security must therefore be found, if anywhere, in the ancient and established practice of the English chancery and of our own equity tribunals. The plaintiff's objection to the motion rests mainly on the argument that a court of equity does not ordinarily require the security—the reason being (so it is said) that a court of equity has ample power to enforce a decree for costs by attaching the plaintiff's person, whereas a court of law may only issue execution against his property. No doubt an attachment for contempt is a more drastic remedy than a fi. fa., but it cannot be made effective unless the plaintiff's person is within the court's jurisdiction; and it is probably safe to assume that (being a nonresident) this is precisely the place he is likely to avoid. But the question need not be discussed upon principle; it is well settled by authority that courts of equity have long exercised the power to require a nonresident plaintiff to enter security. In volume 1 of Daniell's Chancery Pleading and Practice (3d Am. Ed.), at page 28 et seq., the subject is treated at length, and the following statement about the practice is abundantly supported:

"In order, however, to prevent the defendant from being deprived of his right to costs, it is a rule that if a plaintiff in a suit is a resident abroad the court will, on the application of the defendant, order him to give security for the costs of the suit, and in the meantime direct all proceedings to be stayed."

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

See, also, Newman v. Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249; Binns v. Mount, 28 N. J. Eq. 25; Baldwin v. Williamson, 1 Hopk. Ch. (N. Y.) 117.

In 11 Cyc. 171, the rule is stated as follows:

"In America, also, in practically all jurisdictions, it is competent and customary to require a nonresident of the state to give security for costs, this being the usual ground for requiring security. It is probably true that in most jurisdictions there is express statutory authorization for so doing; but notwithstanding this fact it may be asserted with confidence that the right to require security for costs from a nonresident suitor, whether in law or in equity, exists here as in England without any statute or rule of court specially providing therefor, and that the statutes are merely declaratory of the common law."

See cases cited in notes 92 and 93.

In section 574 of his recent treatise upon Federal Equity Practice, Mr. Street states the rule briefly:

"As regards nonresidents, the practice in the federal courts has always been to require security for costs, a requirement in conformity with the English chancery from a remote period"—citing numerous supporting cases in note 15.

See, also, 5 Decennial Digest, cases under title Costs, § 110.

But, while the power is clear, I do not think it should be exercised in the present case. A defendant's right or privilege to ask for security may undoubtedly be waived by laches, as clearly appears in several of the foregoing references; and, while the decisions differ concerning the point of time at which the defendant's delay will bar his right or privilege, I am not advised of any case in which security was exacted at so late a stage of the proceeding as the present controversy had attained when the motion under consideration was made. The foreign residence of the plaintiff appeared on the face of his bill; but, although the case has been pending for several months and the defendants have answered fully, and although an unusual number of motions have been presented to the court for decision, and although the parties have taken several hundred pages of testimony and have almost finished the preparation of the case for final hearing, no effort was made until very recently to require the entry of security. If a real need for security existed, it must have been apparent long ago. No peculiar situation and no special circumstances are averred; and in my opinion, therefore, the defendants must be held to have waived whatever right they may have had originally to ask for protection.

The motion is refused.

See Winkley Co. v. Bowen (C. C.) 180 Fed. 624.

WITHEROW v. SOUTH SIDE TRUST CO. OF PITTSBURGH.

(Circuit Court of Appeals, Third Circuit. October 3, 1910.)

No. 1,296.

BANKRUPTCY (§ 318*)—CLAIMS—RENTS.

A contract between W., the lessee of a hotel, and B., subsequently adjudged a bankrupt, provided that the latter should pay to W. as rent a specified sum in monthly instalments, making actual payment, however, to the original lessor, whose receipts delivered to W. within five days after due and prompt payment of each instalment of rent, should be a complete discharge of B. from his liability for that instalment; it being agreed that, should the rent remain unpaid for 60 days after it became due, W., at his option, might consider B. as tenant at will and re-enter after 15 days' notice, and that B., his heirs, etc., waived the benefit of all exemption laws in the execution of any judgment for rent. *Held*, that, whether the contract should be treated as an assignment on the one hand, or a sublease on the other, the provision for actual payment of rent by B. to the original lessor dominated all the expressions in the contract apparently inconsistent with it, and reserved to the original lessor the exclusive right to collect the rent and to proceed by distress against B.'s property, so that W. could not maintain a claim for rent in arrear against B.'s estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Action by William Witherow against the South Side Trust Company of Pittsburgh, as trustee in bankruptcy of the estate of Howard Bayley, bankrupt. From a decree affirming a referee's decision overruling exceptions to the final account, Witherow appeals. Affirmed.

Thomas Patterson, John C. Slack, and W. D. N. Rogers (Patterson, Sterrett & Acheson and Richardson & Rogers, of counsel), for appellant.

J. M. Shields (W. S. Thomas, of counsel), for appellee.

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

BRADFORD, District Judge. This case is before us on an appeal by William Witherow from a decree of the district court of the United States for the western district of Pennsylvania, affirming a decision of a referee in bankruptcy overruling exceptions taken by Witherow to the final account of the South Side Trust Company of Pittsburgh, trustee of the estate of Howard Bayley, bankrupt. The Hotel Duquesne, in Pittsburgh, Pennsylvania, was leased by A. W. Mellon, its owner, to William Witherow, the appellant, by an instrument under seal bearing date October 20, 1903, for a term of ten years from and after April 1, 1904, for an annual rental of $30,000, payable in monthly instalments of $2,500 on the first day of each month beginning April 1, 1904. Witherow having taken possession of the premises under the lease entered as party of the first part into an agreement under seal with Howard Bayley as party of the second part, bearing date June 22, 1906, which contained, among others, the following provisions:

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

"Whereas the parties hereto have entered into an agreement dated June 12, 1906, whereby the first party agreed to sell to the second party the first party's hotel business known as Hotel Duquesne, and to sublet to the second party the premises * * * which the first party holds under a lease from A. W. Mellon, and in which the first party has heretofore carried on said hotel business, to have and to hold for the remainder of the term of said lease, subject to each and all of the provisions thereof, and upon the same terms and conditions and for the same rental as therein provided so far as they may apply to this sublease: * * * Now this agreement, made for the purpose of carrying into effect the above-recited contract between the parties hereto, except in so far as the terms of the Mellon lease may herein be expressly modified or supplemented, and for the purpose of establishing between the parties hereto the relation of landlord and tenant, with all the right and liabilities attaching to that relation at law, in equity and by statute: Witnesseth, that the first party hereby sublets to the second party from the twenty-fifth day of June, 1906, for and during the term of seven years, nine months and seven days, that is until April 1st, 1914, reserving as rent the several sums hereinafter covenanted to be paid by the second party, the following described premises: All that certain building, curtilage and appurtenance known as the Hotel Duquesne. * * * In consideration whereof the second party, for himself, his heirs, executors, administrators and assigns, covenants and agrees that he will pay to the first party as rent the sum of two hundred and thirty two thousand five hundred dollars ($232,500), in the manner following: Twenty-five hundred dollars ($2,500) on the first day of July, 1906, and the sum of twenty-five hundred dollars ($2,500) on the first day of each and every month following the date last aforesaid until the whole amount of said rent is paid, making actual payment, however, of said several sums to A. W. Mellon, whose receipts, delivered to the first party within five days after due and prompt payment of each installment of rent, shall be a complete discharge of the second party from his liability for said installment. * * * It is agreed between the parties hereto that should the aforesaid rent or any part thereof * * * remain unpaid for a period of sixty days after the same shall become due and payable, the first party at his option may then consider the second party as tenant at will and may after fifteen days' notice in writing, left upon the premises, re-enter and re-possess himself of said premises, using such and so much force as is necessary to that end. And the second party, for himself, his heirs, executors, administrators and assigns, hereby waives the benefit of all laws and Acts of Assembly exempting property of any amount of value from levy and sale on execution or distress for rent upon any landlord's warrant that may be issued, or upon any execution or any judgment that may be recovered for rent to become due under this lease. It is further agreed between the parties hereto that the second party shall give up possession of the leased premises promptly at the end of the term, or at the time of such earlier termination thereof as may result from the enforcement of this contract, without any other or further notice so to do than this contract expressly provides for."

The above agreement contains other provisions unnecessary here to be quoted. Bayley entered into possession of the hotel premises under this agreement and by August 1, 1907, made default with respect to the payment of several of the monthly instalments, amounting in the aggregate to upwards of $14,000. Witherow on or about that day issued a landlord's warrant for the collection of such overdue and unpaid instalments as rent, under which levy was made upon the furniture, fixtures and other chattels of Bayley in the hotel. Bayley on his own petition, filed August 6, 1907, was on that day adjudicated a bankrupt, and on the same day Witherow and the Pittsburgh Brewing Company obtained the appointment of the South Side Trust Company of Pittsburgh as receiver to take charge of all the assets of the bankrupt and

conduct the business of the hotel. With the acquiescence of Witherow an order was obtained on the next following day restraining him from further proceeding on the warrant. Subsequently, September 7, 1907, the South Side Trust Company of Pittsburgh was appointed trustee of the estate of the bankrupt. During the course of the administration of the bankrupt's estate, Witherow became the purchaser of the personal property which had been seized under the distress warrant for the price of $4,325, which amount after confirmation of the sale he paid to the trustee. The trustee filed its second and final account in September, 1908, showing a balance of $267.83 due the trustee. To this account Witherow took six exceptions. It is unnecessary to refer to them in detail. They were all bottomed upon or related either directly or indirectly to the failure of the trustee to recognize his claim to receive rent under the above mentioned agreement of June 22, 1906. The exceptions were overruled by the referee, and in his findings and decision Witherow alleged error. There are thirteen assignments. They, like his exceptions to the final account of the trustee, all turn upon whatever rights he may have had under the agreement of June 22, 1906; for it does not appear that aside from that agreement he has any claim against the estate of the bankrupt. The decision of the question presented by the tenth assignment will be sufficient to dispose of this case. That assignment is as follows:

"10th. The court erred in dismissing the ninth exception of William Witherow to the report of the referee relating to the finding by the referee that the right of distress was not reserved in the lease aforesaid."

The ninth exception referred to is as follows:

"Ninth. The referee erred in his finding that the right of distress was not reserved to your petitioner by the terms of the aforesaid contract of lease."

There has been much contention between counsel over the question whether the agreement of June 22, 1906, was a sub-lease, on the one hand, or, on the other, an assignment. But in the view we take of the case this point is wholly immaterial. Whatever name may be applied to that instrument or whatever may be its general nature, the vital question is whether or not Witherow had a right under its provisions, express or implied, by any proceeding in invitum to collect as rent from Bayley or his estate in bankruptcy the sum or any part of the sum for which the distress warrant was issued. For the proper determination of this question the agreement must be read as a whole. It is true that it is therein stated that it was made "for the purpose of establishing between the parties hereto the relation of landlord and tenant, with all the right and liabilities attaching to that relation at law, in equity and by statute," and, further, that Bayley "waives the benefit of all laws and Acts of Assembly exempting property of any amount of value from levy and sale on execution or distress for rent upon any landlord's warrant that may be issued, or upon any execution or any judgment that may be recovered for rent to become due under this lease." It is, however, nowhere expressly provided in the agreement that the party of the first part, Witherow, should have a right to issue a landlord's warrant or distrain for or otherwise collect the several sums specified as rent or any part thereof. It is expressly provided,

on the contrary, that "actual payment" of the several sums specified as instalments of rent should be made to Mellon whose receipts, delivered to Witherow as stipulated, should be a complete discharge of Bayley from his liability for the instalments so receipted for. It fairly may be inferred from the somewhat unusual character of this provision that it was inserted not without due consideration by the parties, and to effectuate their actual intention. Its purpose is manifest. Bayley's payment of the stipulated instalments to Mellon would not only relieve Witherow from all obligation to pay to Mellon corresponding instalments of rent equal in amount falling due under the lease from Mellon to him, but at the same time protect Bayley against the enforcement by Witherow of what would otherwise have been a liability to him on Bayley's part. The provision for actual payment by Bayley to Mellon of the instalments is controlling. It dominates all expressions apparently inconsistent with it. It conferred upon Mellon the exclusive right to demand and collect the stipulated instalments from Bayley, and, having such exclusive right, Mellon alone had authority under the agreement to proceed by way of distress against Bayley's property. There is nothing in the agreement to indicate that the instalments so to be paid by Bayley to Mellon were to be received by the latter as the agent of Witherow or for the beneficial use of the latter. Nor did the doctrine of subrogation confer upon Witherow even a color of right to distrain. It does not appear that he paid to Mellon any instalment or any part thereof accruing after the execution of the agreement between Witherow and Bayley. It is unnecessary to express any opinion as to the effect of such a payment, had one been made. We are satisfied that Witherow had no right to distrain for the instalments in question or to receive any part thereof from the estate of the bankrupt. This conclusion renders any consideration of the other questions raised in the case unnecessary For, as already stated, aside from his alleged claim for rent Witherow has made no demand against the bankrupt estate. The decree of the court below must be affirmed, with costs, and it is so ordered.

COPE v. BEAUMONT.

(Circuit Court of Appeals, Third Circuit. October 3, 1910.)

No. 1,286.

1. CONTRACTS (§ 289*) — WORK AND LABOR (§ 12*) — BUILDING CONTRACT — ARCHITECT'S CERTIFICATE.

Where plaintiff contracted to make certain alterations and additions to a building under the directions and to the satisfaction of an architect, acting as agent for the owner, who agreed to make final payment within 30 days after the contract was finished, provided the architect should certify in writing that all the work, on the performance of which payment was to become due, was done to his satisfaction, and, after the contractor had completed performance, the architect refused a final certificate, plaintiff could recover on the contract, provided he could prove substantial performance, and that the architect's certificate had been fraudulently withheld, and if the contract had not been sub-

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

stantially performed, but the work done was accepted by the owner, then plaintiff could recover the reasonable value thereof on quantum meruit under the common counts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1310, 1311; Dec. Dig. § 289;* Work and Labor, Cent. Dig. § 27; Dec. Dig. § 12.*]

2. CONTRACTS (§ 353*) — BUILDING CONTRACT — PERFORMANCE — ARCHITECT'S CERTIFICATE—INSTRUCTIONS.

Where a building contract provided for payment only on an architect's certificate, which was refused, and the builder sued, alleging that the certificate had been fraudulently withheld, an instruction authorizing a recovery on the contract in case the jury found from all the evidence that the architect ought reasonably and fairly to have been satisfied with the work and approved it, and issued his final certificate, was erroneous, as substituting the judgment of the jury for that of the architect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1840; Dec. Dig. § 353.*]

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

Action by Wilbert Beaumont against John Purdy Cope. Judgment for plaintiff, and defendant brings error. Reversed.

C. L. Cole, for plaintiff in error.

George A. Bourgeois, for defendant in error.

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

LANNING, Circuit Judge. On March 19, 1907, Wilbert Beaumont, contractor, and John Purdy Cope, owner of the Water Gap House, at Delaware Water Gap, Pa., entered into a written agreement, by which Beaumont agreed to make certain alterations and additions to the Water Gap House "under the direction and to the satisfaction of S. Hudson Vaughn, architect, acting as agent for the owner." The contract price for the work was $22,710. Seven partial payments, aggregating $12,500, were required to be made during the progress of the work. It was provided that the eighth and final payment of $10,210 should be made when the building was entirely completed. It was further provided:

"That the final payment shall be made within thirty days after this contract is completely finished, provided that in each of the cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction."

Beaumont has received from Cope the sum of $12,500.

In his declaration Beaumont, the plaintiff, avers generally in a special count the performance of all conditions precedent except certain alterations, which he declares Cope, the defendant, waived. He also avers that Vaughn, the architect, fraudulently neglected and refused to issue his final certificate. The claim under the special count is for $11,112.51. The declaration also contains the common counts in indebitatus assumpsit for $25,000; a bill of particulars being added containing an item for extra work amounting to $955.24. The pleas filed raise, under the special count, the issue as to whether the final cer-

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

tificate was fraudulently withheld by the architect, and whether the work was substantially performed. Issue was also joined on the common counts.

From the foregoing statement it will be observed that the case has a dual aspect. Recovery might be had under the special count, provided the contract were substantially performed and the architect's certificate fraudulently withheld; on the other hand, if the contract were not substantially performed, but the work done was accepted by the defendant, Cope, then there could be a recovery on a quantum meruit under the common counts. Bozarth v. Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Lumber Co. v. Sharp, 190 Pa. 256, 42 Atl. 685; Batchelor v. Kirkbride (C. C.) 26 Fed. 899; City of Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321; Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668; Welch v. Hubschmitt Co., 61 N. J. Law, 57, 38 Atl. 824. It is not possible, on the record before us, to tell on which of the two grounds of recovery the verdict rests. It was for the plaintiff for $10,828.01, with interest from September 2, 1907. It was not for the full amount claimed. We do not know whether the jury considered the work substantially performed and the certificate fraudulently withheld, or whether the verdict was rendered on the common counts on the theory that the work was accepted by the defendant. If, therefore, there was any error in the charge of the court respecting the alleged fraudulent withholding of the architect's certificate, we shall be compelled to reverse the judgment.

One of the assignments of error is that the court erred in charging the jury as follows:

"As to the certificate, was it withheld in bad faith? Ought the architect, in the exercise of fair and reasonable judgment, to have approved the work and issued the final certificate? Was he, in fact, satisfied with it, although he professed to be dissatisfied? Does the weight of all the evidence bearing upon this question show that the certificate was rightfully withheld, or does it show that it was fraudulently withheld? That is to say, does it show that the architect acted in bad faith in withholding it? You should consider, in this connection, the acts as well as the words of the architect, and also the condition of the work, as to whether it was fully performed or not and also its character, and all other evidence tending to show whether or not the architect ought reasonably and fairly to have been satisfied with the work and approved it, and issued his final certificate."

This portion of the charge related, of course, to the claim based on the special count. The contract, as we have seen, provided that the work was to be done under the direction and to the satisfaction of the architect, and that previous to each payment he should certify in writing that the work had been done "to his satisfaction." This was the contract between the parties. We cannot alter it. We cannot require that the liability of the defendant Cope shall depend upon the judgment of the jury as to whether the architect ought "reasonably and fairly to have been satisfied with the work and approved it, and issued his final certificate." Some of the language above quoted from the charge is unobjectionable, but, ending as it does, with the distinct statement that the jury should consider all

the evidence "tending to show whether or not the architect ought reasonably and fairly to have been satisfied with the work and approved it, and issued his final certificate," it gave to the jury an improper direction in the discharge of their duty. The jury may have been satisfied that the architect "ought reasonably and fairly to have been satisfied with the work and approved it," and yet the architect, in the exercise of his judgment, may have differed with the jury and withheld his certificate in perfect good faith and without fraud.

In Bradner v. Roffsell, 57 N. J. Law, 412, 31 Atl. 387, the highest court of New Jersey said:

"But the verdict was for the whole of the unpaid price, and must obviously have rested upon the fraud of the architect in withholding a complete certificate. In presenting that subject to the jury, the trial court charged that, 'if not waived, it (the certificate of the architect) may be dispensed with only by proof that the certificate was withheld by fraud on the part of the architect. It would be prima facie evidence of fraud if the architect withheld his certificate without any substantial reason for so doing.' An exception was taken to the last sentence of this instruction, and an assignment of error is based thereon. In the Supreme Court this instruction was justly deemed open to objection, because the use of the word 'substantial' tended to substitute the judgment of the jury for the decision of the architect. In Chism v. Schipper, the learned Chief Justice, who delivered the opinion of the majority of the court, carefully pointed out the need of watchful judicial supervision over the determination of juries on this question, and declared that the architect's conduct could not be impeached for want of skill or knowledge, or because his judgments do not agree with those of others. To instruct a jury that they may find fraud from the withholding of such a certificate without a substantial reason is to permit them to determine what are substantial reasons, and, if in their judgment there are none, then, though the architect's judgment may be honestly otherwise, to convict him of fraud."

In Gwynne v. Hitchner & Yerkes, 66 N. J. Law, 97, 48 Atl. 571, it appears that Gwynne agreed on his part to perform his work as an employé of Hitchner and Yerkes "in a workmanlike manner and satisfactory to said Hitchner and Yerkes." Before the expiration of the stipulated term of service, Gwynne was discharged by his employers, and he thereupon sued to recover damages for the alleged breach of the contract. The trial judge charged the jury that if it found that the plaintiff did not do the work in a skillful and workmanlike manner the employers were entitled to a verdict, but if it was found that the plaintiff did his work in a workmanlike and skillful manner and to the reasonable satisfaction of the employers, not to the satisfaction that would be the result of a whim or fancy or notion, then the plaintiff was entitled to a verdict. The Supreme Court said: "In substance and effect, the trial judge left it to the jury to determine, under the evidence, whether the employers had any reasonable cause to be dissatisfied, and, if not, then the plaintiff was entitled to recover." It was held that the instructions given by the trial judge were erroneous, and the judgment was reversed.

If it were possible for us to satisfy ourselves that the verdict of the jury in the case now in hand rested upon the common counts and not on the special count, we might perhaps affirm the judgment. But we cannot do this. The fact is that no special importance seems to have been attached to the common counts in the course of the trial, and on the argument before us they were scarcely mentioned.

It is unnecessary to refer to the other assignments of error. We are forced to the conclusion that the above-quoted instruction to the jury vitiates the verdict and the judgment entered on it. The judgment is therefore reversed and the record remanded, with direction to award a venire de novo.

LEONARD v. LENNOX.

(Circuit Court of Appeals, Eighth Circuit. September 21, 1910.)

No. 2,721.

(Syllabus by the Court.)

1. PUBLIC LANDS (§ 110*)—ESSENTIALS OF RIGHT TO PATENT.

To entitle one to a patent under the public land laws it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the Land Department thereunder.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 308, 309; Dec. Dig. § 110.*]

2. PUBLIC LANDS (§ 110*)—RIGHT TO PATENT AS AFFECTED BY MINERAL CHARACTER OF LAND—TIME TO WHICH INQUIRY MUST BE DIRECTED.

When the right to a patent under such a law as the soldier's additional homestead law depends upon whether the land is agricultural or is known to be chiefly valuable for coal, that question must be determined according to the conditions existing at the time when the applicant complies with all the requirements of the statute and the authoritative regulations. If at that time the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions; but, if before such compliance it is discovered that the land is thus valuable for coal, nothing that he subsequently may do will give him a right to a patent, because land known to be of that character is not subject to acquisition under such a law, but only under the coal land law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 308; Dec. Dig. § 110.*]

3. EVIDENCE (§ 47*)—REGULATIONS OF LAND DEPARTMENT—JUDICIAL NOTICE.

Courts take judicial notice of the regulations of the Land Department, and when required to pass upon the existence of a particular regulation, as when ascertaining any other fact of which they take judicial notice, may resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most appropriate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 69; Dec. Dig. § 47.*]

4. PUBLIC LANDS (§ 97*)—LAND DEPARTMENT—POWER TO PRESCRIBE REGULATIONS.

The Commissioner of the General Land Office and the Secretary of the Interior, although powerless to adopt a regulation which is in any wise inconsistent with, or repugnant to, the public land laws, are empowered to enforce, by appropriate regulations, every part of those laws, as to which it is not otherwise specially provided.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 288, 289; Dec. Dig. § 97.*]

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

5. PUBLIC LANDS (§ 98*)—REGULATION REQUIRING NONSALINE SHOWING.
The regulation of the Land Department prescribed November 19, 1901, requiring applicants under the nonmineral laws to support their applications by a showing that the land applied for is nonsaline, is a valid regulation, and an applicant under the soldier's additional homestead law does not do all that he is required to do to entitle him to a patent until he complies with that regulation.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 290; Dec. Dig. § 98.*]

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

Bill by William Lennox against John C. Leonard. Decree for plaintiff, and defendant appeals. Reversed, with directions.

William V. Hodges (Clayton C. Dorsey, A. A. Hoehling, Jr., and C. W. Darrow, on the brief), for appellant.

Joseph C. Helm and John R. Dixon (C. A. Roberts, on the brief), for appellee.

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

VAN DEVANTER, Circuit Judge. Under a patent from the United States issued to him under the coal land law (Rev. St. § 2347 et seq. [U. S. Comp. St. 1901, p. 1440]), the appellant holds the title to a parcel of land in Colorado which the appellee insists should have been patented to him under the soldier's additional homestead law (Rev. St. § 2306 [U. S. Comp. St. 1901, p. 1415]), and would have been so patented but for a material error of law committed by the Land Department in a contest between the appellant and the appellee relating to the character of the land.

Public lands known to be chiefly valuable for their deposits of coal are not subject to acquisition under the soldier's additional homestead law, but only under the coal land law, and, upon the evidence produced in the contest just mentioned, the Land Department found that the land now in question was known to be chiefly valuable for its deposits of coal and because of that finding rejected an application by the appellee to enter the land as a soldier's additional homestead and sustained an application by the appellant to purchase it as coal land. The appellee's application had been presented to the local land office on April 19, 1902, and, without allowance or rejection by that office, had been forwarded to the General Land Office at Washington for examination and consideration, as was required by an authoritative and long-existing regulation. As so presented and forwarded, the application was complete and perfect, in the sense that nothing remained to be done by the appellee to entitle him to a patent, unless it was incumbent upon him, under another regulation, to support the application by a showing that the land was not saline; that is, did not contain salt springs, or deposits of salt in any form, rendering it chiefly valuable therefor. The application was accompanied by a nonmineral affidavit, but not by a showing that the land was not saline. This omission, if it was such, was supplied after the hearing in the contest, but not be-

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

fore. In the meantime the appellant, alleging that the land was chiefly valuable for its deposits of coal, made application to purchase it under the coal land law, and this led to the contest and a full hearing therein, as a result of which it was found that the land was chiefly valuable for its deposits of coal and was known to be so when the contest was initiated. This finding was rested principally upon evidence of exploration of the land and discoveries of coal therein by the appellant subsequently to the presentation of the appellee's application and prior to the initiation of the contest; and, whilst the appellee objected to the consideration of this evidence, effect was given to it because the Commissioner of the General Land Office and the Secretary of the Interior were of opinion, as is disclosed by their decisions, that an authoritative regulation in force at the time of the appellee's application required him to support it by a showing that the land was not saline, that in the absence of such a showing his application was incomplete in the sense that he had not done all that he was required to do to entitle him to a patent, and that in consequence the character of the land was not to be determined solely by the conditions existing at the time the application was presented, but in the light of any subsequent exploration and discoveries which may have occurred while the application was still incomplete.

After these proceedings in the Land Department had resulted in the sale and patenting of the land to the appellant under the coal land law, the appellee by this suit sought to charge the appellant as a trustee and to obtain an enforced conveyance; the theory upon which the suit was brought being that the Land Department in considering and giving effect to the evidence of the subsequent exploration and discoveries committed a material error of law which resulted in the patenting of the land to the appellant when it should have been patented to the appellee. In the Circuit Court this theory prevailed, and the appellee obtained a decree which is challenged by this appeal.

The questions presented must be considered in the light of these well-settled rules relating to the administration and execution of the public land laws:

1. When a patent is issued by the officers of the Land Department, to whose supervision and control are intrusted the various proceedings incident to the disposal of the public lands, all reasonable presumptions are indulged in support of their action, and it is only when it is clear that some material error of law, imposition, or fraud has resulted in the issuance of a patent to one applicant when it should have been issued to another that the action of those officers successfully can be called in question and the patentee declared a trustee for the unsuccessful applicant and required to transfer the title to him.

2. To entitle an unsuccessful applicant to such relief, it is incumbent upon him affirmatively and clearly to show not merely that his claim to the land was older or better than that of the patentee, but that it was such a claim as in law should have been respected by the Land Department and, being respected, would have given him the patent.

3. When one becomes entitled to a patent, he is treated as the beneficial owner of the land, and the United States is regarded as holding the naked legal title in trust for him, and, if in this situation the Land

Department transfers the title to another, he takes it charged with the trust.

4. To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the Land Department thereunder.

5. When the right to a patent under such a law as the soldier's additional homestead law depends upon whether the land is agricultural or is known to be chiefly valuable for coal, that question must be determined according to the conditions existing at the time when the applicant complies with all the requirements of the statute and the authoritative regulations. If at that time the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions; but, if before such compliance it is discovered that the land is thus valuable for coal, nothing that he subsequently may do will give him a right to a patent, because land known to be of that character is not subject to acquisition under such a law, but only under the coal land law.

The bill of complaint charges that at the time of presenting his application to the local land office the appellee fully complied with all the requirements of the law and the regulations of the Land Department relating to such applications, that he then lawfully secured an entry of the land and became its equitable owner, that there was no authoritative regulation requiring him to support his application by a showing that the land was not saline, that even if there was such a regulation the local land officers waived compliance therewith by not insisting thereon, and that the finding respecting the character of the land was not sustained by any substantial evidence. These allegations, it is insisted by the appellee, must be regarded as admitted, because in the Circuit Court the case was heard upon a general demurrer to the bill. But we think the allegations and the admission are materially restrained by what otherwise is disclosed by the bill and the exhibits which, in terms, are made part of it. The exhibits embrace copies of the proceedings in the Land Department, including the evidence in the contest, and it appears from them that the appellee did not support his application by a showing that the land was not saline, save as he did so after the hearing in the contest, that his application was not allowed or passed to entry, and that the evidence in the contest was such that the finding therein cannot be disturbed unless the character of the land was to be determined solely by the conditions existing at the time of the appellee's application.

On the part of the appellant it is said that in the contest the evidence of the conditions existing at the time of the appellee's application justified a finding that the land at that time was known to be chiefly valuable for coal, and with this as a premise it is argued that the action of the Land Department in considering and giving effect to the evidence of the subsequent exploration and discoveries properly may be disregarded. But as the Land Department's finding was silent respecting the known character of the land at the time of the appellee's application and was rested largely upon the evidence of the subsequent exploration and discoveries, it will be assumed, without so de-

ciding, that it is necessary to inquire whether this evidence rightly was considered and given effect.

The appellant insists that the action of the officers of the Land Department in respect of this evidence was right, even if the appellee had done all that he was required to do to entitle him to a patent, because his application had not been allowed or passed to entry. This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them.

From what has been said it is evident that the principal question in the case is: Was it incumbent upon the appellee to support his application by a showing that the land was not saline? As has been seen, the Commissioner of the General Land Office and the Secretary of the Interior ruled that there was an authoritative regulation to that effect, and so answered the question in the affirmative. Of course, their ruling that there was such a regulation is entitled to great respect, particularly as it relates to a matter peculiarly within their knowledge, and yet it is not necessarily conclusive. Courts take judicial notice of the regulations of the Land Department and when required to pass upon the existence of a particular regulation, as when ascertaining any other fact of which they take judicial notice, may resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most appropriate. Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 309, 23 Sup. Ct. 629, 47 L. Ed. 1064; Caha v. United States, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415; Jones v. United States, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691; Jenkins v. Collard, 145 U. S. 546, 560, 12 Sup. Ct. 868, 36 L. Ed. 812. Because of the appellee's insistent assertion that no regulation, such as that named in the decisions of the Commissioner and the Secretary, was in existence on April 19, 1902, the time when his application was presented at the local land office, we have secured copies of the records of the General Land Office bearing on that question and have considered them in the light of additional briefs which were submitted after the attention of counsel was directed to them. Plainly these records constitute a source of information which is not only trustworthy and helpful, but also the most appropriate in the circumstances.

A better appreciation will be had of the information so secured, if reference first be made to the antecedent situation. Colorado was one of the states in which the mineral land laws were in force and in which public lands known to be chiefly valuable for gold, silver, copper, coal,

or other minerals, not including salines, were subject to acquisition only under those laws. A regulation of the Land Department, which was coextensive with those laws and of long standing, required each applicant for an entry under any other land law to support his application by a showing that the character of the land sought to be entered was such that it was subject to acquisition under that law, and not under the mineral land laws; and among the forms prescribed by the Land Department for the use of applicants was a nonmineral affidavit embracing what was deemed a satisfactory showing under that regulation in the then state of the law. Whilst this was the situation, Congress enacted a statute whereby public lands "containing salt springs, or deposits of salt in any form, and chiefly valuable therefor," became subject to acquisition only under the mineral land laws. Act Jan. 31, 1901, 31 Stat. 745, c. 186 (U. S. Comp. St. 1901, p. 1435).

Coming now to the records before mentioned, the facts disclosed by them are these:

On November 14, 1901, following the enactment of the saline land act, the Commissioner of the General Land Office wrote to the Secretary of the Interior a letter, which, after referring to the change wrought by that act, proceeded as follows:

"I am of the opinion that it would be best to amend nonmineral affidavit (form 4-062) by inserting after the word 'deposit' the second time it occurs therein, the following words: 'That the land contains no salt springs, or deposits of salt in any form, sufficient to render it chiefly valuable therefor.' And I have the honor to submit herewith a form of affidavit so amended and to recommend that the same receive your approval and that I be authorized to substitute it for the form now in use."

On the same day of Secretary answered, saying (31 Land Dec. 130):

"The Department is in receipt of your communication of * * * November 14. 1901, * * * recommending that said regular nonmineral affidavit be amended by inserting therein, at the proper place, the words: 'That the land contains no salt springs, or deposits of salt in any form, sufficient to render it chiefly valuable therefor.' * * * Your recommendation * * * is * * * approved, and you are authorized to make such amendment and to require the amendment to be used in all future nonmineral entries in states and territories where the general mining laws are applicable."

Five days thereafter the Commissioner sent to the officers of each of the several local land offices in the states and territories in which the mineral land laws were in force the following circular letter:

"Under departmental instructions of November 14, 1901, nonmineral affidavit is required in all states and territories to which the general mining laws are applicable, said nonmineral affidavit having been changed by adding thereto, after the word 'deposit' in the thirteenth line of the body of the affidavit, the following: 'That the land contains no salt spring, or deposits of salt in any form, sufficient to render it chiefly valuable therefor.' This will govern all future applications. Copy of form, as approved by the Department, will follow."

By the Commissioner's direction, the new form of affidavit was then printed and a supply thereof forwarded to each of such local land offices for the use of applicants. Just when the circular letter and the newly printed form of affidavit were received at the Glenwood Springs, Colo., land office, at which the appellee's application was presented, does not appear, but photographic copies of other applications pre-

sented at that office in December, 1901, and January, 1902, and then forwarded to the General Land Office, show the interlineation of the nonsaline clause in the old printed form of affidavit at the place designated in the circular letter and also the use of the newly printed form, so it is a necessary inference that both the letter and the newly printed form of affidavit were received at the Glenwood Springs office three or four months before April 19, 1902, the time when the appellee's application was presented.

These facts make it plain that the change in the prescribed form of nonmineral affidavit was made by the Commissioner with the approval of the Secretary, that the circular letter of the former was issued with the approval of the latter, and that appropriate publicity was given to what was so done. Wolsey v. Chapman, 101 U. S. 755, 770, 25 L. Ed. 915. And this being so, it does not admit of any doubt that at the time of the appellee's application there was a regulation making it incumbent upon him to support his application by a showing that the land was not saline. True, the Secretary's approval was not written upon the circular letter, but no particular form of approval was required, and so the antecedent authorization so plainly expressed in the Secretary's letter was sufficient. Wolsey v. Chapman, supra; Wood v. Beach, 156 U. S. 548, 550, 15 Sup. Ct. 410, 39 L. Ed. 528; In re Brodie, 63 C. C. A. 419, 128 Fed. 665.

The power of those officers under the law to adopt such a regulation is not reasonably open to question. Although powerless to adopt a regulation which is in any wise inconsistent with or repugnant to the public land laws, they possess ample power to enforce, by appropriate regulations, every part of those laws, as to which it is not otherwise specially provided. Williamson v. United States, 207 U. S. 425, 462, 52 L. Ed. 278; Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 309, 23 Sup. Ct. 692, 47 L. Ed. 1064; United States v. Bailey, 9 Pet. 238, 254, 9 L. Ed. 113; United States v. Macdaniel, 7 Pet. 1, 14, 8 L. Ed. 587. The newly enacted saline land act in effect prohibited the acquisition of public lands chiefly valuable for salines under any law other than the mineral land laws, and neither it nor any other law designated any particular means by which this prohibition was to be enforced. Thus the selection of some appropriate means devolved upon the Commissioner, subject to the Secretary's approval. Rev. St. §§ 441, 453, 2478 (U. S. Comp. St. 1901, pp. 253, 257, 1586); Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166, 15 Sup. Ct. 779, 39 L. Ed. 931. Neither those officers nor their subordinates could be expected to have a personal knowledge of what public lands were chiefly valuable for salines, and little or no information of value on the subject would be afforded by the records in their custody. See United States v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110; Barden v. Northern Pacific R. R. Co., 154 U. S. 288, 320, 14 Sup. Ct. 1030, 38 L. Ed. 992; Kern Oil Co. v. Clarke, 30 Land Dec. 550, 566; Gray Eagle Co. v. Clarke, Id. 570, 580. Then, of all persons, none so reasonably could be expected to be well informed respecting a particular tract of public land as one who, having selected it from among others, makes application therefor under the land laws. In this situation the Commissioner, with the Secretary's approval, adopted the regulation in question, and in

doing so merely applied to a new situation a general requirement, running through all the regulations of the Land Department, to the effect that applicants for public land must show that the character of the land applied for is such that their applications lawfully may be allowed. These considerations sufficiently indicate that the regulation is not inappropriate or unreasonable.

In urging its invalidity the appellee places some reliance upon section 2290 of the Revised Statutes, as amended by Act March 3, 1891, 26 Stat. 1097, c. 561, § 5 (U. S. Comp. St. 1901, p. 1389), which declares that applicants under the general homestead law, who comply with certain enumerated conditions, which do not include a showing respecting the character of the land applied for, "shall be permitted to enter the amount of land specified"; the argument presented in this connection being that the legislative enumeration of particular conditions is an implied prohibition against the imposition of others by executive regulation. We think the argument must fail, and for these reasons: Section 2290 does not say that, upon compliance with the enumerated conditions, the applicant shall be permitted to enter the land applied for, but only that he shall be permitted to enter "the amount of land specified," meaning the number of acres named in the preceding section. The prohibition against the acquisition of mineral, coal, and saline lands under the homestead law does not arise from anything contained in that law, but from provisions in the mineral, coal, and saline land laws, which take precedence over and qualify the homestead law in that regard. Section 2290 is a part of the general homestead law and relates to the enforcement of its restrictive provisions, but not to the enforcement of the prohibitive or qualifying provisions of the mineral, coal, and saline land laws. As to the latter, the means of enforcement are not specially prescribed by statute, and so may be designated by executive regulation under sections 441, 453, and 2478 of the Revised Statutes, which empower the Commissioner, under the direction of the Secretary, to enforce, "by appropriate regulations," every part of the public land laws, as to which it is not otherwise specially provided.

The old form of nonmineral affidavit contained a declaration that the land applied for was not known to be valuable for gold, silver, cinnabar, lead, tin, copper, coal "or other valuable mineral deposit," and also a declaration that the land was "essentially nonmineral," and because of this it is said that there was no occasion for the use of the nonsaline clause as required by the new regulation. Of course, it must be conceded that the words "mineral deposit" and "mineral" in their larger signification embrace salines, and also that by the enactment of the saline land act public lands chiefly valuable for salines became in legal contemplation mineral lands. But does it follow that applicants would have regarded the old form of affidavit as embracing salines? The words "mineral deposit" and "mineral" are variously used; sometimes with the larger signification just mentioned and at other times in a more restricted sense. In the nomenclature of public land proceedings they generally were used in a sense which excluded salines, because saline lands had not been subject to disposal under the mineral land laws, as was attested by several decisions in the Land De-

partment to the effect that such lands could not be acquired under those laws as either lode claims or placer claims. And whilst the law in this regard was changed by the saline land act, it was far from certain that this change was widely known or fully understood. In these circumstances, we think there was reason to apprehend that applicants would regard the old form of affidavit as not embracing salines. At all events, the Commissioner and the Secretary reached the conclusion that there was occasion to require an express showing in respect of salines, and we cannot say that their conclusion was wrong.

It next is urged that in this instance compliance with the regulation was not necessary, because when the land was surveyed it was noted upon the surveyor's return as being agricultural in character, and not saline. Passing the fact that the surveyor's return, which was made 14 years before the appellee's application, would afford no information in respect of intervening discoveries, we think the contention is foreclosed by the decision in Barden v. Northern Pacific R. R. Co., 154 U. S. 288, 320, 14 Sup. Ct. 1030, where it was said:

"Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties; but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them; nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

Of the contention that the local land officers waived compliance with the regulation by not insisting thereon it is enough to observe: First, that those officers were not charged with the duty of passing upon applications for entries under the soldier's additional homestead law, but were required to forward them to the General Land Office for examination and consideration, so a waiver cannot be predicated upon their action; and, second, that had they been charged with the duty of passing upon such applications, they could not have waived compliance with the regulation, because it had the force of law and was no less binding upon them than upon applicants.

We conclude that the evidence in question rightly was considered and given effect and, therefore, that the case made by the bill and its exhibits was not one which entitled the appellee to relief.

The decree is, accordingly, reversed, with a direction to sustain the demurrer to the bill.

FRANKLIN TRUST CO. et al. v. STATE OF NEW JERSEY.

In re STEWART.

(Circuit Court of Appeals, First Circuit. August 30, 1910.)

No. 827.

CORPORATIONS (§ 688*)—INSOLVENCY AND RECEIVERS — CLAIMS AGAINST RECEIVER—FOREIGN FRANCHISE TAX.

Where a corporation organized under the laws of New Jersey, but whose business situs and all its property are in another state, has become insolvent and is being wound up, and its property distributed by a court of equity in the latter state, a franchise tax imposed upon it under the law of New Jersey after the commencement of the insolvency proceedings and the appointment of a receiver, which, as characterized by the courts of such state, is not a tax in the ordinary sense, but "an arbitrary imposition laid upon a corporation without regard to the value of its property or its franchises," in the nature of a license fee, will not be enforced in the court of the foreign jurisdiction, and given priority of payment over the claims of bona fide local creditors.

Putnam, Circuit Judge, dissenting, holds that it was within the discretion of the court to direct the payment of such tax by the receiver when required by equitable considerations, as where the receiver, acting with the corporation, by direction of the court continued to exercise the franchise of the corporation by carrying out its contracts and continuing its business for the benefit of its creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 688.*]

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

Suit in equity by the Franklin Trust Company against the Milford Pink Granite Quarries. On petition of the receiver of defendant for instructions, the court made an order directing the payment of certain franchise taxes to the state of New Jersey, from which complainant and other creditors appeal. Reversed.

J. Butler Studley (Brandeis, Dunbar & Nutter, on the brief), for appellants.

Arthur Lord (Arthur P. Hardy, on the brief), for the State of New Jersey.

W. G. Thompson (C. F. Weed and H. G. Tucker, on the brief), for unsecured creditors.

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

ALDRICH, District Judge. The taxes sought to be enforced in this case are based upon a statute of a foreign jurisdiction. They are in the nature of a franchise tax, and the decree of the Circuit Court gave them preference over unsecured local creditors in this jurisdiction.

The proposition as to what might be the status in this jurisdiction of a New Jersey tax levied upon property, under rules which exclude the idea of disproportion and arbitrary imposition, has no bearing whatever upon the question before us.

The taxes in question and the mode of assessment are admittedly arbitrary upon outstanding stock, without the remotest reference to

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

value, and they were imposed upon an insolvent situation subsequent to proceedings in equity and subsequent to the appointment of a receiver.

The question whether taxes of the nature of those in issue shall be enforced and given preference outside the state in a suit involving the rights of creditors foreign to the jurisdiction imposing the taxes is one which concerns substantial rights, and is not to be concluded by what is called the exercise of a discretion necessarily incident to a trial; but, aside from the idea that such a question is not concluded upon grounds of discretion, and that all points come up upon appeals in equity, it is apparent that the Circuit Court, in this case, did not asssume to conclude the point by determining it as one of discretion, but decided it as one involving substantive right.

It is extremely doubtful whether a tax like the one here would be upheld in New Jersey with the conditions reversed; that is to say, a tax in the nature of a fee imposed by Massachusetts upon the franchise of a corporation created in that state, with its property wholly in New Jersey, and its business being wound up in an insolvent proceeding in New Jersey. As stated in Re United States Car Co., 60 N. J. Eq. 514, 43 Atl. 673, a claim like the one under consideration is not a tax in the ordinary sense, but an arbitrary imposition laid upon a corporation without regard to the value of its property or of its franchises.

The corporation before us in a practical and substantial sense is an insolvent corporation, and the proceeding, since the interlocutory decree of December 4, 1905, is one to wind up the corporate affairs in Massachusetts. The corporation is a mere shell, and its existence only a technical one, and it is difficult to see equitable considerations which require that a New Jersey franchise tax or fee, characterized by its own courts as an arbitrary imposition, rather than as a just tax upon property, should be extraterritorially upheld and preferred upon equitable principles against bona fide creditors in Massachusetts who have put their money and labor and materials into the local business of the corporation. At best, under the characterization of the New Jersey courts, it is an arbitrary imposition, not a tax at all, and does not have the elements of a tax, but is something in the nature of a license fee imposed upon the corporation without regard to the value of its property or of its franchises. The corporation being one which was not to do business within the state creating it, but one which was intended to go and does go elsewhere, the so-called tax imposed upon its existence is contrary to all principles of just and "proportional" taxation, and is, therefore, odious in an equitable if not in a legal sense.

It would seem that the latest New Jersey case, that of Ballou v. Flour Milling Co., 67 N. J. Eq. 188–191, 59 Atl. 331, fully sustains the view that such an arbitrary imposition would not be enforced outside of the state, because the New Jersey court there says those courts (referring to the outside courts) would neither allow the state franchise taxes which have accrued since the date of the decree of insolvency nor give priority to them if allowed, and that considerations of comity require the New Jersey courts to be governed by the rules which govern the extraterritorial courts.

It must be remembered that the proceeding here is not ancillary to one in New Jersey, but primary in this jurisdiction, and has reference to local conditions and a fund which has its situs here and which never had a situs in New Jersey, and therefore, under the doctrine and expressions of Ballou v. Flour Milling Co., 67 N. J. Eq. 191, 59 Atl. 331, this court surely has the right to determine what creditors have just claim to the fund in question.

Giving extraterritorial enforcement and priority to a franchise tax possessing the arbitrary, obnoxious, and discriminatory elements of the one in question would not only be contrary to principles of equity, but would be contrary to the decisions of Massachusetts, where the funds of the insolvent corporation and the equitable rights of the creditors are located—contrary to decisions of the courts of that state in respect to her own excise laws. Oliver v. Washington Mills, 11 Allen (Mass.) 268. See, also, Com. v. Savings Bank, 123 Mass. 493. A fee or franchise tax like this has no legal status in foreign jurisdictions unless supported by statute or special equities. We fail to see any equitable considerations upholding this claim which would not exist in respect to such a claim in any winding up proceeding in an extraterritorial court.

It must be borne in mind that this is a proceeding under the general rules of equity, and not a bankruptcy case. New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, was decided upon the broad and imperative bankruptcy section in respect to preference of taxes of all kinds, and not upon equitable considerations at all. That decision was expressly based upon the imperative force of the section of the bankruptcy act, in respect to taxes, which specifically obliges the trustee in bankruptcy to pay all taxes legally due and owing. Therefore that decision in no way touches the question whether an arbitrary imposition of this kind, though legal in the bankruptcy statutory sense, would be upheld and given priority upon general principles of equity in an equity proceeding independent of the bankrupt law. The strong dissenting opinion of Mr. Justice Harlan, the Chief Justice, and Mr. Justice Peckham does, however, deal with the question of equitable priority even in a bankruptcy case. Under the bankruptcy section in respect to taxes a license fee or franchise of the character in question doubtless has a certain legal status until the stock is surrendered and the corporation dissolved; but, when it is proposed to give it enforcement and priority over bona fide creditors of an insolvent corporation in a foreign jurisdiction upon broad principles of equity, independent of the bankruptcy statute, an entirely different question is presented.

The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to enter a final decree disallowing the pending claim of the state of New Jersey for taxes; and neither party recovers costs in this court.

LOWELL, Circuit Judge, concurs in the result.

PUTNAM, Circuit Judge (dissenting). This is an appeal in equity against a direction by the Circuit Court for the District of Massachusetts for the payment by a receiver of certain taxes, arising under the

statutes of New Jersey subsequently to the beginning of the proceedings by virtue of which the receiver was appointed, and, indeed, subsequently to his appointment. The appeal has been argued extensively as though it were an ordinary question of the proof of a claim against an estate in insolvency or bankruptcy, while it is not at all of that nature. It arose in connection with the administration of the estate in the hands of the receiver; and, if supported at all, it can be supported only from that point of view. Therefore, at the outset, we disregard the great mass of authorities which have been cited to us pro and con with reference to claims which can be proved against estates in insolvency or bankruptcy, or relative to priorities between such claims.

The real question is whether the amounts directed by the Circuit Court to be paid were such sums as arise during the administration of an estate in the hands of a receiver, or in connection therewith, as to which it necessarily follows that the chancellor has a certain discretion, and whether, under the circumstances, that discretion was properly exercised here. So far as the question involved has any peculiarity outside of the fundamental principles of equity applicable to the administration of estates in the hands of receivers, this appeal is practically without precedent, and without the decision of any court which authoritatively binds us. The facts are somewhat complicated, and the legal incidents which surround the main proposition as we have described it are even more complicated.

The Milford Pink Granite Quarries is a corporation organized under the laws of the state of New Jersey. It owned quarries and other real estate in Massachusetts, and also had a plant there for operating the quarries. So far as this record is concerned, no proceedings were taken in New Jersey, and no receiver of the assets of the corporation was appointed in New Jersey; and the receivership to which this appeal relates was not ancillary, but primary.

The Milford Pink Granite Quarries executed two mortgages to secure its bonded indebtedness. The first mortgage was to the Franklin Trust Company, trustee, and covered its real estate and appurtenant plant in Massachusetts. The corporation having become financially embarrassed, and having a contract involving over a million dollars which offered a large profit, and which it was desirable should be worked out, the Franklin Trust Company filed in the Circuit Court for the District of Massachusetts, on the 22d day of November, 1905, the bill now before us, which was of the kind resorted to to bridge over financial difficulties, and thus containing no prayer known under the proper rules of equity. At a subsequent stage of the proceedings, the Franklin Trust Company filed a bill in the nature of a supplemental bill asking foreclosure, but the details in reference thereto have not been called to our attention. Immediately on the filing of the first bill, by the consent of all parties concerned, Stewart was, on the 28th day of November, 1905, appointed receiver of all the property, rights, and franchises of the Milford Pink Granite Quarries.

The receiver was authorized to take immediate possession of the property, and to continue the operation of the quarries until the further order of court, with full authority to carry on the business of

the corporation and to prosecute and defend suits. There is no indication in this order of any purpose of winding up the affairs of the corporation, although subsequently, on December 4, 1905, there was an interlocutory decree, entered apparently by the consent of all parties, providing for the proof of claims and the distribution of assets, without any special provision as to priorities. The practical effect, however, of this interlocutory decree, was, as well said by the complainant, to convert the proceeding into one for winding up the assets of the corporation in the district of Massachusetts.

The method of the operation of the quarries in Massachusetts will be shown briefly further on. As its result, and from some other sources, without disposing of any portion of the substance of the property which it was finally agreed was covered by the mortgages to which we have referred, the receiver accumulated a considerable fund, though not sufficient by a very large percentage to pay the unsecured claims which had been proved as ordered. Meanwhile, in reply to an application of the receiver filed on June 23, 1908, and amended on July 3, 1908, the state of New Jersey set up a claim, by an answer filed on July 6, 1908, for taxes for the years 1906, 1907, and 1908, of $2,272.80 for each year, with the further claim that they were entitled to priority from the assets in the hands of the receiver. These were clearly not a property tax, but were merely a license or franchise tax, entitled under the laws of New Jersey to priority in case of insolvency, all as sufficiently described in New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284. That case decided that this license or franchise tax is constitutionally valid, and that under the provisions of the present bankruptcy statutes such taxes would be entitled to priority in proceedings in bankruptcy commenced after they accrued, although in a district other than that of the state where they were assessed. So far the law is settled; but this is not a bankruptcy proceeding within the meaning of New Jersey v. Anderson, and the taxes in question accrued after the proceedings commenced.

In accordance with the description of this license or franchise tax in New Jersey v. Anderson, it is based entirely upon the nominal amount of outstanding stock of the corporation and has no reference to the value of the stock or to the value of the assets of the corporation. It may be assessed so long as the corporate stock has not been surrendered and canceled or the corporation not finally dissolved, although the corporation is absolutely insolvent and worthless. It is well described by the Court of Errors and Appeals in New Jersey in the United States Car Company Case, 60 N. J. Eq. 514, 516, 43 Atl. 673, 674, as "an arbitrary imposition laid upon the corporation, without regard to the value of its property or its franchise, and without regard to whether it exercises the latter or not." Therefore, notwithstanding in that case the corporation was insolvent and had gone into the hands of a receiver, this tax was continued to be lawfully assessed after the receiver was appointed and ordered to be paid by the receiver out of assets which he had himself secured. The claim of the state of New Jersey on this appeal follows strictly the decisions of the court in the case last cited, particularly because the taxes were assessed at and for periods subsequent to the appointment of the receiver, and in this

case are sought to be paid out of the fund gathered by the receiver, as we have said.

Both the secured and the unsecured creditors of the corporation claim that they are entitled to certain preferences as against each other as to the marshaling of whatever may be herein paid out to New Jersey; but there is nothing in that for us to consider. By an order of court entered on June 29, 1908, allowing and establishing an agreement for the compromise of various questions between the creditors in this litigation, including the trust companies and unsecured creditors who appear of record, apparently all matters in controversy between them were adjusted. It was then settled that, from the moneys in the hands of the receiver, or coming into his hands, certain sums were to be deducted, and, with the rest, there was to be deducted and paid out whatever amount the court should award to New Jersey "as a preferred claim or direct obligation of the receiver for franchise taxes," being the same now under discussion; and that, after making this payment, together with others agreed on, the receiver was to divide the balance, one half to the Franklin Trust Company on the one part, and the other half, subject to some further deductions expressly named, to the unsecured creditors. This relieves us of any question of marshaling, and requires us only to determine whether or not New Jersey is entitled to all of these alleged franchise taxes or any of them.

As we have said, there has been much discussion as to the character of the claims of New Jersey; that is, whether they were to be proved under the order of the court to which we referred, subject, of course, to the further claim of the appellants that, if they were to be proved, the time limited for them to be proved had expired. No question of this kind, however, arises, because, as we have said, it is clear that, so far as New Jersey has any claims for the taxes in dispute here, they are, within the language we have already quoted, "direct obligations of the receiver," arising in the course of the administration of the property, and not merely technically "preferred," and to be proved as such.

We have said that the receiver here is a receiver of primary jurisdiction, and not ancillary. We have also shown, or it is clear, at any rate, that his authority can be exercised only within the district of Massachusetts, and that the property from which the funds in his hands were derived was located entirely in that district. For all the purposes of this case it is a question of enforcing within the state of Massachusetts a license or franchise tax arising and accruing in the state of New Jersey under the laws of the latter state. It is also a question of enforcing taxes which primarily rest on the corporation, and which primarily have no standing against the receiver or the assets in his hands, because they accrued after the receiver was appointed, and because he was appointed in a foreign jurisdiction, and because the taxes were not a claim provable against the receiver or the assets in his hands, as they arose after he was appointed. If they had accrued before the bill now before us was filed, they might stand, perhaps, as a claim to be proved, either secured or unsecured. But any tax assessed by the state of New Jersey could not, under the rules of international law, be assessed directly against the receiver appointed by a

court of a foreign jurisdiction, or against assets whose locality was in a foreign jurisdiction, as were all the assets which are involved here. Therefore, in order to have any standing, the taxes in question here must be supported by some local statute or by the fundamental rules of equity.

Any other proposition would hardly be supported by the rules of international law, because generally those rules have no regard to the revenue systems of foreign jurisdictions, and provide no method for enforcing or advancing the same. We, perhaps, need for present purposes to refer only to section 257 of Story on Conflict of Laws, in any edition of that work. New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, impliedly recognizes this principle, because it protects this exact franchise tax in view of the fact that the present bankruptcy laws make a "wide departure" from the provisions of the bankruptcy statute of 1867, in that the present laws expressly cover taxes imposed by any state, while the act of 1867 gave a preference only to those accruing to the state in which the proceedings were instituted. The vice chancellor, in Ballou v. Flour Milling Company, 67 N. J. Eq. 188, 59 Atl. 331, decided on June 29, 1904, expressly recognized these rules with reference to this particular franchise tax. One of the ancillary receivers in another state, appointed in another state, resided in New Jersey, but at page 190 of 67 N. J. Eq., 59 Atl. 331, the vice chancellor said that the fund was composed wholly of the proceeds of property and operations which never had any actual or legal situs in New Jersey. At page 191 of 67 N. J. Eq., 59 Atl. 331, he observed that the foreign courts would neither allow the state franchise taxes which had accrued since the date of the decree of insolvency, nor give priority to them if allowed. It is true that the opinion in that case was largely composed of dicta. Nevertheless, it was carefully and thoughtfully expressed, and it clearly stated the law as held by the authorities dealing with international relations in the manner we have said. The insolvency statutes of Massachusetts, on the same principle, expressly discriminated against foreign taxes.

The general proposition in reference to foreign revenue laws was stated by Lord Mansfield as a settled principle in Holman v. Johnson, 1 Cowp. 341, 343 (1775), and again in Planche v. Fletcher, 1 Doug. 251 (1779). It is true that Dicey, in his very valuable work on the Conflict of Laws, at page 567 of the American edition, notes the fact that these decisions are not of recent date, and that their validity may now be open to question. He cites no authorities contravening them. It is true that, in the somewhat broader view towards international relations of modern days, there would be a disposition under equitable circumstances to uphold the right to realize taxes although in a foreign jurisdiction; but this would certainly be only as to taxes equitably assessed, bearing equally on persons and property. The franchise taxes in question here are of a very different character. They are purely and arbitrarily instituted for obtaining revenue, without any provision for an equitable distribution, or for reasonable or fair assessment. They even discriminate in the most marked manner in favor of corporations carrying on at least 50 per cent. of their business in the state of New Jersey.

Even the minor local taxes to which the people of the country are accustomed, levied equally according to just valuations, do not create a debt in the proper sense of the word. This is recognized generally, and has been expressly stated in New Jersey v. Anderson, 203 U. S. 483, already cited, at page 492, 27 Sup. Ct. 137, 51 L. Ed. 284, reaffirming the language of Meriwether v. Garrett, 102 U. S. 472, 513, 26 L. Ed. 197. While it is generally said that no action for even the equitable taxes which we refer to can be maintained, and that the remedy is only by special proceedings, it is true that in some states it is held otherwise; but in those jurisdictions the form of an action of debt lies, although there is no real debt, precisely as it lies even for a qui tam penalty. Also, it is true that the statute in question here declares the tax a debt; but, again, New Jersey v. Anderson, at page 491 of 203 U. S., 27 Sup. Ct. 137, 51 L. Ed. 284, lays down certain rules, applied there under different circumstances, which require this court to determine the nature of this obligation on general principles, and not from the local statutes. Altogether, we are satisfied that it is not usually obligatory on courts of equity in foreign jurisdictions to assist New Jersey in collecting taxes of the class of those in question here.

Therefore, we do not perceive any doubt with reference to the sums claimed here from the point of view of any legal obligation resting on the Circuit Court for the District of Massachusetts. We have shown that, as the taxes here claimed accrued after the proceedings in the Circuit Court commenced, or certainly after the interlocutory decree for proof of claims was entered, there was no demand which could be thus proved in the ordinary sense of the word. Also, it is impossible to conceive that the state of New Jersey could assess a tax against a foreign receiver. It may assess this tax against its own corporations, but this would not attach as a matter of law against a foreign receiver; and, more especially, the state could not assess a tax which would be a lien on the assets in his hands. From every point of view, we must maintain that that state has no relief here, except as based upon some special equity, and except as having some proportionate relation thereto.

None of the authorities cited to us contravene any of the propositions we have made. Nearly all of them, if not all of them, arose in New Jersey, and related to proceedings in that state. We find nothing in the opinion of the learned judge of the Circuit Court that lays down any positive rule other than that reached by us. His opinion is based on the peculiar circumstances of this case, which show that the receiver was not content to rely on his rights as receiver, but proceeded under a supplemental contract made, after he was appointed, by the Milford Pink Granite Quarries with the consent of all concerned. The contract to which we refer was a lengthy one, made with the express approval of the Circuit Court, according to an interlocutory decree entered on December 21, 1905; by virtue of which contract, and of which interlocutory decree, the work was done at the quarries out of which the fund in the hands of the receiver mainly, if not entirely, arose. The contract included a terminable lease executed by the Milford Pink Granite Quarries and Stewart as receiver, and others, to the Milford Stone Company, on December 20, 1905. It was so executed by the Milford Pink Granite Quarries by additional ex-

press authority of its executive committee, and of its directors, as shown by the record of their proceedings of December 20, 1905. The arrangement was intended to secure, through the assistance of the Milford Stone Company, the performance of the large contract referred to in the first part of this opinion. It was in this way that the receiver, under the direction of the court, availed himself of the corporate existence of the Milford Pink Granite Quarries, and of its franchises. Therefore, the learned judge of the Circuit Court based his action, not so much on any strict rule of law as on the facts we have just stated, as appears from the following extracts from his opinion:

"At the time of the appointment of the receiver the defendant corporation had certain valuable outstanding contracts for the furnishing of stone from its quarries. The receiver, the secured and unsecured creditors, and the stockholders, in fact all parties in interest, were desirous of completing these contracts. and especially the so-called Pennsylvania Railroad Terminal contracts. The completion of these contracts required the continued operation of the quarries—in other words, the continued exercise of the franchise granted by the state of New Jersey. For want of sufficient funds in his hands, the receiver was unable to continue the operation of the quarries, and consequently, with the consent of the court and of all parties in interest, the property in the hands of the receiver situated in the town of Milford was leased to a new corporation called the Milford Stone Company, under the indenture dated December 21, 1905, for the purpose of operating the quarries and completing these contracts. By this means the quarries were continued in operation until January, 1907, and the receiver and the creditors obtained the profits derived from these contracts.

"In a case such as is here presented, where the receiver exercises the franchise of the corporation, either directly or through a lessee, and with the consent and co-operation of the creditors, for the purpose of increasing the assets of the estate, I think the franchise tax is properly chargeable as included in the expenses of the administration of the estate while in the receiver's hands."

The consequence was that the allowances made by the learned judge of the Circuit Court which are now appealed against had a basis of equity independently of the law of the state of New Jersey; and they were a matter of administration, within the legal discretion of the Circuit Court, and not an application of the statutes of New Jersey in any method of the kind now objected to. We think, under the circumstances, the allowances were supported by fundamental principles which equity justly recognizes; but we are also of the opinion that, as active operations, in accordance with the contract to which we have referred, ceased on or about the 1st day of January, 1907, no allowance should be made as of January, 1908. The allowances should justly be limited to the franchise taxes of the two preceding years, 1906 and 1907.

As illustrating the equities which support this proceeding, we refer to an opinion of the chancellor in George Mather's Son's Company, 52 N. J. Eq. 607, 611. This case is also found in 30 Atl. 321, 322. While the chancellor, though sitting in New Jersey, refused to order a receiver to pay the franchise tax as such, he clearly pointed out the equity of an allowance on the principles on which this opinion is based, and on which the Circuit Court acted. He said as follows:

"Where the ordinary and usual business of the corporation is continued, as in the present instance, at a profit, in the name of the company, by the receiver, in the hope that the financial difficulties may be adjusted, and the assets may be restored to the company, there can be little hesitation in conclud-

ing that it is the duty of the receiver to pay the tax while he continues the business."

While it was true that the case was reversed on the main proposition involved, it is also true that the New Jersey Court of Errors and Appeals never had any occasion to reverse or observe against this proposition. What was thus said by the chancellor seems to us to carry on its face so much semblance of a fundamental proposition of the law of equity that it needs neither authority nor discussion to support it. What was there said applies exactly to this case as now interpreted. Also, for an understanding of the certain discretion given the chancellor with reference to instructions to receivers, we may well refer to Dickinson v. Saunders, 129 Fed. 16, 63 C. C. A. 666, decided by this court on April 13, 1904; especially to what is there said at pages 20 and 22 of 129 Fed., pages 670, 672, of 63 C. C. A.

In Dickinson v. Saunders, just referred to, directions were given the receiver in the equitable discretion of the court for payment of certain claims which arose before the receiver was appointed, although the payments were not strictly in harmony with the bankruptcy statutes of the United States or the insolvency laws of Maine, where the corporation was created, or the insolvency laws of Massachusetts, where the receiver was appointed. It was said, at page 20 of 129 Fed., at page 670 of 63 C. C. A., that these various legislative systems declared policies "which a chancellor in hunting about for some analogy to guide the equitable administration of his office might lay hold of under some circumstances." This applies here where the bankruptcy statutes of the United States would protect these taxes in proceedings in bankruptcy if they accrued before the proceedings commenced. This points out a determined policy of the bankruptcy statutes which the chancellor would be entitled to regard in view of the fact that the special circumstances of the case in that respect do not reach the merits of the claim. Further illustrations of the extent of the equitable powers of the chancellor with reference to the payment of claims by receivers which are not strictly enforceable are found in the well-known cases of Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419; Miltenberger v. Logansport Railway Company, 106 U. S. 286, 311, 1 Sup. Ct. 140, 27 L. Ed. 117; Union Trust Company v. Railway Company, 117 U. S. 434, 457, 6 Sup. Ct. 809, 29 L. Ed. 963; and especially in Jerome v. McCarter, 94 U. S. 738, 24 L. Ed. 136, where a discretion was used for completing a railroad by a receiver for the purpose of saving a land grant. In Girard Insurance Company v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. Ed. 1062, a similar discretion was exercised with reference to the completion of a building contracted for in behalf of the railway company involved.

Even at the common law, where no equitable principles are involved, the tenant who refused to do fealty to his lord was held guilty of petty treason. In equity no one can accept benefits without compensation, even though there is no legal claim therefor. This was illustrated especially in Louisville Railroad Company v. Wilson, 138 U. S. 501, 507, 11 Sup. Ct. 405, 34 L. Ed. 1023, as against a receiver, where the receiver was directed to pay compensation to an attorney for securing certain assets before the receiver was appointed, of which the receiver

had the advantage. A like result was reached with reference to the construction of the building in Girard Insurance Company v. Cooper, already cited; although, of course, this rule is a limited one, and can apply only where the benefit comes quite directly into the hands of the receiver. In the present case, as said in New Jersey v. Anderson, already referred to, at page 493 of 203 U. S.; 27 Sup. Ct. 137, 51 L. Ed. 284, the state of New Jersey had a right to fix the terms of existence, and to provide for the continued existence, of corporate franchises on the condition of the payment of the tax in question. If the Circuit Court had proceeded in completing the work which we have described through the hand of its own receiver, and had not availed itself of the franchises of the corporation in question, the equities might have been entirely different. But, under the circumstances, it seems impossible to deny that equity will not permit that the court should make active and effective use of those franchises without due consideration for the state of New Jersey, which created and maintained them.

A careful examination of what we have abstracted from the opinion of the learned judge of the Circuit Court leads to the result that he did not hold that the state of New Jersey had a legal claim independently of the particular circumstances to which we have alluded, and which are also referred to by him. On the other hand, while not expressly so stated, the fair inference is that he was availing himself of a proceeding according to the principles governing a chancellor exercising a judicial discretion. In view of the facts that in the cases of receiverships this discretion has been so broadly exercised as indicated by the decisions we have cited, that in exercising this discretion the chancellor looks about for analogies in the way pointed out in Dickinson v. Saunders, already cited, at page 20 of 129 Fed., 63 C. C. A. 666, and especially in view of the fundamental rule represented by the authorities that it is one of the underlying principles of equity that it will not accept benefits without making compensation therefor, we are unable to perceive anything to come from the refusal to affirm the decision of the Circuit Court except a result entirely inequitable.

It would probably be a dangerous proposition to admit that the assets of an insolvent corporation in one jurisdiction may be swept away under a franchise tax like this in question here to another jurisdiction, and thus the rights of creditors in the first jurisdiction perhaps fully defeated; while it is an entirely different proposition to hold that a receiver must recognize a just quid pro quo where, instead of relying on his own rights, he finds it useful or necessary, with a hope of securing large profits, to hold to the franchises to which a particular tax relates. Therefore, we hold that the allowances made by the Circuit Court must be sustained so far as they appertain to the taxes assessed for the years 1906 and 1907, but must be disallowed so far as they relate to the tax assessed for 1908.

The decree of the Circuit Court allowed interest. Probably the matter was not called to the court's attention. Nevertheless, the allowance is assigned as error. The present record shows that a particular sum was held by the receiver awaiting the result of this litigation. We think it is now settled that, under such circumstances, interest beyond what the receiver actually collects is not allowable until from the time

when it is finally concluded that one party or the other is at fault. Thomas v. Western Car Company, 149 U. S. 95, 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663; Hutchinson v. Otis, 115 Fed. 937, 944, 53 C. C. A. 419, applied in Edwards v. Bay State Gas Company (C. C.) 177 Fed. 573.

I think the judgment should be:

The decree of the Circuit Court is modified so far as to strike out the allowance of $2,272.80 for the year 1908, and also to strike out all allowances of interest, and as so modified is affirmed; and neither party recovers costs of appeal.

In view of the fact that this record is a full record, and to comply with the practice as I understand it, and thus to avoid unnecessary delays, I think the judgment, whichever way rendered, should be final. Moreover, I have not considered the question of awarding costs against the state of New Jersey. As this bill is in the nature of a bill by a trustee for instructions, it may be costs of both parties should be paid out of the fund. No costs were awarded in favor of New Jersey in the Circuit Court, and I am not prepared at present to agree to awarding them against a sovereign state of the Union.

NOTE.—The following is the opinion of Colt, Circuit Judge, in the court below:

COLT, Circuit Judge. Upon the state of facts presented in this record I am of opinion that the receiver of the defendant corporation should be directed to pay the franchise taxes for the years 1906, 1907, and 1908, assessed by the state of New Jersey, out of the funds now in his hands.

The conclusion I have reached is based upon the following propositions:

1. Under the statutes of the state of New Jersey, the defendant corporation was subject to the payment of an annual franchise tax of one-tenth of 1 per cent. on the amount of capital stock outstanding on the 1st of January preceding the making of its return to the State Board of Assessors, and such tax was made a preferred debt in case of insolvency. Laws of the State of New Jersey Relating to Business Corporations, §§ 150, 153.

2. The state of New Jersey had a right to fix the terms of the defendant's existence as a corporation, and to provide that for the continued existence of its franchise it should pay certain sums of money fixed by the amount of its yearly outstanding capital stock. This is substantially the language used by the Supreme Court concerning the New Jersey franchise tax in New Jersey v. Anderson, 203 U. S. 483, 493, 27 Sup. Ct. 137, 51 L. Ed. 284. See, also, Home Insurance Company v. New York State, 134 U. S. 594, 599, 600, 10 Sup. Ct. 593, 33 L. Ed. 1025; Metropolitan Street Railway Company v. New York, 199 U. S. 1, 8, 37, 25 Sup. Ct. 705, 50 L. Ed. 65.

3. The defendant corporation was organized under the laws of New Jersey for the purpose of quarrying granite from quarries located in the town of Milford and elsewhere in the state of Massachusetts. Its business office, plant, and the larger part of all its property were in Milford. It never had any property or transacted any business within the state of New Jersey.

4. When the defendant corporation took its charter and franchise into the state of Massachusetts, all persons who voluntarily contracted with it subjected themselves to the laws of the state of New Jersey affecting its powers and obligations. Canada Southern Railway Company v. Gebhard, 109 U. S. 527, 537, 3 Sup. Ct. 363, 27 L. Ed. 1020; Relfe v. Rundle, 103 U. S. 222, 225, 226, 26 L. Ed. 337.

5. By the decree of November 28, 1905, appointing the receiver, he was authorized, among other things, "to continue the operation of the quarries" and "to pay all taxes, assessments, and liens at any time laid or assessed upon or in respect of the said quarries, or property, or business, and all expenses properly incurred by him in working the said quarries."

6. At the time of the appointment of the receiver the defendant corporation had certain valuable outstanding contracts for the furnishing of stone from its quarries. The receiver, the secured and unsecured creditors, and the stockholders—in fact, all parties in interest—were desirous of completing these contracts, and especially the so-called Pennsylvania Railroad Terminal contracts. The completion of these contracts required the continued operation of the quarries—in other words, the continued exercise of the franchise granted by the state of New Jersey. For want of sufficient funds in his hands, the receiver was unable to continue the operation of the quarries, and consequently, with the consent of the court and of all parties in interest, the property in the hands of the receiver situated in the town of Milford was leased to a new corporation called the Milford Stone Company, under the indenture dated December 21, 1905, for the purpose of operating the quarries and completing these contracts. By this means the quarries were continued in operation until January, 1907, and the receiver and the creditors obtained the profits derived from these contracts.

7. In a case such as is here presented, where the receiver exercises the franchise of the corporation either directly or through a lessee, and with the consent and co-operation of the creditors, for the purpose of increasing the assets of the estate, I think the franchise tax is properly chargeable as included in the expenses of the administration of the estate while in the receiver's hands. The law is well settled in New Jersey that a franchise tax levied during the receivership of an insolvent corporation is entitled to preference. The leading case on this subject is In re United States Car Company, 60 N. J. Eq. 514, 43 Atl. 673. See, also, King v. American Electric Vehicle Company, 70 N. J. Eq. 568, 571, 62 Atl. 381; Chesapeake & Ohio Railway Company v. Atlantic Transportation Company, 62 N. J. Eq. 751, 48 Atl. 997; Duryea v. American Woodworking Machine Company (C. C.) 133 Fed. 329; Conklin v. United States Shipbuilding Company (C. C.) 148 Fed. 129.

I shall, therefore, direct the receiver to pay these taxes out of the fund in his hands. As this case was heard upon petition, answers, and an agreed statement of facts, the parties have the right of appeal to the Circuit Court of Appeals.

A decree may be entered in accordance with this opinion.

OREGON R. & NAVIGATION CO. v. DUMAS.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,812.

1. PLEADING (§ 212*)—DEMURRER—ANSWER TO MERITS.

A demurrer to a complaint for want of facts is waived by an answer to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 522; Dec. Dig. § 212.*]

2. CARRIERS (§ 69*)—CARRIAGE OF FREIGHT — SPECIAL CONTRACT—BREACH—COMPLAINT.

Plaintiff's complaint alleged an agreement whereby defendant was to equip a side track to be laid to plaintiff's orchard, and furnish sufficient refrigerator cars to handle plaintiff's apple crop estimated at about 50 cars, at the rate of six or eight cars per week, as required by plaintiff, in consideration of which plaintiff agreed to ship all his apple crop over defendant's railroad. It also alleged that defendant failed and refused on demand to furnish cars in accordance with the contract, and that, by reason thereof, plaintiff was damaged, etc. *Held*, that the complaint alleged a contract mutual in its terms, and was not uncertain for failure to specify the time when the cars were to be furnished, it being presumed that the parties made their contract in view

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

of the usual custom relative to the transaction with knowledge of the time when, in the ordinary course, the crop would be moved.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 69.*]

3. APPEAL AND ERROR (§ 169*)—QUESTIONS NOT RAISED AT TRIAL—REVIEW.

A point asserted in support of an assignment of error will not be reviewed on appeal when it was not presented to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1018; Dec. Dig. § 169.*]

4. CARRIERS (§ 13*)—CARS—SPECIAL CONTRACT TO FURNISH—VALIDITY.

A carrier's special contract to furnish a shipper a specified number of cars at specific times and places is not invalid, as contrary to public policy and discriminatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 22; Dec. Dig. § 13.*]

5. CARRIERS (§ 67*)—CONTRACT TO FURNISH CARS—BREACH—DEFENSES.

Where a carrier contracted to furnish a specified number of cars to move plaintiff's apple crop at specified times and places, the carrier's inability to furnish the cars contracted for owing to unusually heavy traffic at the time the cars were demanded constituted no defense to an action for plaintiff's damages for such failure.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 226; Dec. Dig. § 67.*]

6. CONTRACTS (§ 108*)—VALIDITY—PUBLIC POLICY.

A court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial, and not theoretical or problematical.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 498; Dec. Dig. § 108.*]

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

Action by J. L. Dumas against the Oregon Railroad & Navigation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For convenience the parties to this action will be designated as they are in the court below and as in the briefs of counsel in this court. The plaintiff in an action at law to recover damages against the defendant alleged, in substance, that the defendant owned and was in possession of a railroad line leading past the plaintiff's farm in Columbia county, Wash.; that on the plaintiff's farm was a growing crop of apples, which would be ready for shipment and market in the fall of 1907; that it was known to plaintiff and defendant that to ship the crop to market would require about 50 refrigerator cars; that early in September, 1907, plaintiff and defendant entered into a contract, whereby it was agreed that plaintiff would ship all of said crop of apples over the defendant's railroad line, and would grade and prepare the ground for a side track from the defendant's road, and build a warehouse to use in connection therewith, and that the defendant would lay a side track and put in a switch, and furnish at said point upon demand all refrigerator cars required by the plaintiff to handle and ship said apple crop; that the defendant was informed by the plaintiff prior to making said contract that the plaintiff had a contract for the sale and delivery of his crop of apples, and that the amount to be received by him was dependent upon the delivery of said apples in accordance therewith, and the defendant agreed to furnish such cars as plaintiff needed, not less than six, nor more than eight per week; that, when said contract was made, it was known and understood between the parties that the crop was to be shipped for the purpose of being sold according to the plaintiff's contract with a purchaser; that the plaintiff complied with said contract upon his part, but that, when the crop was ready for ship-

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

ment, the defendant failed and refused on demand to furnish cars in accordance with the contract, and the complaint set forth the facts upon which it was alleged that, by reason of said breach of the contract on the part of the defendant, the plaintiff's damages were $11,128.20. The defendant answered, admitting that it constructed a spur track from its line of railroad where the same passed through the plaintiff's farm, but denied all the other substantial allegations of the complaint. For a separate defense, it alleged that, after making a careful investigation of the amount of apples to be offered for shipment upon its line of railroad upon the basis of shipments of former years, it made adequate provision for refrigerator cars to handle and accommodate all shipments of apples that could reasonably be anticipated during the season of 1907, and in the estimate took into consideration the crop of apples referred to by the plaintiff in his complaint, but that during the fall of 1907 an extraordinary and unusual demand for apples was made by dealers in eastern markets, and elsewhere; that the apple crops in Oregon, Washington, and Idaho were much larger than was expected, or could reasonably have been anticipated, and far in excess of those of any previous year; that at the same time there was an extraordinary demand for refrigerator cars for fruit growers in California; that the result was an extraordinary and abnormal condition in respect to the apple crop in the states of Oregon, Washington, and Idaho, and the transportation thereof, and in the fall of 1907, refrigerator cars were demanded by shippers, including the plaintiff, for immediate shipment, and an unusual and unprecedented demand for such cars was made upon the defendant far in excess of its available supply, and in excess of the number that its officers and agents could have reasonably anticipated would be required, and that the defendant exerted itself to its utmost to meet all orders made upon it for cars, apportioning the same equitably and without discrimination or delay, and that the plaintiff at all times received his share and his fair proportion of all the available refrigerator cars; that it was impossible to furnish immediately and at all times to plaintiff and other shippers refrigerator cars for the movement of apples to points in the eastern states as rapidly as required; that the defendant lost control of the use of cars sent to eastern points, and was powerless to secure the return of the same for the further loading of the crop during the season. And the answer charged against the plaintiff delay in preparing his crop for shipment promptly and early in the season as requested by the defendant. The plaintiff's reply denied the allegations of the defendant's defense. Upon these issues, the cause was tried before a jury, and a verdict was returned in favor of the plaintiff for $6,750.

W. W. Cotton, Arthur C. Spencer, Dunphy, Evans & Garrecht, Ralph E. Moody, Lester S. Wilson, and E. M. Barnes, for plaintiff in error.

Sharpstein & Sharpstein, W. H. Fouts, Winn & Burton, J. A. Hellenthal, A. P. Black, George Clark, and W. C. Sharpstein, for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that the complaint is fatally defective for failure to state a cause of action. A demurrer was interposed on this ground, but it was waived by an answer to the merits. In some respects the averments of the complaint are aided by the allegations of the answer. While the complaint is not as specific as the rules of good pleading require, it nevertheless contains all the essentials of a cause of action. It alleges the agreement between the parties whereby the defendant was to equip a side track to be laid to the plaintiff's

orchard, and was to furnish sufficient refrigerator cars to handle the plaintiff's apple crop, estimated to be about 50 cars, to be furnished at the rate of 6 or 8 per week, as required by him. But it is said that the complaint is uncertain, in that it specifies no time at which the cars were to be furnished, and defective, in that it alleges no promise of the plaintiff to ship his crop by the defendant's road. It must be taken for granted, however, that the contracting parties made their agreement in view of the usual custom relative to such a transaction, and that they had knowledge of the time when in the ordinary course the crop would be moved. Nor does the complaint fail to show that the contract was mutually binding. It alleges that it was mutually agreed that the plaintiff would ship all his crop of apples over the defendant's road.

At the close of the testimony, the defendant moved "that the court direct the jury to return a verdict in favor of the defendant," and error is assigned to the order of the court overruling the motion. It would be a sufficient answer to this assignment of error to point to the fact that the ground on which the motion was made does not appear to have been presented to the court below. But, assuming that the ground was that which is now urged in this court, namely, that the testimony was insufficient to show that there was a valid and enforceable contract, we find no error in the denial of the motion. There was evidence that the plaintiff's orchard was within reach of the Northern Pacific Railroad, as well as that of the defendant; that he had entered into negotiations with the Northern Pacific Company for the construction of a spur to handle his crop for the year 1907, when he was approached by agents of the defendant, with whom negotiations were had which culminated in the contract which is sued upon. There was evidence that the defendant refused to construct a side track for the use of plaintiff, except upon the express condition that all of his apple crop be shipped over its road; that said agents and the plaintiff made an estimate of the quantity of the crop, and the number of cars requisite for the shipment of the same; and that the defendant definitely promised to furnish cars sufficient for the prompt handling of the entire crop. It was further shown that the plaintiff exhibited to said agents a written contract whereby he had sold his crop to an eastern purchaser. That contract was admitted in evidence, and it shows that the shipments were to begin between September 10th and 15th, and to end about November 20th, and there was testimony in the record to show that those dates were agreed upon between the parties to the action. There was further evidence to show the failure and refusal of the defendant to furnish cars as agreed upon, and the consequent damages to the plaintiff.

Error is assigned to the exclusion of evidence offered by the defendant to sustain its defense that it made careful investigation of the apple crop likely to be offered for shipment in the year 1907, and made adequate provision for what could reasonably be expected, that the crop was an extraordinary one, far in excess of any previous year, that there was an extraordinary demand for refrigerator cars in California, and that the plaintiff received his share or fair proportion of available

refrigerator cars; and the defendant argues that to have furnished him all the cars contracted for would have been to discriminate unfairly in his favor, and that, therefore, the contract was void and unenforceable as illegal and against public policy. There was no issue made in the court below directly raising the question of the validity of the contract on the ground that it was affected by any principle of public policy. It is true that a discriminatory contract between a quasi public corporation, such as a railroad company, and its patrons, is held to be void because of the resulting unreasonable advantage to one over another, whereas, in fact, all have a moral and legal right to equality of treatment. But it is nevertheless well settled that a carrier may bind itself by contract to furnish a shipper a specific number of cars at specific times and places, and that damages may be recovered by the shipper for the carrier's failure or delay to carry out the contract (6 Cyc. 429; Baxley v. Tallassee & Montgomery R. R. Co., 128 Ala. 183, 29 South. 451; International G. N. R. Co. v. Young [Tex. Civ. App.] 28 S. W. 819; Nichols v. Oregon Short Line R. Co., 24 Utah, 83, 66 Pac. 768, 91 Am. St. Rep. 778; Outland v. Sea Board Air Line Ry. Co., 134 N. C. 350, 46 S. E. 735; Chattanooga Southern R. Co. v. Thompson, 133 Ga. 127, 65 S. E. 285; Midland Valley R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380; Mathis v. Southern Railway Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824; Clark v. Ulster & Delaware R. R. Co., 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. [N. S.] 164, 121 Am. St. Rep. 848), and inability of the carrier to furnish the cars contracted for, owing to unusually heavy traffic at the time, is no defense to an action for damages for such failure (Harrison v. Missouri Pacific Railway Co., 74 Mo. 364, 41 Am. Rep. 318; Deming v. Railroad Company, 48 N. H. 455, 2 Am. Rep. 267; Gulf, C. & S. F. Ry. Co. v. Hume, 87 Tex. 211, 27 S. W. 110). The defendant cites cases in support of the proposition that unusual press of business, which could not reasonably be anticipated, and the lack of proper facilities, may furnish an excuse, like any other cause not due to the carrier's fault, for failure to transport goods. But they are all cases in which the right of the shipper to the facilities for transportation depended upon the common-law obligation of the carrier to furnish cars on demand and to carry goods when offered. In none of them was the right of the shipper dependent on an express contract, as in the case at bar. Here was a contract made in the very month in which shipments were to commence, at a time when the defendant had all the means for ascertaining the extent of the crop, which it could acquire at any time. It knew, of course, the extent of its own resources available for carrying out the contract. It solicited the contract, and it interfered with the plaintiff's preparations to ship his crop by another road. It made it a condition of the contract that he should ship his entire crop by its road, and construct no spur to the competing road, thereby shutting off his access to the latter. In the terms of the contract as made, there was nothing illegal, and nothing to contravene public policy. The defendant cites cases which hold that a contract, whereby discriminatory rates are afforded a shipper, is illegal and void. But the principle upon which those cases depend is not applicable here. There was nothing

discriminatory in the contract as made. There was nothing in its terms to show that the plaintiff was to receive more than his proportionate share of cars, or that others would be injured thereby. A court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical. Especially is this so when the question of the application of a rule of public policy is raised for the first time in an appellate court. What we have to decide here is whether the court below erred in the decision of any question which was presented before it, to which exception was taken and error assigned. The evidence so offered and excluded would have presented no ground for relieving the defendant from its obligation upon its contract.

The judgment is affirmed.

RIPINSKY v. HINCHMAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,782.

1. MUNICIPAL CORPORATIONS (§ 999*)—CLOUD ON TITLE—SUIT FOR BENEFIT OF TOWN.

A suit cannot be maintained by citizens of an unincorporated town to relieve it of an alleged cloud cast on the title to lots and blocks by a conflicting homestead claim and surveys, since the town could make no claim of title to any of the lots and blocks, but the case would necessarily rest on the claim and title of the individuals, and not of the town.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2149; Dec. Dig. § 999.*]

2. QUIETING TITLE (§ 30*)—JOINDER OF PARTIES.

Where separate claimants of lots and blocks under an alleged unincorporated town site held under various claims of title, possession, etc., some of them claiming under the town site, others disregarding the town site, and some having only the mere shade of possessory right, they could not join in a single suit to remove an alleged cloud on the title to the land within the town site, consisting of a conflicting homestead entry survey, on the theory that such joinder would prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 64; Dec Dig. § 30.*]

3. QUIETING TITLE (§ 10*)—REMOVAL OF CLOUD—RIGHT OF PLAINTIFF.

In a suit to quiet title or to remove a cloud, plaintiff must succeed on the strength of his own title, and not on the weakness of that of his adversary.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. § 10.*]

4. QUIETING TITLE (§ 10*)—REMOVAL OF CLOUD—RIGHT OF PLAINTIFF.

One in possession of land merely, without legal or equitable title, cannot maintain a suit to quiet title or to remove a cloud therefrom.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 38; Dec. Dig. § 10.*]

5. PUBLIC LANDS (§ 39*)—TOWN SITES—POSSESSION.

The right of locators within an alleged town site, not shown to have been entered for that purpose, is at most a mere possessory right, with

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

the privilege of regularly entering the town site in the future, if the citizens so desire, and is insufficient on which to base a suit to remove a cloud on title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 99; Dec. Dig. § 39.*]

6. PUBLIC LANDS (§ 103*)—CLAIMS—LAND DEPARTMENT PROCEEDINGS.

Where defendant's claim of homestead within the boundaries of an alleged town site was pending before the federal land department, a federal court would not, in general, determine the validity of such claim in advance of the land department's decision.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 103.*]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

Suit by G. W. Hinchman and others against Solomon Ripinsky. Decree for complainants, and defendant appeals. Reversed and remanded, with directions.

This is a suit to remove cloud from title. The bill of complaint sets forth, in effect, that plaintiffs are residents and occupants of property in the town of Haines, in the district of Alaska, being lands embraced in United States survey No. 573; that all of said lands embraced in said survey No. 573, ever since December, 1897, have been, and now are, in the actual possession and occupation in good faith, of the plaintiffs, and constitute the principal business section of the town of Haines; that plaintiffs are now occupying in good faith, and have so occupied since the said month of December, 1897, for business and residential purposes. Annexed to the complaint and made a part thereof is a plat of what purports to be the portion of the town site of Haines included within the exterior boundaries of survey No. 573, and in connection therewith it is alleged that certain streets and avenues shown on the map are public highways and thoroughfares, and are used in common by all the residents of the town, and that the remainder of the ground so set forth on the map, and by metes and bounds, and by the numbered parcels, is claimed and occupied in severalty by the various plaintiffs, respectively, setting out each particular parcel which each plaintiff claims to possess and occupy. In this connection it should be noted that some of the parcels shown on the plat, which appears to be in conflict with survey No. 573, do not seem to be claimed by any of the plaintiffs, or by any other persons. It is further alleged that the defendant, Solomon Ripinsky, claims an interest or estate, adverse to these plaintiffs, in and to said lands embraced in survey No. 573, but that defendant has never occupied any of said lands within the survey, except two small parcels, one, 25x50 feet, which he acquired by purchase from one H. Fay, and another, 100x150 feet, which he occupies as a residence, and that he has no right, title, or interest in or to any of the remaining portion of said tract. A decree is sought: First, that plaintiffs are the owners and in possession of, and entitled to the possession of, all the lands described in the complaint except the two parcels conceded to the defendant; second, that defendant has no right, title, or interest in or to any of the premises described in the complaint, except the two parcels alluded to; and, third, that plaintiffs have and recover of and from defendant their costs and disbursements, and for such other and further relief as may seem meet in equity.

The defendant answers by a general denial, and sets up affirmatively that for a long time prior to August 1, 1897, his grantors were the owners and in possession of all the land embraced by survey No. 573, and entitled to possession by virtue of prior claim, occupancy, and improvement thereof; that prior to said date defendant's grantors conveyed to him all their right, title, and interest in and to said premises, and defendant entered into possession and occupancy; that thereafter defendant remained in actual, open, notorious, and exclusive possession and occupancy thereof as a home, until

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

ousted by plaintiffs, by reason whereof defendant was the owner against all persons except the United States, and became and was entitled to the same as a homestead, and to enter the same under the acts of Congress extending the homestead laws to Alaska; that on or about August 1, 1897, the plaintiffs unlawfully, and without right, entered upon the lands described in the complaint, and ousted this defendant therefrom; and prays that the complaint of plaintiffs be dismissed.

A demurrer was interposed to the complaint, on the ground that several causes of action were improperly united. This was overruled, and after replication the cause went to trial upon the merits, resulting favorably to plaintiffs. It was decreed that plaintiffs were the owners of, and entitled to the possession of, all the lands embraced in survey No. 573, situated in Haines, Alaska, except two small tracts, one, 25x50 feet, known and described as lot 5, block 1, in said town of Haines, and another, 100x150 feet, in the extreme easterly end of said tract of land embraced in survey No. 573; and it was further decreed that defendant has no right, title, interest, or possession in or to any of the remainder of the land embraced in said survey No. 573. The defendant appeals.

Maloney & Cobb and R. W. Jennings, for appellant.

Shackleford & Lyons, Alfred Sutro, and H. D. Pillsbury, for appellees.

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

WOLVERTON, District Judge (after stating the facts as above). The testimony is voluminous, and, while it has received our careful attention, only meager reference need be made to it, in the view we take of the controversy. There was introduced in evidence by the plaintiffs a plat of the town of Haines, which purports to have been compiled from the original town plat and actual surveys. The original survey of the town was made by one Walter Fogelstrom, and filed for record January 29, 1898. Fogelstrom acted in behalf and at the request of citizens of the place at the time. This town plat covers by its blocks 1, 2, 3, 4, 5, and 6, and streets and alleys, the larger part of the area of survey No. 573, which marks the boundaries of a homestead claimed by the defendant, Solomon Ripinsky; but there is a parcel of 270 to 280 feet in length and about 150 feet in width at the extreme east end, and another of about 150 feet in length at the west end, of the survey, that it does not include. The parcel at the east end not so covered by the town-site survey is designated on a plat, designed to show the conflict in survey between the town plat and survey No. 573, which was introduced in evidence by the plaintiffs, and marked "Plaintiffs' Exhibit No. 1," as "Ripinsky Homestead." It will be convenient hereafter to refer to this plat as "Plaintiffs' Exhibit No. 1."

The evidence of plaintiffs tends to show, so far as it is necessary to allude to it, that Harry Fay and five or six others went to Haines some time in December, 1897, and that they located upon certain lots or parcels of land within the limits of the town site of Haines as subsequently surveyed; that still others made like locations later, extending down to the time of the institution of this suit, and even thereafter; that some of these locators went into possession and made improvements, and in a few instances they have continued to live upon

such premises to the present time, utilizing the same for business or dwelling purposes. In many cases the possession has passed to others, either through mere delivery, or by bill of sale or deed, and the successors, either immediate or remote, now occupy the premises. In other cases, parties are in occupancy where no previous location has been made, perhaps claiming by right of mere possession, or under some bill of sale or deed from some alleged prior occupant. In still others, locations have been made for the purposes of trade and manufacture, the location notices asserting that the land specified "contains neither coal nor the precious metals, nor any town site, nor any land to which the natives of Alaska have prior rights."

There are 34 parties plaintiff to the suit, and to illustrate the style of holdings relied upon as a basis for the cause of suit it will be instructive to trace the titles of some of the plaintiffs, which are exhibited by the proofs and the record. In order to prevent confusion, the lots as numbered on the Fogelstrom plat begin on the east side and run west, for the south tier of each block from 1 to 6, and for the north tier from 7 to 12. The map to which reference is had here is one compiled by Elias Ruud. It is offered in evidence as "Plaintiffs' Exhibit No. 2," and may be termed the "Fogelstrom Map." The lots as shown on Plaintiffs' Exhibit No. 1, for the south tier in general are numbered from east to west, running from 1 to 6, and for the north tier from west to east, running from 7 to 12. The exceptions to this numbering are blocks 1 and 2. As to block 1, the south tier is numbered irregularly, beginning at the east and running from 1 to 11, and the north tier regularly, beginning at the west and running from 12 to 17. As to block 2, the south tier again is numbered irregularly from east to west, the numbers running from 1 to 8, and the north tier regularly from west to east, running from 9 to 14. The locations and transfers presumably are according to the Fogelstrom or Ruud map or plat, Plaintiffs' Exhibit No. 2.

H. Fay is a party plaintiff. He claims parcel 4, block 1, of the town of Haines. This includes portions of lots 3 and 4 as designated on the Fogelstrom map. A location notice is offered, Harry Fay as locator, whereby he located and claimed for residence and business purposes lots 3 and 4, situated in the town of Haines, as shown on the survey and plat of said town, made by Walter Fogelstrom, civil engineer. This notice bears date December 14, 1897. There is manifestly some mistake as to the date, for the Fogelstrom plat was concededly not made until a later date, and a location could not then have been made as shown on the survey and plat, because it was not then in existence. But, be that as it may, Fay testifies that he has been the owner and in possession of lot 4, block 1, ever since, occupying for business and dwelling purposes. This alludes to lot 4, Exhibit 1. In derogation of his title, however, a deed is in evidence showing that Fay and wife conveyed the east half of lot 4, Fogelstrom map, to James Fay, October 2, 1903. Thus stands Harry Fay's title and right to possession.

G. W. Hinchman, also a party plaintiff, claims to be the owner and in possession of lots 7 and 8, block 3, Exhibit 1, which correspond with lots 11 and 12, Fogelstrom plat. Hinchman testifies that lots 7 and 8

are his lots; that he has occupied them since the fall of 1903; that he bought lot 8 from M. W. Lane, and the other from Bjornstad; and then describes the improvements. The record shows deed from M. W. Lane to George W. Hinchman to lot 11, Fogelstrom map, of date October 8, 1903, and deed from M. W. Lane to Carl Bjornstad to lot 12, of date July 5, 1907. It does not appear that any location was ever made of these lots by any one.

Thomas Vogel claims lot 1, block 2, Exhibit 1, which corresponds in a measure with lots 1 and 2, Fogelstrom map. He testifies, under the name of Tim Vogel, that he is the owner of part of lot 1 and 45 feet of lot 2. He says he did not locate, but bought from E. L. Wilson. The record shows that location was made of lot 1 by Daniel Morris, January 26, 1898, and of lot 2 by A. Blonde, February 12, 1898. There are no conveyances from either Morris or Blonde. Vogel conveyed to W. H. Spencer, March 13, 1903, a parcel lying in the northeast corner of lot 1, being 50 feet east and west by 20 feet north and south. Spencer and wife conveyed to Tom Valeur, of date July 19, 1904, a parcel 40 feet in width off the north end of lots 1 and 2. There are no conveyances other than these.

S. J. Weitzman claims lot 3, block 1, and R. L. Weitzman, his wife, lots 12 and 13 of the same block, according to Exhibit 1. These lots cover parts of 3 and 4 and 11 and 12, Fogelstrom map. Weitzman testifies that he located lot 3, and that his wife bought 12 and 13 from Cronen, the original locator. The record shows Harry Fay located lots 3 and 4, Fogelstrom map, December 14, 1897, and that Harry Fay and wife deeded to James Fay lot 3 and the east half of lot 4 October 2, 1903. As to lots 12 and 13, or 11 and 12 Fogelstrom map, the record shows no location whatever. E. B. Cronen conveyed these lots, July 6, 1901, to R. L. Weitzman, and on October 30, 1902, R. L. Weitzman and husband conveyed 25 feet off the south end to D. Butterick.

W. W. Warne sues for lots 7, 8, 9, 10, and 11, of block 2, Plaintiffs' Exhibit 1. These correspond with 5, 6, 10, 11, and 12, Fogelstrom map. As to these lots W. B. Stout testifies that he thinks Rev. Mr. Warne claims them, that Warne is now in North Dakota somewhere, and that he placed some foundations for buildings on the lots and built a good fence around them several years ago. The record shows that lots 10, 11, and 12 were located by Adele Bigford December 14, 1898, and that lot 10 was again located September 6, 1906, by Cortes Ford, lot 11 on the same date by Frank Bruskers, and lot 12 by T. Wilder Ford. As it pertains to lots 5 and 6, Fogelstrom plat, there has been neither location nor deed of any sort.

Kate Kabler claims to be the owner of lot 1, block 4. As to this parcel the two maps correspond. It is shown that Mrs. Kabler is not in Haines, and that the lot is unoccupied; that it has a house upon it, but no other improvements. The record shows that W. W. Warne located it December 15, 1897, for trade and manufacturing purposes, and that E. Sanderson again located the same lot, under the alleged townsite, January 31, 1898.

These instances well illustrate the record testimony respecting the title to the property concerned. In other cases, the alleged owners do

not appear to testify to their claims and ownership; but witnesses were called and asked, in a general way, who were the owners of such and such lots, with the answers that the several claimants were such owners. Beyond this, Plaintiffs' Exhibit 1 further shows that a number of the lots of the town of Haines, lying in conflict with survey No. 573, are wholly vacant and unoccupied, and in actual fact no one is in possession or claiming any interest therein. So it thus appears that there are all shades of claim of title and possession, as it respects the lots of the town lying in conflict with survey No. 573, from that of the claimant who located his lot and has continued in unbroken possession to the present time to that of him who has the merest shadow of possession, as well as vacant lots without a pretense of claim of title, occupation, or possession.

On the other hand, Ripinsky claims to have obtained possession and title to his claim from one Sarah Dickinson and Billy Dickinson, her son, who were the wife and son of George Dickinson, under deeds dated December 2 and December 21, 1897, respectively, which were intended to convey 16 acres of land adjoining the Presbyterian Mission on the north, less 1 acre that had been sold to Dalton; the description being very indefinite. However, Ripinsky further claims that, immediately after the receipt of such deeds, he went into possession of the whole of such tract of 16 acres, less 1, and fenced the same by means of posts and wires, and was in the sole possession thereof, claiming the whole, before any person located thereon, either as a town-site locator or for trade and manufacturing purposes. Ripinsky further asserts that he continued in such exclusive possession, save that a number of persons unlawfully invaded his holding, until June 23, 1903, when he filed a notice of location of homestead, claiming the land as a homestead. More than two years later, namely, on or about December 18, 1905, he filed an amended notice, by which he claimed actual personal and continuous occupation of the land described, and settlement thereon, since December, 1897, and the exclusive legal right to and ownership of the tract through mesne conveyances and transfers thereof from the original claimants, who settled upon and exclusively occupied the same according to law from the year 1878 to date of transfer to claimant. The survey denominated "Survey No. 573" was made March 23, 1905, being previous to the filing of this amended notice. It seems that Ripinsky has applied to the land department for a patent according to the survey, and the matter is still pending in that department.

This statement sufficiently shows the relative claims of the disputants, so that the legal questions involved may be intelligently resolved and determined. Counsel for Ripinsky insist upon two propositions, which it is claimed are fatal to the maintenance of plaintiffs' suit: First, that there is a misjoinder of causes of suit; and, second, that plaintiffs are without sufficient title upon which to base a suit for removal of cloud.

The first question was raised by demurrer, and is now here insisted upon. As to this the plaintiffs contend that the present "is not a suit to establish the title of the appellees as against all the world; it is an action brought by them as owners of property in the town of Haines,

an unincorporated town (but surveyed and a plat thereof recorded in January, 1898), to remove from all of the property embraced within the limits of the town, as platted, the cloud cast upon its title by appellant's homestead claim (survey No. 573)." And thus it is argued that this is in reality a suit on the part of the citizens of the town to relieve the town of the alleged cloud cast upon the title to the lots and blocks with which survey No. 573 is in conflict; that, while it was not brought in behalf of the plaintiffs and all other persons similarly situated, it should have been so instituted, and ought now to be so treated; and that the appropriate relief is a decree removing the cloud in toto as it affects the town in any of its scope.

The answer to this contention is that the suit was not so instituted. But, if it had been, the case would be no different, as the basis thereof must needs be the claim and title of the individuals, not of the town. Indeed, the town can make no claim of title to any of the lots and blocks within its borders, especially an unincorporated town, which practically has no borders. The rule that a court of equity will interpose its jurisdiction to avoid a multiplicity of suits, "where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone" (1 Pom. Eq. Jur. § 245), is sought to be invoked; but we do not deem it applicable, for the reason that the plaintiffs' claims do not all arise from the same common cause, neither are they governed by the same legal rule, nor do they involve similar facts. One of the plaintiffs, possibly two or three, is claiming as an original locator within the alleged town site, having continued in unbroken possession to the present time, and being now in possession. Others show title simply by exhibiting a deed or deeds from some one else, without even depending upon any location under the townsite, or tracing their holdings or possession thereto. Others show mere possession, without else, and yet others show location for trade and manufacturing purposes, discarding the townsite, with an attempt to trace title and possession to such location. It is thus very apparent that the titles of the several plaintiffs, being held in severalty, are not of the same or similar kind or description, and the rule specified does not meet the case.

In the case of Osborne et al. v. Wisconsin Cent. R. Co. (C. C.) 43 Fed. 824, which is cited by plaintiffs, there was a single question presented, namely, whether the lands held by the plaintiffs were granted by a certain act of Congress for the benefit of the railroad, or reserved to the United States and thus excluded from the grant. It was said that there was a common source of title among the complainants, namely, the action of the land department in opening up the lands for entry; all of the complainants being supposedly entrymen in pursuance of law. In other words, there was there uniformity of title among the complainants. Not so here, for there is the claim as locators under a town site, the claim of locators discarding the town site, the claim as holders under prior deed without tracing title to any location,

and claim by the merest shade of possession only, among which there is such manifest lack of uniformity of title as to put the plaintiffs beyond the scope of the rule. Instead of there being a single question, dependent upon a law of Congress, there arise here as many different questions of fact as there are claimants suing, and the defendant's title depends as well upon the question whether his entry was prior to those of the plaintiffs as upon the regularity thereof. Thus are presented several questions, of both fact and law, for determination.

Nor is the case of Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437, 7 C. C. A. 293, which on principle is like the Osborne Case, in point. There the court says, at page 441 of 58 Fed., at page 296 of 7 C. C. A.:

"The law and the facts which determine the validity of the title of one such owner also determine the validity of the title of every such owner."

And the court continues that:

"While they are owners in severalty, they are united in interest in the sole question at issue in such a case, the validity of the title of their common grantor."

The titles here depend, on the one hand, upon the act of Congress relative to town sites, as applied to Alaska, and the purchase of land for trade and manufacture, and, on the other, upon the homestead act, also as applied in Alaska, as well as upon a great diversity of facts peculiar to each particular claimant. The case at bar is rather to be controlled by the principle applied in the case of Utterback v. Meeker, 16 Wash. 185, 47 Pac. 428. Manifestly, the attempt here, as there, is to unite in one action several distinct and separate causes existing in favor of distinct parties, whose interests are several, and none of whom has any interest in the causes of the others. Their positions may be similar, arising from the fact that each has an alleged right of action against the same person for causes of some resemblance upon the facts; but this is not sufficient. See authorities cited in the above case. There is, to our minds, an improper joinder of causes of suit in the case at bar.

The second question is whether plaintiffs are possessed of title sufficient upon which to base their action. The general rule, in a suit to quiet title or to remove a cloud, as well as in ejectment, is that the plaintiff must succeed upon the strength of his own title, and not on the weakness of that of his adversary. The very idea of removing a cloud from title presupposes that the plaintiff has a title of some order to defend or to relieve of an alleged or threatened incumbrance or cloud. One in possession merely, without legal or equitable title, cannot maintain a suit to quiet title or to remove a cloud therefrom. 32 Cyc. 1329, 1330. And thus it was held by the Supreme Court, in Stark v. Starr, 6 Wall. 402, 18 L. Ed. 925, that mere naked possession is insufficient upon which to require an exhibition of the estate of the adverse claimant, and this under a statute of Oregon providing that "any person in possession, by himself or his tenant, may maintain" the suit. The court there says:

"His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be

exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Under the statute of Alaska, which goes somewhat further than the Oregon statute, it was held by this court that a valid location of a mining claim, accompanied by possession, was title sufficient upon which to base a suit. Fulkerson v. Chisna Min. & Imp. Co., 122 Fed. 782, 58 C. C. A. 582. And such is undoubtedly the rule as applied in mining claims. That case does not go to the extent, however, that mere possession, unaccompanied by a claim of right under some law or authority, is sufficient within itself.

From the facts as portrayed by the testimony, it appears that some of these complainants have no shadow of claim of title, except mere possession. They have no location under the alleged town site of Haines, no deed from previous holders, if this were sufficient, and no pretense that they are claiming under authority of Congress. It is not even shown that a site has ever been entered for townsite purposes in pursuance of the laws of Congress as extended to Alaska. Section 11, Act March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1467); 1 Fed. St. Ann. 53. And the extent of the right acquired in alleged pursuance of the town-site statute is that of mere possession only, with the privilege, perhaps, of regularly entering a town site in the future, if the citizens so desire, when their rights will depend upon prior possession. It does not seem to us that such possession exhibits a sufficient equitable title upon which to base a suit to remove a cloud, and we so hold.

Further than this, the defendant's claim for homestead is now pending in the land department, and a judgment of this court upon the validity of such claim would be anticiptaing the action of the department, which, as a general rule, ought not to be done.

It may be remarked, further, that it appears from the prayer of the plaintiffs and the decree of the court that the scope and purpose of the suit was to determine the extent of the defendant's claim and right, even beyond any effect it might have in clouding the plaintiffs' titles. Thus it appears, by plaintiffs' own showing, and especially by Exhibit 1, which they produced, that Ripinsky's claim extends to the east of the alleged town plat, ranging from 270 to 283 feet, with a width of about 150 feet, and to the west of such plat some 150 feet for the full width of the claim; and yet the decree declares plaintiffs are the owners and entitled to the possession of all lands covered by said claim, except a parcel at the extreme easterly end thereof, 100 by 150 feet in extent, and another parcel within the alleged town site, 25x50 feet in area. This would work a patent injustice to the defendant. But, waiving this, as it could be remedied by a modification of the decree below, the plaintiffs are not entitled to the relief demanded, because of a misjoinder of causes of action and the want of sufficient title upon which to base the action.

The cause, therefore, will be reversed and remanded to the trial court, with directions to dismiss the same.

CHILDS et al. v. FERGUSON.

(Circuit Court of Appeals, Eighth Circuit. September 19, 1910.)

No. 3,323.

(Syllabus by the Court.)

1. COURTS (§ 363*)—FEDERAL COURTS—LAWS OF STATE AGAINST PRACTICE OF NATIONAL COURTS.

Where the constitutional laws of a state which govern the descent, alienation, and transfer of real property and constitute rules of property conflict with the practice of the national courts in equity, the former prevail; and where there is no conflict, both are enforced.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 363.*]

2. COURTS (§ 332*)—FEDERAL PRACTICE—ENGLISH CHANCERY PRACTICE.

The practice of the federal courts in equity regarding abatement and revival is regulated by the practice of the High Court of Chancery in England in 1842, when rule 90 in equity was adopted.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 332.*]

3. COURTS (§ 343*)—FEDERAL COURTS—DEATH OF DEFENDANT AFTER SUBMISSION AND BEFORE DECREE—REVIVAL.

It was the general rule under the English chancery practice in 1842, as it is now in the federal courts in equity, that the death of a sole defendant, which had the effect to transfer his interest to others, abated the suit, in the absence of a revival, and rendered void all subsequent proceedings to affect that interest.

An exception to that rule was, as it is in the federal courts in equity still, that when the suit had been finally heard and submitted the subsequent death of the defendant wrought no abatement, but the court had plenary jurisdiction to decide the issues and enter a valid decree without a revival.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 915; Dec. Dig. § 343.*]

4. MORTGAGES (§ 526*)—FORECLOSURE DECREE AND SALE WITHOUT REVIVAL—COLLATERAL ATTACK IN NEBRASKA.

It was the settled law of Nebraska, when certain mortgages were made, that an order of sale, a sale, and a confirmation of the sale, made after the death of the party to a suit in equity, subsequent to the decree, were impervious to collateral attack. After the final hearing, decision, and order for decree of foreclosure of mortgages, the sole defendant died, and a decree, sale, and confirmation were made without revival. An application for a writ of assistance against the heirs of the defendant in possession was made.

Held, the law of Nebraska became a part of the contract of the parties to the mortgages. The decree, sale, and confirmation were not open to collateral attack, and the writ was rightly issued.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 526.*]

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

Bill by Smith F. Ferguson, executor of Everard D. Ferguson, deceased, against Susan I. Childs and Harriet M. Childs. Decree for complainant, and defendants appeal. Affirmed.

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

Ellery H. Westerfield, for appellants.
W. J. Connell, for appellee.

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

SANBORN, Circuit Judge. Susan I. Childs and Harriet M. Childs, daughters of Charles Childs, the mortgagor, and the defendant in a suit to foreclose certain mortgages upon real estate which he made, challenge the validity of an order made in that suit, after notice to them and a hearing, for the issue of a writ of assistance to place the administrator of the estate of Everard D. Ferguson, the purchaser at the foreclosure sale, in possession of the homestead, which they occupied with their father before his death and under his title since his decease, on the ground that he died before the decree of foreclosure was filed or entered, and before the sale thereunder was made, and the suit has never been revived.

Charles Childs, the mortgagor, was served with a summons, appeared and answered the bill, proof was made, the case was finally heard, and on October 24, 1902, the court decided it and ordered a decree for the complainant. On January 15, 1903, the decree thus ordered was signed, filed, and entered of record, and it contained an order that it should be "entered and spread on the records nunc pro tunc as of the date this cause was decided and decree for complainant ordered, to wit, October 24, 1902." Meanwhile the defendant Charles Childs had died on January 4, 1903, and counsel for the appellants contend (1) that his death abated the suit and rendered the decree futile; and (2) that it caused the order of sale and all proceedings under it to be absolutely void and open to collateral attack. The questions thus raised arise in a field where both the constitutional laws of a state which govern the descent, alienation, and transfer of land within its borders and constitute rules of real property, and the rules of practice of the federal courts in equity, may apply, and it is a well-established rule that, when such rules of practice in equity conflict with the constitutional laws of the state in force when the contracts regarding the land were made, the latter prevail, because they become a part of the contracts between the parties. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143; Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 634, 24 L. Ed. 858. But, when there is no conflict between them, the laws of the state and the rules of practice of the courts are alike enforced.

There is no rule of the Supreme Court or of the Circuit Court which specifically answers the question that the appellants present, and rule 90 in equity declares that in such cases the practice of the national courts in equity shall be regulated by the practice of the High Court of Chancery in England in 1842, when that rule was adopted. It was the general rule under the English chancery practice in 1842, as it is now in the federal courts in equity, that the death of a sole defendant, which transferred his interest to others, abated the suit in the absence of a revival, and rendered void all subsequent proceedings to affect that interest. Mitford's Pleadings (6th Am. Ed.) 69; Story's Equity Pleadings, § 354; Foster's Federal Practice (3d Ed.) § 174. There

was, however, an exception to that rule, and there is still in the national courts in equity, to the effect that, when the suit had been finally heard and submitted to the court for decision, the subsequent death of such a defendant wrought no abatement, but the court had plenary jurisdiction to decide the issues and enter a valid decree without a revival. Yeaveley v. Yeaveley (A. D. 1671) 3 Reports in Chancery, 25, 41; Clapham v. Phillips (A. D. 1674) Finch's Cases in Chancery, 169; Sheffield v. Duchess of Buckingham (A. D. 1739) 1 West's Chancery Rep. 673, 676; 2 Equity Cases Abridged (A. D. 1769) 279; Belsham v. Percival, 2 Cooper's Chancery Cases, 176; Turner v. London & S. W. Ry. Co. (A. D. 1874) 17 Law Reports, Equity Cases, 561, 566, 569; Troup v. Troup (A. D. 1867) 16 W. R. 573; Collinson v. Lister, 20 Beav. 355. No statute of Nebraska or decision of any of its courts has been cited or found in conflict with this general rule, or with the exception to it which has been recited, and both must, therefore, be enforced. The case at bar falls under the exception, and the decree of foreclosure was valid, and, since it was not challenged by appeal, it renders the questions determined by it res adjudicata against the appellants.

Their counsel argue, however, that under the practice in chancery in England and under that of the federal courts a revivor is necessary where a sole defendant whose rights are affected by the decree dies and his interests pass to another after the decree and before its execution, and that this is also the rule established by the decisions of the Supreme Court of Nebraska; and they cite Street v. Smith, 75 Neb. 434, 436, 106 N. W. 472, and Keith v. Bruder, 77 Neb. 215, 109 N. W. 172. But these are cases in which the question arose under a direct attack upon the proceedings subsequent to the death. In the case at bar the sale under the decree was made and confirmed without a revivor. No appeal was taken from the order of confirmation of the sale, no motion or petition to avoid it was made, and it is not now directly, but is collaterally, assailed. In McCormick v. Paddock, 20 Neb. 486, 488, 489, 30 N. W. 602, the Supreme Court of that state held that an order of confirmation of a sale under a decree made after the death of a party whose interest in the subject-matter passed to another by her death, and the decree itself, were voidable, but not void, and that they were impervious to collateral attack, although there had been no revivor; and it cited in support of this conclusion its prior decision to a like effect in Jennings v. Simpson, 12 Neb. 558, 565, 11 N. W. 880. In the year 1894, in the case of Harter v. Twohig, 158 U. S. 448, 454, 15 Sup. Ct. 883, 39 L. Ed. 1049, the Supreme Court of the United States cited these cases and declared that this was the settled law in Nebraska. The mortgages foreclosed under the decree in this suit were made between 1890 and 1896, and this, the settled law of Nebraska at that time, became a part of the contracts between the parties under the decisions of the Supreme Court in Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143, and Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 634, 24 L. Ed. 858, and the other cases there cited, and rendered the decree, the sale, and the confirmation impervious to collateral attack.

The decisions in Vogt v. Daily, 70 Neb. 812, 98 N. W. 31, Street v. Smith, 75 Neb. 434, 436, 106 N. W. 472, and Keith v. Bruder, 77 Neb. 215, 109 N. W. 172, upon which the appellants rely, are not controlling here, because they were not rendered until after the mortgages had been made, and hence they could not become a part of the contracts between the parties. Moreover, the decision in the first case was in an action at law and not in a suit in equity, and those in the last two cases, as we have already stated, did not involve collateral attacks upon the proceedings after the death.

Nor is this rule of property unjust or unreasonable. When a mortgagor dies after he has appeared, answered, presented his evidence and arguments, and the court has decided his case and ordered a sale of the mortgaged property to satisfy the liens the mortgages evidence, those who acquire his property by his death take it subject to that decision and to those liens. If the mortgagor conveys his title and interest, it is unnecessary to make his grantee a party to the suit, or to notify him of the decree or the subsequent proceedings to apply the land to the payment of the liens; and why should one to whom the title passes by descent without consideration have greater rights than one to whom it goes by purchase? It is said that the decree in this case provides for a judgment for a deficiency after the sale, and that such a judgment cannot be rendered without notice to the parties to be charged thereby. Conceding, without deciding, that this position may be tenable, and that such a judgment would be beyond the jurisdiction of the court, it does not follow that the sale of the real estate to satisfy the lien upon it, which was adjudicated by the decision of the court, is not within that jurisdiction; and, although decisions upon the latter question are conflicting (Seeley v. Johnson, 61 Kan. 337, 341, 59 Pac. 631, 78 Am. St. Rep. 314; Halsey v. Van Vliet, 27 Kan. 474, 482), there is very respectable authority to the effect that the proceedings for such sales are far within the jurisdiction of the court and are valid (Whiting v. United States Bank, 38 U. S. 6, 12, 13, 14, 15, 10 L. Ed. 33; Harrison v. Simons, 3 Edw. Ch. [N. Y.] 394; Hays v. Thomae, 56 N. Y. 521, 522; Smith v. Joyce, 14 Daly [N. Y.] 73, 75; Wing v. De La Rionda [City Ct. Brook.] 5 N. Y. Supp. 550; Id., 125 N. Y. 678, 680, 25 N. E. 1064).

Because it was the settled law of the state of Nebraska, and a rule of property in that state when the mortgages in suit were made, that sales of mortgaged lands and their confirmations after the death of the mortgagors defendants under decrees ordered against them before their decease were voidable, but were not void, and were not open to collateral attack, the sale of the land here in question and the confirmation thereof were impervious to the assault of the appellants on the application for the writ of assistance, and there was no error in its issue.

The order below is accordingly affirmed.

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

(Circuit Court of Appeals, Eighth Circuit. September 19, 1910.)

No. 3,288.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 724*)—ASSIGNMENT OF ERROR FOR REFUSAL TO DIRECT VERDICT SUFFICIENT WITHOUT REPEATING THE REASONS FOR THE DIRECTION STATED BELOW.

   Where at the close of all the evidence a motion to direct a verdict for the defendant, on the grounds that there is no substantial evidence to sustain a charge of negligence of the defendant and that the evidence of the plaintiff's contributory negligence is conclusive, is denied, an assignment of the denial as error is sufficient to invoke the review of this ruling, without a further statement of the reasons why the ruling is alleged to be erroneous.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2997; Dec. Dig. § 724.*]

2. NEGLIGENCE (§ 82*)—CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSING.

   One whose negligence contributes to his injury cannot recover damages of another whose negligence concurred to cause it, even though the carelessness of the latter was the more proximate cause of it.

   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112–114; Dec. Dig. § 82.*]

3. NEGLIGENCE (§ 136*)—DUTY TO DIRECT VERDICT WHERE EVIDENCE OF CONTRIBUTORY NEGLIGENCE CONCLUSIVE.

   Where at the close of the trial the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which contributed to his injury that a finding to the contrary cannot be sustained by the court, it is its duty to direct the jury to return a verdict for the defendant.

   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

4. RAILROADS (§ 335*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE OF DEFENDANT NO EXCUSE FOR.

   The negligence of the servants of railroad companies in failing to sound whistles or ring bells on the approach of their trains to crossings constitutes no excuse for the failure of travelers on the highways to discharge their duty to exercise reasonable care to look and listen effectively to avoid collisions before they enter upon railroad tracks.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1087; Dec. Dig. § 335.*]

5. RAILROADS (§§ 327, 328*)—CONTRIBUTORY NEGLIGENCE—FAILURE TO STOP, LOOK, AND LISTEN NEGLIGENCE, WHERE LOOKING AND LISTENING WITHOUT STOPPING USELESS.

   Where a plaintiff upon a highway, approaching a railroad crossing, cannot look or listen effectively without stopping, it is his duty to stop and look and listen before entering upon the railroad, and a failure so to do is fatal to his recovery, if such failure contributes to his injury.

   If his view is obstructed, then he must listen more attentively and carefully. If his eyes are useless, and there is any noise or confusion which he controls, such as that of horses' feet, or the rumbling of a wagon, or the grinding of brakes, which interfere with the acuteness of his hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1050, 1058; Dec. Dig. §§ 327, 328.*]

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

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

Action by Marion Bennett against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

O. W. Dynes, O. M. Brockett, J. C. Cook, J. N. Hughes, and Jaques & Jaques, for plaintiff in error.

A. C. Steck, D. F. Steck, F. F. Dawley, and C. E. Wheeler, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below drove his team of horses, attached to a lumber wagon, upon the railroad of the Chicago, Milwaukee & St. Paul Railway Company at a crossing in a cut about eight feet deep, and was struck and injured by a train that crossed the highway on the railroad. He sued the company for damages caused by its alleged negligence, in that it failed to sound the whistle or ring the bell of its engine at the proper time to warn of the latter's approach. The company alleged that it rang the bell, sounded the whistle, and otherwise exercised due care, and that the plaintiff's injury was caused by his own negligence, in that he failed to exercise ordinary care to ascertain whether or not a train was approaching before he drove his horses upon the railroad.

At the close of the trial the company made a motion for a peremptory instruction to the jury to find for the defendant (1) because the evidence showed that the plaintiff was not in the exercise of ordinary care for his safety at and immediately preceding the time of his injury; (2) because this lack of care contributed to his injury; and (3) because the evidence failed to show that the company was guilty of actionable negligence. The court denied the motion, and this denial is specified as error in the company's assignment. Counsel for the plaintiff below insist that this specification is too general to invoke the consideration of the ruling by an appellate court under rule 11 of this court, which requires that an assignment of errors shall set out separately and particularly each error asserted and intended to be urged, and declares that errors not assigned according to this rule will be disregarded, and they cite Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 133, 12 Sup. Ct. 181, 35 L. Ed. 961, Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 415, 12 Sup. Ct. 679, 36 L. Ed. 485, Supreme Lodge of K. P. v. Withers, 32 C. C. A. 182, 185, 89 Fed. 160, 163, and Deering Harvester Co. v. Kelly, 43 C. C. A. 225, 228, 103 Fed. 261, 264.

The opinions in these cases have been carefully examined, but they do not seem to us to sustain the contention of counsel for the plaintiff here. The objection counsel make to the specification is that it fails to state for which of the three reasons specified in the motion its denial is now claimed to be error. The denial, however, was error, if the motion should have been granted for either of the reasons urged therein, and the eleventh rule requires counsel to set forth in their assignment the errors alleged only, and not the reasons why they alleged that

they are errors. The purpose of this rule is to facilitate, not to prevent, reviews. The reasons why the denial was claimed to be error clearly appear in the motion denied, and the practice of restating them in the assignment of errors which counsel seek to establish is too cumbersome and technical to commend itself to the judgment. Where at the close of all the evidence a motion to direct a verdict for the defendant on the grounds that there is no substantial evidence to sustain a charge of negligence of the defendant and that the evidence of the plaintiff's contributory negligence is conclusive is denied, an assignment of the denial as error is sufficient to invoke a review of the ruling, without a further statement of the reasons why the ruling is alleged to be erroneous.

One whose negligence contributes to his injury cannot recover damages of another whose negligence concurred to cause it, even though the carelessness of the latter was the more proximate cause of the injury. Western Union Telegraph Co. v. Baker, 140 Fed. 315, 318, 72 C. C. A. 87, 90, and cases there cited.

If at the close of the trial of an action for negligence the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which directly contributed to his injury that a finding to the contrary cannot be sustained by the court, it is its duty to instruct the jury to return a verdict for the defendant. Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 532, 63 C. C. A. 27, 30, and cases there cited.

The specification to which reference has been made therefore presents the question: Did the evidence at the close of this trial conclusively prove that the plaintiff was guilty of negligence which contributed to cause his injury? If every disputed issue of fact be determined, as it must be in the decision of this question, in favor of the plaintiff below, these facts were established at the trial:

The crossing at which the accident occurred was in a cut about 8 feet deep to which the highway, which extends north and south, descends from the south on an average grade of a little over half an inch in a foot for a distance of about 30 rods. The railroad runs from the east to this crossing in a cut for a distance of about 968 feet. In the angle between the railroad east of the crossing and the highway south of it were an orchard, locusts, weeds, and a barn, so that as the plaintiff came to the crossing from the south he could see nothing of the railroad or of any trains upon it between the points 30 rods south of the crossing and 25 feet south of the south rail. The railroad at this point consisted of a single track, and was a part of the main line of the company from Chicago to Kansas City. At the time of the accident the plaintiff was a farmer 26 years of age, who lived a few miles north of the railroad, and from the time he was a small boy he had been accustomed to crossing the railroad on this highway on his way to and from Ottumwa, Iowa, which is situated a few miles south of the crossing. He was perfectly familiar with the crossing and of its surroundings and with the facts which have been recited. About 15 trains passed over this crossing daily, the majority at irregular times.

The plaintiff was driving a pair of horses that were hauling an empty lumber wagon at the time of the accident. He was sitting near

the bolster on the rear axle on a plank that rested on the bolsters, with his feet down between the planks 24 feet back of the heads of his horses, driving them with one hand and with the other holding, by means of a lever, two wooden shoes, six inches long by four inches wide, which constituted a brake against the rims of the rear wheels as he went down to the crossing. He had drawn a load of hay to Ottumwa, and was going home about 7 in the evening on a warm August day. As he went north on the highway he constantly looked and listened for engines and trains, but neither saw nor heard any, with the exception of one passenger train standing on a track west of the crossing, until his horses' heads were over the south rail, when he saw the work train which injured him coming west about 60 feet from the crossing. The engineer first saw the team at about the same time and too late to stop the train, which was running about 15 miles an hour before it struck the wagon. When the plaintiff was about a quarter of a mile from the crossing, he saw a passenger train about a quarter of a mile west of the crossing headed east, and he expected this train, and did not know that there was any train due to go west at that time. At a point about 35 rods south of the crossing he stopped, while a horse drawing a buggy trotted past him; but his view of the railroad was then obstructed by the barn. At the north end of the barn there was an open space of about 2 rods in width, through which he looked, but he saw nothing, and from the north side of that space, which was about 30 rods from the railroad, he could not see anything upon the railroad until he was 25 feet from the south rail. As he descended to the crossing he locked the wagon with the brake, which ground against the rims of the wheels, and with the wagon in this condition he drove his horses at a fast walk until he arrived on the level of the crossing, when he put the brake down tight, so that the horses would not walk so fast, and listened and looked; but he did not stop his horses, nor still the noise of the horses' feet, the rumbling wagon, or the grinding brake. The highway was smooth and hard, and the wagon made some noise, "just about the same as any lumber wagon."

He testified that the whistle of the engine was not sounded and its bell was not rung, and three witnesses who were within hearing distance testified that they did not hear the sound of the bell or the whistle. On the other hand, seven witnesses testified that they heard the bell or the whistle. Two of them—Mrs. Rust, who was expecting her husband on this work train and was listening for its whistle, and her son—testified that they waited for and heard it; and the engineer testified that he sounded it, and the fireman that he rung the bell. It is difficult to conclude that there is any substantial conflict in this evidence concerning the sound of the bell and the whistle, because evidence of those who heard it is so clear, reasonable, and convincing, and that of those who did not hear it may be so readily reconciled with that of those who heard it on the ground that the former failed to notice it, though the whistle sounded and the bell rang.

But, conceding that the whistle was not sounded and the bell was not rung, these facts do not excuse the plaintiff from exercising ordinary care to protect himself from a collision at the crossing. A rail-

road track is a constant warning of danger. The engines and trains must run over them so rapidly that their operators cannot alone protect travelers on the highways which cross them. The law requires railroad companies to sound their whistles and ring their bells as their trains approach the crossings, and it also requires travelers on the highways to exercise ordinary care to use efficiently their senses of sight and hearing to prevent collisions. The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track. Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield v. Chicago, etc., Ry., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Fletcher v. Atlantic & Pacific R. R. Co., 64 Mo. 484.

Did the plaintiff faithfully discharge that duty? For 30 rods before his horses' heads came to a point one foot south of the railroad track, where he was in a position whence he could not escape the coming train, his eyes were useless, looking was futile, and he knew it. This fact imposed upon him the duty to make a more diligent use of his sense of hearing, or to stop his horses and go forward where he could see before he drove into the place of irremediable danger. His lumber wagon was rattling over the smooth, hard road, his horses' feet were clattering thereon, and the brake shoes were grinding against the rims of the rear wheels, and he sat between the shoes near the rear axle, 24 feet from his horses' heads, as he came down to the crossing and drove to the track, without stopping his horses or stilling the rattle of their hoofs, the rumble of his wagon, or the grind of his brake, so that he might effectively hear a coming train. Was this the exercise of ordinary care? In Davis v. Chicago, R. I. & P. Ry. Co., 159 Fed. 10, 16, 88 C. C. A. 488, 494 (16 L. R. A. [N. S.] 424) a case identical in all material facts with that in hand, this court answered this question in these words:

"The duty to stop is a relative one. It depends upon the situation of the particular case, the knowledge the traveler has of the situation, and the reliance he may reasonably place under the circumstances on his opportunities for seeing and hearing without taking the last precaution of stopping. The authorities are quite in accord on the proposition that if the view is unobstructed, so that an approaching train, before it reaches the crossing, can be seen, there is no occasion for the special exercise of the sense of hearing, listening, and therefore there is no reason why he should stop for that purpose. On the other hand, if the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively. And if there is any noise or confusion over which he has control, such as that of the noise of the horses' feet, or the grinding sound of the wheels, or the ordinary noise of the vehicle, interfering with the acuteness of the sense of hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track."

The rule of law here announced is just and reasonable; it is supported, as the quotations in the opinion in that case show, by the decisions of the courts in Railroad Co. v. Hogeland, 66 Md. 149–161, 7 Atl. 105, 59 Am. Rep. 159, Henze v. St. L., K. C. & N. Ry., 71 Mo. 637, 640, Blackburn v. Southern Pacific Ry. Co., 34 Or. 215, 55 Pac. 225–229, Chase v. Railroad, 167 Mass. 383, 45 N. E. 911, Seefeld v.

C., M. & St. P. R. Co., 70 Wis. 216–222, 35 N. W. 278, 5 Am. St. Rep. 168, Shufelt v. Flint & P. M. R. Co., 96 Mich 327, 55 N. W. 1013, Stepp v. Chicago, R. I. & P. Ry. Co., 85 Mo. 235, Merkle v. Railway Co., 49 N. J. Law, 473, 9 Atl. 680, and Denver City Tramway Co. v. Norton, 141 Fed. 599, 607, 608, 73 C. C. A. 1, 9, 10; and we are unwilling to depart from or relax it. If the plaintiff had stopped his horses just before he drove them into their dangerous position, stilled the noise of their feet, of the wagon, and of the brakes, and then listened, he would probably have heard the approaching train and have escaped his injury. If he had stepped off his wagon, and gone to the track before them, and looked to the east, he would certainly have seen the coming train. Looking where he could not see it, and listening while other noises prevented his hearing it, were futile. It is no more the exercise of ordinary care to look and listen when and where looking and listening are useless than it is to fail to look and listen where looking and listening would be effective. The evidence of the contributory negligence of the plaintiff was conclusive in this case, and the court below should have instructed the jury to return a verdict for the company. This conclusion necessitates a new trial of the action, and renders it unnecessary to consider other alleged errors.

The judgment is accordingly reversed, and the case is remanded to the Circuit Court, with directions to grant a new trial.

BOATMEN'S BANK v. TROWER BROS. CO.

(Circuit Court of Appeals, Eighth Circuit. September 19, 1910.)

No. 3,283.

(Syllabus by the Court.)

1. COURTS (§ 356*)—MOTION FOR NEW TRIAL UNNECESSARY FOR REVIEW—ACT OF CONFORMITY AND STATE PRACTICE IMMATERIAL.

A motion for a new trial, indispensable under the state practice, is not essential to a review of the rulings of the trial courts under the federal practice.

The means of review of the rulings of the national courts are prescribed by the acts of Congress, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the act of conformity (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]), the statutes of the states, or the practice of their courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356;* Appeal and Error, Cent. Dig. § 3397.

Federal courts following state practice as to procedure on appeal, see note to Nederland Life Ins. Co. v. Hall, 27 C. C. A. 394.]

2. COURTS (§§ 339, 356*)—EXCEPTIONS TO REFEREE'S REPORTS IN ACTIONS AT LAW—TIME OF FILING—ACT OF CONFORMITY.

Although the statute of a state required exceptions to the report of a referee in actions at law in its courts to be filed within four days in term after the filing of the report, it was not error for the federal trial court to extend the time for filing exceptions for a defeated party, who had received no notice of the time of filing within the four days, for the

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

period of seven days, and to consider exceptions filed within this extension of time.

The act of conformity (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]) does not require the Circuit and District Courts to conform their practice or procedure to that of the state courts, where such conformity in their judgment "would unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 914, 937; Dec. Dig. §§ 339, 356;* Appeal and Error, Cent. Dig. § 3397.]

8. APPEAL AND ERROR (§ 924*)—REFEREE'S REPORT—PRESUMPTION THAT HE RETURNED THE EVIDENCE.

Where the statute of a state, which under the conformity act prescribes the practice in the federal court in an action at law, requires a referee to return the evidence taken before him with his report, the legal presumption in the appellate court, in the absence of evidence in the bill of exceptions or otherwise to the contrary, is that he complied with the statute and did so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3726–3728; Dec. Dig. § 924.*]

4. COURTS (§ 352*)—TRIAL BY REFEREE—BILL OF EXCEPTIONS BY REFEREE NOT NECESSARY TO REVIEW BY CIRCUIT COURT IN MISSOURI.

A bill of exceptions by the referee is not essential to a review in the United States Circuit Court of the rulings of a referee in his trial of an action at law in Missouri, because the Missouri statute requires the referee to set forth all exceptions to his rulings and the particulars thereof in his report, and to return all the evidence taken before him to the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 931; Dec. Dig. § 352.*]

5. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS REQUISITE TO REVIEW BY APPELLATE COURT.

Where the writ of error challenges the rulings of the Circuit Court on exceptions to a referee's report in an action at law, a bill of exceptions which sets forth the evidence which conditioned those rulings is indispensable to their review in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433–2440; Dec. Dig. § 548.*]

6. REFERENCE (§ 103*)—TRIAL BY CONSENT REFEREE—ON AVOIDANCE OF REPORT FOR ERROR COURT MAY NOT RETRY ISSUES OF FACT—NEW TRIAL BEFORE SAME REFEREE.

A stipulation to commit to a referee for trial and decision issues of fact in an action at law, which the court is without power to try or to refer without the consent of the parties, gives the court no authority to try those issues after the avoidance of the findings of the referee for error of law, but entitles the parties to a new trial by their chosen referee under proper instructions from the court upon questions of law alone.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 203; Dec. Dig. § 103.*]

7. REFERENCE (§ 99*)—TRIAL BY CONSENT REFEREE—QUESTIONS OF LAW ALONE REVIEWABLE BY TRIAL COURT ON EXCEPTIONS.

A trial by a consent referee is reviewable by the trial court, if there is no substantial evidence to sustain his findings of fact, and for other errors of law. But the questions of fact are committed to the judgment of the referee, and if there is substantial evidence to support his findings the court may not avoid them, because in its judgment the evidence is insufficient to support them, or preponderates against them.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 153; Dec. Dig. § 99.*]

*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 Western District of Missouri.

Action by the Boatmen's Bank against the Trower Bros. Company. Judgment for defendant (171 Fed. 964), and plaintiff brings error. Reversed and remanded.

J. S. Botsford (Buckner F. Deatherage and Goodwin Creason, on the brief) for plaintiff in error.

J. C. Petherbridge, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The questions in this case involve the extent and method of review of a trial by a consent referee of an action at law in the national courts. The seventh amendment to the Constitution provides that in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The only instance in which the finding of a fact by a jury may be re-examined and avoided by a court is where there is no substantial evidence to sustain it, and the review of the findings of fact in an action at law by a court, or a consent referee, is limited by the same restriction. Hecker v. Fowler, 2 Wall. 123, 129, 130, 133, 17 L. Ed. 759; Newcomb v. Wood, 97 U. S. 581, 583, 24 L. Ed. 1085; Boogher v. Insurance Co., 103 U. S. 90, 93, 94, 96, 98, 26 L. Ed. 310; United States v. Ramsey (C. C.) 158 Fed. 488, 491, 493, 498; Campbell v. Equitable Life Assur. Soc., 130 Fed. 786, 787; Tyler v. Angevine, 24 Fed. Cas. 458, 461 (No. 14,306).

The acts of Congress contain no grant of power to the national courts to delegate to referees the authority to try actions at law. They provide, however, that the parties to any such civil action may stipulate in writing that any issue of fact therein may be tried by the court without a jury, and that in such case the finding of the court upon the facts shall have the same effect as the verdict of a jury (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]), and that the practice, pleadings, 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 and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit and District Courts are held. Rev. St. § 914 (1 U. S. Comp. St. 1901, p. 684). But this act of conformity (section 914) does not apply to the practice or proceedings of the national appellate courts, or to bills of exceptions, motions for new trials, or any other means adopted to review the judgments or rulings of the trial courts of the United States. The power and practice of the national appellate courts are derived exclusively from the Constitution, the acts of Congress, the ancient English statutes, and the rules and practice of the courts of the United States, and this practice may neither be extended nor contracted, controlled, nor affected by the statutes of the states or the practice of their courts. Francisco v. Chicago & Alton R. Co., 149 Fed. 354, 358, 359, 79 C. C. A. 292, 296, 297; Chateaugay

Iron Co., Petitioner, 128 U. S. 544, 554, 9 Sup. Ct. 150, 32 L. Ed. 508; Hudson v. Parker, 156 U. S. 277, 281, 15 Sup. Ct. 450, 39 L. Ed. 424; City of Manning v. German Ins. Co., 107 Fed. 53, 55, 57, 46 C. C. A. 144, 146, 148; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 49 C. C. A. 229, 235, 111 Fed. 81, 87; Louisville & N. Ry. Co. v. White, 40 C. C. A. 352, 356, 100 Fed. 239, 242, West v. East Coast Cedar Co., 51 C. C. A. 411, 415, 113 Fed. 737, 741; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Boogher v. Insurance Co., 103 U. S. 90, 95, 26 L. Ed. 310; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Kentucky Life, Acc. & Ins. Co. v. Hamilton, 63 Fed. 93, 98, 11 C. C. A. 42, 47; Elder v. McClaskey, 17 C. C. A. 259, 278, 70 Fed. 529, 556; Ghost v. United States, 168 Fed. 841, 843, 94 C. C. A. 253, 255; Connecticut Fire Ins. Co. v. Manning (C. C. A.) 177 Fed. 893, 896.

Nor does this act of conformity even require the Circuit and District Courts to conform their practice or procedure in matters which do not relate to methods of review to those of the state courts, where such conformity in their judgment "would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals." Railway Company v. Horst, 93 U. S. 291, 299, 300, 23 L. Ed. 898; O'Connell v. Reed, 56 Fed. 531, 536–539, 5 C. C. A. 586, 592; Times Publishing Co. v. Carlisle, 36 C. C. A. 475, 484, 94 Fed. 762, 771.

This is an action of trover and conversion of cattle that the plaintiff and defendant respectively claim under adverse mortgages, and the issues were the identity of the cattle described in the respective mortgages and the superiority of their respective liens. The referee found these issues in favor of the plaintiff below, and filed his report, which set forth these findings and a recommendation of a judgment accordingly. The Circuit Court sustained exceptions to the findings of fact of the referee, and an exception to the introduction in evidence of a report regarding the ownership of the cattle made by one Kelly, and rendered a judgment for the defendant. To reverse this judgment the plaintiff sued out a writ of error; but the defendant insists that it is entitled to no consideration by this court of the errors assigned, because it made no motion for a new trial, and under the practice of the courts of the state of Missouri a motion for a new trial is indispensable to a review of the rulings of the trial court. State ex rel. v. Hurlstone, 92 Mo. 327, 5 S. W. 38; Maloney v. Missouri Pac. Ry. Co., 122 Mo. 106, 115, 26 S. W. 702; State ex rel. v. Burckhartt, 83 Mo. 430. The position of the defendant is untenable, because, as we have seen, the practice and proceedings of the federal courts relating to motions for new trials, bills of exceptions, and other means of review of the judgments of the Circuit and District Courts are not governed, controlled, or affected by the act of conformity, or by the practice or proceedings in like causes in the state courts, but by the acts of Congress, the ancient English statutes, and the rules and practice of the courts of the United States.

The plaintiff's first specification of error is that the court below, after the lapse of more than four days in term subsequent to the filing

of the referee's report, extended the time for the defendant to file its exceptions thereto, and reversed the findings of the referee on exceptions filed after the expiration of the four days, in the face of the statute of Missouri, which provides that all exceptions to reports of referees in like causes shall be filed within four days in term after the filing of the respective reports. Rev. St. Mo. 1899, § 714 (Ann. St. 1906, p. 711). But there is no proof that any notice of the time when the report was filed was given to the defendant within the four days. It is the great purpose of the national system of jurisprudence to effect the speedy determination of controversies upon their merits, and a practice which would deprive the defeated party of all opportunity to challenge before the court a report of a referee at the end of four days after it is filed, in the absence of all notice of its filing, would tend to defeat this object, to prevent the determination of cases on their merits by the courts, and to defeat the ends of justice. It was not, therefore, the duty of the court below to conform its practice to that of the state court in this regard in the case at bar, and there was no error in its extension of the time for filing the exceptions, nor in the consideration of the exceptions filed within the extended time.

The second contention is that the Circuit Court had no jurisdiction to consider any evidence in passing upon the exceptions of the defendant to the findings of the referee, because the evidence was not reported to that court by the referee. The bill of exceptions before us does not affirmatively show that the referee did not return the testimony taken before him to the court, although it does not contain that evidence. The act of conformity required this referee to conform his practice and proceedings to those of referees appointed by the courts of Missouri in like causes, where such conformity would not incumber the administration of justice or tend to defeat its ends. The return of the evidence to the court could have had no such effect. The statute of Missouri, which under the conformity act became a part of the stipulation for the trial of this case by the referee, required him to return to the court the testimony taken before him with his report (Rev. St. Mo. § 713 [Ann. St. 1906, p. 711]), and the legal presumption is that he faithfully discharged that duty (Lutz v. Linthicum, 8 Pet. 165, 179, 8 L. Ed. 904). This contention cannot be sustained, therefore, because the presumption from the record is that the evidence was reported to the Circuit Court by the referee, and was before that court for consideration.

It is not necessary to a review by the Circuit Court of the rulings of a referee under the Missouri practice that those rulings or the evidence taken by him should be presented to that court by a bill of exceptions or certified by the referee, because the statutes of Missouri require him to return the evidence to the court with his report, and to set forth in the latter, if required, all rulings to which exceptions are taken and the particulars thereof. Rev. St. Mo. §§ 712, 713 (Ann. St. 1906, p. 711); Boogher v. Insurance Company, 103 U. S. 90, 93, 26 L. Ed. 310.

The third objection to the action of the court below is that the order and judgment sustaining the exceptions to the report is erroneous; but that order and judgment rests on the conclusion of the Circuit Court

that the report of Kelly regarding the ownership of the cattle was erroneously introduced in evidence before the referee, and that there was no substantial evidence to sustain his findings of fact. The plaintiff, however, has presented in his bill of exceptions neither the report of Kelly nor any of the other evidence in the case, so that there is no way in which this court can determine whether the rulings of the court below upon this report and evidence were right or wrong. The burden is on him who alleges error to prove it. The presumption is that the rulings of the trial courts are right, and one who would successfully attack the decision of a court, because there was evidence in the case which rendered it erroneous, must produce that evidence in the appellate court, or the ruling must be affirmed. Guarantee Co. of N. A. v. Phenix Ins. Co., 124 Fed. 170, 175, 59 C. C. A. 376, 381; United States v. Patrick, 73 Fed. 800, 806, 20 C. C. A. 11, 17; Chicago Great Western Ry. Co. v. Price, 97 Fed. 423, 434, 38 C. C. A. 239, 250; Board of Commissioners v. Sutliff, 97 Fed. 270, 275, 38 C. C. A. 167, 172; Taylor-Craig Corp. v. Hage, 69 Fed. 581, 583, 16 C. C. A. 339, 340.

The fourth and last specification of error is that the court below erred, after sustaining the exceptions to the report of the referee, in finding the facts and rendering the judgment in favor of the defendant, because it had no judicial authority so to do. This position is sound. This is a case in which the court below had no jurisdiction, either under the common law, or under the acts of Congress, or under the statutes of Missouri (section 698, Rev. St. Mo. [Ann. St. 1906, p. 707]), and the conformity act, to try the issues of fact without a jury, or to refer them for trial, without the consent of the parties to the controversy. While these parties originally consented to the trial of these issues by the court, that stipulation was superseded by their subsequent agreement to refer this cause for "hearing and decision upon all the issues of law and fact in the case to Hon. Willard P. Hall, as referee." This stipulation and all its provisions condition this reference, and none of them may be abrogated or disregarded by the courts. One of them is that the issues of fact and of law shall be heard and decided by Mr. Hall, and the legal effect of this provision under the practice in Missouri, as well as under the practice in the federal courts, is that, while the findings of Mr. Hall as referee may, like the findings of a jury, be set aside by the court, not because they are unsupported by the preponderance of the evidence, but only because there is no substantial evidence to sustain them, such action does not avoid the stipulation of the parties that these issues of fact shall be tried by the referee, nor empower either the court or a jury to try and determine them. The avoidance of the verdict of a jury for a like cause would not authorize the court or a referee to try the issues of fact triable by the jury, and the same principle governs the case in hand. A stipulation to commit to the referee for trial and decision issues of fact in an action at law which the court is without power to try, or to refer without the consent of the parties, gives the court no power to try those issues after the avoidance of the findings of the referee for error of law, but entitles the parties to a new trial by their chosen ref-

eree under proper instructions from the court upon questions of law alone. United States v. Ramsey, 158 Fed. 488, 490, 491; Rev. St. Mo. § 715 (Ann. St. 1906, p. 712); Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484, 488, 3 S. W. 865; State ex rel. v. Hurlstone, 92 Mo. 327, 332, 333, 5 S. W. 38.

References of suits in equity and references of actions at law, pursuant to statutes, practices, facts, or stipulations which differ materially from those which condition this rule, may not be subject to it. Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 335, 32 L. Ed. 764; Terry v. Naylor, 125 Fed. 804; O'Neill v. Capelle, 62 Mo. 202; Bank v. Miller, 73 Mo. 187, 192. But it controls the decision of this case, and renders another trial of this action by Mr. Hall, the chosen referee of the parties, unavoidable. After he has completed this new trial, let him return to the court all the evidence taken before him with his report, and let him state in the latter all exceptions to his rulings which either party request him to report and the particulars thereof, together with the fact that he has returned with his report all the evidence taken before him, which he should clearly identify by a proper description in his report. If exceptions are filed to the report, they will present to the Circuit Court for review rulings of questions of law by the referee to which he reports exceptions, and these only. The sufficiency of the evidence to support his findings of fact will not be reviewable by that court, or by this; but, if proper requests are made and exceptions taken, the question whether or not there is substantial evidence to sustain the findings of fact of the referee may be considered by the Circuit Court, for that is always a question of law. If a review in this court of the rulings of the Circuit Court is subsequently desired, a bill of exceptions clearly setting forth the rulings, exceptions, and evidence or facts which conditioned the rulings challenged, certified by the judge who made them, will be indispensable to their consideration here.

The judgment below is reversed, and the case is remanded to the court below, with directions to grant a new trial thereof by Mr. Hall, the chosen referee of the parties, pursuant to their stipulation.

In re L. M. ALLEMAN HARDWARE CO.

GITT v. ZIEGLER et al.

(Circuit Court of Appeals, Third Circuit. September 28, 1910.)

No. 51.

BANKRUPTCY (§ 345*)—CORPORATIONS—DISTRIBUTION OF ESTATE—CLAIMS OF STOCKHOLDERS.

A corporation was organized to take over the business of a mercantile partnership in payment for which it assumed the debts of the firm, and also issued its capital stock to the partners. It did a large business, in the course of which it sold the merchandise so acquired, and paid the debts of the partnership. *Held* that, on the distribution of its estate in bankruptcy, the question of the value of the consideration paid by the partners for their stock was not in issue, and that a claim of

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

one of them against the estate, otherwise undisputed, could not be deferred until after the payment of other creditors on the ground that, as the event showed the corporation was insolvent from its organization, and that, therefore, such creditor gave no value for his stock and was liable therefor, the evidence being insufficient to show that the transaction was fraudulent, and neither the corporation, to whose rights only the trustee succeeded, nor the present creditors, having any standing to make such claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

In the matter of the L. M. Alleman Hardware Company, bankrupt. Appeal from an order refusing to permit H. N. Gitt, a creditor, to share in the distribution of assets. Reversed.

For opinion below, see 172 Fed. 611.

Allen C. Wiest and C. J. Delone, for appellant.

W. C. Sheely and John D. Keith, for appellees.

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

BUFFINGTON, Circuit Judge. In the distribution in bankruptcy of the assets of the L. M. Alleman Hardware Company, the court below refused to permit H. N. Gitt, a creditor in the sum of $21,094.12, to share in said distribution. He thereupon appealed to this court.

The L. M. Alleman Company, the bankrupt, was a corporation chartered by the state of Pennsylvania in March, 1903. It was extensively engaged in the hardware business from then until December 10, 1906, when it was adjudged bankrupt. It carried large stocks of goods, a statement made by the accountant in evidence showing that its assets at the date of bankruptcy aggregated some $68,000, and its property even under bankrupt liquidation realized, over administration expenses, upwards of $35,000 for distribution among its creditors. It is over the distribution of this fund that this controversy arises, and it is helpful to the proper consideration of the question here involved that we should bear the fact in mind that the present proceeding is one of distribution. It is in affirmance of the ownership by the corporation of the subject of distribution. Indeed, the present situation may be aptly described by what was said of the status in Hooven Co. v. Evans Co., 193 Pa. 31, 44 Atl. 277:

"The bill in this case was filed by a creditor of the corporation defendant, alleging the insolvency of the company, and asking the court to take charge of the property and assets of the defendant, and to appoint a receiver for that purpose. It was not a creditor's bill filed against a corporation and its stockholders for the purpose of enforcing the payment of unpaid capital stock for the benefit of all the creditors by means of an assessment to be made by the court upon the stockholders of the company defendant of an amount of unpaid capital stock sufficient to pay all the debts of the corporation. The bill has no aspect of that character. It does not ask for such a decree. Nor is it a bill against the stockholders claiming to hold them liable as partners by reason of defects in the organization of the defendant company as a corporation. On the contrary, it is a bill against the corporation in its corporate capacity, asking the court to administer

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

its property and assets in such a manner as to have them applied to its debts. It necessarily implies, and proceeds upon the presumption, that the defendant is a corporation, lawfully created, having property of various kinds, engaged in the prosecution of a lawful business, with its assets of whatever kind, and with the intent and purpose to have those assets administered as the property of the corporation, and to have them converted into money, and the money resulting from the business carried on and from the property sold, to be applied to the payment of its debts, so far as that result can be accomplished."

The claim of Gitt is not controverted, but it is contended it cannot participate in this distribution because he is indebted to the bankrupt company. And such liability to the corporation is alleged to exist by reason of certain matters connected with the organization of this corporation. Now the Supreme Court in Hewit v. Berlin Machine, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, York v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, held that the rights vested in a trustee in bankruptcy are simply those the bankrupt held, with the exception in case of certain liens, not here involved, noted in Bank v. Staake, 202 U. S. 149, 26 Sup. Ct. 580, 50 L. Ed. 967.

The question, then, is, What rights had this corporation against Gitt when it became bankrupt? That liability is determined by the law of Pennsylvania. Let us first ascertain the facts. In 1903, Gitt, the appellant, and one Johns, were partners in the hardware business. They organized this corporation for the purpose of taking over that partnership business, of which they were sole owners. In order to obtain a charter under the Pennsylvania statutes, it was necessary that $5,000, being 10 per cent. of its capital stock, be paid in, which was done. Messrs. Gitt and Johns, who were both men of large means, were personally responsible as partners for the indebtedness of that firm. Its personal property, which inventoried $73,305.33, was turned over to the company, and this thereafter formed the stock in trade of the company, and on it and additions thereto the company did a large business. For example, its sales from March to December following its incorporation aggregated $108,000 and upwards. The corporation sustained losses by fire and its property at that time was such that $41,000 was realized from insurance and applied to the payment of its debts. During the 3½ years of its operation it lost some $34,000. When it was adjudged bankrupt, its trade assets, as we have seen above, not including an item of $18,799.80 for fixtures and good will, stable and warehouse $2,340.96, and accounts receivable $23,698.52, aggregated $51,364.84. The proofs do not disclose the gross amount realized therefrom, but there is now for distribution some $35,000. The partnership whose business was taken over by the company was so heavily involved at the time that we may assume that liquidation meant insolvency. As Gitt and Johns were of abundant means and were personally liable for all of that indebtedness, they chose to continue the business under corporate name, and since none of the indebtedness of the partnership, liability for which was assumed by the corporation, is now claimed against the latter, presumptively it has all been paid. At any rate, there is no evidence that any of it is now existing, and no claims made upon the present fund are shown to have been in-

debtedness of the old firm. Moreover, there is no evidence in this case that any present claimant of the company was misled, deceived, or induced to extend credit to the corporation by any statement, fact, or omission connected with or growing out of the original incorporation of that company, its taking over of the business of the preceding partnership, or of the terms of such transfer. In fact, there is nothing in this case that satisfies us of anything but the good faith of the parties in forming this corporation. They were men of means, and had originally become responsible on paper of the preceding partnership. Their experience with it and with a partner who had drawn them into it naturally led to a desire to limit their future personal responsibility, and this they sought to do by incorporation. But the course of business showed this could not be done, for, from the date of incorporation forward, Gitt continues to evidence his faith in the future of the corporation by permitting Johns to go out of the business. From time to time Gitt extended his personal credit, and increased his liability by indorsing its paper. In view of the subsequent fire, the corporation's losses and its system of bookkeeping, which, as we understand the accountant's criticism, was such as might not have given the company itself full appreciation of its operations, the bankruptcy of the company can be attributed to other causes than to the charge that the whole life of this company from its start was an insolvent bankrupt operation. Indeed, when the attention of the accountant, who examined the company's affairs at the instance of the trustee, was called to the fact that his report as of March, 1903, shows the company was insolvent, he says:

"We know it now that it was insolvent then and at the time of its incorporation. We make the statement now, but could not have made it then."

And this is the just view to take, for, as was said in Finletter v. Acetylene Light Company, 215 Pa. 90, 64 Atl. 430, when it was alleged patents were overvalued in the issuing stock therefor:

"In the proceeding the question of the value of the licenses is to be determined as of the time of the formation of the company, and not after it has become insolvent from any particular cause. American Company v. Hays, 165 Pa. 498 [30 Atl. 936]."

Now, in the present case, it is alleged the firm was insolvent when its property was taken over by the company, and the $25,000 in stock which Gitt and Johns received in payment therefor, and all of which Gitt now owns, was issued without consideration and in violation of the provisions of the Pennsylvania act of April 29, 1874 (P. L. 81), as amended by the act of April 17, 1876 (P. L. 32), which provides:

"Every corporation created under the provisions of this act or accepting its provisions, may take such real and personal estate, mineral rights, patent rights, and other property, as is necessary for the purpose of its organizations and business and issue stock in the amount of the value thereof, in payment thereof."

Now, granting that subsequent events show the partnership was then insolvent, we then have the question, How was any party now before us effected thereby, or how could that issue be involved in this distribution? This company came into existence, and its whole corpo-

rate business was based on the stock of goods it obtained from this firm. Its whole business existence and the assets here distributed are founded on the affirmance, ratification, and enjoyment of the contract for the sale or the property of Gitt and Johns to the corporation. It sold these goods and mixed the proceeds up in its operations, and the present fund had its origin in property of the old firm. How does it lie in the mouth of the company to at the same time enjoy the property it received and allege the illegality of its reception? We are not here dealing with a fraud, we are not dealing with a subscription to stock, we are not dealing with the rights of any creditor who was misled; but we are dealing with a case where no party who might have been injured thereby is concerned, where all the creditors of the old firm have been paid, and where there is no proof that any creditor of the new corporation has been deceived or misled by the stock issue complained of. If, then, the rights of no individual creditor are here involved or sought to be enforced, it follows that Gitt's claim cannot be rejected unless the bankrupt company itself has a counterclaim against him. And how can it be said it has? It is true capital stock is a trust fund for the benefit of creditors, and, if stock is ficticiously and fraudulently issued, it may be collected for the benefit of creditors (Coit v. Gold Co. [C. C.] 14 Fed. 16; Handley v. Stutz, 139 U. S. 436, 11 Sup. Ct. 530, 35 L. Ed. 227); but when, as here, the value of the consideration of the stock was fairly debatable, and the corporation enjoyed, used, and did its entire corporate business for several years on the property conveyed to it, and where the property cannot be restored or the contract rescinded, and where no person here interested was in any way induced to act or was misled or wronged by the maintenance of that status, we think the corporation has no such right or claim against Gitt as prevents his unquestioned debt from participating in this distribution. Under these facts, it is clear that this corporation had, prior to bankruptcy, no right of action against Gitt to recover on this stock which was issued to him for his merchandise. And, if such be the case, the status of the parties is not changed by bankruptcy, for, as was said in Thompson v. Fairbanks, supra:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in case unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in the hands of the bankrupt."

We are therefore of the opinion that Gitt should have been allowed to prove his claim, and the decree is reversed, with directions to allow him to do so.

THE ASHBOURNE.

THE BOUKER NO. 2.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

Nos. 270, 271.

1. COLLISION (§ 66*)—PASSING TOWS—FAULT.
In a libel against certain tugs for injuries to a scow due to a collision between the tows, evidence *held* to require a finding that the main fault was that of the tug of one of the tows in permitting her tow to get on the port side of the channel owing to negligent navigation.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*]

2. COLLISION (§ 123*)—PRIMARY FAULT—CONTRIBUTING NEGLIGENCE.
In a libel for collision, the vessel guilty of primary fault is liable for the damages sustained, and clear proof of contributory fault by the other vessel must be presented before the latter can be held to bear an equal share of the damages.
[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259–261; Dec. Dig. § 123.*]

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

Libel by the Red Star Towing & Transportation Company against The Steamtug Ashbourne and the Steamtug Bouker No. 2, and by the Phoenix Towing & Transportation Company against the same vessels. From a decree dismissing the libels as to the Ashbourne and assessing damages against the Bouker No. 2, she appeals. Affirmed.

The following is the opinion of Adams, District Judge, in the trial court:

This action was commenced by the Red Star Towing & Transportation Company, filing a libel against the tug Ashbourne, in which it is alleged that on the 11th day of October, 1907, at about 8 o'clock P. M. the tug Ashbourne started with a tow from Packer Dock, Jersey City, bound for Port Reading, New Jersey, the boat Red Star being in the fifth tier of the tow and next to the outer port boat; that the tow consisted of twenty-four boats, four boats abreast, making six tiers, the hawser or leading tier being fast to the stern of the Ashbourne. That the Ashbourne proceeded across the Bay of New York, and into the Kill von Kull with the tow, and when nearing or in the vicinity of Bergen Point, the steamtug Bouker No. 2, bound towards New York, was observed coming through the Kills with two mud scows in tandem fashion, in tow of and astern of the Bouker No. 2; that before meeting one another the said steamtugs exchanged a signal of one whistle, the tide running ebb at the time and the wind from the west, and that the tugs with their tows attempted to pass one another, the Bouker No. 2 being on the Staten Island side of the channel and the tug Ashbourne with her tow on her port side, but that in the effort to pass, the boat in the fourth tier of the Ashbourne's tow on the port side came in contact with the mud scow in tow of the Bouker No. 2 driving her back so as to bring her in contact with the boat Red Star, resulting in serious damage to her and in the sinking of the boat in the fourth tier of the Ashbourne's tow. That the collision occurred about 2:30 A. M. on the 12th day of October, 1907.

The faults alleged against the Ashbourne are: (1) in not keeping a proper lookout; (2) in not having a helper at the stern or somewhere on the port side of her tow in order to keep it straight and follow in the wake of the Ashbourne; (3) in not giving a wider berth to the Bouker No. 2 and her tow

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

in passing, as there was plenty of room on her starboard side so to do; (4) in not blowing any alarm whistles; (5) in not taking timely measures to prevent her tow, because of the tide and the direction of the wind (the boats being light) from setting on to the tow of the Bouker No. 2. The damages claimed were $900; (6) in not stopping so as to prevent collision.

The Ashbourne's answer to the libel alleges that at 2:20 A. M. on the 12th of October, when between Bergen Point Ferry and the Red Buoy those in charge of the Ashbourne observed the loaded tow coming up in charge of the Bouker No. 2, consisting of two loaded mud scows; that signals of one whistle each were exchanged between the tugs, and that pursuant thereto the Ashbourne ported her wheel and stood over as much as she possibly could to the starboard side of the channel; that the Bouker No. 2 and her scows passed the tug Ashbourne, but that the Bouker No. 2 failed to keep to the starboard side of the channel, with the result that the first scow in her tow struck the Irene, that being the port boat in the fourth tier of the Ashbourne's tow, breaking her and six other boats adrift and causing serious damage to the said boats.

The allegations of fault against the Bouker No. 2 are: (1) that she did not keep over to the starboard side of the channel; (2) that she had no competent lookout or a competent man in charge of her navigation; (3) that her tow was improperly made up so as to be unmanageable; (4) that in having ample room to pass the Ashbourne and her tow, if properly managed, she brought her tow into collision with the tow of the Ashbourne.

The Ashbourne then filed a petition bringing the Bouker No. 2 into the action and alleged substantially the same facts and the same faults as stated in her answer.

Some little time after that the Phœnix Towing & Transportation Company filed a libel against the Bouker No. 2 and the Ashbourne. The last mentioned libelant was owner of the scow Irene, and the libel was joined by Chris Seiverson, the master of the Irene. The libel alleges that the Irene was placed in the third tier of boats and made fast in the tow by two hawsers from the bow to the stern of the boat ahead of her and two hawsers from its stern to the bow of the boat immediately astern of it; that when the tow was so made up, the Ashbourne started with it bound for Port Reading, and that while the tug and tow were under way and when about abreast of Bergen Point Buoy about 2 o'clock in the morning of the 12th of October, the tug Bouker No. 2 was observed approaching, bound towards New York, then being about opposite Shooter Island, the Bouker No. 2 having two loaded mud scows in tow astern, one behind the other; that both the Ashbourne and Bouker No. 2 had their tows on hawsers and that they proceeded on such a course that the head mud scow in tow of Bouker No. 2 struck the Irene breaking in the planks in her side and stern and affecting other severe damage, whereby some of the hawsers with which it was made fast were broken and she sustained damages, including damage to the master's household furniture, and so forth. The damages in this case caused by the sinking of the boat are claimed to be $2,300 and the loss of the master's personal effects $350.

The allegations of fault against the Ashbourne are: (1) in endeavoring to navigate with a tow that was too large and unwieldy to permit of proper navigation; (2) in making up its tow in a careless manner; (3) in failing to keep nearer to the New Jersey shore; (4) in navigating on such a course as to bring its tow into collision with the tow of the Bouker No. 2; (5) in failing to observe the approach of the Bouker No. 2 with its tow in time to take measures necessary to avoid collision; (6) in approaching on a course too close to the No. 2 and its tow; (7) in neglecting to provide for sufficient assistance or help in the navigation of a fleet of the size of that which the Ashbourne had in tow.

The Bouker No. 2 is charged with fault: (1) in failing to keep over towards the Staten Island shore; (2) in failing to have her tow upon a hawser of such length that she would be able to properly control her tow and avoid collision; (3) in proceeding on a course too close to the Ashbourne; (4) in failing to observe the course of the Ashbourne and her tow in time to avoid collision.

This libel was duly answered by both parties and I do not think it necessary to state the pleadings any further at this time.

The pivotal point of this collision is which boat was on the wrong side of the channel. It is claimed on the part of the Ashbourne that the tow of the No. 2 swung out from her side of the channel and got in the Ashbourne's water so that the collision happened, the Ashbourne claiming that her tow was kept straight behind her and always on her own side of the channel.

The most difficult question in this case is to determine which tug dragged her tow out of its own water. The tide was ebb. There has been some little dispute about its strength, it being contended on the part of some that it was as much as four or five knots, while on the other hand it is contended that it was practically a knot and a half. There is great divergence there and it is not explainable in any way excepting perhaps the observations made by the government were not in the place at or near where the collision occurred. That has been suggested in the course of the argument. However, I do not see that that is controlling. The tide was undoubtedly ebb and running towards New York Bay; the Ashbourne was proceeding against the tide and the No. 2 was proceeding with it. Each had her tow behind her until one was in the immediate vicinity of the place of the collision, as to which the testimony does not differ very much, it being to the southward and a little to the westward of the Red Buoy in the channel opposite Port Richmond.

An important question in the case is what effect did the tide have upon the vessels? The tide being ebb, if there had been nothing to deflect it or change it in any way it would undoubtedly proceed nearly straight, somewhat influenced by the contour of the land, towards New York Bay; but there was a great volume of water coming out of Newark Bay, the principal part of it in the main ship channel and some small part over the shore between the Light and Bergen Point, and that part between the Point and the Light was, admittedly by all parties, much less in force than that which was running in the main ship channel. It is contended here by the Bouker No. 2 that that had a very considerable force, while on the part of the Ashbourne it is alleged that it had very little force. I think the preponderance of the testimony shows that it did have some force although it was close up to the Light, between the Light and the Point, but it was a narrow channel at best, that is, the part of the channel which allowed the flow of any considerable body of water; most of it was broken up by the rocks which were on the bottom and it was only up near the Light there could be a channel allowing any force at all, so that I do not think that the force of the water to the eastward of the Light had very much to do with this collision. Of course the great body of the water came out of the regular channel to the westward of the Light and then meeting the regular tide or the currents running to the eastward joined with it and ran over and struck the Staten Island shore in the vicinity of what is known as the Fighting Dock. Whatever the strength of the tide may have been—anywhere from two to four knots probably—when it struck the Staten Island shore at the point indicated, it then struck over across the channel and proceeded in the direction of the New Jersey shore to a point a little to the eastward of what is known as the Bergen Point Ferry. Now, when the Ashbourne brought her tow down in the vicinity of the Red Buoy she then encountered this Newark Bay tide, and there has been a great controversy as to what the influence of that tide was upon the Ashbourne's tow; it being contended by the Ashbourne that it simply had the effect of keeping the tow out straight behind her on her starboard side of the channel; and on the part of the No. 2 it has been contended that some portion of the tide struck across, caught the Ashbourne's tow and forced it over to the No. 2's part of the channel. Giving to this the best consideration I can, I have come to the conclusion that the Ashbourne's contention is right. At the opening of the case when the claims of each side were given I was quite inclined to think that the case would turn against the Ashbourne because she was taking a large tow—twenty-four boats—to the westward—and if there were any tide at all it would tend to deflect her tow from a straight course, it would naturally affect it very much, and I thought she should have a helper properly stationed so as to aid her. She had a helper but the helper was up on the first tier where, while it was useful no doubt as far as speed was concerned, it was of no use whatever in keeping her tow straight. I think that is conceded by proctor for the Ashbourne. It is claimed that she did not need any helper at

the end of the tow because it would have to be straight on account of the way the current was running and as I said a moment ago, I think most likely that is the situation and that she could not get her tow over on the Staten Island side of the channel, which was 600 or 700 feet wide probably, unless there was something more than the current to take her there. I believe that this collision which occurred between the tows of the respective tugs was on the northern side of the mid channel. To account for No. 2's tow being there, the Ashbourne suggests that it was an unmanageable sort of tow, difficult to tow straight, and that when it got a cant in either direction it was very difficult if not impossible to straighten it out immediately, therefore, while the No. 2 went by the Ashbourne's tow safely, the scows sheered over in a somewhat northerly direction and struck the tow of the Ashbourne in the fourth tier; there were six tiers altogether, and the other tiers cut loose from the rest of the tow and perhaps avoided it in that way.

I think the main fault in this case was that the No. 2 permitted her tow to get on her port side of the channel, the Ashbourne keeping her tow in a reasonably straight line on her starboard side of the channel, so that if the No. 2 had kept her tow on her side of the channel the collision would have been avoided.

It only remains to consider whether, or not, there was any contributing fault on the part of the Ashbourne. It has been argued that she should have stopped; that she should have blown alarm whistles. After listening very attentively to what has been said in that connection by the proctors, while granting that she was undoubtedly in fault in those respects, because she should have had a lookout and should have blown alarm whistles, still I am not convinced that her faults in those respects really contributed to the collision.

There has been a strong disposition manifested on the part of the courts recently to let the blame rest where it principally belongs. Some time ago I had a case that occurred in the channel between Blackwells Island and the New York shore, where the tug Teaser with a tow on a hawser was going to the southward and eastward and met a tug with a tow of two car-floats, I think, one on each side of her in the channel. The Teaser was proceeding to the westward and the other tug to the eastward and was on the wrong side of the channel. I divided damages there. I held the Teaser in fault also because she did not stop or do something to avoid the collision. My decision was reversed by the Circuit Court of Appeals which said: "The Teaser was held to have fulfilled her duty in porting, in going to the right of the channel and as to her lights and signals. The testimony of her witnesses as to her navigation was credited by the district judge who heard them, and we see no reason why it should be discredited. She saw No. 14 and her floats when nearly a mile away. She repeatedly blew single whistles, interspersed with alarm whistles when they were not responded to either by whistles or by change of course. She ported promptly, then straightened out, then ported again, and finally when quite as close to the New York shore as it was safe to go. She was condemned for not stopping and backing sooner. In the City of Augusta and the Chicago, 125 Fed. 712, 60 C. C. A. 480, we held that, where a primary fault was attributable to one vessel, clear proof of contributing negligence by the other vessel should be presented, before the latter could be held to bear an equal share of the consequent damage."

This case seems to me even more doubtful than that of the Teaser. It seemed to me then that the Teaser should have stopped because she was almost running into collision and I thought if she had stopped to give the other vessel a chance it would have done something towards avoiding a collision. Bnt you see what the Circuit Court of Appeals has held, and applying the principle to this case the collision can be accounted for by the fault of No. 2, if I am correct in holding her in fault.

I therefore allow a decree in favor of the libelants against the Bouker No. 2 and dismiss the libels as to the Ashbourne.

Counsel for the tug Bouker No. 2 offer in evidence the report of the captain to the local inspectors. It reads as follows:

"Tugboat Bouker No. 2 at 12:30 A. M. the 12th instant left Dredge No. 7 off Crassell, S. I., with two mud scows 7 R R and 14 H on a short hawser bound

to sea. About 2:30 A. M. I was at the east of Shooters Island when I saw the lights of a west bound tow; he blew me one whistle which I promptly answered, as the tide was running ebb and the wind from the westward; I had to hold my tow well up to the windward as the tide out of Newark Bay sets strong on the Staten Island shore. I passed the tow which proved later to be the tug Ashbourne bound to Port Reading, I passed her on my port side about 300 feet, when I was abreast of the Fighting Dock, abreast of Newark Bay.

"My tow was close to the Staten Island shore and as my scows were drawing 14 feet I did not have much room; the light tow was sagging towards me, when my scows were about the middle of the light tow; the tow fouled my head scow No. 7 R R and the scow Irene was sunk; my hawser parted after the collision; the tow broke up and I went back and beached the scow Irene at West Brighton. The man on the scow got on a canal boat in the tow. I could not learn of any other damage done so I proceeded to sea; the lights on my scows were burning brightly.

"I did everything in my power to avoid a collision and I had a strong ebb tide with me.

"Respectfully, William J. Walsh."

Henry E. Mattison and Carpenter & Park, for appellant.

Armstrong, Brown & Boland, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The crucial question in the case is where the collision occurred. If it was near the Oil Dock or Fighting Dock on the Staten Island side of the channel it would be easy to find the Ashbourne in fault. If, however, it happened on the other side of the channel near the red buoy, the Bouker No. 2 would seem to be in fault. The District Judge found that the collision was on the northern side of the channel a little to the westward of the red buoy. The testimony as to location is voluminous and very conflicting; all the witnesses who gave evidence on that point were examined in court, and the District Judge had the advantage of seeing them and hearing their testimony. We find nothing in the case which would warrant this court in reversing his finding. The decrees are affirmed, with interest to libelants, and with costs to the Ashbourne against the Bouker No. 2.

SMITH et al. v. JONES et al.

(Circuit Court of Appeals, Third Circuit. June 3, 1910. Rehearing Denied.)

No. 62.

1. STREET RAILROADS (§ 52*)—SALE OF BONDS—CONSTRUCTION OF CONTRACT.
A written contract for the sale and purchase of bonds of an insolvent street railroad company, made with a bondholders committee, *held* not to have been so modified by a supplemental agreement as to relieve the bondholders from the payment of the cost of acquiring certain right of way by condemnation proceedings which by the original contract they were to pay before receiving the consideration for the bonds.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. § 52.*]

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

2. COURTS (§ 354*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

The procedure prescribed by the Pennsylvania practice act of April 22, 1905 (P. L. 286), giving either party requesting binding instructions which have been refused or the point reserved the right to "move the court to have all the evidence taken upon the trial duly certified and filed so as to become a part of the record and for judgment non obstante veredicto upon the whole record," is adaptable to the federal courts and one which the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) requires circuit courts within the state to follow.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

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

Action by Thomas A. Jones and others, to the use of J. W. Van Dyke, against Edward B. Smith and others, trading as Edward B. Smith & Co. Judgment for plaintiffs, and defendants bring error. Reversed.

See, also, 158 Fed. 911.

H. C. Boyer and Wm. A. Glasgow, Jr., for plaintiffs in error.

Malcolm Lloyd, Jr., R. D. Brown, and C. H. Burr, for defendants in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Thomas A. Jones and others brought an action at law against Edward B. Smith & Co. to recover damages for failure to deliver bonds of a certain character. At the trial the court reserved a point of defendants, viz., "Under all the evidence in this case the jury should find for the defendants," and submitted the case to the jury. It found a verdict in favor of the plaintiffs for $47,739.83, and as part of such verdict:

"The jury did also answer the following questions: (1) Did Smith & Co. agree to modify the contract of January 25, 1906, in the manner referred to in the trustees' letter of February 9th? Answer: Yes. (2) Was the issue of $600,000 on February 8, 1907, a mere temporary expedient for the purpose of meeting pressing obligations? Answer: No."

Subsequently the court denied the motion of the defendant to enter judgment in its favor on such reserved question and entered such judgment for the plaintiffs. Thereupon defendants sued out this writ of error.

Under the issues formed, the proofs adduced, the finding of the jury that Smith & Co. modified "the contract of January 25, 1906, in the manner referred to in the trustees' letter of February 9th," and the statement of the plaintiffs' predecessor in title made in the letter of January 11, 1907, to Smith & Co., wherein he adopts the sale made by the bondholders committee, "as such sale is supplemented and interpreted by the letter of Messrs. Leigh & Perebee, trustees, to Messrs.

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

Foster, Simcoe & Cobb, dated February 9, 1906," the case turns on the meaning and proper construction of such letter, which is:

"The undersigned trustees, acting under contract between yourselves and D. L. Groner and Tazewell Taylor, bearing date on the 25th day of January, 1906, beg to report that in compliance with the said contract, Edward B. Smith & Company, assignees of D. L. Groner and Tazewell Taylor, have paid to us the sum of fifty-nine thousand and four hundred ($59,400) dollars, that being 40 per cent. of the amount of the face value of the bonds placed by you in our hands, and we have, in compliance with the trust imposed in us, delivered to the said D. L. Groner and Tazewell Taylor the said bonds which were placed by you in our hands, and we hold now, subject to your orders, 40 per cent. of the face value of said bonds, to wit, fifty-nine thousand and four hundred ($59,400) dollars, less the sum of nine thousand ($9,000) dollars, that being 40 per cent. of the bonds belonging to the Consolidated Turnpike Company, and the further sum of eight thousand ($8,000) dollars, which two sums are reserved by us as our indemnity against any loss which may be sustained by the purchasers of the bonds on account of condemnation of the Ocean View right of way, and the further sum of four hundred ($400) dollars, reserved for certain general expenses.

"Deducting these sums, amounting to seventeen thousand four hundred ($17,400) dollars, from the amount received by us, leaves in our hands, subject to your order, for distribution among the owners of said bonds, other than the Consolidated Turnpike Company, the sum of forty-two thousand ($42,000) dollars, or 33⅓ per cent. of the face value of all said bonds, except those owned by the Consolidated Turnpike Company.

"The cost, if any, of the said condemnation proceedings, will fall first upon the bonds of the Consolidated Turnpike Company, and we feel confident that the eight thousand dollars ($8,000.00) above reserved, for indemnity as aforesaid, or the greater part thereof, will ultimately be returned to us for distribution, through you, among the bondholders, from whose holdings the sum has been received.

"You will observe from the above that there can in no event be any further liability on account of condemnation proceedings than the reserved fund above stated, and only so much of that as may be necessary to meet the costs of such condemnation proceedings.

"We have a contract with the purchasers of said bonds, under which each bond owner may at his election accept the money for their holdings as above stated, or leave said money in bank, and exercise the right to take new bonds in a new company, should said purchasers hereafter acquire the Bay Shore Terminal Company, by purchase or reorganization."

The facts necessary to an understanding thereof are these: In September, 1905, Jones and the other defendants, being mortgage bondholders of the Bay Shore Terminal Company, an insolvent trolley road at Norfolk, Va., by writing, constituted F. S. Foster and others a bondholders committee, authorizing them:

"To sue, dispose of, exchange and contract concerning said bonds. * * * And we agree to accept the consideration received for said bonds * * * whether in cash or securities, provided only that such consideration shall be of equal benefit to all signers hereof without preference."

On January 25, 1906, E. B. Smith & Co., through their agents, Messrs. Groner & Taylor, made a contract with this committee, whereby, inter alia, they agreed to buy and the committee to sell not less than $135,000 in value of bonds held by the committee at 40 cents on the dollar, or at the option of the bondholders, instead of paying said sum for the bonds, to pay for them in bonds of a reorganized trolley company, dollar for dollar. It was also agreed that the bonds so sold by

the committee were to be free from certain right of way charges then in dispute, as follows:

"It is understood between the parties hereto that authority has been given to the present receivers to begin proceedings for the condemnation of such part of the right of way of the said company as is in dispute, and it is further understood that such proceedings are to be begun and concluded without cost to the parties of the second part hereto, and, in the event that the said parties of the second part hereto are called upon to pay anything on account of the said right of way, they shall be reimbursed proportionately by the bondholders herein represented."

By said contract Messrs. Leigh & Ferebee were constituted trustees to hold the purchase money and the bonds pending performance of the contract.

Now it is conceded that, if this contract has not been modified as to the requirement of removing the right of way liens, the plaintiffs have no right of action. We turn then to the question whether the contract is modified in that particular by the letter quoted above of February 9, 1906, which Messrs. Leigh & Ferebee, with the approval of E. B. Smith & Co., wrote to the bondholders committee. To us it is clear that the agreement which that letter evidences did not release the requirement in the contract of January 25, 1906, that the rights of way should be paid by the bondholders as a condition precedent to Smith & Co. settling for the bonds. A due appreciation of the facts and the situation of the parties clearly shows: First, what was the object in view in such letter; and, secondly, that it was not intended to waive the right of way requirement. After the contract was made on January 25, 1906, and the trustees on January 26, 1906, had receipted for the $10,000 earnest paid by Smith & Co. and the bonds, it was seen that the whole $59,400 of purchase money which Smith & Co. were to pay would be tied up pending the removal of the purchase-money liens. Now, as appears by the letter, Smith & Co. had paid the trustees $59,400, which was the purchase price of 40 per cent. for all the bonds delivered to the trustees. But it also appeared by the letter that Smith & Co. were willing that, if the trustees retain in their hands $17,400 to protect the right of way, they might pay any bondholders electing to take money, 33⅓ out of the 40 per cent., the agreed-on price. But this provision was clearly only intended to cover the case of those bondholders who elected to take money. As to those who wished to take bonds there was no call to change the contract. There was no money of theirs tied up in the hands of the trustees. It is true Smith & Co. had provided the money for all bonds; but if any bondholder did not elect to take money, but stood on his right to take bonds, then his getting such bonds had to await the clearance of the right of way liens. That this is the fair, reasonable, and just construction of this letter is to us clear. The letter itself shows that Smith & Co. were standing on their right to have the right of way liens removed. They received no consideration for any release of that right, and if the letter itself, without any action by the bondholders thereunder, is a release to any bondholder who did not choose to accept money under it, but stood on his option to take reorganization bonds, we would have the result that, if all the bondholders had elected to take reorganiza-

tion bonds, they all would get those bonds and escape any contribution whatever towards the extinguishment of the right of way liens. On the other hand, the reasonable construction is: That the money and the retention for the right of way extinguishment covered those bondholders who chose to take money, for, as the trustees say:

"We hold now, subject to your order, 40 per cent. of the face value of said bonds."

And that those bondholders who chose, not to take 40 per cent., in money, but reorganization bonds dollar for dollar, were relegated to their rights under the contract of January 25th by the closing provision of the letter which is:

"We have a contract with the purchasers of said bonds, under which each bondholder may at his election accept the money for their holdings as above stated, or leave said money in bank, and exercise the right to take new bonds in a new company, should said purchasers hereafter acquire the Bay Shore Terminal Company, by purchase or reorganization."

It follows, therefore, that the plaintiffs, not having elected to take money for their bonds, were in no way released from the provisions of the contract of January 25th, whereby the right to demand reorganization bonds was conditioned on the extinguishment of the right of way liens.

It is contended, however, that the court below was without power to enter a judgment in favor of the defendants non obstante veredicto in pursuance of the Pennsylvania practice act of April 22, 1905 (P. L. 286). In Fries-Breslin Co. v. Bergen, 176 Fed. 76, this court held that:

"Under the conformity provisions of section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684], the Circuit Court was required to recognize the practice authorized by the said Pennsylvania act of 1905; there being nothing incongruous therein with the organization of the federal courts or their settled rules of procedure."

In view of the able argument made in the present case in support of an opposite view, we have re-examined the question but find no reason to differ from our former conclusion. The practice of entering judgments non obstante veredicto has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the court's opinion on a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in the stress of trial. Moreover, if an appellate court on review of such judgment finds error, it can reverse and direct entry of judgment for the other party and avoid a retrial. Long experience in this practice has convinced the bar and bench of the state of its value in conducing to a more careful and deliberate consideration of the law by the trial judge and to the avoidance of retrials. The practice in Pennsylvania is of statutory origin, as stated by Judge Acheson in Casey v. Pennsylvania Asphalt Co. (C. C.) 109 Fed. 746, adopted in 114 Fed. 189, 52 C. C. A. 145, and the principles involved in its application are set out in Fisher v. Sharadin, 186 Pa. 568, 40 Atl. 1091, and Boyle v. Mahanoy City, 187 Pa. 1, 40 Atl. 1093. Under the conformity act this

practice has long been followed in the federal courts in Pennsylvania and met with the approval of this court in Carstairs v. American Bonding & Trust Co., 116 Fed. 449, 54 C. C. A. 85. Subsequently the act of April 22, 1905 (P. L. 286), was passed, which provides:

"That whenever, upon trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidences taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or superior court; as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

And its provisions have been adopted and followed in the practice in the United States courts in this state and approved, as we have seen, by this court in Fries-Breslin Co. v. Bergen, supra.

In the present case, the defendants, in accordance with the act, moved the court for binding instructions in their favor. This request was reserved by the court in terms:

"I reserve the first point of defendants asking for binding instructions in connection with the question whether there is any evidence to go to the jury in support of the plaintiff's claim."

Subsequently, on defendants' motion for judgment non obstante veredicto, the evidence was certified, and thereupon (Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; German Ins. Co. v. Frederick, 58 Fed. 148, 7 C. C. A. 122; Village of Alexandria v. Stabler, 50 Fed. 689, 1 C. C. A. 616), it became the duty of the court to decide whether there was evidence to go to the jury. On this point the court below thought there was and entered judgment for the plaintiff on the verdict. In this, as we have shown in the foregoing part of this opinion, there was error. The case turned on the construction of the papers, and under our construction they disclosed no right of action in the plaintiffs. We, accordingly, reverse the action of the lower court and remand the case, with directions to enter judgment on the reserved point in favor of the defendants. That this practice results in but one trial and a final judgment on review is sound ground for the federal courts of this state conforming to the state's statutory practice. That this practice saves retrials and permits a final judgment when the case is reviewed shows its practical administrative worth. Interest rei publicæ ut sit finis litium. That the statute is of the kind to which the conformity act applies we are clear. Townsend v. Jemison, 48 U. S. 706, 12 L. Ed. 880; Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926; Bond v. Dustin, 112 U. S. 607, 5 Sup. Ct. 296, 28 L. Ed. 835; Ft. Scott v. Eads, 117 Fed. 51, 54 C. C. A. 437.

The judgment of the court below is therefore reversed, and the case will be remanded, with directions to enter judgment non obstante veredicto in favor of the defendants.

HARE v. BIRKENFIELD.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,834.

1. APPEAL AND ERROR (§ 185*)—FEDERAL JURISDICTION—QUESTION OF JURISDICTION—REVIEW.

The Circuit Court of Appeals of its own motion will inquire whether the trial court had jurisdiction of the controversy, and will not determine the appeal if federal jurisdiction is not shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1169; Dec. Dig. § 185.*]

2. COURTS (§ 299*)—FEDERAL COURTS — JURISDICTION — CONTROVERSY UNDER CONSTITUTION AND LAWS OF THE UNITED STATES.

Federal jurisdiction on the ground that the cause arises under the Constitution and laws of the United States obtains only when the cause really and substantially involves 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, appearing from plaintiff's statement of his own claim unaided by defensive allegations interposed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*

Jurisdiction in cases involving federal question, see note to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.]

3. COURTS (§ 285*)—FEDERAL COURTS — JURISDICTION — CONTROVERSY UNDER FEDERAL LAWS.

Plaintiff sued to restrain an alleged continuing trespass on his homestead entry, alleging that he had a subsisting uncanceled homestead entry on the land in controversy, and that proceedings had progressed so far as to entitle him to a patent; also, that defendant had taken possession of the land. The bill did not allege that defendant's possession had been taken under any claim of right, and defendant in his answer did not assert any claim of right under any provision of the land laws of the United States or under any grant or deed, only claiming that proceedings were pending to cancel complainant's title, and that defendant was in possession to make a homestead entry on the land in case plaintiff's entry was finally canceled. The bill further alleged that, though complainant's entry be canceled, his improvements and relinquishment were vendible and worth $4,500. *Held* that, since a homestead settler's right to transfer his possession and sell his improvements depended on no statute, the complaint did not show a case of federal jurisdiction depending on the Constitution, laws, or treaties of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 285.*]

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

Bill by Chester V. Hare against August Birkenfield. Decree for defendant, and complainant appeals. Affirmed.

The appellant was the complainant in a bill in equity in which he alleged that on July 21, 1902, he had made a homestead entry on certain public land of the United States, and that on February 21, 1903, he had submitted a commutation proof thereon at the proper United States district land office, which proof was duly accepted, and that he is now entitled to a patent therefor from the United States; that on October 15, 1909, while he owned and was seised in fee of the land embraced within his homestead entry, the appellee, without right or title, unlawfully and forcibly entered into and upon

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

the same, and ousted and ejected the appellant therefrom, and still withholds the possession thereof, and that the appellee's occupation is a continuing trespass; that he has cut and threatens indefinitely to cut, burn, and destroy timber on said land, which timber is of the value of $10,000; that he has mutilated, and threatens to mutilate and injure, the buildings and other improvements on said land. The bill further alleged that the appellant has made improvements of considerable value on said land; that he is in danger of losing his title thereto by having his homestead entry canceled by the action of the Secretary of the Interior on the ground that he had not resided on said land sufficient to show that he intended to make the same his permanent home; that, if such order of cancellation shall be made, he will, notwithstanding, be able to sell his improvements on said land, and the possession thereof for the sum of $4,500, provided that the appellee shall be removed therefrom; that, under the public land laws of the United States and the regulations of the Interior Department, the right of a homestead entryman who has not been guilty of any fraud to sell his relinquishment and improvements is recognized and protected, and that, under such laws and regulations, any person who settles upon lands covered by the homestead entry of another is a trespasser up until the time when the previous entry is canceled of record in the local land office; that the appellant is without plain, adequate, or complete remedy at law, and the appellee is insolvent, and could not be made to respond in damages for the injuries complained of. The bill prayed for a preliminary injunction restraining the appellee from residing on the land or cutting any timber therefrom, or mutilating the buildings thereon, or withholding the possession, and that upon final hearing such injunction be made permanent, and for the recovery of damages. The appellee answered, admitting his possession, and alleging that he occupies the land as a bona fide settler. He denied the alleged acts and threatened acts of injury to the property, and alleged that on August 3, 1909, the register and receiver of the land office for the district in which the homestead entry is located, upon the evidence adduced, rendered a decision recommending that the homestead entry of the appellant be canceled and set aside on the ground that the appellant had not resided upon the land sufficient to show an intention to make the same his permanent home, and had not complied with the laws of the United States in that regard, and that since February 21, 1903, the appellant has never occupied said land or been in possession thereof, or lived thereon, but has wholly deserted the same, and the answer further alleged that the appellee's sole purpose in taking and holding possession of the property is to enter the same as a homestead whenever the appellant's homestead entry shall be canceled. The court below denied the application for a preliminary injunction, and dismissed the bill for want of equity.

A. W. Lafferty and Arthur I. Moulton, for appellant.
Moulton & Scobey and W. H. Fowler, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The court is compelled of its own motion to inquire whether the court below had jurisdiction of the controversy. No diversity of citizenship is alleged, and jurisdiction was assumed evidently upon the ground that a federal question is involved. A cause may 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 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. Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046.

What law of the United States, one construction of which would sustain and the other would defeat recovery, is involved in the present case? Clearly no question of the construction of any provision of the homestead laws is presented. The bill alleges, and the answer does not deny, that the appellant has a subsisting, uncanceled homestead entry upon the land in controversy, and that proceedings have progressed so far as to entitle him to a patent. The bill alleges, and it is not denied, that the appellee has taken possession of the land in controversy. The bill does not allege that such possession has been taken under any claim of right, nor does the appellee in his answer assert any claim of right under any provision of the land laws of the United States, or under any grant or deed. In brief, the situation presented by the pleadings is this: The appellant has acquired the equitable title to his homestead, and, although proceedings have been instituted to set aside and cancel his entry, it has not yet been canceled. During his absence the appellee jumped the claim, and now holds possession in the expectation that the entry will be canceled, whereupon the appellee will exercise his right to make entry of the land under the homestead law. Under the admitted facts, the appellant is undoubtedly entitled to the possession of the land. It does not follow, however, that he has a right of action in a federal court. His allegation that, if possession were restored to him, he would, on the cancellation of his homestead rights, be in a position to sell out his improvements to another, does not present a federal question. The right of such a settler to transfer his possession and sell his improvements depends on no statute, and it cannot be seen that in dealing with any phase of the controversy which is here presented the court will be called upon to construe or apply any law of the United States. 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. The case is unlike Jones v. Florida C. & P. R. Co. (C. C.) 41 Fed. 70, McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237, and Spokane Falls, etc., Ry. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79. Decision in the first two of those cases depended directly upon the construction of the terms of the homestead act, and, in the third, upon the construction of the pre-emption act.

The decree dismissing the bill is affirmed on the ground of lack of jurisdiction.

SWIFT et al. v. DAVID.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,823.

1. JUDGMENT (§ 831*)—FOREIGN JUDGMENT—MERGER—BAR.
A judgment in personam in a court of a foreign country, while constituting a good cause of action in a domestic court, does not merge the original cause of action or extinguish the original contract debt, and is therefore no bar to an action thereon in a domestic court, unless it has been paid or satisfied.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1519–1522; Dec. Dig. § 831.*]

2. JUDGMENT (§ 875*)—BAR—SATISFACTION—APPEAL BOND.
A bond conditioned to pay a foreign judgment in case it should be affirmed on appeal taken in the foreign jurisdiction did not constitute such a payment or satisfaction as would bar a suit on the original cause of action in a domestic court.
[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 875.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by Lester W. David against Edward F. Swift and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Chas. F. Munday, for plaintiffs in error.

McCord & Kerr, for defendant in error.

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

GILBERT, Circuit Judge. In September, 1908, the defendant in error brought an action in a state court of the state of Washington against the plaintiffs in error to recover the sum of $77,500 on a contract of sale of certain shares of stock in a corporation of British Columbia. The cause was removed to the United States Circuit Court for the Western District of Washington on the ground of diversity of citizenship. In that court a supplemental complaint was filed, to which an answer was made, in which the plaintiffs in error set up a counterclaim for $244,291.79, and on September 27, 1909, a reply was filed. After the issues had been made up and the cause assigned for trial, the plaintiffs in error filed a motion to dismiss their counterclaim without prejudice. The motion was allowed, and on the same day the plaintiffs in error asked leave of the court to file a proposed supplemental answer, in which they alleged that prior to the commencement of that action they, as plaintiffs, had commenced an action against the defendant in error in the Supreme Court of the Province of British Columbia, Dominion of Canada, a court of record of common-law jurisdiction in which they had alleged a cause of action which was identical with their counterclaim in the present action, and that the defendant, in answer thereto, had alleged as a counterclaim thereto his demand for $77,500 on which he sued in the present action, and that upon issues so framed in that court the cause

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

had been tried and judgment had been rendered on December 4, 1909, in favor of the said defendant in error herein for $77,500, and dismissing the complaint of the plaintiffs in that action; that thereafter, on December 6, 1909, the plaintiffs in said action took their appeal to the Court of Appeal of British Columbia from so much of said judgment as dismissed their complaint, but that no appeal was taken from the judgment so rendered in favor of the defendant in error on his counterclaim therein; and that subsequently, on the demand of said defendant in error, they gave security to the satisfaction of the registrar for the payment of said judgment in all respects, which security was approved and accepted by the defendant in error, and is now in full force and effect, and in said proposed supplemental answer, the plaintiffs in error prayed that no further proceedings be had or taken in the action, and that the complaint be dismissed. The court denied the application for leave to file the supplemental answer, and thereafter the cause was tried on January 6, 1910, and judgment was rendered in favor of the defendant in error and against the plaintiffs in error for the sum of $86,798.62.

The plaintiffs in error rely upon the assignment that the trial court erred in denying their application for leave to file the supplemental answer, and they contend that the judgment of the court of Canada, which the defendant in error secured upon the same cause of action which he alleged in the present case, should have been held a bar to the further prosecution of the latter action, and that the undertaking given to secure the judgment of the Canadian court should be held equivalent to the payment and satisfaction thereof. A judgment in personam in a court of a foreign country, while it constitutes a good cause of action in a domestic court, does not merge the original cause of action or extinguish the original contract debt, and it is no bar to an action thereon in a domestic court unless it has been paid or satisfied. Australasia Bank v. Nias, 16 Q. B. 717; Trevelyan v. Myers, 26 Ont. 430; New York, L. E. & W. R. Co. v. McHenry (C. C.) 17 Fed. 414; Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665; The Propeller East, 9 Ben. 76, Fed. Cas. No. 4,251; Lyman v. Brown, 2 Curt. 559, Fed. Cas. No. 8,627. In the case last cited Judge Curtis, after referring to the fact that there is some uncertainty concerning some of the effects and force of a foreign judgment, said:

"But there is none as to this particular. It does not operate as a merger of the original cause of action. The fact that assumpsit lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger."

No exception to the rule is created by the fact that the supplemental answer in the case at bar shows that security has been given for the payment of the judgment of the Canadian court. If security for the absolute and unconditional payment of the judgment had been voluntarily accepted by the defendant in error, a different case would be presented, for a party may not twice obtain payment of the same demand. But all that was done was to stay the execution of the judgment by means of an undertaking whereby the plaintiffs in error

bound themselves to pay the judgment within 10 days after the judgment of the Court of Appeal, "unless said judgment be such as to disentitle the defendant to receive such amount." In other words, the undertaking is merely a supersedeas bond on appeal, and is not security for, or satisfaction of, the judgment.

The judgment of the court below is affirmed.

SHARON FIRE BRICK CO. v. MILLER.

(Circuit Court of Appeals, Third Circuit. September 27, 1910.)

No. 25, March Term, 1910.

MASTER AND SERVANT (§§ 221, 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé, engaged in loading stone on the cars at the defendant's quarry, was struck and fatally injured by the derrick boom, by means of which the stone was being hoisted, by the breaking of the cable sustaining the boom. The deceased had noticed and reported to the foreman on Saturday, preceding the Monday on which the accident occurred, that the cable was frayed, and on investigation it was found that one strand had been cut or broken. The foreman stated his intention of fixing it on Monday morning, but delayed doing so, and under press of work continued to use the derrick as it was, cautioning the deceased, however, not to get under the boom. There was a tag rope attached to the end of the boom, by which it could be guided, without the necessity for going under it, and this was always used when stone was being lifted out of the quarry, and also at times when stone was being taken off of the ground to be loaded on the cars, but not, as a rule, after the stone had been lowered, and was being set in place on the car; the stone, if it needed to be shifted, being then more conveniently steadied by hand, and the boom, even if it came down, being over the center of the car, involving no danger. This tag rope was not used on the occasion of the accident. The deceased and the man working with him having merely to raise the stone a little and shove it over by hand as they stood beside it, *held*, that whether the deceased was guilty of contributory negligence in not moving the stone by means of the tag rope was a question for the jury, the way the stone was being handled not only being the most convenient, but the customary way of doing so, and not being ordinarily or obviously attended with danger, no one, as a rule, being required to be wise above the custom of the business. But there was an extra hazard by reason of the defect in the cable, and the deceased having discovered and reported the defect, and knowing that it had not been repaired, and the danger arising from it being obvious, he assumed the risk, and binding instructions should therefore have been given for the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638–647, 1089–1132; Dec. Dig. §§ 221, 289.*

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

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

Action by one Miller against the Sharon Fire Brick Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. O. Fording, for plaintiff in error.

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

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

ARCHBALD, District Judge. The court below somewhat seriously confused in its charge the distinction between contributory negligence and assumption of risk, and the defendants would be entitled to a reversal and the granting of a new trial in consequence, except as we feel compelled to go further and hold that, on the undisputed evidence, the defendants were entitled to binding instructions, and, these having been refused, to judgment non obstante veredicto, on the point reserved.

Thomas Miller, the plaintiff's son, by reason of whose death this suit is brought, was killed while at work loading stone onto a car by means of a derrick at the defendants' quarry. The accident occurred on Monday, and it had been noticed on the preceding Saturday, by the deceased, who called it to the attention of Bailey, the foreman in charge, that the cable which held up the boom of the derrick was wearing or being cut on something, making it dangerous to work with. The cable was a new one, and the same day a man was sent up by Bailey to inspect it and see what was cutting it. He reported, in the hearing of Miller, that a strand was broken, but that he could not find the cause of it; and it being at the close of the day, Saturday, and the day being also pay day, the matter of fixing the cable was put over until Monday. On Monday the derrick was used by Bailey for hoisting stone, without the cable having been fixed; but he was careful to let no one else handle it, and warned Miller under no circumstances to go under it. After dinner he took out the tools to fix the cable, all that was necessary being to cut off the bad end of it; but he was interrupted by other matters, and there being a car there waiting to be loaded with stone to go to the gangway, where the work was going slow, Miller, of his own motion, with the help of a man named Jermyn, went to work to load the car by means of the derrick. They had put on two stones, and had a third nearly disposed of, when, finding that it needed to be moved slightly to bring the end in line with the others, a signal was given to Bailey, who was running the derrick, to raise the stone a little, when the cable snapped and the boom fell, striking Miller, who ran under it, and so injuring him that he died a week later. There was a tag rope attached to the end of the boom, by which it could be guided without the necessity for going under it; and this was always used when stone was being lifted out of the quarry, and also at times when stone was being taken off of the ground to be loaded on the cars, but not, as a rule, after the stone had been lowered and was being set in place on the car, the stone, if it needed to be shifted, being then more conveniently steadied by hand, which, even if the boom came down, as it was over the center of the car, involved no danger. This tag rope, for the reasons given, was not used on the occasion in question; the stone which Miller and Jermyn were handling having merely to be raised up a little, and shoved over by hand as they stood beside it. Neither of them was immediately under the boom when the cable broke; but hearing it snap,

and knowing that the boom was about to fall, Miller jumped one way, and Jermyn the other, Miller unfortunately jumping towards the boom and being struck by it.

Whether the deceased was guilty of contributory negligence, as contended, in not moving the stone by means of the tag rope, was a question for the jury, and their disposition of it, after appropriate instructions, would be conclusive. The way the stone was being handled was not only the most convenient but it was the customary way, and not being ordinarily or obviously attended with danger, it cannot be said, as a matter of law, that in not using the tag rope, so as to stand at a distance, Miller was so clearly negligent that there can be no recovery. Always, no doubt, there is a certain amount of peril in working under the boom of a derrick. But it apparently was not so imminent, with regard to this one, as to induce the men who worked about it to use the tag rope when they merely had to adjust a stone on the car, and no one as a rule is required to be wise, in any case, above the custom of the business. Except for the weakened condition of the cable, the risk that the deceased ran was a risk of the work in which he was engaged, as it was ordinarily performed, and the exposure of himself to it did not thus necessarily constitute contributory negligence. Kreigh v. Westing House, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

But there was an extra hazard on the occasion of the accident, by reason of the defect in the cable, and such as it was the deceased, under the circumstances, assumed the risk of it. It was he that discovered and reported the defect, and, of course, he therefore knew of it. He knew, also, that it had not been repaired, whatever had been said by the foreman about doing so the first thing Monday morning. And the danger of working under the boom, in the condition in which it was, was certainly obvious. He was thus affected with the established doctrine that where an employé has knowledge of a defect and the danger arising from it, or where both are so manifest that he must have known of them, he is conclusively presumed to have assumed the attendant risk, and cannot recover if it goes against him. Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281. If the attention of the employer is called to the defect, and the employé is assured, by some one authorized to speak, that the defect will be remedied, he is entitled to rest on this assurance for a reasonable time, and if he keeps on, either voluntarily or by the direction of his employer, and is injured, the employer is liable. But the direction, even so, must be of such a character that the employé had the right to assume that it was the intention of the employer to carry the risk up to the time of the accident. McGill v. Traction Co., 79 Ohio St. 203, 86 N. E. 989, 19 L. R. A. (N. S.) 793, 128 Am. St. Rep. 705. And there is nothing on which to base an assumption of that kind here.

It is true that Bailey, the foreman, expressed his intention to fix the cable the first thing Monday morning, and that he got out his tools to do so, and that without this having been done, the derrick, under the press of business, continued to be used up to the time of the accident. But the statement of Bailey, that he would fix the cable on Monday,

carried with it no direction or suggestion to Miller that he should go on and use it as it was in the interval; and it was entirely of his own motion that he undertook to do so. Bailey also, while it was being used that morning, was particular not to let any one work under the derrick, and twice cautioned Miller that if he (Bailey) was called away, whatever he did, to keep from under the boom. There was thus no promise or assurance to the deceased, leading him to go on and use the derrick in its crippled condition; but, on the contrary, there was an express warning against the very danger that overtook him, which, had he observed, there would have been no difficulty. The defect, therefore, being known, and the danger from it obvious, the deceased, in making use of the derrick as he did, must be held to have assumed the risk involved in it, and the court upon this ground should have directed a verdict.

The judgment is reversed, and the case is remanded, with directions to enter judgment for the defendants, on the point reserved, non obstante veredicto.

THE P. R. R. NO. 5.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 263.

1. COLLISION (§ 81*)—FOG SIGNALS—VESSEL MOORED AT DOCK.
   A vessel moored at a dock in a fog is not required to sound fog signals.
   [Ed. Note.—For other cases, see Collision, Dec. Dig. § 81.*]
2. COLLISION (§ 85*)—MOVING AND MOORED VESSEL—EXCESSIVE SPEED IN FOG.
   A tug with a car float on her side *held* solely in fault for a collision between the float and a tug moored at a dock at Hoboken in a dense fog for navigating in the fog at such speed that she could not stop in time to avoid collision after the moored vessel could be seen.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 169; Dec. Dig. § 85.*]

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

Suit in admiralty by the Taylor Dredging Company against the steam tug P. R. R. No. 5; the Pennsylvania Railroad Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

The following is the opinion of Adams, District Judge, in the trial court:

There are two actions involved in this litigation. The first is by the owner of the tug General Newton, to recover for damages to her, and the second by her master for personal injuries, both due to a collision with the Pennsylvania Railroad's tug No. 5, which had a carfloat in tow on her port side, extending considerably ahead of the tug. The proceedings are practically the same in both cases.

The libels allege that on the 23rd of December, 1907, about three o'clock in the afternoon, in a dense fog which had prevailed for some time, No. 5 ran into the steam tug General Newton, which was lying alongside of the Derrick Strongwood, the Derrick lying outside and alongside of a sand scow that was

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

lying alongside and outside of a lime boat which was made fast to Schultz's Dock in Hoboken.

It is further alleged that the Strongwood was made fast with a bow line running to the lower end of the Consolidated Coal Company's Dock or trestle work just above Schultz's Dock and a stern line to the said scow. The said steamtug General Newton was made fast with a bow line to the said Company's Dock or trestle work. Then there is some description as to how she was made fast, the bow of the General Newton lapping a little on the said Coal Dock or trestle.

The testimony shows that this tug was lying outside of the scow or vessel that she had been towing and partly on the dock, about two-thirds of it outside of this scow. Inside of this scow were a couple of other boats, so that she was essentially a solid obstruction; there was not any give to her.

It is further alleged that at this time the General Newton discovered through the fog the cars of an approaching carfloat, apparently coming right on to the General Newton at a rapid rate of speed, heading about for her starboard amidships and from a direction across and a little up river from the General Newton and about 100 feet away, which afterwards turned out to be the carfloat No. 36 in tow of the tug No. 5, bound from Thirty-Seventh Street, North River, New York, to Jersey City. This float kept coming on and before anything could be done on the General Newton to avoid collision struck the General Newton bow on, on the Newton's starboard side staving in the bulwarks, house, and so forth.

It appears that the master of the General Newton was in his pilothouse and was severely scalded by escaping steam.

It is alleged that the collision was not because of or through any fault on the part of the General Newton but because of the negligence of the No. 5.

(1) In that said steamtug started out and attempted to navigate in the Hudson River in a dense fog.

(2) In that the said steamtug did not seek an anchorage and did not come to an anchorage in view of the dense fog that was prevailing.

(3) In that the tug did not sooner discover her proximity to the Jersey shore.

(4) In that she did not keep a proper lookout properly stationed and attending to his duties as such.

(I may say here that the evidence shows there was an ample lookout, so that no negligence is established in that respect.)

(5) In that the tug was navigating at too great a rate of speed.

(6) In that said tug did not slacken her speed or stop or reverse in time to avoid collision.

The Pennsylvania Company's answers are that about 2:20 p. m. the tug No. 5 with a carfloat in tow on her port side left the pier at Thirty-Seventh Street, North River, bound for Harsimus Cove, New Jersey; that at this time the weather was hazy but not thick and boats could be seen across the river; that the tide was ebb and wind light from the southwest; that the carfloat was made fast alongside of the tug in the usual and customary manner and the tug and tow were navigated properly and carefully; that when about abreast of Twenty-Third Street and about in the middle of the Hudson River a heavy fog came up and the weather became very thick and the tug was slowed down and navigated with great caution; that fog signals were blown continuously and two lookouts were on watch, one on top of the cars on the float and the other on the bow of the carfloat; that the weather becoming so thick as to make navigation unsafe it was determined to put in at the Hoboken shops to await clearing weather; that while proceeding at dead slow and navigating with the greatest caution one of the lookouts reported a coal-pocket ahead and the engines of No. 5 were immediately stopped and backed and every effort made to avoid collision, but despite every effort the corner of the carfloat came up against the starboard side of the tug lying alongside of the coal-pocket.

It is alleged that this collision was not in any respect the fault of the No. 5 but was solely due to the fog and thick weather and to the negligence of the General Newton in remaining alongside of the outside of an exposed dock in

such thick weather without giving any warning signals, and especially so upon hearing the signals from the No. 5.

The testimony substantially corresponds with the allegations, that is, that No. 5 took her tow at Thirty-Seventh Street, North River, and proceeded down to the vicinity of Twenty-Third or Twenty-Fourth Street and then turned to go to New Jersey. It is alleged that the fog was not thick at that time, that is, on the part of the tug No. 5, but that it become so and by reason thereof the tug started to go across the river to seek shelter at its own docks above the place where this collision occurred, at Hoboken, and in seeking that harbor she ran into the General Newton, doing the damages claimed and also injuring the pilot who was in the pilothouse of the tug at the time.

It seems to me to be perfectly clear that the Pennsylvania tug was in fault here. She ought not to have been navigating in such weather. She had no right to move about when she could not see where she was going. It has been said here in the testimony, and argued, that it was impossible to see and that the tug did not know where she was. This is true. What should a tug do under those circumstances? If she is caught out she takes the chances. Perhaps she is justified in taking the chances, that she had to navigate we will say, but at a point when the fog became so dense that she knew perfectly well that she could not navigate with any safety, she nevertheless continued on when she could have stopped. It seems to me that when she struck that dense fog she could have kept on the New York side and that in attempting to go over to New Jersey she took all the risks which would ensue from navigating in the fog when she could not see her way. When she came in the vicinity of this boat she does not pretend to have seen it or anything on the shore until she was about 75 feet away and then she saw the coal pockets which were above and back of the boat. She was probably at that time 50 feet away from the boat, and she was then going at a rate of speed which I do not know, the tug says one or two knots an hour. We all know that it is almost impossible for a tug and tow to navigate at one or two knots an hour, but assuming that in this case it was at such a speed, that she could not stop in time to avoid an obstruction which was there and which was concealed from her by the fog. Does the law permit anything of that kind? I do not think so. It says that boats must navigate in a fog in such manner that they will not come into collision. Here a collision occurred, and occurred evidently when the tug and float were going ahead at a considerable rate of speed. We do not know at what rate, but assuming it was two knots an hour that was too high a rate of speed, because the tug could not stop in time to avoid an object which was ahead of her. It was her duty to be under full control of herself if she were going to navigate and to be able to stop in time to avoid collision upon seeing such an object ahead of her. Not being able to do that she should not navigate.

The General Newton was carefully avoiding navigation at the time. She at first made a pier somewhat below the point of collision but was obliged to leave there on account of a change in the tide. She then selected a place slightly above and chose the best she could find. There was no protected place available, but it would have been safe if the No. 5 had been equally careful. When the Taylor heard the No. 5 approach, signals were given by the master who was stationed in the pilothouse. These were doubtless too late to be of service but they tend to show that such precautions were taken.

It seems that when a collision like this takes place between a moving and a motionless boat, the former should bear the consequences.

There will be decrees in favor of the libellants, with orders of reference.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and William S. Montgomery, of counsel), for appellant.

Carpenter & Park, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. It was conceded at the argument that the General Newton was not at fault for tying up at the coal dock in Hoboken.

That she was not at fault in failing to blow her whistle is manifest, because there is no law requiring her to do so, and, on the contrary, every reason why she should not do so. As was pointed out at the argument, she was moored fast to the dock, and sounding fog signals by her would only have tended to confuse and mislead moving vessels. As there was no fault on the part of the Newton, it is evident that the collision was due either to inevitable accident or to the fault of the No. 5. The case presents no element of inevitable accident. The careless navigation of No. 5 fully accounts for the collision. She was navigating in a fog so dense that she did not see the Newton until she was about 75 feet distant; she was then proceeding at a rate of speed which could not be checked in time to prevent the collision. That she was proceeding at a considerable rate of speed is made plain by the fact that her tow, the carfloat, struck the starboard side of the Newton with such force as to break in her house, sever her steam pipes and shift her boiler. We agree with the district judge, and nothing further need be added to his opinion.

The decree is affirmed, with interest and costs.

WARREN WEBSTER & CO. v. C. A. DUNHAM CO.

(Circuit Court of Appeals, Eighth Circuit. September 19, 1910.)

No. 3,315.

(Syllabus by the Court.)

1. PATENTS (§ 27*)—NEW USE—WHEN PATENTABLE.

The application of an old machine or combination to a new use is not in itself invention, or the subject of a patent.

If the relations between the two uses be remote, and if the use of the old device produce a new and beneficial result, the application to the new use may involve the exercise of the inventive faculty and be patentable.

But it is only when the new use is so recondite or so remote from that to which the old device has been applied, or for which it was evidently conceived, that its application to the new use would not readily occur to the trained mind of the ordinary mechanic skilled in the art, seeking to devise means to accomplish the desired function, that its conception rises to the dignity of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*

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 (§ 328*)—LETTERS PATENT NO. 454,964 TO HALL, JUNE 30, 1891, FOR DOUBLE USE AND VOID.

The combination of thermostatic valves with the return pipes or the connections between the return pipes and the radiators of suction or vacuum systems of steam heating, such as are disclosed in letters patent No. 256,089, to Williames, issued April 4, 1882, did not rise to the dignity of an invention, in view of the combination of such valves with the return pipes of pressure steam-heating systems shown in letters patent No. 113,434, to John J. Jordan, issued April 4, 1871. And letters patent No. 454,964, to W. E. Hall, issued June 30, 1891, was for a double use, and the patent for it is void.

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

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

Bill by Warren Webster & Co. against the C. A. Dunham Company. Decree for defendant, and complainant appeals. Affirmed.

Ernest Howard Hunter, for appellant.

Robert W. Hardie (Edwin N. Farber, William L. Read, and Charles A. Munn, on the brief), for appellee.

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

SANBORN, Circuit Judge. This case involves the validity of letters patent No. 454,964, issued June 30, 1891, for an improvement in a steam-heating apparatus, the single claim of which reads in this way:

"In a steam-heating system, the combination with a steam pipe leading from the boiler, a radiating system connecting with the steam pipe, and a return pipe connecting with the lower part of a radiating system, of a thermostatic steam trap situated in the connection between the radiating system and the return pipe, all substantially as and for the purpose specified."

Prior to 1882 the steam in a steam-heating system was forced by the engine or by a loaded exhaust pipe through the supply pipe, the radiators or heating coils, and the return pipe into the open air or into some suitable receptacle. In such a system a pressure in excess of that of the atmosphere was obviously indispensable to its operation. Where there were many radiators or heating coils connected with the supply pipe, the pressure necessary to drive the steam from many of them at the same time caused a choking and back pressure in the return pipe, which retarded the circulation of the steam and made the heating of the various radiators difficult and expensive. In order to remove this objection Napoleon W. Williames invented a combination with an unobstructed exhaust pipe and the other elements of this system of a pump or other like means for producing a partial vacuum in the return pipe and the radiators or heating coils connected therewith, by means of which the water of condensation, the steam, and air were drawn or sucked out of the return pipe, and letters patent No. 256,089 were issued to him for this invention on April 4, 1882. For the sake of brevity the apparatus system and return pipe through which the steam is forced will be called the pressure and that in which it is drawn by the partial vacuum the suction apparatus system and return pipe. The essential distinction between the systems is that the exhaust pipe is unobstructed, and the pump or other device to form the partial vacuum sucks the steam through the pipes in the latter, while the steam is forced through them in the former. The improvement made by Hall consisted of the combination of a thermostatic steam trap or valve placed in the return pipe, or in the connection between the radiators and the return pipe, with the other elements of a suction system. Without this valve the suction system was but partially successful, because the steam was short-circuited; that is, an excess of steam was drawn through the short lines of pipe and an insufficient amount from the long lines, and because it was difficult to regulate or modulate the heat in the respective radiators, and frequent readjustments of their

valves were necessary. The use of the thermostatic steam trap or valve remedied these defects. This trap placed in the connection between each radiator and the return pipe automatically opened and discharged the condensed water and air when it was cool, and when the steam was drawn through it, and it was again heated, it closed, and prevented the unnecessary use and escape of the steam, the heat of each radiator was readily and automatically modulated, and the suction system with this improvement became exceptionally successful commercially, and displaced the pressure system very generally in hotels and other buildings, where many radiators were heated from a single supply pipe.

But thermostatic valves were old, and their combination with the mechanical elements of the pressure system of steam heating alternately and automatically to release the water of condensation and to confine the steam had been described in letters patent No. 113,434, issued on April 4, 1871, to J. J. Jordan, and was well known to mechanics skilled in the art before Hall made his improvement.

Counsel for the complainant concedes that if the patent to Hall is sufficiently broad to cover the combination of the thermostatic steam trap with the supply pipe, radiators, and return pipe of a pressure system of steam heating, it is anticipated by previous patents and void; and the counsel for defendant admit that if the patent is valid the defendant has infringed it. So the case presents two questions: Is the true interpretation of the patent that it is limited to the combination of the thermostatic valve with the supply pipe, the radiators or heating coils, and the return pipe in a suction or vacuum system, or that it secures by its terms a monopoly of that combination in a pressure system also, and if its true construction be that it is limited to the protection of this combination in a suction system only, was the application of the thermostatic valve shown in the patented descriptions of the pressure system to the suction system the exercise of inventive genius or the skill of the trained mechanic familiar with the art?

While the patentee did not restrict his monopoly in his claim to the combination of the thermostatic valve with the elements of the suction system, his statements in his specification strongly indicate that this was his intention; and conceding, without discussion, that he accomplished his purpose, let us consider the second question.

The thermostatic valve performed the same function in the suction system as in the pressure system. It automatically discharged the water of condensation, the air, and the steam when it was cool, and confined the steam when it was warm. In 1871 Jordan had patented it, and had described its combination and use with steam-heating pipes to discharge the water of condensation and prevent the escape of steam. A patentee who has plainly described and claimed his machine or combination has the right to every use to which his device can be applied, and to every way in which it can be utilized to perform its function, whether he was aware of these uses or methods of use when he claimed or secured his monopoly or not. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 709, 45 C. C. A. 544, 560; Roberts v. Ryer, 91 U. S. 150, 157, 23 L. Ed. 267; Miller v. Manufacturing Co., 151 U. S. 186, 201, 14 Sup. Ct. 310, 38

L. Ed. 121; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 C. C. A. 13; Frederick R. Stearns & Co. v. Russell, 85 Fed. 218, 226, 29 C. C. A. 121, 129; Manufacturing Co. v. Neal (C. C.) 90 Fed. 725; Tire Co. v. Lozier (C. C.) 90 Fed. 732, 744, 33 C. C. A. 255, 268.

But counsel argue that the suction system was unknown when Jordan made his invention, and that, while he secured the combination of a thermostatic steam trap with a pressure return pipe, Hall secured the new combination of the thermostatic trap with the suction return pipe in 1882. The answer is that Jordan secured the monopoly of every use of the steam trap and return pipe which he disclosed, until Williames in 1882 secured a monopoly of the use of his new combination of the pump or similar device for causing a partial vacuum in the return pipe with that pipe, the radiators, and supply pipe, and when the patent of Williames expired in 1899 Jordan and, since his patent had also expired, all others then acquired the right to use the combination of the thermostatic steam trap with the suction system.

The improvement made by Hall consisted of the application of the thermostatic valve of the return pipe of the pressure system to the return pipe of the suction system. Counsel argue that this was an invention, because it did not suggest itself to those skilled in the art for 11 years after Williames made his invention, while the results of the suction system were unsatisfactory, and there was a demand for the improvement wrought by the use of the steam trap during all this time, because after the application of the steam trap to the suction system that system became exceptionally successful, and because its application prevented back pressure and short-circuiting, and enabled the manufacturer to modulate automatically and separately the heat of each radiator, results neither attained nor foreseen prior to this improvement. These arguments are persuasive. They have been carefully considered. But the application of an old device or combination to a new use is not in itself an invention, or capable of protection by a patent. If the relation between the two uses is remote, and the old device or combination produced a new result by virtue of its new application, that application may constitute invention. Where a machine or a combination is discovered in a remote art, where it is used to perform a different function, and where it was not designed and was not apparently suitable to accomplish the thing desired, the application of it with proper mechanical adaptation to a new use is often the result of the exercise of the inventive faculty and may be protected by patent. But the thought that an existing machine or combination, discovered in the same art or one nearly analogous to it, designed and suitable to perform a similar function, may be used or adopted to accomplish the desideratum, is not the product of inventive genius, but the result of the application of the skill of the mechanic to the subject under consideration. It is only when the new use is so recondite and remote from that to which the old device and combination has been applied, or for which it was conceived, that its application would not occur to the mind of the ordinary mechanic skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination before him, that its conception may rise to the dignity

of invention. Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; Hobbs v. Beach, 180 U. S. 383, 390, 21 Sup. Ct. 409, 45 L. Ed. 586; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 447, 23 C. C. A. 223, 237; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 702, 45 C. C. A. 544, 553.

The court below was probably of the opinion that a mechanic skilled in the art, with a pressure system of steam heating with the thermostatic valve of Jordan attached to its return pipe, as Jordan said, "for effectually draining from steam-heating and other steam pipes the water of condensation and preventing the escape of steam," and the patent of Williames, showing the combination of the pump or other device for producing a partial vacuum in the return pipe with the return pipe radiators and supply pipe of a heating system, as Williames said, to "perform the double function of heating the building without back pressure to the engine and reducing the normal pressure by creating a partial vacuum in the exhaust pipe," before him, would not long fail to think that thermostatic valves in the return pipes of suction systems, or in the connections between those pipes and the radiators, would be very likely to prevent back pressure and short-circuiting, and to modulate automatically the heat of the radiators; and it is probably for this reason that the court below dismissed the bill. A review of the evidence has failed to convince that it was in error. The thermostatic valve was found in the same art in combination with a pressure return pipe performing the same function that it performs in combination with the suction return pipe and producing results similar to those which the suction system demanded. Its application to the latter system failed to rise to the dignity of an invention, and the decree below is affirmed.

ASHLEY v. SAMUEL C. TATUM CO.

(Circuit Court, S. D. New York. August 12, 1910.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR INKSTAND.

The Ashley design patent, No. 37,504, for a design for an inkstand, consisting of a low spuare base surmounted by a low dome of a diameter somewhat less than the side of the base, wholly devoid of ornamentation, discloses a meritorious and novel design, depending entirely upon its simplicity and the proportions of the parts for its artistic merit; also, *held* infringed by the design of the Hilles patent, No. 40,125, which contains every element of the Ashley design, with the addition only of sufficient ornamentation to make a colorable differentiation.

In Equity. Suit by Frank M. Ashley against the Samuel C. Tatum Company. Decree for complainant.

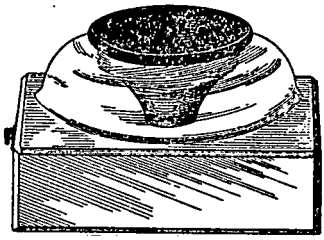
On final hearing of a bill in equity to enjoin the infringement of design patent No. 37,504 and construction patent No. 829,752. Both patents relate to glass inkwells, and the design patent, though best shown in the drawing, may be described in words as a low square base surmounted by a low dome of diameter somewhat less than a side of the base, with an orifice at the top, in which fits a hard rubber inverted cone. The ink is held within the dome and a shallow recess in the base. The well is wholly devoid of any orna-

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

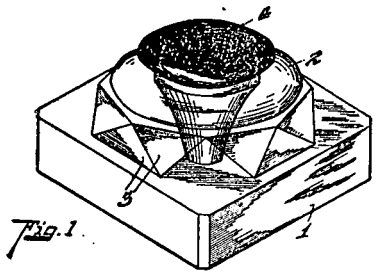
mentation, and depends for its success upon the association of the dome with the base and upon the proportions. To indicate such proportions, the following dimensions are taken from the drawing attached to the patent: Width of base 2⅜ inches; height, ⅝ of an inch; opening at top of dome 1¼ inches. The total height is therefore one-half of the width of the base.

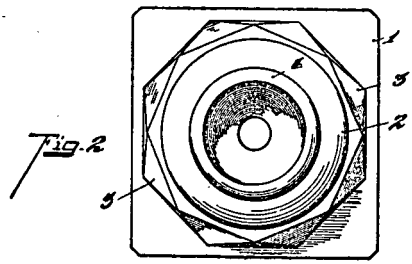
The defendant's inkwells are also of glass, consist of a low, flat base, surmounted by a similar dome, and have relatively nearly the same proportions as the complainant's. They are devoid of ornamentation except as hereinbefore stated. No point is made of their dissimilarity except that from the base of the dome to a point about one-half way up the glass side of the dome is markedly thickened and moulded into a band of triangular facets, some perpendicular, some inclined, the top of this band forming a kind of narrow horizontal terrace.

The defenses are want of invention and noninfringement.



COMPLAINANT'S INKSTAND.





DEFENDANT'S INKSTAND.

Albert T. Scharps, for complainant.
John W. Loveland, for defendant.

HAND, District Judge (after stating the facts as above). The first question is want of invention. No design had appeared in any way resembling the complainant's before he designed his inkwell. The parties introduced in evidence 30 or 40 inkwells to show the prior art, and neither the combination nor the proportional relation in dimension appears in any one of them. The complainant was the first to conceive of an inkwell with a flat, broad, base surmounted by a low dome. There had been domed inkwells, and square inkwells, and low bases of one material with a low dome fitting into them. There had been forms of the old safety inkwells in which the base was thickened and made square. This was the nearest approach, but it was neither

flat, nor low, and the dome was a drum bent sharply at the top in a reverse curve, nor were the proportions at all alike. Vide complainant's Exhibit No. 30, in which the total height is 2¾ inches and the width 3⅜ inches. Nor did it depend, like the complainant's, strictly upon its proportions, but had a base of irregular horizontal section in an inferior manner, designed apparently at once to reduce the area covered by the base and to give a pleasing appearance.

The complainant has invented a wholly new scheme of element and proportion, resulting in a cheap inkwell of real artistic value which, deliberately or not, follows the excellent canon that beauty depends rather upon perfect adaptation to use and pleasing proportion. It is fitted for its purpose, in that its weight and low height insures it against accident, and keeps it near the table's level. It makes no shallow appeal to the senses by an effort at inconsequent ornament. The complainant has achieved a meritorious and novel design by resort only to the most legitimate artistic means. The prior art presents nothing which, to my eye, in the least suggests it. I have no trouble in finding his patent valid.

The defendant's well is no doubt distinguishable, and that, too, without the aid of an expert. It may be urged that under Gorham v. White, 14 Wall. 511, 20 L. Ed. 731, that distinction is enough to prevent infringement, but such would be, I believe, a misunderstanding of that decision. Friedberger-Aaron Mfg. Co. v. Chapin, 151 Fed. 264. A glance at the silver designs on page 521 of that case shows that, when put side by side, they were readily enough distinguishable by a person who was not an expert. The reason why that was an infringement is that in use they were not put side by side, but that the defendant's design was near enough to copy the essential novelty of the complainant's except to an eye so accustomed to the precise details of each as in memory to carry one into comparison with the other. In short, the fancy of the purchaser, whose attention cannot be supposed to have a photographic accuracy, would, in fact, have been caught by those fundamental elements of charm and novelty in White's silver that Gorham had devised. Scofield v. Browne, 158 Fed. 305, 85 C. C. A. 556 (C. C. A., 3rd Cir.).

So in the case at bar, if I am right in believing that the eye is pleased in the complainant's well by the proportion and combination he has devised, his design depends upon it, since it can depend upon nothing else, there being no ornamental addition. The defendant's well has indeed such an addition, and is, to my eye at any rate, thereby greatly damaged, but it nevertheless contains every element of the complainant's design. Certainly no mere ornamentation would be enough to protect one who had borrowed all the complainant's design. No one would say that a row of raised dots or a countersunk Grecian border around the base of the dome would be enough to avoid infringement. This border is, in fact, no more than either of these, though it does more effect the contour of the dome. It seems to me unreasonable to suppose that any one not attracted to the combination and proportions of the defendant's well would be induced to buy it, because it contained around the dome the band of facets which is the sole difference appreciable to the lay eye. The defendant has taken over bodily every ele-

ment of the complainant's design and he has added just enough, and that too injuriously, to make a colorable claim to differentiation. The analogy is strong between the case and the usual case of trade-mark in which the defendant imitates everything, and then relies upon some irrelevant detail of distinction to justify his exploitation of another man's brains and originality.

The complainant's design appears to me to have been imitated, and I therefore find that the defendant's wells are an infringement. The question of the construction patent after this conclusion becomes academic.

Let the usual interlocutory decree pass.

MURRAY v. SEATTLE CEDAR LUMBER MFG. CO.

(Circuit Court, W. D. Washington, N. D. August 18, 1910.)

No. 1,743.

PATENTS (§ 328*)—NOVELTY AND INFRINGEMENT—SAW GUARD.

The Murray patent, No. 893,087, for a saw guard, claim 3, is void for lack of novelty. Claims 1, 2, and 4 *held* not infringed.

In Equity. Suit by John Murray against the Seattle Cedar Lumber Manufacturing Company. Decree for defendant.

Reynolds, Ballinger & Hutson, for plaintiff.

Peters & Powell, for defendant.

HANFORD, District Judge. This is a suit in equity to protect rights of the complainant as patentee under letters patent No. 893,087, covering an "improvement in saw guards with dimension gage attachments for shingle clippers." The machines called "shingle clippers" are of the same general character as circular trimmer saws used in sawmills and other wood-manufacturing establishments. Their operation without guards to keep persons from contact with the teeth is dangerous, and previous to the use of Murray's device many accidental injuries happened. Now the use of guards is legally compulsory in this state.

To operate the clipper a man, or boy, stands facing the side of the saw and places each shingle on a spring board with its butt end aligned against a straight ledge, with the part to be cut off projecting over the top of the saw, and brings the shingle into contact with the top of the saw by pressing it on the spring board downward. The use of clippers is to make straight edges, cut out knots and flaws in the timber, and divide wide shingles. It is necessary for the operator to frequently extend his hand over the saw to grasp detached parts of the shingles. With a guard attachment over the saw an additional motion, to shove the shingle laterally after placing it on the spring board, is necessary, and because of that additional motion operators have always objected to the use of guards on clippers.

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

The Murray device consists of a straight iron bar, with supports, to which it is attached at each of its ends, holding it rigidly in a horizontal or slightly inclined position above the saw and lengthwise with its diameter. The straight bar serves the double purpose of a fender and support for one of the elements of Murray's patent, indicated by the descriptive words "dimension gage attachments." The straight bar is adjustably united to its support at one of its ends, so that the space between it and the top of the saw may be widened or diminished. The support at the other end consists merely of an extended part of the bar, bent so that one part is horizontally united to the machine and an intermediate part constitutes an upwardly inclined standard. The bar, at its adjustable end, is bent into an obtuse angle to form a downward projection, to which the support first mentioned is adjustably connected by means of a slot and set screw. In its entirety the guard is hip-shaped, instead of being a true curve; the object being to provide sufficient space between the guard and the saw for feeding in the manner indicated with the least possible enlargement of the structure. The Murray patent also covers another attachment, described as "a guard member formed of a section of flat metal which is formed with a right angular lip." This so-called guard member "performs the function of preventing contact of the operator's hand with the moving saw when grasping the shingles after the sawing operation."

The defendant is charged with infringement of the patent by making and using clipper shingle machines with guards similar to Murray's device without his consent. The evidence proves that the defendant has in its mill and has used clipper shingle machines equipped with guards of two different styles, neither of which is identical with the Murray device, but both are similar. One is composed of three pieces of metal, a straight bar and two end pieces secured to the body of the machine, constituting standards supporting the straight bar in a horizontal or slightly inclined position above the saw; one end being adjustably united to the standard, like the Murray device. The other style is a single bar bent in two places to form obtuse angles, with its ends secured to the machine body; the part between the two angles constituting a fender above the saw lengthwise with its diameter. If desirable to have it so, this guard could be easily made adjustable, so as to widen or diminish the space between the guard and the saw, by the simple method of perforating several screw holes in the ends united to the machine body.

The claims of the patent are four in number. Nos. 1, 2, and 4 cover combinations of elements not found in any machine made or used by the defendant. Therefore no further consideration will be given to them in this decision. Claim No. 3 reads as follows:

"A guard for rotary saws consisting of a member having a horizontal end and an inclined end, a second member having a horizontal end, an inclined intermediate portion, and a downwardly extending end adjustably secured to said inclined end of the first member."

It is a matter of common and general knowledge that blacksmiths and metal workers can, and do habitually, make anything and everything required as guards and fenders, from sword hilts to cages for

tigers, or bank tellers, shaped in curves, angles, and compound formations with separate parts joined to fit any and every object or space to be protected, or guarded against, and it is the opinion of the court that two or more pieces of metal applied to use as a guard to a circular saw do not constitute a patentable invention. The shapes, sizes, and joints of such a guard call for only ordinary mechanical skill to adapt them for use on any kind of a sawing machine. Such a structure is no more patentable than any formation of metal in successive lines, straight, horizontal, vertical, inclined, angular, and curved, to fit any particular object or space, with or without adjustable connecting joints, which ordinary mechanical skill is competent to produce.

The single-piece guard in use in the defendant's mill is simpler and better than the Murray device. It was designed by a blacksmith making no pretensions to inventive genius. Any other blacksmith, who never heard of Murray's patent, could make an equally effective guard.

The court directs that a decree be entered dismissing the case, with costs, for the reason that claim No. 3 of complainant's patent is void for lack of novelty, and the other claims of the patent have not been infringed by the defendant.

THE NORA.

(District Court, S. D. Florida. January 7, 1910.)

ADMIRALTY (§§ 28, 66*)—JURISDICTION IN PERSONAM—LIBEL IN REM FOR DEATH—AMENDMENT.

A suit in admiralty to recover for the death of a person will not lie in rem against a vessel unless a lien thereon is given by the state laws, and, when such is not the case, the filing of a libel in rem does not give the court jurisdiction, and, where the only process issued and served was an attachment against the vessel and her owners have not appeared except as claimants, the libel cannot be amended to give the court jurisdiction to render a personal judgment against them

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 285, 288, 524; Dec. Dig. §§ 28, 66.*]

In Admiralty. Suit by Eliza Wilson against the steamship Nora. On exceptions to libel and motion to amend. Motion denied, and exceptions sustained.

Kay, Doggett & Smith and H. H. Buckman, for libelant.

J. N. Stripling, for claimant.

LOCKE, District Judge. The distinction between a libel in rem and in personam is too well established to require extended argument. The one is a demand and claim against the ship itself, and incidentally against the owners and all parties interested in the ship, not as persons against whom an action is brought, but as against their interest in the vessel, and who are therefore entitled to represent the vessel in defending the res from a judgment. The jurisdiction in action in rem is only given by attachment and bringing the vessel into the custody of the court, and no valid decree can be entered without such

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

attachment. In a suit in personam it must be brought against the person, and the process may be served by a warrant of arrest in the nature of a capias, or it may contain a clause that, if the person cannot be found, his goods and chattels for the amount sued for may be attached, or the service may be by a simple summons in the nature of a summons to appear and answer to the suit. The monition or notice usually embodied in the process calling upon all persons having an interest in the vessel attached to come in and defend their rights can under no circumstances be considered a personal summons as in an action in personam.

The question in this case is whether upon the return of the attachment in an action in rem, with no other process issued or executed, the court had jurisdiction of an action which can only be properly brought in personam. In The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727, it is clearly and distinctly declared that no action of this character, the basis of which is the death of an individual, would lie in rem, unless the state laws gave a lien upon the vessel, which is not the fact in this state. This libel clearly and distinctly states an action in rem; the prayer being that process issue against said vessel, her tackle and apparel, and that all persons interested in said vessel may be cited to appear and answer, and that said vessel may be condemned and sold to pay libelant's claim. It cannot be claimed that this court, under the decision of The Corsair, supra, had any jurisdiction in an action in rem in this case, and the question presented is, Can such libel be amended as to give the court jurisdiction over the owners of said vessel so that a valid decree could be entered against them in personam.

This matter has been frequently before the courts, and has been in every instance determined in the negative. No action at present is in existence within the jurisdiction of the court against the owners of this vessel. They have not been summoned by publication or service of process of any kind. They have not appeared by a representative in their personal capacity, but simply by one on account of their connection with the res. In the case of The Ethel, 66 Fed. 340, 13 C. C. A. 504, it was held that, where there is no prayer, process or personal judgment in the libel and no process and service upon the owner, the fact that he appears and answers the libel in rem does not give the court jurisdiction to render a personal judgment against him. To the same effect is the decision in the case of The Monte A. (D. C.) 12 Fed. 334, and the case of The Lowlands (D. C.) 147 Fed. 986.

Two cases have been cited and relied upon by the libelants in asking to amend, which I have carefully examined. In The Virgin, 8 Pet. 538, 8 L. Ed. 1036, the Circuit Court entered a decree against the owners as in an action in personam, when the action was in rem. The Supreme Court reversed the decree, and, in passing upon that point, says, "The view which has been taken of the present case renders it wholly unnecessary to consider whether a decree in personam could be made by the Circuit Court upon a libel and proceeding in rem;" and, although the amount decreed to the libelant was very much larger than the value of the vessel which had been taken by one of the claimants at a stipulated price, confined its decree to the amount thus determined, and fully exonerated the owners from all amounts beyond the actual

proceeds of the vessel. Clearly and distinctly overruling the opinion of the Circuit Court in permitting judgment to be given against the owners in an action in rem.

In Chamberlain v. Ward, 21 How. 548, 16 L. Ed. 211, the Supreme Court say:

"This was a suit in personam. It was commenced by the owners of the steamer Atlantic against the owners of the propeller Odensbury and grew out of a collision."

It is further explained in that opinion that originally a libel was filed against the propeller in rem and a process of attachment taken out, and in personam against the owners and summoning them as respondents. Upon exceptions taken to the form of the libel alleging an improper joinder of the vessel and owners, the case was continued as an action in personam, and the action in rem abandoned. In that original libel the court had jurisdiction under the fifteenth admiralty rule equally whether the action was in rem or in personam, but they could not be presented jointly. The libelants were, therefore, given a privilege of election.

In this case the court has no jurisdiction in an action in rem, and the amendment of the libel would simply be for the purpose of giving the court jurisdiction in an action in personam in a case in which it has no jurisdiction as the matter stands. No proper process has been issued, nor summons served, or attachment had as in an action in personam. The attachment had has been in an action against the vessel itself, and not as the property of her owners.

Notwithstanding the apparent injustice which may result from the denial of the motion to amend, I am fully satisfied that no jurisdiction could be acquired over the owners of this vessel, or any valid decree entered by the court that could be collected or made out of the bond filed for the release of the vessel, and the motion to amend must be denied, the exceptions to the libel sustained, and the libel dismissed; and it is so ordered.

UNITED STATES v. ABRAMS et al.

(Circuit Court, E. D. Oklahoma. September 19, 1910.)

No. 1,113.

1. INDIANS (§ 27*)—INDIAN LAND—LEASE.

Under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, authorizing Indian allottees within the limits of the Quapaw agency to lease their allotments for a term not exceeding 10 years, where a lease of such land is made for a period exceeding 10 years, the United States may sue in its own name to cancel the instruments as a violation of congressional conditions placed on the alienability of the land, but with reference to leases for purposes named in the act, and which do not exceed the term allowed, the government has no capacity to sue to cancel the same, though made by the allottee for an improvident consideration.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 27.*]

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

2. INDIANS (§ 16*)—INDIAN LANDS—ALLOTMENT—LEASING.
Under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, authorizing the leasing of Indian allotments within the limits of the Quapaw agency subject to the condition that such leases should not extend for more than 10 years for mining or business purposes, an Indian allottee had complete power to lease his land in any manner and for any consideration he might desire, except that the term should not extend beyond that prescribed.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

3. INDIANS (§ 16*)—LEASES—EFFECT.
Where an Indian allottee in the Quapaw agency leased his allotment for mining purposes for 10 years, and before the expiration of such lease granted another lease for a similar term to run concurrently without cumulation of periods, the second lease to the holder of the first operated as a surrender of the first, and was therefore not a violation of Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, limiting the period of such leases to 10 years.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

4. INDIANS (§ 16*)—INDIAN LANDS—ALLOTMENT—LEASES.
An Indian allottee in the Quapaw agency, being authorized to lease his allotment for mining purposes for 10 years by Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, having done so, had authority during the term to agree with the tenant to annul the lease, and execute a new one for the maximum period.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

5. INDIANS (§ 16*)—INDIAN LANDS — ALLOTMENT — LEASES — ASSIGNMENT OF ROYALTIES.
Where an Indian allottee in the Quapaw agency leased his allotment for mining purposes, reserving a royalty for the maximum period authorized by Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, an assignment of the royalties payable under the lease was valid.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

In Equity. Bill by the United States against A. W. Abrams and others. On demurrer to bill. Sustained in part.

Paul A. Ewert, for the United States.
J. J. Bulger, V. E. Thompson, and S. C. Fullerton, for defendants.

CAMPBELL, District Judge. In March, 1893, the National Council of the Quapaw Tribe of Indians, owning lands in what is now northeastern Oklahoma, passed an act providing for the allotment of said lands in severalty to the individual members of the tribe, subject to congressional approval, and rules and regulations to be prescribed by the Secretary of the Interior. By Act March 2, 1895, c. 188, 28 Stat. 907, it was provided:

"That the allotments of land made to the Quapaw Indians, in the Indian Territory, in pursuance of an act of the Quapaw National Council, approved March 23rd, 1893, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council subject to revision, correction, and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby au-

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

thorized to issue patents to said allottees in accordance therewith: Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents: And provided further, that the surplus lands on said reservation, if any, may be allotted from time to time, by said tribe to its members, under the above entitled act."

On September 26, 1896, pursuant to said act of Congress, a patent for the land involved in this case was issued to Charley Quapaw Blackhawk, a member of said tribe, with habendum clause as follows:

"Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions in said act of Congress approved March 2, 1895, the order and schedule of allotment aforesaid, has given and granted, and by these presents does give and grant unto the said Charley Quapaw Blackhawk, and to his heirs, the said tract above described: but with the stipulation and limitation contained in the aforesaid act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Charley Quapaw Blackhawk, and to his heirs forever: Provided, as aforesaid, that said tract shall be inalienable for the period of twenty-five years."

On June 7, 1897 (Act June 7, 1897, c. 3, § 1, 30 Stat. 72), Congress further provided:

"That the allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes. And said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him. All acts and parts of acts inconsistent with this are hereby repealed."

This is a suit by the United States to cancel certain lease contracts and contracts assigning royalties thereunder entered into by the allottee with the various defendants. Demurrers are interposed by the defendants on the ground that the government has no such interest in the action as will entitle it to maintain the bill, and that there is no equity in the bill. If from the bill it appears that any of the alleged contracts or leases are in violation of the conditions or limitations imposed by acts of Congress, under which the allottee has taken his allotment, then the complainant has such interest as entitles it to maintain this action. United States v. Allen (C. C. A.) 179 Fed. 13. Do the leases or contracts sought to be canceled violate the provisions of such acts of Congress? On June 11, 1902, the allottee leased his allotment to the defendant Abrams for mining purposes for the term of 10 years for a cash payment of $10, and a royalty of 5 per cent. of the market value, at the place mined or produced, of all mineral produced, except gas, for which a royalty of $40 per annum for each paying well was to be paid. The 5 per cent. royalty provided for was to be paid monthly, and, pending such operation as would result in a royalty exceeding $20 per annum, the lessee agreed to pay a minimum annual royalty of $20. The complainant concedes the foregoing lease to be a valid lease, and contends that it is still in force, and that all

subsequent leases and contracts are invalid. On August 13, 1903, the foregoing lease was assigned by Abrams to the defendant, the Iowa & Oklahoma Mining Company. The bill further alleges that on August 24, 1903, the allottee and said Abrams entered into another mining lease contract for the term of 10 years from date thereof, covering the same land, in consideration of a cash payment of $18, and royalty of 5 per cent. on the output, and a minimum annual royalty of $21. This contract contains this clause:

"All leases or parts of leases heretofore made are by mutual consent canceled, annulled, and abrogated."

It appears that on November 2, 1904, Abrams assigned the last-mentioned lease to the Iowa & Oklahoma Mining Company. It is further alleged that on March 25, 1905, the allottee executed a mining lease on the same property to L. C. Jones and A. J. Thompson, for the term of 10 years, for a cash bonus of $10 and a 5 per cent. output royalty. This lease has this clause:

"Subject to prior mining lease executed by said first party January 1st, 1902, unto A. W. Abrams."

On July 31, 1905, the lessee, Jones, assigned his interest in said lease to Thompson.

The bill further alleges that on April 4, 1905, the allottee leased his said allotment to the said Iowa & Oklahoma Mining Company for mining purposes for a term of 10 years from date, for a cash bonus of $25 and 5 per cent. output royalty, $40 per annum for each gas well, and a minimum annual royalty of $21. No reference is made in this lease to any former leases. It is further alleged that on the 22d day of May, 1906, the allottee leased his said allotment to the said Iowa & Oklahoma Mining Company, for mining purposes, for the term of 10 years from date, for a cash bonus of $25 and 5 per cent. output royalty, $40 per annum for each paying gas well, and a minimum annual royalty of $21. The last-mentioned lease also contains this provision:

"Provided, that it is expressly understood and agreed by and between the parties hereto that the execution and delivery and acceptance of this lease shall not in any manner be construed as a waiver or relinquishment by the lessee of any rights, title, interest, or claim which it now holds, owns, or enjoys under and by virtue of prior leases held by it upon the lands above described, which leases are recorded within the office of the deputy clerk and ex-officio recorder in and for the First recording district of Indian Territory, at Miami, in Book 'Q,' at page 558, in Book 'S,' at pages 55 and 177, and this lease and all former leases above referred to shall run concurrently; that it is expressly declared that no merger of the leases above referred to into each other or into this lease is contemplated by the execution of this lease; and that the said party of the second part may elect under which of the leases it holds upon the lands above described that it will operate and make payments to said first party, and that the payments and performances by said second party under either of the leases it holds upon said lands shall be in full payment and satisfaction of all requirements and conditions set forth in said several leases held by it upon said land for the term of said respective leases above referred to."

"(The foregoing clause constitutes a part of the written terms and conditions of a certain mining or business lease executed by Charley Quapaw Blackhawk to the Iowa & Oklahoma Mining Company of Baxter Springs, Kansas, dated May 12th, 1906, upon the N. W. ¼ and the N. W. ¼ of the S. W. ¼

of Sec. 32, Twp. 29, R. 24, Quapaw Reservation, Ind. Ter., and is attached to and made a part thereof.)"

It is further alleged that on July 28, 1906, the allottee made a mining lease to the said Iowa & Oklahoma Mining Company, covering his said allotment, for the term of 20 years from date, for a cash bonus of $21, 5 per cent. output royalty, $40 per annum for each paying gas well, and a minimum annual royalty of $21. The last-mentioned lease has this provision:

"Provided, that it is expressly understood and agreed by and between the parties to this lease that this lease and those certain mining leases held by said second party and recorded in the office of the deputy clerk and ex-officio recorder in and for the First recording district, Indian Territory, in Book 'Q.' p. 558, Book 'S,' p. 55, and Book 'S,' page 177, & Book 'G,' pages 296-297, shall run concurrently until the expiration of the said leases respectively; and that no waiver, relinquishment, or forfeiture of any of the rights or interests now held by said second party under the prior leases is intended by the execution, delivery, and acceptance of this lease, and that no merger shall be effected of said prior leases, or any of them, because of the execution, delivery, and acceptance of this lease; also that second party shall have the right to elect under which of said leases it will operate or hold said lands, and that payments or performances of the terms and conditions of any of the said leases shall be in full payment and satisfaction of all terms and conditions of like in all leases held by it upon said lands."

It is alleged in the bill that the allottee was born in 1835. If so, he was between 60 and 70 years of age when most of the leases were made, and 71 when the last one was made. It is alleged that he is unable to read or write or understand intelligently the English language; that he was old and infirm, and wholly incompetent of transacting business; and that defendants in the procurement of the leases sought to be canceled fraudulently took advantage of said allottee's age and incapacity. It does not appear, however, that his condition has been brought to the attention of the Secretary of the Interior pursuant to that proviso in the leasing act of 1897, authorizing the Secretary to lease lands of incompetent Indians upon such terms and conditions as he might prescribe, and, in view of the admission in the bill that the first lease was a valid lease, it appears that complainant does not contend that the allottee could not or should not have availed himself of the leasing provisions of the act preceding the proviso, but does contend that either because of the said fraud practiced upon him or the illegality of subsequent lease, because violating the provisions of the act, the government may maintain this suit.

The act of Congress granting authority to lease for mineral purposes contained one limitation, to wit, that the term should not exceed 10 years. A lease for a longer term would be invalid, and hence the lease of July 28, 1906, to the Iowa & Oklahoma Mining Company, for 20 years, is invalid, and should be canceled. The law makes no provision as to the amount of consideration that shall be paid, or any other terms, except as to duration. No supervision of the contract is provided for by the Secretary of the Interior, or any agent of the government. It appears that Congress, while still imposing the general condition against alienation for 25 years, has seen fit to modify that to the extent of vesting in the allottee the right, on his own responsibility, to enter into lease contracts for a limited term. No doubt

Congress conceived that it would be for the welfare of the Indian to take upon himself this limited responsibility regarding his land. At the expiration of the 25-year term, unless further extended, he would have absolute control. The right in the meantime to make the limited lease contracts provided for, bringing him into contact with others in a business way, it was no doubt conceived would enable him to reap some benefit from his allotment in the meantime, other than he might gain by his own labor thereon, and accustom him to business dealings, preparatory for the ultimate absolute control of his property. The allottee in this case is a citizen of the United States and of the state of Oklahoma. General Allotment Act (Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390), as amended by Act March 3, 1901, c. 868, 31 Stat. 1447; Oklahoma Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267). If in the making of any mineral lease contract, running for a lawful term, he is overreached in some fraudulent manner relating to the consideration or other feature of the lease, such as would entitle any citizen to maintain an action in court for legal redress, he has such right of action, which he may prosecute in the proper court in his own name. It is held in United States v. Allen, supra, that a deed or lease procured in violation of the acts of Congress imposing restrictions upon alienation, as, for instance, an attempted sale of inalienable land or an attempted lease for a longer period than the law provides, is such violation of the governmental policy involved in the making of such allotments as entitles the government, in its own name, to sue for the cancellation of such instruments. In such case there is a clear violation of conditions imposed by Congress as to alienability. Where, however, as in this case, Congress has extended the right to lease with no condition except that for a particular purpose the term shall not exceed a certain number of years, if the lease is expressly for the purpose contemplated in the act, and does not exceed the term allowed, I can conceive in the act permitting leasing no governmental policy, either express or implied, which would enable the government to maintain an action in its own name to cancel such lease. In making the allottee a citizen and in vesting him with power to lease for a particular purpose and term for such consideration as might be agreed upon between him and his lessee, I think it was the intention of Congress that in all respects, save as to the purposes, which must be either grazing, farming, or mineral, and the term, which must not exceed a prescribed period, the allottee is clothed with just as full and complete power to lease his land as his white brother, and if, though the lease be for a lawful term and purpose, he is imposed upon by the lessee in regard to some other feature in such way as would give a white citizen a right of action for legal redress, then he, and not the government, must bring the suit. The mere fact, therefore, that by fraud the lessee may have secured a lease for a manifestly inadequate consideration would not entitle the government to sue if it appears to be made for a lawful purpose and term.

In my opinion Congress intended that within the limitations as to purposes and term the allottee should exercise the same independent right to lease his property and enjoy the proceeds thereof that the law gives to other citizens, and, in lieu of the governmental supervision

thus partially withdrawn, gave him the status of a citizen and access to a forum where, like any other citizen, he could redress his wrongs. I believe that it was the intention of Congress that within the limitations mentioned this right of disposal of his property by leasing was granted as a means of affording him that experience in business affairs necessary to enable him to eventually handle his property without any restrictions whatever. This is consistent with the purpose manifested by Indian legislation of recent years to hasten, as much as may be, consistent with his welfare, the time when the Indian in this state shall have the same rights of disposition of his property as his white neighbor exercises over his. Hence the absolute supervision so long exercised by Congress over the Indians, keeping them a people apart from other races, dependent and incapable, is gradually being withdrawn, and, while it is the duty of the courts to recognize the existence of such supervision wherever it does not appear to have been withdrawn, it is equally their duty to recognize in the Indian that measure of independence and equality under the law with his white brother which the acts of Congress, from time to time, indicate that body intended the Indian should have, bearing in mind, of course, that wherever an act under consideration is fairly capable of more than one construction that construction should be given most favorable to the Indian.

Now, turning to the leases in question. The first one, that of January 11, 1902, is conceded to be a valid lease, being for a lawful purpose and term, and its cancellation is not sought. The second one, of August 24, 1903, to the same lessee, expressly provides that all leases theretofore made are by mutual consent canceled, annulled, and abrogated. It is for a lawful purpose and term. Does the fact of a former lease or assignment thereof disqualify the parties from making this lease? Certainly, if the allottee could make the former lease, he could agree with the lessee that it might be canceled and annulled. I cannot agree with the contention that, having made the lease for the term of 10 years, the allottee's hands are tied, and he cannot enter into an agreement modifying or canceling the first lease during its term. But for the assignment to the Iowa & Oklahoma Mining Company, whereby that company had acquired rights under the first lease, I am of the opinion that this second lease would have annulled the first lease, and would have given the lessee the same rights thereunder as if no former lease had been made.

Passing to the lease of March 25, 1905, to Jones and Thompson, this lease was for a lawful purpose and period. It was made subject to the first Abrams lease. It does not appear that the lessees, Jones and Thompson, are in any way connected with Abrams or the mining company. The question is presented whether the allottee may, while he has one outstanding lease, make another lease to another lessee, which does not exceed the lawful term, so that the second lessee may enjoy that portion of his term beyond the termination of the first lease. Such an agreement might be made between white persons, and, so long as such lease is for one of the purposes provided in the act and not for a longer term than that prescribed, the term beginning with or near the date of the lease, I see no reason why it may not be validly

made by the allottee. It will be noted that the lease to Jones and Thompson is to run from "date hereof until March 25th, 1915"—10 years—so that there is not presented the case of an overlapping lease which is to begin to run in the future and the term of which, considered with the term of a prior existing lease, amount together to a longer time than the allottee is permitted to tie up his land by lease. Whitham v. Lehmer, 22 Okl. 627, 98 Pac. 351. I think the Jones and Thompson lease was at the time of its execution, so far as is shown by the bill, a valid lease, subject to the unexpired term of any valid existing lease previously made by the allottee. If during the existence of a 10-year lease the allottee should make a second lease to the first lessee or to another for a term of 10 years, to begin at the expiration of the first term, that, I think, would be a violation of the law, for the unexpired term and the term of the second lease would, together, amount to more than 10 years. But where, as in this case, the 10-year term of the second lease runs from the date of its execution, so that the land is not tied up by either or both leases for a longer term in the future than the law prescribes, there is no violation of the leasing act.

Now, taking up the lease of April 4, 1905, to the Iowa & Oklahoma Mining Company. This lease is for mining purposes and is limited to 10 years. There is, therefore, nothing on its face to suggest invalidity, and, were this the first appearance of this lessee, it would be in the attitude of the lessees Jones and Thompson, just considered. But it appears that at the time this lease was made this lessee had taken from the lessee Abrams an assignment of each of the leases he had taken from the allottee. Assuming that one or the other of the Abrams leases was valid and in force and assignable, then the mining company owned and was entitled to enjoy the unexpired term of such lease. In either event, such unexpired term was still running when this lease was made. If by the terms of this lease the former leases under which the mining company claimed had been expressly annulled, then there would be presented the question considered in relation to the second Abrams lease: Does the execution and acceptance of this lease, without any mention of former leases, operate to cancel and annul such former leases? "The acceptance by the tenant of a new lease during the term of the first lease constitutes a surrender by operation of law, unless the surrender would be contrary to the intention of the parties, and it is immaterial whether there was any actual surrender of the old lease." 24 Cyc. 1369. In Edwards v. Hale, 37 W. Va. 193, 16 S. E. 487, it is said:

"Taken alone, discarding the fact that a tenancy from year to year existed between these parties when it was made, it does show a lease for a specific term by Edwards to Hale. Hale could not in its face deny that he became Edwards' tenant in that property for a certain term, yielding certain rent. But, as a tenancy from year to year existed at the time, the question is, Did it supplant that tenancy? Roberts, Frauds, p. 254, states the law thus: 'A surrender in law of a lease in possession is implied in the acceptance of a new lease from the reversioner; for, if the lessee accept a new lease from his lessor, he admits and affirms his lessor's ability to make such new lease, which could not be done by him if the old lease stood in his way.' Same doctrine in Wood, Landl. & Ten. p. 492; 2 Tayl. Landl. & Ten. p. 512; 2 Lomax, Dig. 105. 'Where, pending a lease, a second lease is made, containing stipu-

lations inconsistent with the former lease, the latter shall prevail: the presumption being that a surrender of the old one was intended.' Wood, Landl. & Ten. p. 492."

See, also, Donkersley v. Levy, 38 Mich. 54; Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449; Leyman v. Abeel, 16 Johns. (N. Y.) 30.

It is my opinion that the lease of April 4, 1905, to the mining company operated to cancel and annul the former lease originally given to Abrams, and assigned to the mining company. As to the respective rights of Thompson, holding under the Thompson and Jones lease, on the one hand, and the mining company, under the lease of April 4, 1905, on the other, that is a question not involved here. Each provides for a royalty of 5 per cent. of the ore produced, and I find nothing in either lease which is violative of the act permitting such leases. Taking up the lease to the Iowa & Oklahoma Mining Company, dated May 12, 1906, it will be noted that in this lease it is attempted to continue in force all former leases to this company, either as lessee or assignee, as well as create a new lease, and so that all may be considered as running concurrently, the mining company reserving the right to elect at any time under which lease it will operate and make payment, and that payment under one shall amount to payment under all. That is palpably an effort to combine the terms and conditions of the several leases into one lease, to cover the combined term of all, amounting to more than ten years, and is invalid. The lease of date July 28, 1906, to the Iowa & Oklahoma Mining Company is, as we have seen, for the term of 20 years, and therefore invalid.

If the conclusion that the lease to the mining company of April 4, 1905, operated to cancel and annul the former leases which it held as assignee, being the leases originally made to defendant Abrams, is correct, then by the contract of the parties the Abrams leases are of no effect, and a decree canceling them would serve to clear the record. The leases of May 12 and July 28, 1906, to the Iowa & Oklahoma Mining Company, are invalid, and should be canceled. The demurrers of the defendant Abrams and the Iowa & Oklahoma Mining Company will therefore be overruled. The demurrer of defendant A. J. Thompson will be sustained.

On August 16, 1902, the allottee entered into a contract with Charles F. Noble, purporting to "grant, bargain, sell, assign, transfer and set over" to said Noble all his right, title, and interest in and to the royalty, rental, and proceeds of the mining lease executed by the allottee to defendant Abrams under date of January 11, 1902. We have seen that this lease provided for a cash payment of $10 at date of execution, and "a sum of money equal to five per centum of the market value at the place mined or produced" of all substances to be mined, except gas, for which lessee was to pay $40 per annum for each paying well; and further provided for a minimum annual royalty of $20. The royalty was to be paid in money, based upon a per centum of the market value of the ore produced. A one-half interest in this contract was later assigned by defendant Noble to defendant Cooper. It is further alleged that on February 21, 1906, the allottee entered into a contract with defendants A. S. and V. E. Thompson, whereby he assigned to them as a fee for their services in litigation arising out of

the assignment to Noble one-half of the royalties recovered by the allottee in such litigation. The government seeks to cancel both the foregoing contracts assigning royalty, on the ground that the allottee cannot assign such royalties. The defendants have demurred to the bill, challenging the capacity of the government to sue, and asserting want of equity in the bill. The bill concedes that the lease upon which the royalties attempted to be assigned accrue is a valid lease. The law contemplates that the moneys representing the royalties arising therefrom shall become the absolute property of the allottee, to be disposed of as he may see fit. No provision is here made, as is done in many cases, by which payment shall be made to the Indian agent, and by him disbursed. Such a provision would have manifested an intention to extend the supervision of the government over the proceeds of these leases. The absence of such provision, on the other hand, manifests a congressional intent that the proceeds of such leases shall be at the disposal of the Indian. It is his to handle as he may see fit. If it is fraudulently taken from him, he has his remedy like any other citizen to recover it. It appears from the recitations in the assignments to the defendants Thompson that he invoked that remedy through them as counsel, and assigned to them as their fee a portion of the royalties recovered. I can conceive no reason why such assignments of royalties cannot be legally made. It is true the Indian may make most improvident contracts relating to such assignments, but Congress has seen fit to entrust him with the disposal of the moneys accruing from these royalties; and if, for a consideration satisfactory to himself, he sees fit to realize upon this fund in advance by assigning it, I can conceive nothing in the transaction violating any governmental policy expressed by any legislation relating to these Indians, which has been brought to my attention. In the matter of receiving and disposing of these royalties, as he may see fit, as in the matter of agreeing upon the consideration which shall be paid to him for a lease, for a lawful purpose and term, Congress has seen fit to place the Indian upon his own responsibility, and I cannot escape the conviction that Congress in so doing intended that, to that extent, he should take his place as a citizen of the United States and of the state, together with all other citizens of whatever race or color.

The demurrers of the defendants Noble, Cooper, and A. S. and V. E. Thompson are therefore sustained.

KNOHR & BURCHARD v. PACIFIC CREOSOTING CO.

(District Court, W. D. Washington, N. D. August 26, 1910.)

No. 3,837.

1. SHIPPING (§ 123*)—RESPONSIBILITY FOR STOWAGE—EFFECT OF PROVISIONS OF CHARTER PARTY.

A ship is responsible for proper stowage of her cargo, although the charter party gave a representative of the charterer the right to select the stevedores for loading, which fact did not deprive the master of his

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

authority to control the manner of stowage, nor affect the warranty of seaworthiness, which includes proper stowage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 454, 455, 466; Dec. Dig. § 123.*]

2. SHIPPING (§ 123*)—INJURY TO CARGO—LIABILITY OF VESSEL—IMPROPER STOWAGE.

A contract for the carriage of a cargo of creosote oil in iron drums from Liverpool to Eagle Harbor, Wash., as evidenced by the charter party and bill of lading, warranted the seaworthiness of the ship, specified that she should load in a customary manner, that all liability of the charterer should cease on completion of loading, and payment of advance if required, admitted the receipt of the cargo in good order, and obligated the carrier to deliver it in like good order, subject to the usual exceptions of loss by perils of the sea, etc. In the vicinity of Cape Horn, the vessel encountered bad weather, and in a heavy gale was thrown on her beam ends and a part of the cargo in the between decks was dislodged, drums there stowed and in the upper tier in the hold were injured by chafing, straining, and bruising, and the contents spilled and lost. The ship made the voyage safely, and no damage to the cargo was caused by any exposure to the direct action of the elements. It was shown that such drums could be stowed so as to remain secure in the rough weather, which was to be expected in rounding the Horn. *Held*, that the damage was due to improper stowage, and that the ship was liable therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 454–455; Dec. Dig. § 123.*]

In Admiralty. Suit by Knohr & Burchard against the Pacific Creosoting Company, and cross-libel by respondent. Decree for respondent.

Bogle & Spooner, for libelants.

Ira A. Campbell and Bruce C. Shorts, for respondent.

HANFORD, District Judge. This is a suit in personam to recover the freight charges for transportation of a cargo consisting of 4,739 iron drums containing creosote oil in the ship Jupiter from Liverpool to Eagle Harbor, in this state. The consignee of the cargo resists payment of freight, and by a cross-libel has pleaded a counterclaim for damage to the cargo in transit and for short delivery. In the vicinity of Cape Horn, the ship encountered bad weather, and in a heavy gale she was thrown on her beam ends, and part of the cargo between decks was dislodged, and a number of the drums were so damaged as to spill the oil, and others lost their contents by plugs working loose. Most of the spillage was pumped out of the ship and wasted, so that, when the cargo was discharged at Eagle Harbor, there was a shortage of 51,321 imperial gallons, worth $2,800, and 1,220 drums were damaged, and 272 drums were completely ruined. These drums have a market value of $5.50. Those damaged were worth not more than the gross sum of $854, leaving a loss of $7,352 for damage to drums. The ship's bill for freight amounts to £2343, 15s., on which interest is claimed. The issues to be decided are whether the damage was a consequence of bad stowage of the cargo, and whether responsibility for the fault, if any, of bad stowage rests upon the libelants.

The drums are the usual iron oil drums encircled with two thick

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

iron bands; the weight of each drum and contents being about 1,000 pounds. The system of stowage in the lower hold was to lay the drums snug together in tiers with chocks and dunnage to keep them from chafing. On top of the first layer scantlings were placed upon which the second layer rested. Five layers or tiers were placed in like manner with dunnage placed between the drums and the sides of the ship and all spaces filled. The vertical space from the tween deck up to the main deck was not sufficient to admit three layers of drums, each resting on scantlings, as in the hold below, and, in order to get in a larger number than would otherwise have been practicable, the first layer on the floor was spaced and the second layer was laid fitting into the valleys, and the third tier was placed on scantlings resting on the second tier, and all vacant spaces between and around the drums, as thus placed, were filled with dunnage, but the wedging was not sufficient to prevent displacement of some of the drums when the ship was laboring in tempestuous weather, and the resulting damage.

The contract for transportation of the cargo, evidenced by the charter party and bill of lading, warrants the seaworthiness of the ship, specifies that she should load the cargo in a customary manner; that all liability of the charterer should cease on completion of loading and payment of advance if required; that the captain should have a lien on the cargo for freight and any demurrage for delay in discharging, admits that the cargo was received in good order and well conditioned and obligated the carrier to deliver it in like good order and well conditioned at Eagle Harbor subject to exceptions of liability for damages caused by "the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collisions, strandings, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of pilots, masters, mariners, or other servants of the shipowners."

It is claimed, however, that the ship and owners were relieved from responsibility for bad stowage, by reason of the facts that the charter party provides that Messrs. Andrew Weir & Company should have the nomination of the stevedore to stow the cargo, and that said firm did select the stevedore. The mere selection, however, of the stevedore, did not deprive the captain of his authority to control the operation of loading, and to insist upon stowage satisfactory to him, and the evidence proves that the stevedores worked under the supervision of a marine surveyor employed by the captain and that the system of stowing between decks was agreed to by the captain, his marine surveyor, the stevedore and a representative of Andrew Weir & Co. This evidence certainly leaves the responsibility for stowage upon the captain of the ship where it usually rests. Corsar v. J. D. Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378. The firm of Andrew Weir & Co. acted as a go-between in negotiating the contract for hiring of the ship. The original charter party is between Knohr & Burchard, agents for owner of the ship, and Andrew Weir & Co., acting for Blagden, Waugh & Co.; the latter named firm being the vendors of the cargo and charterers in fact, and the court holds that their responsibility, as well as the responsibility of Andrew Weir & Co. terminated when the

cargo was completely loaded as provided by a clause in the charter party, and that the respondent and cross-libelant by purchase of the bill of lading became entitled to rely upon the warranty of seaworthiness of the ship which includes proper stowage of the cargo. "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." The Edwin L. Morrison, 153 U. S. 210, 14 Sup. Ct. 825 (38 L. Ed. 688).

Ships necessarily roll and plunge in the troubled waters and gales to be expected and usually encountered in the vicinity of Cape Horn, and to fulfill the carrier's obligation cargoes must be stowed securely to stay as placed. Notwithstanding the testimony of expert witnesses, the physical facts of this case prove conclusively that there is a right way to stow iron drums in a ship so that they will not be injured by the mere labor of a ship strong enough to protect them from external violence. The Jupiter was stanch and strong. She made a gallant fight against the elements, and her safe arrival at her port of destination proves the excellent seamanship of her captain and crew. The damage to her cargo was not caused by any exposure to the direct effect of the elements. The greatest weight was sustained by the drums in the lowest tiers of the lower hold of the ship, and they were not crushed nor damaged. All of the damaged drums were in the top tier of the lower hold and between decks, and the damage was caused by chafing, straining, and bruising, which could not have happened if the wedging had been sufficient and carefully placed, and, if the first and second tiers in the tween deck space had been separated by scantlings, so as to prevent the bands on the drums in each tier from chafing the drum bodies. The rule of law defining the liability of a shipowner with respect to the cargo, where the whole carrying capacity of the ship has been hired for a voyage, is well stated in the written argument in behalf of the libelants as follows:

"If the whole ship is chartered by the owner to a single person for a particular voyage out and home, for a specified freight, under a charter party, the charter party will be held to regulate the rights, duties, and responsibilities of the parties, and supersede those of the shipowner, as a common carrier. Angell Car. (5th Ed.) § 89."

The contract set forth in the charter party and bill of lading takes the case out of the law applicable to mere bailees for hire as well as the rules applicable to common carriers, and the parties must be held to performance of the obligations assumed, as in other cases where parties to contracts stipulate to do or not do any particular thing for a consideration. By this contract the shipowner not only relieved the charterer from responsibility, but also admitted that the cargo had been received in good order and undertook to deliver it in like good order, and well conditioned, at Eagle Harbor, and specified the conditions which should exempt it from liability for loss or damage. Therefore

the burden of proof rests upon the libelants to prove affirmatively that the damage was a consequence of one or the other of the specified causes, viz.: The act of God, perils of the sea, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collisions, strandings, or other accidents of navigation. 7 Am. & Eng. Enc. of Law (2d Ed.) 229. The damage cannot be attributed to an act of God, perils of the sea, nor to accidents of navigation, because the storms which the vessel survived would not have harmed the cargo if it had been well stowed. The libelants having failed to deliver the cargo undamaged and failed to prove the loss to have been a consequence of either of the conditions in the exemption clauses of the contract, their liability must be held to be absolute.

The freight stipulated for in the charter party is at the rate of 18s., 9d., per ton, on 2,500 tons guaranteed by the charterer, with a proportionate deduction for short delivery. Therefore, after deducting $928.25 for 162 tons of creosote wasted, the freight earned amounts to $10,462.50. From this amount, a partial payment of $600 is to be subtracted, leaving a balance of $9,862.50 to be set off against the total damages which the court finds to be $10,152. The court directs that a decree be entered in favor of the respondent and cross-libelant for the difference amounting to the sum of $289.50 and costs.

UNITED STATES ex rel. MANGO v. WEIS, Com'r of Immigration, et al.

(District Court, D. Maryland. September 24, 1910.)

1. ALIENS (§ 54*)—EXPULSION OF IMMIGRANTS — ALIEN PROSTITUTES — CONSTRUCTION OF STATUTE.

Under Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264, which provides that "any alien who shall be found an inmate or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this act," there is no limitation of the time within which an alien prostitute may be deported to three years from the time of her entry, as was the case under the section before amendment, it being one of the purposes of the amendment to abolish such limitation as to the class of aliens referred to therein; and the amended section, while not retrospective, applies to any alien woman found so conducting herself as to come within its provisions since its enactment, regardless of her previous conduct or of the time of her entry into the country.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

2. ALIENS (§ 40*)—DEPORTATION OF ALIEN PROSTITUTES—CONSTITUTIONALITY OF STATUTE.

Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264, which provides for the deportation of any alien woman who after her immigration into the United States shall be found practicing prostitution therein, regardless of the length of time which has elapsed since her entry, is within the constitutional power of Congress, and valid.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

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

Petition by Colomba Mango for writ of habeas corpus, directed to Louis T. Weis, Commissioner of Immigration, and Charles A. Hook, Warden of the Baltimore City Jail. Writ denied.

Vincent L. Palmisano, William Curran, and Thomas J. Mason, for plaintiff.

John Philip Hill and J. Craig McLanahan, for respondents.

ROSE, District Judge. Colomba Mango, alias Lina Marino, hereafter called the petitioner, is a native of the province of Salerno, kingdom of Italy. On July 30, 1910, the Acting Secretary of Commerce and Labor issued a warrant to the Commissioner of Immigration at Baltimore, directing that she be arrested on the charge that, being an alien, she had been found an inmate of a house of prostitution subsequent to her entry into the United States. The warrant directed the Commissioner to give her a hearing, to enable her to show cause why she should not be deported. Under this warrant she was taken into custody. On August 3, 1910, she was given a hearing. She was represented by counsel. At their request the hearing was adjourned until August 8th, when it was renewed and concluded. On August 12, 1910, the Acting Secretary of Commerce and Labor issued his warrant directing the return of the petitioner to the country whence she came. The warrant sets forth that the petitioner landed in New York on October 23, 1906, and is in this country in violation of the act of Congress approved February 20, 1907, as amended by the act approved March 26, 1910, in that she is an alien prostitute and has been found an inmate of a house of prostitution subsequent to her entry into the United States. The petitioner thereupon sued out this writ of habeas corpus.

There is no controversy as to the facts, and, if there were, as she has had a fair hearing, this court would have no jurisdiction to pass upon any disputes concerning them. They are recited because, being undisputed, they illustrate the evils which doubtless inspired the legislation of Congress upon the construction of which the decision of the present case turns.

In October, 1906, she was about 18 years of age. She says that an Italian, who was established in business as a druggist in New York City, made a short visit to Italy and to the village of which the petitioner is a native. The petitioner, with the consent of her mother, went to New York with him and served as a servant in his family. She landed in New York on October 23, 1906. She remained with her employer for something over two months, when she was seduced by another Italian whom she met in New York. She lived with him 15 days, when she left him; he having tried to put her in a house of prostitution. She went to Boston, she says, to get work; but on the day she arrived in Boston she met for the first time a certain Cipitello, who induced her to become a prostitute. She says she was an inmate of a house of prostitution in Boston for about six months. During this time she supported Cipitello by her earnings as a prostitute. She then became ill, and spent some time in a hospital as a public charge. While in the hospital, the man who had been living on the wages of

her shame was convicted of larceny and sent to jail. When he was released, she again joined him and became an inmate of a house of prostitution in Bridgeport. In his company she visited several other cities, in every case practicing prostitution and giving the money she made to Cipitello. When she found that he was sustaining like relations with three other girls, she left him. She went to Philadelphia, and became an inmate of a house of prostitution, and afterwards she came to Baltimore. Since coming to Baltimore she has been an inmate of three different houses of prostitution. She says that she was a pure girl when she came to this country, that she does not like the life she is living, and that if she could get honest work she would take it.

Her counsel contend that she cannot be legally deported, because the proceedings looking to her deportation were not instituted within three years after the date of her landing in this country. They claim that section 3 of the act of February 20, 1907, as amended by the act of March 26, 1910, under which the warrant is issued, expressly declares that an alien deported under its provisions shall be deported in the manner provided by sections 20 and 21 of the original act of 1907, and that the authority given by sections 20 and 21 to the Secretary of Commerce and Labor to order the deportation of an alien is expressly limited to aliens who have not been more than three years in this country. Section 20 provides for the deportation of an alien who has entered the United States in violation of law, and of such an alien as becomes a public charge from causes existing prior to his landing. It says that such alien shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry within the United States. It further provides for the payment of the expenses of such deportation and for releasing the alien on bond pending the hearing of the case against him. Section 21 provides that whenever the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of the act, or that an alien is subject to deportation under the provisions of that act, or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by section 20. Section 21 further imposes the duty of returning such alien upon certain persons, and authorizes the Secretary of Commerce and Labor, when the mental or physical condition of the alien requires personal care and attendance, to furnish such care and attendance.

For the petitioner it is argued that, as sections 20 and 21 do not give any power to the Secretary of Commerce and Labor to issue a warrant to deport any alien who has been more than three years in the country, the warrant in this case is invalid on its face. The government answers that section 3 as amended merely requires that the deportation shall be made in the manner provided by sections 20 and 21. All that is meant, the government says, is that the same form of procedure shall be followed—that is, that there shall be a warrant issued by the Secretary of Commerce and Labor; that the alien shall be taken into

custody, and permitted to give bail pending the decision as to whether he shall or shall not be deported; that he shall be deported in the way mentioned in those sections; that the expenses of such deportation shall be paid as provided therein; that personal attendance shall be given to him when necessary, and so on. In the government's view, the question of whether the warrant of deportation must or must not be issued within any particular time after the entry of the alien in this country depends solely upon the wording of section 3 of the act of February 20, 1907, as amended by the act of March 26, 1910.

It will profit nothing to make a nice inquiry into what construction would ordinarily be put upon the word "manner," as used in connections similar to that in which it is found in the amendatory act of 1910. The real question is what it means in that act. Congress had two purposes in view in amending the original law of 1907. It was necessary to repeal those provisions of section 3 of the act of 1907 which had been held unconstitutional by the Supreme Court of the United States in the case of Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, and Congress wished more fully and effectively to use, for the prevention of prostitution by aliens, the powers which the federal government has to protect, to exclude, and to deport them.

In section 3 of the original Act of 1907 it is provided:

"Whoever shall keep, maintain, control, support or harbor in any house or other place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl *within three years after she shall have entered the United States*, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars."

The section as amended by the act of 1910 declares that:

"Whoever shall keep, maintain, control, support, employ or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars."

It will be noted that under the act as it originally stood it was no offense to harbor such alien for such purposes, provided the alien had been more than three years in the United States. Under the act as amended, it is immaterial how long the alien has been in the United States, provided the harboring is in pursuance of such illegal importation. With reference to the alien herself, the section as originally enacted provided that:

"Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, *at any time within three years after she shall have entered the United States*, shall be deemed to be unlawfully within the United States and shall be deported *as provided* by sections 20 and 21 of this act."

The section as amended reads:

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute, or who is employed by, in or in connection with any house of prostitution or music or

dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported *in the manner* provided by sections 20 and 21 of this act."

Congress has here expressly stricken out the limitation as to three years. In order apparently to negative the very contention now made, it has changed the original language, which read, "shall be deported *as provided* by sections 20 and 21 of this act," to the words "shall be deported *in the manner* provided by sections 20 and 21 of this act." Moreover, the section as amended contains this additional provision, not found in the original act:

"Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections 20 and 21 of this act."

As already shown, the act provides a maximum penalty which may be imposed upon an alien violating its provisions of ten years' imprisonment, and the section also says that any alien so convicted and sentenced under the act shall, after the expiration of his sentence, be deported in the manner provided by sections 20 and 21 of the act, using precisely the same language with reference to sections 20 and 21 in this connection as it does in connection with the alien practicing prostitution. It is quite clear Congress did not intend that an alien convicted of an especially grave offense under the act and sentenced to a long term of imprisonment should escape deportation because more than three years had elapsed since his entry into the country; and, as the same language is used with reference to the case of an alien found practicing prostitution, the argument is convincing that Congress did not intend the three-year limitation to apply to persons of the class to which the petitioner unfortunately belongs. A careful examination of the debates in Congress shows that it was distinctly stated by the member in charge of the bill which became the present law that one of its purposes was to strike out the three-year limitation. Congressional Record, vol. 45, pt. 1, p. 518.

Counsel for the petitioner assert that, even if the construction above stated be sound, still their client should not be deported, because the act should not be given a retrospective construction. He cites a large number of cases to prove that acts of Congress will not be given a retrospective application, if any other construction can be put upon their language. There is no doubt that this proposition of law is perfectly sound. But I do not find that the government is seeking in this case to give any retrospective application to this act. It will scarcely be contended that, because the alien petitioner had practiced prostitution in this country for more than three years before the passage of the act of 1910, she had thereby acquired by prescription a vested right to continue the practice. She is not now being deported since the passage of the act because she was an inmate of a house of prostitution before the passage of the act, but because she was an inmate of a house of prostitution practicing prostitution after its passage. If she had seen fit after the act was passed to have adopted another mode of

life, if any other mode of life was open to her in her unfortunate situation, another and different question would have been presented.

Counsel for the petitioner, however, assert that the act of 1910 was intended to apply only to those immigrants who have come into the country after its passage. To support this contention, they say that the language of the act is that any alien found practicing prostitution after such alien "shall have entered" the United States implies that the entry must have been subsequent to the passage of the act. Such, I am clear, was not the intention of Congress, and it would be carrying nice grammatical construction too far to put any such interpretation upon the words used. The old act contained the clause "within three years after she shall have entered the United States." Under that act it was repeatedly held by the courts that the alien prostitute could be deported, although she had come into the country before the passage of the act of 1907. For the purpose of getting rid of the three-year limitation with as little change in the language of the statute as possible, Congress simply struck out the words "within three years," leaving the words "after she shall have entered the United States" as they were in the old act, except that "such alien" is substituted for "she." As all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States, no one who has not entered the United States at some time can be an alien, and therefore it is unnecessary to say "after she shall have entered the United States"; but the history of the act shows quite clearly how it is that those words are now found in the statute.

It being quite clear that Congress intended that an alien practicing prostitution shall be deported from the country, no matter how long the alien had been in the country, the only remaining question is whether Congress has the constitutional power so to direct. The plenary power of Congress to provide for the expulsion of an alien from the territory of the United States has been repeatedly affirmed by the Supreme Court. In Wong Wing v. United States, 163 U. S. 237, 16 Sup. Ct. 980, 41 L. Ed. 140, it was said:

"We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree and causing their deportation upon executive or subordinate officials."

In Fong Yue Ting v. United States, 149 U. S. 730, 13 Sup. Ct. 1028, 37 L. Ed. 905, it was said with respect to a proceeding before a United States judge, as provided for in section 6 of the act of 1892 (Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]), that Chinese proceedings are—

"in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It 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 of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

The language of Justice Brewer in Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, that "it is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here," has obvious reference to the extent of the power, if any, which Congress may have to provide for the punishment of aliens for doing acts with which, when done by citizens, Congress would have nothing to do.

By the act of March 26, 1910, Congress says, in effect, that in its judgment public policy requires that any alien found in the United States practicing prostitution shall be sent out of the country. Under the decisions of the Supreme Court of the United States, as I understand them, this Congress has a constitutional right to do. In so doing, it does not in any wise exercise a police power. It does not seek to punish any one for any offense any more than the provisions excluding Chinese are intended as a punishment for being born of the Mongolian race. One class of considerations has led Congress to believe that the presence of Chinese laborers in this country was contrary to the best interests of the nation; another and different class of considerations has convinced it that the continued residence in this country of alien prostitutes should be prevented.

I shall sign an order remanding the petitioner for deportation.

FROST et al. v. LATHAM & CO. et al.

(Circuit Court, S. D. Alabama. August 20, 1910.)

No. 2,791.

1. BANKRUPTCY (§ 115*)—RECEIVERS—POWERS—SUIT TO RECOVER PROPERTY.
   Receivers in bankruptcy cannot maintain a suit to set aside a transfer of property by the bankrupt as fraudulent or preferential.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 115.*]

2. BANKRUPTCY (§ 209*)—SUITS TO RECOVER PROPERTY—RIGHTS OF CREDITORS AND OF TRUSTEE TO MAINTAIN.
   Bankr. Act July 1, 1898, c. 541, § 64b(2), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), as amended by Act Feb. 5, 1903, c. 487, § 14, 32 Stat. 800 (U. S. Comp. St. Supp. 1909, p. 1315), providing for payment from the estate of a bankrupt of the reasonable expense of the recovery of property transferred by the bankrupt either before or after the filing of the petition "by the efforts and at the expense of one or more creditors," impliedly recognizes the right of a creditor to maintain a suit to set aside transfers of property by the bankrupt to third parties either actually fraudulent or preferential, and on the election of a trustee pending such a suit he is entitled to become a party plaintiff therein.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 209.*]

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

3. BANKRUPTCY (§ 294*)—SUITS BY TRUSTEE—JURISDICTION.

A Circuit Court of the United States as a court of equity has jurisdiction of a suit by a creditor of a bankrupt or by a trustee in bankruptcy to recover property transferred by the bankrupt either fraudulently or preferentially; such jurisdiction not being affected by the provisions of Bankr. Act July 1, 1898, c. 541, §§ 23b, 60b, 67e, 30 Stat. 552, 562, 564, 565 (U. S. Comp. St. 1901, pp. 3431, 3445, 3446, 3449, 3450), as amended by Act Feb. 5, 1903, c. 487, §§ 7, 13, and 16, 32 Stat. 798, 799, 800 (U. S. Comp. St. Supp. 1909, pp. 1312, 1314, 1315, 1316), authorizing such suits by the trustee to be brought in a court of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 294.*

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

4. FRAUD (§ 6*)—"CONSTRUCTIVE FRAUD."

A "constructive fraud" is an act which the law declares to be fraudulent without inquiring into its motive.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 7; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 2, pp. 1470–1471.]

In Equity. Suit by C. E. Frost and William S. Lovell, as receivers of Knight, Yancey & Co., bankrupts, and Joe T. Gibson against Latham & Co. and others. On motion by William S. Lovell, as trustee of said bankrupts, for leave to file supplemental bill. Motion granted.

Percy, Benners & Burr and Rich & Hamilton, for complainants.
Howe, Fenner, Spencer & Cocke, for defendants.

TOULMIN, District Judge. The grounds of objections by the defendants to this motion are, in substance, as follows: (1) That the original plaintiffs were without legal right or capacity to institute or maintain the bill filed by them herein, or to have the relief prayed for. (2) That the original bill herein did not state or show any right or cause of action in the original plaintiffs. (3) That this court has no jurisdiction of the matters and things in said original bill set forth. (4) That there is no privity of title between said trustee and said complainants, and particularly between said trustee and said Joe T. Gibson, one of the complainants. (5) That this court has no jurisdiction to hear and determine the matters and things set forth in said proposed supplemental bill. (6) That the filing of the supplemental bill would cause a change of interest, in that it would substitute in said suit, instead of parties who had no right of action, a different party, who has such right of action in the matters and things in said original bill contained. (7) That said receivers, parties plaintiff to said original bill, are still necessary parties to this suit.

It is well settled that receivers in bankruptcy have no legal right or capacity to maintain a suit of this character or to have the relief prayed for; and the writer, presiding in the District Court for this district, so ruled in a suit of this character brought by said receivers in that court. This court now holds that said receivers are not necessary or proper parties to this suit.

2. Section 64b(2) of the bankrupt act clearly recognizes the right of a creditor to institute proceedings to recover, for the benefit of

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

the estate of the bankrupt, property transferred by him either before or after filing of the petition, wherein it provides that, when such property shall have been recovered by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall be paid out of the bankrupt estate. While the language employed does not expressly vest in a creditor the right to bring suit to recover such property, it implies that right to exist as clearly as language can do so. And it will be observed that the act makes no distinction as to the character of the transfer, whether it be one involving actual fraud, an intent to hinder, delay, or defraud the creditors of the bankrupt, which the law declares to be null and void, or a constructive fraud, "an act which the law declares to be fraudulent without inquiring into its motive." McBroom v. Turner & Rives, 1 Stew. (Ala.) 72.

A preferential transfer is a constructive fraud. It is one which to some extent hinders and delays creditors, but is not necessarily, in and of itself, a fraudulent transfer. It is, however, "an infraction of that rule of equal distribution among all creditors which is the policy of the law to enforce when all cannot be fully paid." Van Iderstine v. Nat. Dis. Co., 174 Fed. 519, 98 C. C. A. 300. So, then, it makes no difference whether the transfer be one of actual or of constructive and technical fraud, so far as the interest and rights of creditors are concerned. The effect of the transaction is the same. See, also, section 70e, Bankrupt Act.

"A trustee in bankruptcy represents all persons interested in the estate of the bankrupt." In re Bothe, 173 Fed. 597, 97 C. C. A. 547.

He is the representative of the creditors of the bankrupt, and if he in any given case would have the right as their representative to institute a suit to set aside a fraudulent or preferential transfer, it seems to me it follows as a necessary consequence that such creditors are entitled to do so also, in the absence of a trustee, and to maintain the same until such trustee shall have been chosen, when he would be entitled to become a party plaintiff in the suit. The court, in Fourth St. Nat. Bank v. Millbourne Mills Co., 172 Fed. 177, 96 C. C. A. 629, said:

"Unless the rights of creditors are preserved and protected in some such way, bankruptcy, instead of being in their (creditors') interest, as supposed, is an actual disadvantage."

Where the transfer is made fraudulent or voidable by the bankrupt act as against creditors, no trustee having been chosen, the creditors have the right themselves to take steps to avoid such transfer.

"If this be so, any creditor would be entitled to sue on behalf of himself and others, either before or after institution of proceedings in bankruptcy; such suit, if after, being ancillary thereto, no trustee having yet been chosen." Guaranty Title & Trust Co. v. Pearlman (D. C.) 144 Fed. 550; In re Schrom (D. C.) 97 Fed. 760.

"Creditors may institute suits for the recovery of property fraudulently transferred." Remington on Bankruptcy, vol. 1, § 399.

"To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy. It must be a plenary suit at law or in equity, according to the nature

of the case. Such suit may be an action at law or suit in equity, as a bill to set aside a fraudulent conveyance." Loveland on Bankcy. (2d Ed.) 608; Parker v. Black, 151 Fed. 18, 80 C. C. A. 484.

The Supreme Court of the United States, in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, employs language which indicates that the court regarded the payment to a creditor by a bankrupt in violation of the bankrupt act as in the nature of a fraud, and that a remedy in equity would more readily afford adequate relief. In referring to the jurisdiction of the United States courts, the language employed includes suits "to set aside transfers of property to third parties alleged to be fraudulent as against creditors, including payments of money or property to preferred creditors."

The question of jurisdiction of the court is a question of the right of the court to determine, not of the principles to obtain in reaching a determination. If the bankrupt himself had brought this suit, he could not be turned out of court on the question of jurisdiction. The authority of the court to decide as to his rights would be unquestioned. But he would be precluded in his right to relief by his own act of making a fraudulent or preferential transfer. He would be denied relief upon the principles of estoppel. Where the suit is by the trustee or by a creditor, a different result would follow. It is not a question of the determination to be reached, but of jurisdiction to hear and make the determination. Burnett v. Morris Mer. Co. (D. C.) 91 Fed. 365.

In the absence of the amendment of February 5, 1903, to the bankrupt act, the question involved in this suit must be determined either by the proper court of the state or by the federal circuit court. Hicks v. Knost (D. C.) 94 Fed. 625; Camp v. Zellars, 94 Fed. 799, 36 C. C. A. 501. Since said amendment of February 5, 1903, the trustee may maintain a suit in the proper District Court, as a court of bankruptcy, to set aside preferential transfers, and to recover the property transferred. The right to do so is exclusively in him so far as that court is concerned. The right to bring such suit in the bankruptcy court is given exclusively to the trustee. Said amendment does not take away, or in any manner limit, the jurisdiction conferred by the bankrupt act on the Circuit Court of the United States and on the state courts. The United States Circuit Courts have jurisdiction of suits at law and in equity between the trustee and adverse claimants, etc. Sections 23, 60b, and 67e, Bankrupt Act.

"A trustee in bankruptcy may at his election maintain a suit in equity to recover a payment by a bankrupt to a creditor as a voidable preference; such suit being in the nature of a creditors' suit to set aside a fraudulent conveyance." Parker v. Black, 151 Fed. 18, 80 C. C. A. 484; Pond v. N. Y. Nat. Ex. Bk. (D. C.) 124 Fed. 992.

In Hull v. Burr, 153 Fed. 951, 83 C. C. A. 67, the Circuit Court of Appeals, Fifth Circuit, said:

"The trustee is vested by the act with all the rights and title of the bankrupt, as well as with the rights of the bankrupt's creditors, and when he seeks to enforce rights or to recover property in another district, outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to

the same courts, state or federal, and is confined to the same remedies, subject to the exceptions made by the amendment of 1903."

Under that amendment, as we have seen, the trustee may bring suit in the bankruptcy court to recover property fraudulently transferred by the bankrupt, whether the transfer be actually or constructively fraudulent, void or voidable, as to the bankrupt's creditors.

The allegations of the bill, if true, make a case of preferential transfer, one voidable as against creditors of the bankrupt. They have rights involved in the avoidance of the transfer. The trustee is vested with these rights, and when he seeks to enforce them it is in the interest and for the benefit of said creditors. It seems to me that there is a "privity" of right between the trustee and said creditors; Joe T. Gibson being one of said creditors, and a complainant in this cause, in behalf of himself and all other creditors of said bankrupt who may become parties therein.

The objections of the defendants to the motion of William S. Lovell, trustee in bankruptcy of Knight, Yancey & Co., for leave to file a supplemental bill in this cause, are overruled, and said motion for leave to file an amended or supplemental bill is hereby granted.

Let an order be entered accordingly.

In re JACOBSON.

(District Court, D. Massachusetts. May 27, 1909. On Petition for Rehearing, July 19, 1909.)

No. 14,047.

BANKRUPTCY (§ 74*)—INVOLUNTARY PROCEEDINGS—REDUCTION OF INDEBTEDNESS AFTER ACT OF BANKRUPTCY.

A debtor who owed more than $4,000 made a general assignment of his property, which was assented to by some of his creditors, and not by others. The assignment was an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), and entitled the nonassenting creditors, who held claims sufficient in number and amount, to file a petition in involuntary bankruptcy within four months, which they did. Subsequent to the assignment, but before the filing of such petition, the debtor made a settlement with the assenting creditors, and, on payment to them of a percentage of their claims, received releases discharging him and the assignee from any further liability which left his indebtedness to the remaining creditors at the time of the filing of the petition in bankruptcy less than $1,000. *Held*, that the provision of section 4b that "any natural person * * * owing debts to the amount of $1,000, or over may be adjudged an involuntary bankrupt," should probably be construed as having reference to the indebtedness at the time of the commission of the act of bankruptcy charged, but, in any event, it was not within the power of the debtor and the assenting creditors, by a transaction which on an adjudication could be avoided as a constructively fraudulent or preferential transfer of property, to deprive the nonassenting creditors of their accrued right to avail themselves of the act of bankruptcy committed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 74.*]

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

In the matter of Abraham Jacobson, alleged bankrupt. On question of adjudication. Adjudication ordered.

Martin Witte, for petitioning creditors.
Lee M. Friedman, for the bankrupt.

DODGE, District Judge. The only objection to adjudication which the alleged bankrupt raises by his answer is that he does not owe $1,000, and is not therefore such a person as may be adjudged an involuntary bankrupt under section 4b of the bankruptcy act.

The petition was filed August 26, 1908; the answer on September 11, 1908. Upon a reference for ascertainment of facts and report, it was agreed before the referee that on June 1, 1908, the alleged bankrupt owed $4,462.61 to 32 creditors; that on that day he made an assignment for his creditors' benefit; that 24 creditors, having claims amounting in all to $3,544.11, assented to this assignment, leaving 8 creditors, with claims amounting in all to $898.50, who did not assent; that a settlement was thereafter agreed on between him and the assenting creditors, whereby each creditor agreed to take 25 per cent. of his claim in full settlement, and to discharge, transfer, or assign his claim as the assignee might determine, provided such payment should be made in cash "within thirty days from the acceptance of said offer by the creditors of said Jacobson"; that all of the 24 creditors who accepted the assignment had received 25 per cent. of their claims in cash before the petition was filed; and that each of these creditors had executed a release under seal in the following terms:

"We, the undersigned, hereby acknowledge the receipt of 25% of our respective claims against Abram Jacobson, and in consideration thereof we hereby assent to the assignment of said Jacobson to William Charak, dated June 1, 1908 as of its date, and we hereby discharge the said Jacobson and the said Charak from all further claims against either. Witness our hands and a common seal this tenth day of June, A. D. 1908. [Seal.]"

When the petition was filed, therefore, there were only eight creditors who had not released the alleged bankrupt, as above, from all liability to them. Their claims amounted in all, as has been stated, to only $898.50. Among them are the four petitioning creditors named in the petition. The only act of bankruptcy which the petition charges is the general assignment above mentioned.

Although the alleged bankrupt shows as above that, when the petition against him was filed, he owed creditors who had not released their claims less than $1,000 in all, he shows this only by showing at the same time that he has committed the act of bankruptcy charged, that he then owed more than $1,000, and that it was by means of the transfer of his property then made to his assignee that he obtained the releases upon which he now relies to prove that his indebtedness then outstanding has since been reduced to less than $1,000.

The language of section 4b applicable to the case is:

"Any natural person * * * owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt and shall be subject to the provisions and entitled to the benefits of this act."

"Debts" by the definition found in section 1 (11) includes any debt, demand, or claim provable in bankruptcy. There is no express provi-

sion that the required amount of debts owing is to be ascertained as of the time the involuntary petition is filed. Act March 2, 1867, c. 176, 14 Stat. 517, provided in section 11 (Rev. St. § 5014) that any person residing within the jurisdiction of the United States owing debts provable under the act exceeding the amount of $300 might be adjudged bankrupt upon his voluntary petition; and the same act provided in section 39 (Rev. St. § 5021) that "any person residing and owing debts as aforesaid" who should commit any of the acts of bankruptcy thereafter described in the same section should be adjudged bankrupt upon an involuntary petition against him. It would seem to be clear that according to those provisions the amount of debts owing was to be ascertained for the purposes of an involuntary petition as of the date of the act of bankruptcy charged; and upon principle so reasonable does this appear that I am much inclined to believe it to be what was really intended by section 4b of the present act. I find no necessity, however, for resting the determination of the question in this case solely upon any doubtful construction of the language there used. As against the petitioning creditors, and upon what appears in this case, I do not think the bankrupt can successfully deny that he was owing debts to the amount of more than $1,000 at the time the petition was filed.

The petitioning creditors have claims of more than $500 in total amount, and they are not debarred by any consent to the general assignment from treating it as an act of bankruptcy. They ask for an adjudication because of it, the immediate effect of which adjudication will be to avoid and annul it. Save for the objection above stated, they are entitled to accomplish that result. By insisting upon their rights here, they have distinctly repudiated the assignment and all benefits secured to them by its provisions. While it is not necessarily illegal or void for all purposes (see Re Chase, 124 Fed. 753, 59 C. C. A. 629; Randolph v. Scruggs, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165), it is nevertheless possible to say, as is remarked in the opinion in the latter case, that constructively a general assignment falls under the description in section 67e of the bankruptcy act of conveyances made with the intent to hinder, delay, or defraud creditors. So far as this assignment or anything done under it may tend to deprive these creditors of any rights secured to them by the bankruptcy act, I think they are entitled to have it regarded as falling under that description. And, inasmuch as the effect of its enforcement will be to give creditors other than the petitioners—i. e., such creditors as have accepted or may accept it—a greater percentage of their debts than the petitioners, creditors of the same class, receive, it may also be regarded here, so far as their rights are concerned, as a preferential transfer of all the debtor's property. See National, etc., Bank v. Eagle Sugar Refinery, 109 Mass. 38, 40; Steel Edge, etc., Co. v. Manchester Bank, 163 Mass. 252, 254, 39 N. E. 1021. The petitioners are entitled in bankruptcy to a distribution of this property without regard either to the assignment or to any distribution under it by the assignee, and therefore to have every creditor who has received 25 per cent. of his claim from the assignee ordered to restore what he has received to the trustee in bankruptcy. Of these rights I do not believe they can be de-

prived by any dealings between the alleged bankrupt and his other creditors had after the assignment and based upon it.

If an act of bankruptcy has been committed, the relations between the bankrupt and any one of his creditors can no longer be regarded as relations which concern him and that creditor only. They have become involved with the rights of every other creditor. Thus an act of bankruptcy once committed cannot be condoned at the will of that creditor only who may be immediately concerned in it. Every creditor, whether a party to the transaction or not, is a creditor entitled to ask for adjudication by reason of it. Lowell, Bankruptcy, § 57, and cases there cited. And for similar reasons the question whether a given debt existing at the time of the act of bankruptcy is to be regarded as thereafter extinguished or not cannot be regarded as a question depending entirely upon what may have been subsequently agreed between the bankrupt and the creditor to whom that debt was owing. A debt even if paid in full within four months of an involuntary petition may be counted as a debt owing at the date of the petition, if the payment has been preferential or in fraud of creditors. The trustee in bankruptcy will have the right to recover such a payment back, and the debt will thereupon become a provable debt. Re Tirre (D. C.) 95 Fed. 425. So, also, as to a debt settled by acceptance in full settlement of a payment of the same character less in amount than the amount of the debt. Re McMurtrey et al. (D. C.) 142 Fed. 863.

The releases under seal which have been given do not in my opinion oblige me to hold that the debts released are extinguished for the purposes of this case, nor prevent me from regarding them as existing for those purposes according to the principles above stated. As between the alleged bankrupt and the releasing creditors, no doubt a sufficient consideration is to be presumed. But, as regards the petitioning creditors, entitled in bankruptcy as they are to defeat the consideration for every release, no such presumption is to be made.

The result will be that for the purposes of this petition I find the alleged bankrupt upon the evidence before the referee to have been liable to adjudication under section 4b when this petition was filed.

I have thus far assumed that there has been no deliberate attempt in what has been done under the general assignment to deprive nonassenting creditors entitled to resort to proceedings in bankruptcy of their rights under the act, nor any actual fraud practiced. It is obvious, however, that, if the release of a bankrupt's indebtedness subsequently to his act of bankruptcy, such as was made in this case, is allowed to have the effect of extinguishing so much of the indebtedness or rendering it nonexistent for the purposes of an involuntary petition, a way is opened for the possible intentional defeat of the rights of part of the bankrupt's creditors by collusion between him and the others. I agree with the referee in believing that the evidence raises a strong suspicion as to the good faith of some of the proceedings in connection with the sale of the bankrupt's property made under the assignment. It would at least appear to be true that the agreement to settle for 25 per cent. was subject to the condition that all the creditors should accept the same settlement, and that no payment to any of them

ought to have been made until that condition was fulfilled. But since the petitioners never accepted the assignment, and are in no way bound by it, nothing of this kind can be said to have affected their rights. Upon adjudication it will be the trustee's duty to investigate all the assignee's dealings with any of the bankrupt's property.

Adjudication ordered.

On Petition for Rehearing.

Since the order of adjudication made in this case in pursuance of the opinion dated May 27, 1909, the alleged bankrupt has filed a petition for rehearing. Briefs have been submitted on both sides which are understood to contain all that either party will desire to submit in case a rehearing should be ordered, so that, if the bankrupt satisfies the court that the questions decided should be reargued before it, the case may be treated as already so reargued.

The petitioner urges that the question at issue is "a question of jurisdiction and that alone, "and this is true in the sense that unless the petitioners prove that when the petition was filed the alleged bankrupt was owing debts to the amount of $1,000 or over, within the meaning of section 4b of the bankruptcy act, the court cannot proceed to adjudge him bankrupt; but, of course, the court has full jurisdiction to hear and determine the question whether within the meaning of that section he was then owing debts to that amount or not.

It is said that the jurisdiction of the court depends upon the state of things existing at the time the petition was brought, and this also is true, it being understood that by the state of things then existing is meant the state of things existing as between the parties before the court and for the purposes of the issues raised between them. To ascertain the state of things thus existing, inquiry is not infrequently necessary, in cases like the present, where the commission of the act of bankruptcy charged is undisputed, into states of things existing before the filing of the petition. Thus, if the debtor belonged to a a nonexempt class when the act of bankruptcy was committed, he is to be adjudged bankrupt notwithstanding that he has come to belong to a class which the bankruptcy act exempts from adjudication before the petition is filed. Flickenger v. Bank, 145 Fed. 162, 76 C. C. A. 132. A state of things existing at the time of the filing of the petition may have been brought about by acts of the bankrupt, or by dealings between him and persons other than the petitioning creditors, to which the law attaches consequences very different, so far as the petitioning creditors are concerned, from those which follow when the bankrupt alone is concerned, or when he and persons other than the petitioning creditors are alone concerned. In such cases it is the state of things as between the bankrupt and the petitioning creditors with which the court deals. Thus a debtor is not to be heard to say as against petitioning creditors that he has ceased to do the business he was in when they trusted him, although he may as a matter of fact have discontinued it before the petition was filed. Tiffany v. La Plume Co. (D. C.) 141 Fed. 444. Nor is a corporation to be heard to say that it has ceased to be a corporation since its debts to the petitioning creditors were incurred. Re Adams & Hoyt Co. (D. C.) 164 Fed. 489. That

the death or insanity of a debtor subsequently to his commission of an act of bankruptcy renders it impossible to maintain a petition in bankruptcy against his estate is because the law has prescribed other methods for the administration of estates of decedents or insane persons, and affords no argument against the principles above adopted.

It is the transfer of property from the bankrupt to the assignee which has been regarded as preferential rather than the transfer of property from the assignee to the assenting creditors. If, as I have held, the assignment was wholly without effect as against nonassenting creditors, it makes no difference to them whether the assignee believed or not that he could as against nonassenting creditors accomplish a reduction of the bankrupt's indebtedness to a figure below $1,000.

To say that as soon as the debtor procured his creditors' assent to the assignment so that less than $1,000 of creditors were outstanding he was immune from bankruptcy proceedings for that cause, or that a situation was then created which made the assignment invulnerable so far as bankruptcy on that ground was concerned, or that until avoided by bankruptcy the assignment was valid as to all creditors, assenting or nonassenting, seems to me merely to beg the question here to be decided.

If Leighton v. Kennedy, 129 Fed. 737, 64 C. C. A. 265, on which the debtor relies, holds that claims purchased by an assignee are extinguished, so that the bankrupt cannot count them as existing claims against his estate, it does not seem to me to follow that claims so purchased must be regarded as extinguished for all purposes as against creditors who have never accepted the assignment and seek an adjudication because of it.

Nothing that has been advanced on behalf of the alleged bankrupt since the opinion dated May 27, 1909, has seemed to me sufficient to require any change in the views therein expressed, and the petition for a rehearing must therefore be denied.

WELCH et al. v. FALLON et al.

(District Court, D. Massachusetts. December 31, 1909.)

No. 148.

1. ADMIRALTY (§ 30*)—PLEADING—JOINDER OF CAUSES IN CONTRACT AND TORT.
A court of admiralty may, in its discretion, permit the joinder in the same libel of claims in contract and tort.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 299; Dec. Dig. § 30.*]

2. SEAMEN (§ 11*)—MEDICAL TREATMENT—EQUIPMENT OF FISHING VESSEL.
There is no law requiring fishing vessels, which are generally not far distant from a port of supply, to carry a medicine chest; and as a rule the failure to do so cannot be charged as negligence, which will render the owners liable in damages to a member of the crew who is injured, and especially where the master and crew shipped on a lay, and are chargeable with the supplies and share in the profits of the voyage, in

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

which case the master is the representative of the crew, rather than of the owners.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 11.*

Rights and liabilities of seamen as to medical treatment, see note to The Cuzco, 83 C. C. A. 186.]

3. SEAMEN (§ 28*)—FISHERMEN—SHARE IN EARNINGS—EFFECT OF SICKNESS OR INJURY.

A member of the crew of a fishing vessel, shipping on a lay, who was injured while in the service without his fault, and thereby disabled until after the voyage ended, is entitled to his share in the proceeds, as though he had remained on board and served until the end.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 170–175; Dec. Dig. § 28.*]

4. SEAMEN (§ 28*)—COMPENSATION—"HALF LINE."

The "half line" plan in the fishing business is an arrangement between the owners of a fishing vessel and a master and his crew, whereby the master undertakes a fishing voyage, in which the gross proceeds of the catch, less certain deductions, are shared equally between the vessel and the master and crew; the latter half share, after payment for certain things charged to the master and crew as a body, being divided among them share and share alike. The voyage is a "half line voyage."

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

In Admiralty. Suit by John Welch and another against John J. Fallon and others, as owners of the fishing schooner Arthur Binney. Decree for libelants.

French & Sullivan and A. A. Lang, for libelants.
Russell & Russell, for respondents.

DODGE, District Judge. The three respondents are the owners of the fishing schooner Arthur Binney. The respondent Fallon appears to have been managing owner. In March, 1907, the libelant was one of a fishing crew who agreed with one McKay to make a fishing voyage in her. McKay, by arrangement with the owners, undertook the voyage as master, obtained his crew, and made the voyage on what is known in the fishing business as the "half line" plan, according to which the gross proceeds of the catch, less certain deductions, are shared equally between the vessel and the master and crew; the latter half share, after payment for certain things charged to the master and crew as a body, being divided among them share and share alike. The master and crew were 18 men in all, including the libelant and Frost, who has filed a petition to intervene, and all understood that they were shipping with McKay as master on a "half line" voyage. The vessel left Boston about the end of March, and returned there about the end of August. The fishing done was for mackerel, and was mainly off the New Jersey coast. From time to time she put into Lewes or New York, to land and sell fish or for other purposes.

On April 25th according to the libel, or on April 23d according to the evidence, the libelant hurt three of his fingers, by getting them jammed between the seine boat, which was being launched and manned at the time, and the vessel. He left the vessel not less than seven days later, at New York, with the injured fingers in bad condition, and went

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

to a hospital, where it was found necessary to amputate parts of them. This was done, according to the libel, on May 2d. He was not again in condition to do work aboard until after the vessel had finished the voyage and had returned to Boston.

He makes two distinct claims in his libel. One is for a full share in the crew's part of the entire voyage, as wages due him. The other is for damages, and is based on allegations that his injuries were caused by negligence, for which the owners are liable. An objection that claims in contract and in tort may not be joined in the same libel was duly taken by exception, but was overruled. As to the propriety of such a joinder there has been some conflict. Pratt v. Thomas, 1 Ware, 427, Fed. Cas. No. 11,377; The Guiding Star (D. C.) 1 Fed. 347; Olsen v. Whitney (D. C.) 109 Fed. 80; 2 Parsons, Shipping and Admiralty, 374, 375. I find nothing, however, which seems in any way conclusive against permitting it, and in this case it seems to me to have the advantage of convenience, without imposing any real disadvantage upon the respondents.

The only alleged ground for the damage claim is the absence of "medicines" on board the vessel. Merchant vessels, whose voyages may probably oblige them to stay at sea for considerable periods, or take them far away from any port of supply, and for the outfitting of which the owners assume the full responsibility, are required by statute to be provided with "a chest of medicines." Rev. St. §§ 4569, 4570 (U. S. Comp. St. 1901, p. 3100). But there is no such requirement applying to fishing vessels, and, speaking generally, it may be said that, so far as they are concerned, little occasion exists for any such requirement. Not only does their employment seldom take them far out of reach of a port of supply, but the supplies to be consumed on their trips, if furnished by the owners in the first instance, are really paid for by the captain and crew out of their share in the voyage. Such is the result of the arrangements according to which fishing trips are commonly made, as it is of the arrangement under which this vessel sailed. For the purpose of selecting the supplies to be taken, or of seeing that they are all on board when the vessel sails, the master would appear to be the representative rather of the crew than of the owners.

But, even if it be assumed that the owners were bound to see that this vessel had "medicines" on board, the evidence in this case does not show that it was for want of anything commonly carried on board vessels under that term, whether merchant or fishing vessels, that the libelant's fingers got into a condition requiring amputation. That condition was brought about by the want of sufficient antiseptic treatment, rather than of "medicines," and such treatment could hardly be expected on board a fisherman, whether provided or not with the usual "medicines," by reason of the unavoidable difficulty of keeping the wounds properly cleansed and protected against infection.

The evidence does not seem to me to disclose on the part of the master any want of due attention to the libelant's injuries, so far as anything to be done on board the vessel is concerned. I think he did all that could reasonably have been expected of him, if the vessel was to continue fishing and the libelant to remain on board her. He went

on board another fishing vessel, and brought from her some remedies which were used in binding up the libelant's fingers. It was urged that the libelant ought to have been taken at once in the vessel to the nearest port where hospital treatment could be had, instead of being kept on board until she got into New York, a week or more after the injuries were sustained; but no such claim is made in the libel, and there was no attempt to introduce such a claim by amendment until after the evidence had been closed. I declined to permit its introduction at that time. I think the respondents were clearly entitled to notice in advance of the trial that such a claim was asserted against them. It cannot be taken for granted that, with such notice, they would have had no further evidence to offer than that which they have introduced upon the issues presented by these pleadings. No other issues are properly before the court. Whether or not the master ought on the whole, as part of his duty toward the libelant, to have left the fishing grounds at once and headed his vessel for that port which could have been soonest reached, where hospital treatment might be had, is not a question to be investigated in this case. There were, in the evidence I have heard, conflicting statements about matters which might have been important in such an investigation. The further question whether or not negligence of the master in this respect would render the owners liable, in view of the terms upon which this vessel was sailed and her crew shipped, is, of course, also outside the scope of the controversy raised by these pleadings.

In Knight v. Parsons, 1 Sprague, 279, Fed. Cas. No. 7,886, decided in this court in 1855, Judge Sprague held that a fisherman on shares has, if injured in the course of his services on board, the rights of a seaman on wages to cure at the vessel's expense. See, also, Crowell v. Knight, 2 Lowell, 307, Fed. Cas. No. 3,445; The Cornelia M. Kingsland (D. C.) 25 Fed. 856, where this rule appears to have been accepted as settled law. Since a seaman on wages, injured in the ship's service, may claim wages to the end of the voyage (The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760), and since it has been decided in this circuit that the shares of fishermen in the proceeds of the voyage are substantially wages, and that fishermen are to be regarded as seamen for the purposes of recovery of the shares due them (The Carrier Dove, 93 Fed. 978; Id., 97 Fed. 111, 38 C. C. A. 73), I think this libelant may properly claim a share in the voyage as if he had continued on board until it was ended. The evidence seems to me to show that his disability continued until after the vessel had returned to Boston. It appears that the proceeds of the voyage came into the owner's hands, and that there is no dispute regarding the total amount realized, or the amount of the libelant's share, if he is entitled to one. The accounts of the voyage were made up by the owners, and they were to make the distribution. A considerable number, if not all, of the other men composing the crew, have left in the owners' hands money which should belong to them if the libelant is not to share in the voyage, in order that it may go to him if his claim to a share is established. I see no reason why the owners might not have retained the whole of his share in their hands pending a decision on the merits of his claim, if it be true that they have not done so.

The defense of laches on his part in asserting the claim is set up in the answer, but is not, in my opinion, sustained by the evidence.

The agreed amount of the libelant's total share in the voyage, if he is entitled to such a share, is $281.49. For advances made or goods supplied to him on account by the owners during the voyage, $29 is to be deducted. There may be a decree in his favor for the balance of $252.49.

As to the intervening petitioner, Frost, it appears that he left the vessel at New York in May, and that McKay gave him an order upon the owners for the "balance due him." The evidence, however, has not satisfied me that there was any balance due him at the time. I think he had received on account more than his share of the proceeds of the voyage, up to the time he left the vessel, amounted to. Upon his petition, therefore, the decree will be in favor of the respondents.

UNITED STATES v. NORTHERN PAC. TERMINAL CO.

(Circuit Court, D. Oregon. December 21, 1909.)

No. 3,544.

1. CARRIERS (§ 219*)—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—"CONNECTING CARRIER"—TERMINAL COMPANY.

A terminal railroad company, which receives cars of live stock from other railroad companies for transportation and delivery to another company or to stockyards, is a "connecting carrier" whose road forms a part of the line of road over which the shipment is made, within the meaning of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), and is subject to its provisions as to interstate shipments.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 219.*]

2. CARRIERS (§ 37*)—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

A carrier, which receives and transports stock which has been kept in confinement for more than 28 consecutive hours by the connecting carrier from which it was received, violates the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), and is liable to the penalty therefor, notwithstanding the first carrier has been prosecuted and has paid the fine for its own violation.

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

3. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—CONSTRUCTION.

The provision of section 2 of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 608 [U. S. Comp. St. Supp. 1909, p. 1179]) that carriers of live stock in interstate commerce "shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 1 of this act," does not enlarge the time for loading or unloading, which by section 1 is not to be included in computing the time of confinement, and time spent in switching at terminal yards cannot be considered as a part of the loading or unloading.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.*]

Proceeding by the United States against the Northern Pacific Terminal Company. On motion by defendant for directed verdict. Motion denied.

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

John McCourt, U. S. Atty.
Dolph, Mallory, Simon & Gearin, for defendant.

WOLVERTON, District Judge. There are three questions raised upon the part of the defendant: (1) It is contended that the Terminal Company is not a connecting carrier; (2) that the Terminal Company should not be held liable to pay the penalty, because the Spokane, Portland & Seattle Railway Company has heretofore been prosecuted, and paid the penalty; and (3) the question is presented whether or not the switching at the terminal yards should be considered a part of the loading and unloading of this stock.

It has been held by this court with reference to the safety appliance act that the Terminal Company is a connecting carrier, and that it should be held liable where it has violated the terms of that act. United States v. Northern Pacific Terminal Company (D. C.) 144 Fed. 861. The Attorney General has passed upon the question in an opinion delivered at the solicitation of the Department of Agriculture, in which he says:

"I concur in this interpretation of the law, and upon the facts stated it is my opinion that the law applies to these terminal railroad companies. The statute is unambiguous, and is clearly designed to prevent any 'railroad company within the United States whose railroad forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another,' from transporting such animals under conditions other than those set forth in the statute. It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stockyards that has already been confined for more than 28 consecutive hours without unloading for feed, rest, and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides."

So I think that in this case, although the Terminal Company did carry this stock but a short distance, it ought to be considered, and will be considered, as a connecting carrier with any other railroad company coming into Portland, through and by reason of its aid in taking stock up delivered to it by other companies centering here, to be carried for delivery to another company, or to be delivered to the Union Stockyards. And thus I hold that, as to the first point, this is a connecting carrier. The same thing is held by Judge McPherson in the case of United States v. St. J., etc., Co., 181 Fed. 625.

The next question: Can the Terminal Company be held liable when it appears that the Spokane, Portland & Seattle Railway Company has been prosecuted, and has paid the penalty, for carrying this stock? One case has been presented here (United States v. Stockyard Terminal Company [C. C.] 172 Fed. 452) which holds in effect that, when one company has violated the law by carrying the stock for 28 hours, or with consent 36 hours or more, and then has been prosecuted and paid the fine, no other prosecution can be had, unless some other company has taken up the stock and carried it for 28 or 36 hours, as the case may be, subsequent to that time. I am not in accord with that view of the law. It seems to me that this statute is remedial in its intendment. It was adopted for humane purposes, and was designed to prevent the wrongful or cruel treatment of stock. Furthermore, it

was adopted for the purpose of preserving cattle in good order for future uses; and the purpose is to prevent the carrying of stock or the abuse of it in that way. It is criminal in its nature. Yet, in order to enforce the law, the act has given a right of civil action, and whoever violates the law, whether one or more, each individual carrier is liable for the penalty prescribed. Suppose, for instance, the Oregon Short Line, in carrying stock from the East to Huntington, had been carrying a car load of stock more than 28 hours before it reached Huntington, that company would then be liable. Next, suppose the Oregon Railway & Navigation Company takes the stock up at Huntington, and carries it on to Pendleton, less than 28 hours, but knowing that the stock has been in continuous travel more than 28 hours before, then the question comes up, would both railroad companies be liable? I think they would, unmistakably; because the latter company takes the stock and carries it on while it has been in confinement more than 28 hours, or 36 hours, as the case may be. That would make it liable along with the Oregon Short Line Company. I think that both in that instance would be subject to fine and penalty, and the action would lie against either one or both. And so in this case it is true that, if the defendant company, being a connecting carrier, as I conclude, knowingly took up the stock and carried it on to its destination, having knowledge that it had already been carried more than 36 hours, it would be liable, notwithstanding the Spokane, Portland & Seattle Railway Company had already been prosecuted for the same cause. Each individual carrier that violates the law is liable to the penalty. That is my construction of the law.

The other point depends upon the construction of the statute. The first section of the statute (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) provides that no railroad company—

"whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory * * * into or through another state or territory * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding," etc.: "Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

Section 2 provides:

"That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company," etc., "at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company * * * shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are

collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 1 of this act."

Now, I think that section 2 was enacted for the purpose of the protection of the railroad company. That is, in default of the owner of the animals appearing to feed them or take care of them while at rest, the railroad company might take care of them itself; or it should take care of them, and in that case it should have a lien upon the animals for the expense incurred. Then it is provided that, in so taking care of them, so unloading them, and so complying with this law, the railroad company shall not be liable for any detention of such animals, when such detention is of reasonable duration to enable compliance with section 1 of the act. So that when the railroad company has unloaded the stock in order to comply with the provisions of the act, and kept them at rest for the time fixed by the act, it shall not be liable for that detention to the shipper. And I think that is what this section means. I do not think it has relation to the time consumed in loading and unloading the stock as being time not to be included in the time of carriage. I construe section 2, therefore, as not enlarging the time which is given under the first section for loading and unloading. And it does not seem to me that the time spent in switching from one track to the other about the switching yards should be deducted from the time of carriage, but simply that space of time that would be required in putting the animals aboard the car, and in unloading them when necessary.

I will therefore overrule the motion for a directed verdict.

UNITED STATES v. CHICAGO, B. & Q. R. CO.

(District Court, W. D. Missouri, St. Joseph Division. June 14, 1910.)

ANIMALS (§ 34*)—QUARANTINE REGULATIONS — FEDERAL STATUTE—OFFENSES BY CARRIERS.

Under Act March 3, 1905, c. 1496, § 2, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185), which provides that "no railroad company * * * shall receive for transportation or transport from any quarantined state or territory * * * or from the quarantined portion of any state or territory * * * into any other state or territory * * * any cattle or other live stock except as hereinafter provided," it is only the railroad company which receives for transportation and transports cattle from the quarantined state or district into another state or territory in violation of the authorized regulations prescribed thereunder by the Secretary of Agriculture that is subject to the penalty imposed by the act, and a connecting carrier, which receives such cattle in another state and transports them therein to their destination, without actual knowledge that they came from an infected district, cannot be convicted of a misdemeanor under section 6 of the act, because it did not placard the car or mark the waybill to indicate such fact, as required by the regulations of the first carrier.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. § 34.*]

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

Criminal prosecution by the United States against the Chicago, Burlington & Quincy Railroad Company. Trial to the court by agreement. Verdict and judgment for defendant.

Leslie J. Lyons, Asst. U. S. Dist. Atty.
H. J. Nelson, for defendant.

PHILIPS, District Judge. The indictment is predicated of section 2 of the act of March 3, 1905 (33 Stat. 1264, c. 1496 [U. S. Comp. St. Supp. 1909, p. 1185]), charging the defendant with transporting a car load of cattle from Maud, in the state of Oklahoma, in May, 1908, within the quarantine district prescribed by the Department of Agriculture, in violation of the regulations of said department. The case has been submitted to the court upon the following agreed statement of facts:

"It is hereby stipulated and agreed between the plaintiff and defendant in this cause that a jury shall be and is hereby waived, and this cause is submitted to the court upon the following agreed statement of facts:

"It is agreed and admitted that the defendant is a corporation organized under the laws of the state of Illinois, and that during the month of May, 1908, it was engaged in the business of a common carrier of live stock and in the transportation of interstate commerce between various states of the United States; that defendant's line of railroad connected at Kansas City, Mo., with the railroad of the Missouri, Kansas & Texas Railway Company; that on or about the 16th day of May, 1908, one Peter Hansen shipped from Maud, Okl., over the Missouri, Kansas & Texas Railway, 28 head of cattle consigned to Davis & Son at St. Joseph, Mo.; that in the ordinary course of business the car containing said 28 head of cattle was delivered to defendant by said Missouri, Kansas & Texas Railway Company at Kansas City, Mo., on or about May 18, 1908, and was carried by defendant from Kansas City, Mo., to St. Joseph, Mo., and there delivered to consignee on May 18, 1908, in the original car into which the cattle were loaded by said Hansen at Maud, Okl., to wit, C. C. C. car 774; that said 28 head of cattle and the car containing the same were, when so delivered to defendant at Kansas City, Mo., accompanied by the original waybill made by said Missouri, Kansas & Texas Railway Company at Maud, Okl., said cattle having been waybilled through from Maud to St. Joseph; that a true copy of said original waybill is attached hereto, marked 'Exhibit A' and made a part hereof; that said original waybill described said cattle as being 'Native Cattle,' and was not stamped with the words 'Southern Cattle'; that the waybill did not show said cattle to be 'Southern Cattle,' and that the said car in which they were transported was not placarded as containing 'Southern Cattle' with cards of any kind or size; that when said cattle, car, and waybill were so delivered to the defendant by said Missouri, Kansas & Texas Railway at Kansas City, Mo., the defendant had no knowledge or information as to the point or origin of said cattle, or as to the kind, class, or origin of said cattle, other than as shown upon said original waybill so made by said Missouri, Kansas & Texas Railway Company.

"It is further agreed that at the time said shipment of cattle was made from Maud, Okl., the said Maud, Okl., was located within the quarantined area from which cattle were required to be shipped in cars placarded 'Southern Cattle' and upon waybills describing the cattle as 'Southern Cattle,' all in accordance with the quarantine regulations promulgated by the Secretary of Agriculture of the United States, and duly published."

It is not easy to understand why the government selected this defendant for prosecution, rather than the Missouri, Kansas & Texas Railway Company. The latter was the carrier that received the cattle and billed the car out at Maud, Okl., for transportation beyond the

state to St. Joseph, Mo. The regulations of the Department of Agriculture imposed upon it the duty of plainly writing or stamping upon the face of the waybill the words "Southern Cattle," so as to indicate that the cattle were from the quarantined district. The further requirement was to conspicuously placard the car containing the cattle with the words "Southern Cattle." The fact that this company instead wrote conspicuously across the face of the waybill the words "Native Cattle" tends to indicate that it connived at an evasion of the quarantine regulations. Its failure to properly placard the car, and turning it and the waybill over to the defendant company at Kansas City, Mo., were well calculated to mislead the latter company in taking the car into its train for transportation to St. Joseph, Mo. So there was no conceivable difficulty in obtaining the fullest evidence of its culpability.

There is no charge or proof that the required placard became detached or defaced during the transportation conducted by the defendant, so as to make it answerable for failure to replace the same. The regulation in this respect is as follows:

"If for any reason the placards required by this regulation are removed from the car, or are destroyed or rendered illegible, they shall be immediately replaced by the transportation company or its agents; the intention being that legible placards shall be maintained on the car from the time such shipments leave the quarantined area until they arrive at final destination."

From which it is clear that unless the car had been placarded by the Missouri, Kansas & Texas Railway Company, which brought it from the state of Oklahoma, and it had been destroyed or rendered illegible, there was no obligation imposed by this regulation upon the defendant company to put on such placard in the first instance. Neither is there any charge in the indictment that the defendant had neglected to replace a destroyed or illegible placard. Its liability to indictment must, therefore, in so far as the indictment charges and the proof submitted goes, depend upon its mere failure to note the words in the upper left-hand corner of the waybill "from Maud, Okla.," and the inference to be drawn therefrom, against the more palpable facts that conspicuously written across the face of the waybill were the words "Native Cattle," indicating that they were not from an assumed infected district, and the absence of any placard on the car in large words "Southern Cattle," which placard, by the regulations aforesaid, was required "to show the name of the place from which the shipment was made, the date of the shipment, the name of the transportation company, and the name of the place of destination." Those were the signs prescribed by the regulations to indicate to other persons than the shipper taking the cattle out of the district that they had come from within the quarantine lines.

It must be conceded that, as this is a criminal prosecution, the guilty knowledge of this defendant is an indispensable element of the offense, and the burden of proof rests upon the government to establish this fact beyond a reasonable doubt in the mind of the trier of the facts. Under the circumstances of this case I would seriously hesitate to find this defendant guilty.

Aside from this, the question arises in my mind: Does the carrier connecting with the railroad company that received the shipment within the prescribed quarantine territory, and after the transportation has passed into another state and the connecting carrier only carries the car within the state where it received it, also become liable to indictment, whereby the government might recover a penalty from each of said carriers? The statute in question is as follows:

"That no railroad company * * * shall receive for transportation * * * from any quarantined state or territory, etc., into any other state or territory * * * any cattle or other live stock, except as hereinafter provided."

The after provision referred to is section 3, which authorizes the Secretary of Agriculture to make regulations for inspection, etc., and removing inspected cattle, etc.

It is only the railroad company that receives "for transportation from any quarantine state into any other state or territory any cattle or other live stock" that may be guilty of a misdemeanor provided for in the sixth section of the act. Such transportation, as applied to the situation under consideration, must be interstate to give jurisdiction to this court over the offense. It was the Missouri, Kansas & Texas Railway Company that received the cattle in the state of Oklahoma for transportation. It crossed the line with the cattle, bringing them through the states of Oklahoma and Kansas into Kansas City, Mo., where the car was transferred by it to the defendant, which only carried the car from Kansas City to St. Joseph, within the state of Missouri.

The succeeding clause of said section 2 of the statute is as follows:

"Nor shall any person, company or corporation deliver for such transportation to any railroad company, etc., nor shall any person, company or corporation drive on foot or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance from a quarantine state or territory, etc., into any other state or territory, etc., any cattle or other live stock, except as hereinafter provided."

Thus again indicating that only the person, company, or corporation that drives or causes to be driven or transported in private conveyances, etc., such live stock "from a quarantine state, etc., into another state, etc., any cattle or other live stock," is subjected to punishment by the statute. Nothing whatever is expressed by the statute respecting the liability of any connecting carrier or driver of the cattle after they pass beyond the quarantine district into another state or territory. Suppose that the shipment in question had been from Maud, Okl., to Chicago, and been carried by the Missouri, Kansas & Texas Railway Company in its car through the states of Kansas, Missouri, and Illinois, with the car not placarded and the waybill just as the one in question, would there have been more than one offense? The only offense for which it could have been indicted would have been for shipping the cattle from the state of Oklahoma into another state without complying with the regulations of the Department of Agriculture. The offense was completed by the last-named act the moment it crossed the line between Oklahoma and Kansas. Can it make any difference, under the language of the statute, that after the Missouri, Kansas & Texas Rail-

way Company got across the line into Kansas it turned over the transportation of the car for carriage to its destination to another carrier? The statute has neither in terms nor spirit subjected both the carrier that brought the cattle out of Oklahoma into Missouri and the connecting carrier, who completes the unfinished part of the transportation inside of the latter state, to punishment.

There has been considerable discussion among the judges of various districts as to whether or not what is known as the "Twenty-Eight Hour Law," respecting the interstate shipment of live stock, admits of the construction that the length of time consumed in the transportation by the antecedent carrier can be carried over and charged to the connecting carrier, who does not run over the 28 or 36 hours time without unloading, feeding, and watering. In United States v. Stockyards Terminal Co. (C. C.) 172 Fed. 452, Judge Willard held that where the initial carrier of live stock has been subjected to the penalty imposed by Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), for confining live stock longer than permitted without unloading, rest, water, and feeding, a second action against a connecting carrier to recover for the same confinement, the first 28 hours or 36 hours which were necessarily included in the first action cannot be counted against the defendant or the connecting line. Contra, United States v. Northern Pacific Terminal Co., 181 Fed. 879, by Judge Wolverton.

It is to be noted that the last statute declares that no railroad company "whose road forms any part of a line or road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory * * * into another state or territory * * * shall confine the same in cars * * * for a period longer than 28 consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding," with the proviso of a period of 36 hours on request of shipper.

As each railroad successively carrying the live stock forms a part of the continuous line, the language of the statute may be held reasonably to extend to the respective carriers making up the entire line. From this difference in the respective statutes, which are germane, touching the transporting of cattle, where the Congress intended to penalize all the roads handling such live stock forming any part of the line of the interstate carriage, it has said so in terms. The statute in question employed no correlative language signifying a purpose to subject any railroad company carrying such cattle over its own road after the first carrier completed the offense denounced by the statute by bringing the cattle "from the state," within the quarantine district, into "another state."

The defendant company did not bring the cattle from Oklahoma into another state; and the regulation prescribed by the Department of Agriculture for billing and placarding the car was imposed upon the railroad company shipping the cattle out of the quarantine district into another state or territory.

While such remedial statutes, even in a criminal proceeding, are to be liberally construed so as to effectuate the legislative intent, it is to be kept in mind that it is none the less a penal statute, not to be extended

by mere implication beyond the terms in which it is expressed. In the zeal and eagerness sometimes born of newly created statutory offenses, there is at times manifested a disposition to press the courts for a most latitudinarian construction. But the courts should recognize the dangerous evil of legislation by judicial construction, and incline them to await the advance by the lawmaking branch of the government.

Verdict and judgment for defendant.

UNITED STATES v. RUNDELL et al.

No. 575, Equity.

(Circuit Court, E. D. Oklahoma. September 12, 1910.)

INDIANS (§ 27*)—INDIAN LANDS—ALLOTMENT—TRANSFER—ACTIONS.

Act March 2, 1888, c. 188, 28 Stat. 907, provided for the allotment in severalty of land in the reservation of certain confederated tribes in northeastern Oklahoma, subject to the provision that the allotted land should not be alienable for 25 years from and after the patent. *Held* that, where a patent was issued to an allottee under such act expressly prohibiting alienation for 25 years, the United States had capacity to sue in equity to enforce such restriction, and to set aside a conveyance in violation thereof, without joining the allottee in his lifetime, and could also maintain such action after the allottee's death without joining his heirs, at any time during the restricted period, in case the heirs attempted to convey in violation of the restriction.

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

In Equity. Bill by the United States against John E. Rundell and others. Demurrer to bill overruled.

Paul A. Ewert, for the United States.

W. H. Kornegay and H. H. McCluer, for defendants.

CAMPBELL, District Judge. This is a suit by bill in equity, instituted by the United States of America against John E. Rundell and others, seeking to have set aside certain conveyances, and to have decreed as invalid a certain judgment of the United States Court for the Northern District of Indian Territory, sitting at Wagoner, of date May 19, 1899. The land involved was originally the allotment of Pe-te-lon-o-zah, or William Wea, a member of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, being a portion of the lands formerly held in common by said tribes in what is now northeastern Oklahoma. By the patent from the United States to said allottee, dated April 8, 1890, it was provided:

"That said lands shall not be alienated or subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period, shall be absolutely null and void, to have and to hold the said land with the appurtenances thereunto belonging to the said Pe-te-lon-o-zah, or William Wea, and to his heirs, forever, with proviso as aforesaid."

It is alleged that the allottee, William Wea, died intestate in January, 1894, seised of said lands, and that thereafter the defendant Rundell

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

procured certain persons, who claimed to be the heirs of said allottee, to execute deeds to him for said land, and that he also fraudulently caused to be instituted in the said United States Court for the Northern District of Indian Territory a certain action, wherein said purported heirs were plaintiffs and the said Rundell was defendant, and fraudulently procured a judgment to be rendered by said court, adjudging and decreeing the validity of a certain contract on the part of said heirs to convey said land to the defendant Rundell, and such conveyance and those subsequently made by defendant Rundell and his grantees, and the judgment of said court it is now sought to have set aside by this proceeding.

To the bill the defendants the Miami Investment Company, and George E. Bowling have demurred. By the demurrer it is urged that complainant has no interest in the matters and things alleged in the bill, and no right, title, interest, or claim in or to the lands described therein entitling it to maintain this suit or obtain the relief sought; that complainant is in no sense guardian of said allottee or his heirs, and has no right, authority, duty, or function, either in its own right or as sovereign or guardian, entitling it to maintain the suit; that it does not appear that the complainant or the tribe or the heirs of the said allottee, or any person of Indian blood, has any right, title, or interest in or claim to said land, or in the matters and things set forth in the bill; that it does not appear that the heirs of the said allottee ever requested the complainant to bring the suit; and that less than the jurisdictional amount is involved.

Since the argument and submission of this case upon the demurrer, the United States Court of Appeals for this circuit has rendered its decision in the case of United States v. Allen et al., 179 Fed. 13. In that case, as in this case, the United States have brought suit in their own name, without joining the allottees, to cancel and set aside certain alleged unlawful conveyances of restricted Indian allotments of members of the Five Civilized Tribes. The point was there made by the defendants that the United States, having divested itself of every vestige of the title to such allotments, not even holding the legal title in trust, as in the case of allotments made under the general allotment act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 388), they had no such interest in the suits as entitled them to maintain the actions. The court said:

"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. 506, 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 allottees, 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, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. 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 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."

If in the case of the Five Civilized Tribes, the mere placing of restrictions by the government upon the allotments expressed a governmental policy, which the United States, in their own name, without joining the allottees, can enforce in this court, then, in my judgment, the same result must follow the placing of the 25-year restriction against alienation under which the allottee in this case took his allotment.

Does the restriction period of 25 years run with the land, or is it personal to the allottee, and does that cease with his death? The language of the act is:

"The lands so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years." Act March 2, 1889, c. 422, 25 Stat. 1014.

As we have seen, this provision is incorporated into the patent. In the case of the Quapaw Indians, a neighboring tribe, the act of Congress providing for the allotment in severalty of their lands (Act March 2, 1888, c. 188, 28 Stat. 907) authorized the Secretary of the Interior to issue patents to the allottees in accordance with the provisions of the act, with the proviso that such allotments should be inalienable for a period of 25 years from and after the date of such patents. The patents issued pursuant to this act read that the United States—

"does give and grant unto the said [patentee], and to [his or her] heirs, the said tract above described, but with the stipulation and limitation, contained in the aforesaid act, that the land embraced in this patent shall be

inalienable for the period of twenty-five years from and after the date hereof, to have and to hold the same, together with all the rights, privileges, and immunities and appurtenances of whatsoever nature thereunto belonging, unto the said [patentee], and to [his or her] heirs, forever, provided as aforesaid that said tract shall be inalienable for the said period of twenty-five years."

In the case of Goodrum v. Buffalo, 162 Fed. 817, 89 C. C. A. 525, decided by the Circuit Court of Appeals for this circuit, the court say:

"The language of the statute under which the patent was issued to John Medicine is 'that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents.' It is a limitation attached to and running with the land, in no wise dependent upon the life or death of the patentee. It was as much within the policy and purpose of the government to see that the heirs of the allottee, in case of his death, were protected against alienation of the land, as the allottee himself; otherwise, they might become a charge upon the public, and the beneficent policy of the government in bringing about the allotment of lands in severalty would be thwarted."

The terms of the two acts, so far as they imposed restriction upon alienation, are essentially similar, and I can conceive of no such difference in the character of holding by the Quapaw allottee and that of the allottee in this case as would make this any less a restriction running with the land than that of the Quapaw. If, then, the United States might, during the life of the allottee, come into this court for the purpose of enforcing the restriction against alienation, and to set aside a conveyance made in violation thereof, without joining the allottee, they may also maintain such action after the death of the allottee, without joining his heirs, at any time during the continuance of the 25-year restriction period, in a case where the heirs have attempted to convey in violation of such restriction. Nor can the judgment of the United States Court for the Indian Territory, involved in this case, be said to be of any more binding effect to overcome the restriction provision than can the judgment of the United States Court for the Indian Territory, involved in the case of Goodrum v. Buffalo.

In the light of the two controlling decisions of the Circuit Court of Appeals for this circuit, heretofore cited, the demurrer must be overruled. It is so ordered.

HEALEY ICE MACH. CO. v. GREEN et al.

(Circuit Court, E. D. North Carolina. October 3, 1910.)

No. 293.

1. MECHANICS' LIENS (§ 245*)—PROCEEDINGS TO ENFORCE—JURISDICTION OF FEDERAL COURT IN EQUITY.

While Revisal N. C. 1905, § 2027, gives a right of action at law for the enforcement of a mechanic's lien, a Circuit Court of the United States sitting in equity has jurisdiction to entertain a bill for that purpose, especially where there are conflicting liens to be adjusted.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 428; Dec. Dig. § 245.*]

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

2. HUSBAND AND WIFE (§ 14*)—MECHANICS' LIENS (§ 73*)—LANDS OWNED BY HUSBAND AND WIFE—LAW OF NORTH CAROLINA.

Under the decisions of the Supreme Court of North Carolina which establish a rule of property controlling in the federal courts in that state, a conveyance of land to a husband and wife vests them with an estate by entireties, which cannot be aliened, burdened, or otherwise affected except by their joint action, and a mechanic's lien cannot be acquired thereon through a contract with the husband alone.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 14;* Mechanics' Liens, Cent. Dig. § 88; Dec. Dig. § 73.*]

3. MECHANICS' LIENS (§ 75*)—LANDS OF MARRIED WOMAN—NORTH CAROLINA STATUTE.

Under Revisal N. C. 1905, § 2015, by which the lands of a wife become subject to a mechanic's lien only for improvements made with her "consent or procurement," something more than mere knowledge that her husband is making the improvement is required.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 106; Dec. Dig. § 75.*]

4. MECHANICS' LIENS (§ 76*)—SUIT TO ENFORCE—DEFENSES—ESTOPPEL.

A provision, in a mortgage given by a husband and wife on property the title to which was in both, that any sum which might be paid by the mortgagee to remove prior liens should be added to the debt secured, was not an acknowledgment by the wife of a prior mechanic's lien claimed on the property, which estopped her to contest its validity.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 104; Dec. Dig. § 76.*]

5. INSURANCE (§ 580*)—RIGHTS AFFECTED—PROCEEDS OF INSURANCE.

The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1439–1443; Dec. Dig. § 580.*]

In Equity. Suit by the Healey Ice Machine Company against Robert Green, Louisa A. Green, and others. Bill dismissed. Suit retained on cross-bill.

A. B. Andrews, Jr., for complainant.

Skinner & Whedbee, S. Brown Shepherd, and T. H. Calvert, for defendants.

CONNOR, District Judge. This cause was set down for hearing upon the pleadings. The facts, for the purpose of the hearing and disposition at this time, are not controverted. Complainant company, a resident of the state of Illinois, on the 21st day of April, 1906, entered into a contract with defendant Robert L. Green, a resident of the county of Pitt, in the Eastern district of North Carolina, whereby it undertook and obligated itself to deliver and erect "in his building in the city of Greenville, North Carolina, on foundations to be built by him, one of its improved ice-making machines, with steam engine, boiler condenser, freezing tank," and other machinery incident thereto, for the price of $5,000, one-third of which was to be paid when the machine was shipped, and the remainder "when the machine is fulfilling guarantee named in contract." A copy of the contract is attached to the original bill.

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

Complainant alleges that it delivered, erected, and set up the machine in accordance with its contract, and in all respects complied therewith; that one-third of the purchase price was paid by defendant Green according to his contract; that he has not paid the balance, or any part thereof; that the machine was erected on a tract or lot of land lying in the town of Greenville, Pitt county, owned by defendant Robert Green and his wife, Louisa A. Green, by virtue of a deed executed to them jointly; that on the 28th day of September, 1906, defendants Robert Green and wife executed to John W. Aycock a deed of trust conveying the said real estate upon which said machine was erected, for the purpose of securing the payment of a note for $1,250, executed by said defendants, payable to defendant the National Bank of Greenville; that this deed was duly registered; that on December 4, 1906, complainant, pursuant to the provisions of the Constitution and statutes in force in North Carolina, filed notice of lien in the office of the clerk of the superior court for Pitt county "for work and labor done and material furnished in the erecting, putting up, constructing, and equipping of the said ice machine hereinbefore described," etc. A copy of said notice of lien is attached to the original bill herein.

Defendants Robert L. Green and wife filed an answer, admitting the execution of the contract set up in the original bill and the terms thereof. They admit the shipment of certain machinery and the erection thereof on the lot of land described in the bill, but deny that said machinery was either delivered or set up in accordance with the contract, or the guaranties therein. They further allege that the machinery set up was defective and inadequate for the manufacture of ice, etc., and failed in many respects to comply with the terms of the contract. They deny that they are indebted to complainant in any sum whatever. They admit the execution of the trust deed to defendant J. W. Aycock, and allege that they are indebted to the National Bank of Greenville in the sum of $1,250, as therein set forth. They admit that the real estate upon which the machinery was erected belongs to them jointly, subject to the trust deed to defendant Aycock, and deny that complainant was entitled to, or could acquire, any lien thereon. Defendant R. L. Green, by leave of the court, filed a cross-bill alleging a breach of warranty in the sale, construction, and erection of the machine, whereby he had sustained large damage, etc. A further reference to the allegations of the cross-bill need not here be made.

Thereafter complainant filed a supplemental bill, alleging that, subsequent to filing the original bill and the answer thereto, defendants R. L. Green and wife sold the lot upon which said machine was erected, with the buildings, machine, etc., to R. L. Hill and D. B. Johnson for the price of $4,000, of which $500 was paid cash, and notes executed for the remaining part of said purchase price; that said notes were deposited with J. F. Forbes, cashier of the National Bank of Greenville; that on May 4, 1908, said Hill and Johnson took out policies of insurance in the companies named in the supplemental bill on said property to the amount of $4,000, payable to said R. L. Hill and D. B. Johnson, Robert L. Green and wife, and the National Bank of Greenville, "as their interest may appear"; that on the night of September

8, 1908, the said ice factory and building, with all of its contents, was destroyed by fire; that the insurance companies adjusted the loss at $3,845. Complainant alleges that by virtue of the alleged lien on said property it is entitled to the proceeds of the policies of insurance. It prays that process issue against Hill and Johnson, the insurance companies, and J. F. Forbes, cashier of the National Bank of Greenville; that the insurance companies be directed to pay the proceeds of the policies into court; and that the same be adjudged and decreed to represent the said property, and that the lien of complainant be transferred to said proceeds, and the same be applied to the payment of the amount due from defendant Robert L. Green, and for other and further relief, etc.

Process having issued as prayed, defendants Robert L. Green and wife, Louisa A., Hill and Johnson, and J. F. Forbes, filed separate answers, in which they admit the sale of the property and the disposition of the notes as alleged, except that they say that one of said notes for $400 was assigned to T. B. Mosely for value and is now owned by him. Said defendants deny that complainants have any interest in or claim to the proceeds of said policies, or any part thereof, and allege that the same should be applied, first, to the discharge of the balance due on the note (a part thereof having been paid) due the National Bank of Greenville; second, to defendants Robert L. Green and wife to the extent necessary to discharge the amount due them on account of the purchase price (the amount received by the bank being a part thereof); third, the balance to Hill and Johnson.

Thereafter H. A. White filed his petition in the cause, alleging that since filing the supplemental bill and answer thereto said Hill and Johnson had assigned all of their interest in said funds to him, and asking that whatever sum was found to be due them from the proceeds of said insurance policies be paid to him. Pursuant to a consent order made in the cause the several insurance companies paid the amount of the loss into the registry of the court.

While the North Carolina statute (Revisal 1905, § 2027 et seq.) gives an action at law for the enforcement of a mechanic's lien, it seems that, upon the authority of Sheffield Furnace Company v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853, the Circuit Court of the United States, sitting in equity, has jurisdiction to entertain a bill for that purpose. This is especially true when, as in this case, there are conflicting liens upon the property, which a court of equity alone can adjust. It is by no means clear that the complainant's case comes within the language of the Constitution giving a lien, article 14, § 4, or Revisal 1905, § 2016:

"Every building built, rebuilt or improved shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished."

Certainly complainant has not "built or rebuilt" any "building" on defendant's premises. If it comes within the language or the equity of the statute, its place must be found in the word "improved." As the case must "go off" upon other grounds, it is not necessary to discuss or decide the question whether any lien is given by the statute, or,

if so, the question as to whether, when the contract is entire, the amount due for "material furnished" may be separated from that due for "labor performed." The distinction would become important by reason of the constitutional provision securing a homestead as against the first, and not as against the last.

The complainant is met, at the threshold, with the fact that the land upon which it seeks to fix a lien is owned by the defendant R. L. Green and his wife, Louisa A. Green; and this, as uniformly held by the Supreme Court of this state, which is the "rule of property" controlling this court, gives them an estate by entireties, which cannot be aliened, burdened, or in any manner affected, except by their joint action. In Hood v. Mercer, 150 N. C. 699, 64 S. E. 897, it is held, in accordance with an unbroken line of decisions, that a judgment against the husband does not constitute a lien upon land owned by his wife and himself. They may convey a good and indefeasible title subsequent to, and notwithstanding, the docketing of the judgment. Authorities from other states are cited to the effect that the interest of the husband may be burdened with the lien. Boisot on Mechanic's Liens, § 28. The law in this state is otherwise.

The deed to the land, under which Green and wife claim title, bears date May 12, 1906, and following the description contains these words:

"This being a piece or parcel of land on which Robert Green is now erecting an ice plant."

It is insisted that this language put Mrs. Green upon notice that the lot was, or might become, subject to a lien for the labor and materials performed and furnished, etc. The case of Bank v. Vass, 130 N. C. 593, 41 S. E. 791, is relied upon to sustain this contention. It was there held that the words, "Said 239 acres is subject to a mortgage or deed of trust for about $1,650, balance of purchase money on same," following the description, and the words following the warranty clause, "that the same are free from all incumbrances whatever, except as above stated," established a trust in equity in favor of the creditor. There are other cases in the books to the same effect, but it will be noted that in all of them the language is very much more specific in its character than here. This language certainly cannot operate by way of an estoppel as between complainants and the feme grantee; but, assuming that it could do so, what would be its effect? The only fact asserted is that her husband was building an ice plant on the lot. Suppose that he had thereafter executed a mortgage to complainant for the price of the plant, it will hardly be contended that she was estopped to assert her title as against the mortgage. If the recital is relied upon to bring her within the language of section 2015, Revisal 1905, it will be noted that, by that statute, her property becomes liable when the improvements on her land are made with her "consent or procurement." This language indicates something more than mere knowledge that her husband is making the improvement; otherwise the title to her separate real estate, supposed to be protected by carefully devised constitutional and legislative safeguards, would be, as to liens of this character, easily burdened. To consent to or procure improvements on one's real estate requires some act, or words, much more unequivocal than mere silence with knowledge of the fact.

Attention is called to the fact that, in the trust deed executed by Green and wife to Aycock, this provision is found:

"It is further stipulated and agreed that any sum expended by the parties of the third part [National Bank of Greenville] to remove any prior liens or incumbrances shall be added to and constitute a part of the debt hereby secured and shall bear interest at the same rate."

This deed was executed September 28, 1906. This language cannot be invoked by complainants as a promise to pay, or otherwise provide for the payment, of its debt. Assuming, however, that, to give effect to the purpose of the statute, a court of equity would hold that the lien was valid upon the machine and fixtures, and could be enforced by treating them as removable trade fixtures, complainant is confronted with the difficulty that this property has been destroyed by fire. It endeavors to meet this condition by its supplemental bill, in which it asserts an equity to have the alleged lien transferred to the proceeds of the insurance policies; and to that end, for the purpose of preserving the fund until the rights of the parties can be determined, the money was paid into court and awaits the final decree in this cause.

Has complainant any claim upon, or interest in, the proceeds of the insurance policies? It would seem that complainant, in respect to this phase of the case, can be in no more favorable attitude than a mortgagee. Assuming a valid lien existed, that it had an insurable interest in the property is well settled. Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473. That a mortgagee, in the absence of any contract on the part of the mortgagor to insure for his benefit, has no right to the proceeds of an insurance policy taken out by the mortgagor with loss payable to himself, is uniformly held by the courts. In Columbian Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512, Story, J., says:

"We know of no principle of law or of equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property in case of a loss by fire. It is not attached, or an incident, to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

See, also, Carpenter v. Prov. Wash. Ins. Co., 16 Pet. 495, 10 L. Ed. 1044.

In Farmers' Loan, etc., Co. v. Penn Plate Glass Co., 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234, it is held that, in the absence of any contract on the part of the mortgagor to insure the property for the benefit of the mortgagee, the latter has no equity upon which he can base a claim to the proceeds of the policy. It is said by Justice Peckham:

"There was no contract in the policies covering the interest of the complainant as mortgagee, nor was the insurance in fact effected for the purpose of carrying out any agreement or obligation on the part of the Penn Company with the complainant to effect insurance covering the interest of the bondholders."

See same case, 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710; Chipman v. Carroll, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; Vance on Ins. 418; May on Ins. § 456.

In Galyon v. Ketchen, 85 Tenn. 55, 1 S. W. 508, it is held that the holder of a mechanic's lien upon property has no claim upon insurance effected by the owner and assigned to the mortgagee after the loss, but before the lienor's bill is filed. Donnell v. Donnell, 86 Me. 518, 30 Atl. 67; Stamps v. Insurance Co., 77 N. C. 209, 24 Am. Rep. 443.

Any suggestion of an intention on the part of Hill and Johnson, who took out the policies, to protect complainant's alleged liens, is negatived by the fact that both they and their grantors denied that any debt was due complainant, or that the property was subject to any lien. Again, the proceeds of the policy are specifically appropriated by its terms. There being no obligation on the part either of Hill and Johnson or Green and wife to insure for the benefit of complainant, it is difficult to perceive how a court of equity could appropriate to it money due upon an express contract by the insurance company to defendants. Equity seeks to effect the intention of parties, and only to prevent fraud renders decrees contrary to the expressed intention.

Upon a consideration of the case, upon any aspect, the conclusion is reached that complainant is not entitled to maintain its original or its supplemental bill. The question arising upon defendant Green's cross-bill will be reserved until the coming in of the report of the special master. Let a decree be drawn referring the question as to the interest of the several defendants and interveners in the proceeds of the insurance policies. The cause will be retained for further orders.

In re WISHNEFSKY.

(District Court, D. New Jersey. September 27, 1910.)

BANKRUPTCY (§ 399*)—EXEMPTIONS—PROPERTY CONVEYED AS PREFERENCE.

The exemptions given a debtor by the laws of the state and to which he is entitled on his bankruptcy under Bankr. Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), can only be claimed from property of which he was the owner at the time of his bankruptcy, and he is not entitled to such exemptions out of property which he had previously conveyed to a creditor as a preference or to defraud creditors after it has been recovered by, or surrendered to, his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

In the matter of Jacob Wishnefsky, bankrupt. On petition to review referee's refusal to permit bankrupt to amend his schedules so as to claim exemption. Order affirmed.

The referee's refusal is based on the ground that the bankrupt had no title to the goods claimed. From the testimony taken before the referee and the papers in the case it appears that the bankrupt carried on a small dry goods business at No. 521 South Fifth street, Camden, N. J.; that within four months prior to the filing of the creditors' petition alleging bankruptcy one Samuel Tabak, a brother of the bankrupt's wife, an alleged creditor, recovered a judgment against the bankrupt; that the bankrupt thereupon executed a bill of sale to him of all his stock of dry goods, being all of his property save clothing, that thereupon said Tabak conveyed the same property without change of location to the bankrupt's wife; and that thereafter such business was carried on in her name. In his schedule the bankrupt claimed to own but $10 worth of property—clothing. In schedule

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

B4, relating to property held in trust for debtor, reversion, etc., he mentions "Stock of goods in store No. 521 South Fifth Street, Camden, N. J., to Samuel Tabak," as property heretofore conveyed for benefit of creditors, giving $150 as the "amount realized from proceeds of property conveyed." In schedule B5, relating to exemption, he "claims exemption of personal property under the law of the state of New Jersey to the value of $200." After the bankrupt and his wife had been examined before the referee relative to such transfer, the property upon demand of the trustee was surrendered, counsel for the bankrupt reserving the "right to file an amended petition for the exemption under the law." This petition was subsequently filed, specifically enumerating and separately valuing the articles claimed. The referee refused to allow the amendment or the exemption claimed, and subsequently the trustee sold the entire property thus surrendered, realizing the sum of $300.

Daniel V. Summerill, Jr., for bankrupt.
Bleakly & Stockwell, opposed.

RELLSTAB, District Judge (after stating the facts as above). Bankrupts are allowed the same exemptions as are prescribed by the laws of the state in which they are domiciled. Bankr. Act (July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). The bankrupt is required to submit under oath to the court a schedule of his property showing amount and kind, location, and money value in detail, and a claim for such exemption as he may be entitled to. Section 7, cl. 8. The trustee is to set apart bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after his appointment. Section 47a, cl. 11. And General Order 17 (89 Fed. viii, 32 C. C. A. viii) requires such report to be made within 20 days after receiving the notice of his appointment. Transferring property, with intent to defraud creditors, or, while insolvent, with intent to prefer one of such creditors over others, or while insolvent, suffering a creditor to obtain such a preference through legal proceedings, are acts of bankruptcy. Section 3. All property which within four months of the institution of bankruptcy proceedings, unless the same is exempt from execution and liability for debts by the laws of the bankrupt's domicile, is conveyed or incumbered with intent to defraud creditors, except as to purchasers in good faith, and for a present fair consideration, and all property conveyed or incumbered within the same period, the bankrupt being insolvent, and which operates as a preference, unless the person benefited thereby had no notice that such preference would result, is vested in the trustee as of the date of the bankrupt's adjudication, and is recoverable by him for the benefit of the creditors from any person who is not a bona fide holder for value. Sections 47a (2), 60a, 60b, 67, 70a, 70e. By the laws of New Jersey personal property of every kind, not exceeding in value (exclusive of wearing apparel) the sum of $200, and all wearing apparel or property of any debtor having a family residing in this state, is to be reserved as well after as before the death of the debtor for the use of his family, and shall not be liable to be seized or taken by virtue of any execution or civil process whatever. Gen. St. N. J. 1895, p. 1421, § 35.

Bankrupt had a family residing in the state, and if he had not transferred this property now claimed to be exempt, and which transfer was made the basis of the bankruptcy proceedings against him, his right to

such exemption could not have been successfully resisted. The exemption prescribed by the New Jersey statute is not given to debtors generally. It is limited to debtors having families residing in this state, and their property. It is designed to prevent the disintegration of the family, which would likely result if all the property of the head of it was subject to the creditors' demands. It is a remedial statute, in order, as said by C. J. Whelpley in Bonnel v. Dunn, 29 N. J. Law, 435, 438, "that the families of debtors might not be broken up by creditors, depriving them of all the comforts of life." The family life is the basis of all community life, and the state's exemption is to aid the head of the family to keep it intact, though misfortune overtake him. But, while this is so, the title of as well as the dominion over such exempt property remains with the debtor. The statutory protection is effective only against creditors. It does not prevent the debtor from disposing of it.

These excerpts from the bankruptcy act and the state laws show a legislative intent, first, not to include exempt property in the assets to be administered for the benefit of creditors; and, second, that no exemption can be allowed to bankrupt out of any property which was not owned by him at the time he was adjudicated a bankrupt. The first proposition is removed beyond controversy by Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, where it was held that:

"Under the bankruptcy act of 1898, the title to property of a bankrupt which is generally exempted by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee, and the bankrupt court has no power to administer such property even if the bankrupt has, under a law of the state, waived his exemption in favor of certain of his creditors."

The second, to my mind, embodies the only logical conclusion that can be reached from both the words and reason of the statutes. It is the debtor's property, not another's, that the state law exempts, and it is his, and not another's, that he is to schedule to the bankruptcy court. In re White (D. C.) 109 Fed. 635, 6 Am. Bankr. Rep. 451; In re Coddington (D. C.) 126 Fed. 891, 11 Am. Bankr. Rep. 122.

By the bankrupt's conveyance to one of his creditors of all his property except clothing, he voluntarily gave what under the state statute he could not have been forced to yield. But, when he thus parted with his title, it, so far as he is concerned, was beyond recall. Lokerson v. Stillwell, 13 N. J. Eq. 357; Ruckman v. Conover, 37 N. J. Eq. 583; In re White, supra. The question whether the vendee can maintain the title to so much of the property so conveyed as would have been exempt had it remained in the bankrupt is one in which he has no concern. Perhaps, in view of the evident scheme of the bankruptcy act to administer only that property of the bankrupt which, by the state law, is subject to creditors' claims, and the right of the debtor to dispose of his exempt property, the person obtaining title thereto from the bankrupt, or his assigns, may successfully defend an attack by the trustee as to so much thereof as does not exceed in value the amount exempted, no matter what the purpose or effect of such conveyance. With that question, however, we are not now concerned. Neither such creditor nor his as-

signs have made a claim to such property. The cases as to the right of the bankrupt to obtain exemption out of the property not owned by him at the time of filing his schedule, but which was subsequently recovered by the trustee from the bankrupt's vendees, are conflicting. I have carefully examined all that were submitted to me by counsel, and some others obtained by my own research, and, while some whose conclusions are contrary to those here expressed are no doubt influenced by the decisions of the state courts interpreting the exemption laws of the respective bankrupt's domiciles, yet candor compels the admission that all may not thus be explained, and that some of the decisions are unreconcilable. The conclusions here reached are in harmony with the decisions of this circuit (In re Long [D. C.] 116 Fed. 113, 8 Am. Bankr. Rep. 591; In re Coddington, supra), and are deemed to be the only ones permissible by the laws applicable to the facts of this case.

The referee's dismissal of the bankrupt's petition is sustained.

In re MASON.

(District Court, S. D. Alabama, S. D. August 6, 1910.)

BANKRUPTCY (§ 475*)—VOLUNTARY PROCEEDINGS—PAYMENT OF FEES.

On presentation of a petition and schedules in voluntary bankruptcy, together with an affidavit in compliance with Bankr. Act July 1, 1898, c. 541, § 51a (2), 30 Stat. 558 (U. S. Comp. St. 1901, p. 3441), that the petitioner is without and cannot obtain the money to pay the fees of the clerk, referee, and trustee, it is the duty of the clerk to file the papers and proceed without such payment, but any money shown by the schedules in the possession or under the control of the petitioner is subject to an order for the payment of such fees, regardless of state exemption laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885; Dec. Dig. § 475.*]

In Bankruptcy. In the matter of Alexander Mason, petitioner in bankruptcy. Order for filing of petition by clerk.

On submission, by agreement of the clerk and attorney for petitioner to the court, of the question as to whether the clerk should file a petition in bankruptcy, when pauper's oath is made and proposed bankrupt is shown to have assets with which to pay the costs.

F. K. Hale, Jr., for petitioner.

Richard Jones, pro se.

TOULMIN, District Judge. Clause 2 of section 51 of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 558 [U. S. Comp. St. 1901, p. 3441]), provides that clerks of the court shall collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees.

In Re Hines (D. C.) 117 Fed. 790, it is said:

"A fair construction of the above language indicates that it was the intention to allow voluntary bankrupts to file their petition without the payment in advance of the fees therefor only in case they did not have, and could not

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

obtain, the money with which to pay such fees. In other words, if the bankrupt was absolutely without money or effects of any kind, but was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees."

The court further said that:

"Exemptions allowed by the statute were not intended to cover exonerations from the payment of the fees provided for the court officers by that act."

See, also, In re Collier (D. C.) 93 Fed. 191, 192.

I concur in the views of the courts expressed in the foregoing quotations from the cases cited, except that in Re Hines, supra, where the court in effect declares that, if the bankrupt was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required, and it would be his duty to pay the fees. I think the rule announced by Judge McCormick in Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, which in substance is that a proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit loans from his friends for that purpose, is more reasonable and just. He says that such a requirement "would inflict a humiliation on any citizen to require that he solicit or accept alms of his kindred or friends." Moreover, it would raise an issue not contemplated by the bankrupt act, and which would be embarrassing and difficult to determine. I do not think that the case of Sellers v. Bell, supra, can justly be considered as in conflict with the views expressed by the courts in the opinions from which I have quoted. That case arose on the opposition of creditors to the granting to said Bell of a discharge from his debts, etc., and assigned many grounds for same. Among others, that said Bell swore falsely when he made the pauper's oath swearing that he did not have, and could not obtain, the money to pay the costs and fees. The ground alleged is not one provided for by the bankrupt act for defeating a discharge. The only comment of the court on this alleged ground is that "it (the bankruptcy act) does not require that he (the bankrupt) should apply to his kindred or friends to furnish him the money at the peril of being * * * convicted of making a false oath should he tender the statutory affidavit, and having his prayer for a discharge refused on that ground," which implied that the particular ground assigned was not one provided by the bankrupt act for refusing a discharge. The bankrupt had in his schedule reported personal wearing apparel $100, which he claimed as exempt from levy and sale under execution, etc., under the Alabama Code. While there was no claim in the case that this exempt property should be sold for the payment of the fees of the clerk, referee, and trustee, and no question presented in reference to the same, and hence was not an issue in the case, the judge incidentally suggests that:

"The whole purview of the act is opposed to the thought that the fees of the clerk, referee, and trustee are made, or in any event are to become, a charge on the personal earnings of the bankrupt accruing after he is adjudged to be a bankrupt, or a charge on the exempt property."

But, if this statement were considered as a material part of the decision in the case, then it must be considered in view of the facts in the case. There was no effort to charge future "personal earnings" of the bankrupt, or to charge any money with the payment of the fees. The effort was to prevent the discharge of the bankrupt because he had made an affidavit that he had no money with which to pay the fees when his schedule showed he had personal wearing apparel worth $100, and which was specifically exempt from the payment of debts contracted by the law of Alabama.

The fees provided by the law to be paid the clerk, referee, and trustee are not debts contracted, but (as said by the court in Re Bean, 100 Fed. 262) "are presumably for services for the benefit of the bankrupt and do not depend upon property not exempt, but upon absolute inability." It has been said that a refusal to file a voluntary petition in bankruptcy until the fees are paid is no more defensible than would be a refusal to discharge a bankrupt for the same reason.

In Sellers v. Bell, supra, the judge said:

"Upon the presentation of his petition and schedules, accompanied by the affidavit in the terms of the statute, the clerk has no option as to filing the petition and taking the action thereon prescribed by the law."

In this I fully concur. Money belonging to the petitioner, either in his hands or otherwise held subject to his order, is, in my opinion, subject to an order for the payment of the statutory fees provided for in the bankruptcy act. From the schedule offered with the petition it appears that the petitioner has $32. This fact is at variance with his affidavit.

His petition should be filed; and an order would be proper requiring the money, shown to belong to the petitioner, to be paid into court, from which the fees and costs may be paid. Any surplus remaining of course belongs to the petitioner.

In re NORTON.

(District Court, E. D. Pennsylvania. October 5, 1910.)

No. 3,679.

BANKRUPTCY (§ 318*)—PROVABLE CLAIMS—CONDITIONAL SALE OF PROPERTY—ELECTION OF REMEDIES.

Under the law of Pennsylvania, a contract, called a lease, under which a machine was delivered to the lessee, who gave his notes for installments of so-called rent, with the privilege, on full payment, of buying the machine for a nominal sum, and which provided that until such purchase it should remain the property of the lessor, who on default might retake possession, was in effect a contract of conditional sale, and on default of the purchaser the seller could, at his election, affirm the sale and enforce the notes or retake the property, but could not do both; and where, on the bankruptcy of the purchaser, the seller retook possession of the machine, he cannot prove the notes as a claim against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

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

In the matter of James E. Norton, bankrupt. On review of order of referee disallowing claim. Affirmed.

J. Bennett Nolan, for trustee.
Wellington M. Bertolet, for bankrupt and creditors.
Ellwood H. Deysher, for claimant.

J. B. McPHERSON, District Judge. The facts of this controversy are as follows:

In February, 1908, the Harris Automatic Press Company entered into the following agreement with the bankrupt:

"That the said party of the first part has agreed to let to hire and does hereby let to hire to the said party of the second part for the term of twenty (20) months, commencing with the date of these presents, the following described property, to wit:

"One 1S two-color Harris Press, etc., for the rental of the sum of thirty-five hundred dollars ($3,500), which said rental shall be paid by said party of the second part to said party of the first part as follows:

"Five hundred dollars ($500) upon the execution of this lease, and the further rental of one hundred and fifty dollars ($150) per month, payable on the seventh day of each and every month for the period of the succeeding twenty (20) months, said rental bearing interest at the rate of six per cent. (6%) per annum.

"The said James E. Norton understands and agrees that he does not acquire any property rights in said press whatsoever, but merely accepts the same as bailee, and that he will not allow said property to be removed from the premises now occupied by him, No. 30 North 6th St., in said city of Reading; that he will not underlet nor assign this lease, nor allow the said property out of his possession without the written consent of the said Harris Automatic Press Company, and should he do so, or make any default in the payments of the rental in the time herein specified and as the same shall fall due, the said Harris Automatic Press Company or any person authorized by it is then privileged to enter any premises where it has reason to believe the said property is located and to remove the same without any force, hindrance, or molestation by, through, or from the said James E. Norton in any manner whatsoever, he, the said James E. Norton, waiving all actions for assault, trespass, or other suits in law or equity, and thereupon to enjoy the said property as though this agreement of hire had never been made or entered into.

"And the said James E. Norton certifies that the said press is in good condition and is good and serviceable and in all respects as represented by the said Harris Automatic Press Company, and agrees that he, the said James E. Norton, will at his own expense keep said property insured against loss or damage by fire in a company or companies and, for amounts satisfactory to the said Harris Automatic Press Company, and mark the loss, if any, payable to and deposit the policies of said insurance with said Harris Automatic Press Company, and upon the termination of this lease, by forfeiture or otherwise, will deliver the said property to the said Harris Automatic Press Company in as good condition as it now is, ordinary wear excepted.

"And the said James E. Norton further agrees to give to the said Harris Automatic Press Company as evidence of the indebtedness for said rental, twenty (20) notes, each in the sum of one hundred and fifty dollars ($150), bearing even date herewith and payable one in each succeeding month hereafter for the term of this lease, said notes bearing interest at the rate of six per cent. per annum.

"The said Harris Automatic Press Company agrees that if the said James E. Norton, his heirs, administrators, or assigns, shall well and truly keep the covenants herein made and shall make no default in the payment of any of the said installments of hire or rent as the same shall fall due, and this agreement shall not be sooner determined by mutual consent or otherwise, it

will execute and deliver to the said James E. Norton, his heirs, administrators, or assigns, in consideration of the further sum of ten dollars ($10), a bill of sale for said property, and the said Harris Automatic Press Company also agrees that for a period of one year from the date of the execution of this lease it will repair all breakage due to imperfections of workmanship or material, provided all broken parts which are required to be replaced are returned to them, carriage charges prepaid.

"It is distinctly understood that any indulgence to the said James E. Norton in meeting said installments of rent as they fall due shall not operate as a forfeiture or abatement to any extent to collect the rent due, and, if not paid when demanded, to enter and take possession of said property as herein stipulated."

The bankrupt paid the $500 and gave the notes. The lease—for present purposes I shall call it a lease—expired on October 8, 1909, and at that time seven of the notes had been paid. On December 27th, $50 more was paid on account of the eighth note, thus making a total payment of $1,600. Norton was adjudged bankrupt on February 11, 1910, and on that day, therefore, he owed the claimant $1,900, with interest. For this sum a proof of debt was filed on February 15th, in which the consideration is stated as follows:

"Rental of printing press leased by said claimant to said bankrupt at said bankrupt's special instance and request; and that said debt is evidenced by a certain copy of lease and notes hereto attached," etc.

Not content, however, with making this demand in distinct affirmation of the lease, the claimant on April 1st took possession of the press, and has thus regained its property, and has also received $1,600 of what may be formally called rent, but in substance is the purchase price. Upon objection to the claim the referee (Samuel E. Bertolet) disallowed it, and the correctness of his action is now presented for review.

In the light of several comparatively recent decisions by the Supreme Court of Pennsylvania, the question is scarcely open for discussion. Campbell v. Hickok, 140 Pa. 290, 21 Atl. 362, presented almost an identical situation, and the court held that suit could not be maintained on the unpaid notes after the lessor had retaken the property. The following paragraph from the opinion states the reason for this conclusion:

"The rights of the parties were fixed by the agreement, which was the law to them. The company had these two remedies for the enforcement of their rights: One, in affirmance of the contract by suit upon the notes as they matured; the other, in rescission of it by repossessing themselves of the property, in which case the company were to have and enjoy the said personal property as though the contract 'had never been made.' The notes were not given in satisfaction of the agreement, or of the hire of the property. This seems to be conceded by both parties. The agreement and the notes were part and parcel of one transaction. If the agreement 'had never been made,' the notes would not have been given; and when the agreement is rescinded, with like effect as if it 'had never been made,' the notes fall with it for want of consideration."

To the same effect is Scott v. Hough, 151 Pa. 630, 25 Atl. 123, and Seanor v. McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467.

The claimant admits the fatal effect of these decisions unless they can be distinguished, and a distinction is attempted upon the ground

that the present agreement contains the following provision which does not appear in the other cases:

"It is distinctly understood that any indulgence to the said James E. Norton in meeting said installments of rent as they fall due shall not operate as a forfeiture or abatement to any extent to collect the rent due, and, if not paid when demanded, to enter and take possession of said property as herein stipulated."

But I am unable to see how the claimant can draw from a proper construction of this language the double right to collect the unpaid notes and in addition to retake possession of the property. As I interpret the provision, it simply means that, if the lessor shall extend the time for paying any installment of rent, such indulgence shall not in any respect interfere with the remedies under other provisions of the contract. These remedies are specified, namely:

"To collect the rent when due, and, if not paid when demanded, to enter and take possession of said property as herein stipulated."

But nothing in the clause, as I understand it, confers upon the lessor the right to exercise both remedies. On the contrary, collection in money is first spoken of, and then, but in default of payment, the retaking of possession. It is declared that both remedies shall continue to exist in spite of the lessor's leniency in exacting payment; and the result merely is that the lessor may still select whichever remedy is preferred. In my opinion, the natural meaning of the words goes no further. Only the clearest language could avail to clothe a lessor under such an agreement with the right to retake the property after having received a large part of the so-called rent, and also with the right to collect in cash the remainder of the debt.

The order of the referee is affirmed.

In re MEYER.

(District Court, D. Oregon. October 3, 1910.)

1. BANKRUPTCY (§ 372*)—REOPENING ESTATES.

A petition to reopen a bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 2a (8), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), on the ground that it was closed before fully administered, can only be filed by one who has an interest and will be benefited thereby.

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

2. BANKRUPTCY (§ 328*)—PROOF OF CLAIMS—LIMITATION.

The court has no power, under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), to permit the proof of claims after the expiration of a year from the adjudication, even though the creditor was misled, and no proof made, because of the fraudulent concealment of assets by the bankrupt, who scheduled no assets.

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

In the matter of M. Meyer, bankrupt. On motion by Clara Kaufman to reopen estate. Motion denied.

Lester W. Humphries and Downs & Behrman, for petitioner.
Beck & Hoecker, for bankrupt.

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

BEAN, District Judge. On September 24, 1907, M. Meyer was on his own petition duly adjudged a bankrupt. In the schedule accompanying his petition the bankrupt stated that he had no assets and was indebted to sundry persons, including the petitioner, which debts were duly scheduled. None of the creditors appeared at the creditors' meeting called by the referee, although notified thereof, nor did they at any time file proof of their debts. The estate was closed by the referee without the appointment of a trustee, and the bankrupt discharged, in April, 1908, by order of this court. In August, 1910, Clara Kaufman, who holds a judgment against the bankrupt recovered more than four months prior to the adjudication, and who was one of the creditors mentioned in the schedule of the bankrupt, but who has not made proof of her debt, filed a petition for an order reopening the estate, on the ground that it had not been fully administered, because the bankrupt falsely and fraudulently concealed from his schedule of property certain real estate owned by him and upon which her judgment is a lien. The bankrupt demurs to this petition, on the ground that the petitioner, not having proved her claim within the time required by the bankrupt law, has no standing to ask a reopening of the case.

By subdivision 8 of section 2 of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) the District Court is given jurisdiction to reopen estates in bankruptcy whenever "it appears that they were closed before being fully administered"; but the application or petition to do so must be made by some party interested in the estate and who would be benefited by such reopening. In re Chandler, 138 Fed. 637, 71 C. C. A. 87. The petitioner does not occupy such an attitude. No creditor is entitled to participate in the distribution of a bankrupt estate, unless his claim or debt has been proved in the manner and within the time required by law. Loveland on Bankruptcy, § 130. The petitioner has not proved her claim, nor do I think she may now do so. Section 57n of the bankrupt act, so far as applicable here provides "that no claim shall be proved against a bankrupt estate subsequent to one year after adjudication." This provision has been repeatedly construed by the courts, and they are practically agreed that it is more than a limitation, but is prohibitory, and that the courts have no power or discretion to extend the time therein specified, or permit the proof of claims after the expiration of the year, even if the claimant has been misled by the fraudulent concealment of assets of the bankrupt. Loveland on Bankruptcy, § 132; In re Paine, 127 Fed. 246; In re Ingalls Bros., 137 Fed. 517, 70 C. C. A. 101; In re Shaffer, 104 Fed. 982; In re Muskoka Lumbr. Co., 127 Fed. 886; In re Peck, 168 Fed. 48, 93 C. C. A. 470.

The only case to which my attention has been called out of line with this construction is the decision of Judge Lowell in Re Towne, 122 Fed. 313, in which he held that a bankrupt is estopped from making an objection to the proof of a claim after the time specified in the law, when he intentionally and in bad faith failed to schedule his properties and thus misled his creditors. This case has not been followed by subsequent decisions, and, as suggested by Mr. Remington in his

work on Bankruptcy, "seems to overlook the fact that section 57n operates as an absolute termination of the court's power to act, and is not dependent on objection being filed by any one. The court itself should refuse to act in such cases, without waiting for any one to file objections." As stated by Evans, J., in Re Paine, supra:

"It may well be that Congress could with wisdom have put into the clause an exception covering cases where there had been a fraudulent concealment of assets; but that was a matter exclusively for Congress to determine, and not for the courts to remedy. This court at least assumes no power to interpolate an exception, and thus put into the statute what Congress declined to embrace therein. The language of the clause is plain and unequivocal. There is no ambiguity about it, and it admits of no construction. The decisions are equally clear to the effect that no proof of debt can be made after the expiration of one year after the adjudication, except in those instances where the period is extended by the act to not exceeding one year and six months."

As the petitioner has not proved her claim, and never can do so, the reopening of the case, as far as she is concerned, would therefore be an idle and vain thing, because all the trustee could do, if the case is reopened and one appointed, would be to receive the real property alleged to have been omitted from the schedule, subject to the petitioner's lien, and turn it back to the bankrupt in the same condition. There could be no sale or disposition of the property by the trustee, and no distribution to be made, as no debts have been or can be proved.

The demurrer is sustained, and petition dismissed.

UNITED STATES v. ECCLES et al.

(Circuit Court, D. Oregon. September 19, 1910.)

No. 3,600.

1. INDICTMENT AND INFORMATION (§ 87*)—AVERMENT AS TO TIME OF OFFENSE—CONSPIRACY TO DEFRAUD UNITED STATES.

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States, is not insufficient because it charges that the conspiracy was formed on a date more than three years prior to the time it was found, and sets out overt acts at different times thereafter up to and within the three years, where it is also charged that the conspiracy was in continuous operation and continuously in process of execution at all times down to that of the last overt act specified.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244–255; Dec. Dig. § 87.*

Commencement of period of limitations against prosecutions for continuing offenses, see note to Ware v. United States, 84 C. C. A. 519.]

2. INDICTMENT AND INFORMATION (§ 125*)—FEDERAL STATUTE—DUPLICITY.

The crime of conspiracy to defraud the United States, within Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), is not necessarily complete when the first overt act is committed; but, where it contemplates a series of acts, it is a continuing offense as to all conspirators who have not withdrawn therefrom as long as any act or acts are committed by one or more of them in furtherance of the object thereof; and such acts are not separate and distinct offenses, but a part of the substantive

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

offense, and may be charged in the same count of an indictment without rendering it bad for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

Prosecution by the United States against David Eccles and others. On demurrer to indictment. Demurrer overruled.

John McCourt, U. S. Atty.

Snow & McCamant and John L. Rand, for defendants.

BEAN, District Judge. The defendants were indicted for the crime of conspiracy to defraud the United States out of its public lands, in violation of section 5440 of the Revised Statutes (U. S. Comp. St. p. 3676). The indictment contains two counts. The first charges a conspiracy entered into on October 1, 1899, and continuing down to the 1st day of October, 1909, and specifies divers and sundry overt acts charged to have been committed in pursuance thereof. The second count charges a conspiracy entered into on the 11th day of March, 1907, and continuing down to the 1st day of October, 1909, and sundry overt acts committed in pursuance thereof. The defendants have demurred on the ground that the first count charges more than one conspiracy, and that both the first and second counts are duplicitous.

The true test of the sufficiency of an indictment is not whether it might have been more accurately or concisely drawn, but whether "it contains every element of the offense intended to be charged and substantially apprises the defendant of what he must be prepared to meet on the trial, 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." Peters v. U. S., 94 Fed. 131, 36 C. C. A. 109. And "no indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereunder be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant." Section 1025, Rev. St. (U. S. Comp. St. p. 720).

Within these rules, the indictment in question is sufficient, and the demurrer should be overruled. It certainly apprises the defendants of what they must be prepared to meet on the trial, and a record of the judgment thereon would show with accuracy to what extent they could plead a former acquittal or conviction. Indeed, if the indictment is objectionable at all, it is because there is set out therein evidential matter, which might have been given on the trial without alleging it. The grand jury could legally have charged a conspiracy formed at some date within three years prior to the finding of the indictment, with subsequent overt acts, and proof that the conspiracy was formed and overt acts committed thereunder prior to that time, and that it continued down to and including the dates stated in the indictment, and the commission of the alleged overt acts, and the conscious participation of the defendants therein would have been competent evidence for the consideration of the jury in determining the

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

issues presented by the indictment. Jones v. U. S., 162 Fed. 417, 89 C. C. A. 303; Ware v. U. S., 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053. The grand jury, however, saw proper to allege the date of the formation of the original conspiracy, the overt acts committed thereunder, and its existence and overt acts within three years, thus particularly advising the defendants of what the government expects to prove on the trial, and certainly they are not injured thereby. The first count, in my judgment, charges but one conspiracy or unlawful agreement. That is alleged to have been entered into on or about October 1, 1899, by the defendants and one Hyde. It is charged that such conspiracy "was in continuous operation and continuously in process of execution by the defendants at all dates and times on and between the 1st day of October, 1899, and the 1st day of October, 1909," and divers and sundry overt acts are alleged to have been committed in pursuance thereof. Hyde was a party to the original conspiracy and the alleged overt acts prior to the one charged to have been committed December 8, 1906. Thereafter the original unlawful agreement and combination, it is alleged, was continued and carried on by the defendants without Hyde, and sundry overt acts done by one or more of them in pursuance thereof. The averment that on October 11, 1907, the defendants "did knowingly, willfully, and unlawfully plot, conspire, combine, and confederate together with, between, and amongst themselves to defraud the United States of America out of the possession, use of, and title to various large tracts of public lands," etc., is simply a charge that the original conspiracy was then in existence and in process of consummation, and that the defendants were still consciously participating therein.

The contention that each overt act constitutes a separate crime, and should be so charged in the indictment, is not in accordance with the authorities as I read them, although there is ambiguity in some of the opinions. It is the conspiracy, and not the overt acts done in pursuance thereof, which is denounced by section 5440. U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. It is true the conspiracy is not effective until an overt act is committed by one or more of the conspirators, and therefore no prosecution can be had until that time, and then only against those consciously participating at the time in the effectuation of the unlawful purpose. This, however, was merely intended to afford a locus pœnitentiæ, so that, before any act is done, either one or all of the conspirators may abandon their design. Nor is the crime necessarily complete when the first overt act is committed. If, as is here alleged, the unlawful combination or agreement contemplates a series of acts for its accomplishment, requiring a considerable period of time for their performance, the conspiracy is a continuing offense as to conspirators who have not withdrawn therefrom, as long as any act or acts are committed by one or more of them in furtherance of the object thereof, and such acts are not separate and distinct offenses, but merely a part of the substantive offense. Jones v. U. S., supra; Ware v. U. S., supra; Arnold v. Weil (D. C.) 157 Fed. 429. Therefore more than one overt act may be charged in the same count of an indictment without making it duplicitous.

In re BREON LUMBER CO.

(District Court, M. D. Pennsylvania. October 13, 1910.)

No. 1,423, in Bankruptcy.

1. BROKERS (§ 53*)—SALE OF LAND—COMMISSIONS—PROCURING CAUSE OF SALE.
Whether a broker has been the procuring cause of the sale of land depends largely on the continuity of the transaction.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.*]

2. EVIDENCE (§ 213*)—ADMISSIONS—EFFORT TO SETTLE—EFFECT.
An effort to settle a claim, while ordinarily not to be taken as an admission of liability, may be so regarded when it is necessarily to be implied from it.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745–751; Dec. Dig. § 213.*]

3. BROKERS (§ 56*)—SALE OF LAND—COMMISSIONS.
Bankrupt agreed to pay claimant $10,000 commissions for a sale of certain timber land to a specified purchaser for $200,000. Claimant made various efforts to effectuate the sale, but was unsuccessful, and thereafter the price was modified, and with independent assistance a sale was made to the purchaser named for $130,500. *Held*, that the broker, having been regarded by his principal as instrumental in the consummation of the sale, was entitled to compensation for the reasonable value of his services.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85–89; Dec. Dig. § 56.*]

In the matter of the bankruptcy proceedings against the Breon Lumber Company. On exceptions to the report of a referee, rejecting a claim of the Tomb Lumber Company. Exceptions sustained in part.

S. T. McCormick, Jr., for exceptions.
W. R. Deemer and M. C. Rhone, for trustee.

ARCHBALD, District Judge. This is a claim for commissions on the sale of real estate. The Breon Lumber Company, the bankrupt, was the owner of a tract of 5,000 acres in Somerset county, Pa., and in June, 1906, George B. Breon, the treasurer, approached H. C. Tomb, of the Tomb Lumber Company, to see if his company could effect a sale of it. The title was in A. W. Buck, as trustee for certain banks which had made loans to the Breon Lumber Company, but subject to this the property was recognized as belonging to that company. The price put on it was $200,000; that is to say, 5,000 acres at $40 an acre. And it was agreed that, if a sale was made, the Tomb Lumber Company was to get $10,000. The agreement was subsequently put in writing by the following letter:

"Williamsport, Pa., June 25, 1906.

"Tomb Lumber Company, Philadelphia, Pa.

"Gentlemen: Confirming the conversation with you when in Philadelphia, if I sell my Somerset timber lands to the Central Lumber Company, I will pay you $10,000.00 commissions for the sale of the same.

"Yours Truly, Breon Lumber Company,
"By George B. Breon, Treasurer."

Later on, in pursuance of this agreement, Mr. Breon was introduced to Mr. A. P. Woodman, president of the Central Lumber Company,

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

who went out to Somerset county with W. A. Tomb and C. L. Peaslee, representing the Breon Lumber Company, to look over the property. No sale, however, was effected as the result of this visit, and for the time being the negotiations ended. A few months afterwards Mr. Peaslee, on behalf of the Breon Lumber Company, went to Philadelphia, and new negotiations were opened, Mr. Peaslee at that time endeavoring to sell the property on a stumpage basis. But this also was ineffectual. Later in the fall, Mr. Peaslee again took the matter up with the Central Lumber Company, through Mr. Woodman and J. Hector McNeal, an attorney at Philadelphia, and, after somewhat protracted efforts, the property was sold to the Cambria & Somerset Lumber Company, a Pennsylvania corporation formed for the purpose, the whole stock of which was owned by the Central Lumber Company, there being a doubt as to the right of the latter to hold real estate in Pennsylvania on account of being a foreign corporation. The price obtained for the property was $130,500, of which $15,000 was paid in stock of the Central Lumber Company, and the balance in monthly notes, extended over five years. While the sale so consummated was not directly brought about by the Tomb Lumber Company, it was recognized by the Breon Lumber Company that that company was instrumental in selling the land, and that something was due on account of it. And, demand having been made for the $10,000 which was to be paid, a compromise was offered by which the Breon Lumber Company agreed to give a note for $500 and a deed for three houses in Philadelphia. But this was refused, it being found by the Tomb Lumber Company that the houses were incumbered to within $1,500 of their value, which reduced the offer to about $2,000.

Except for the acknowledgment by Mr. Breon that the Tomb Lumber Company was instrumental in the sale of the property, and the implication that it was entitled to something by reason of the offer of settlement, there would be nothing whatever on which to base a claim. So far as appears outside of this, the sale was brought about, not by the Tomb Lumber Company, but by Mr. Peaslee, with the aid of Mr. McNeal, who successfully concluded it. The original effort of Mr. Tomb fell through, as did that of Mr. Peaslee, for a sale on a stumpage basis. And with negotiations twice broken off in this way, and twice independently resumed, there would seem to be no place for a claim by the Tomb Lumber Company that they had effected it. But the question after all depends on the continuity of the transaction. 19 Cyc. 251. And this is often better appreciated by the parties than can be made to appear to others. When, therefore, it is testified by Mr. Breon that the Tomb Lumber Company was always understood as having been instrumental in selling the property, it is persuasive of that fact, notwithstanding what has been already alluded to. And this is confirmed by the effort made to settle, which, while ordinarily not to be taken as an admission of liability, may be so, when that, as here, is necessarily to be implied from it. 16 Cyc. 948. The sale, as eventually made, was to the party with whom Mr. Breon was put in touch, and, although the price was modified, and independent assistance had to be brought in to help, it can hardly be doubted, taking all the evi-

dence together, that the sale resulted in the end from that which the Tomb Lumber Company directly contributed.

The claimant is therefore entitled to something, and the only question is how much, as to which it is clear that it is not entitled to $10,000. So far as appears, Mr. Breon was not authorized to bind his company for any such amount, and while it could not accept the benefit of the arrangement made in its behalf, and repudiate the obligation, it cannot, under the evidence, be said that it did so. The sale as made was made with Mr. Buck, and except as the debts of the company were paid, a matter beyond its control, there is nothing to show that it got anything out of it. Nor do counsel insist on the full $10,000. This is 5 per cent. on $200,000, the amount which it was hoped would be realized, and that is evidently the way it was arrived at. And, if the sale had been effected by the Tomb Lumber Company unaided, a like percentage of the price obtained would have been naturally expected. But, as already shown, the sale was not brought about by the Tomb Lumber Company alone. It produced a party who ultimately became the purchaser, but it required the efforts of others to conclude the bargain. And, to entitle a broker to commissions on a sale, he must have been actively instrumental in its consummation. 19 Cyc. 251. Five per cent. on $130,000 would be $6,525. But that must be scaled down to allow for what was done by others. A commission of $5,000 under the circumstances would seem to be all that was earned, and this therefore is the amount which will be allowed.

The exceptions are sustained, and the claim is reinstated, but is reduced to $5,000, at which amount it is directed to be allowed to participate in the distribution.

In re MEADOWS, WILLIAMS & CO.

(District Court W. D. New York. September 27, 1910.)

No. 3,040.

BANKRUPTCY (§ 231*)—SUITS BY TRUSTEE—DUTY TO COMPROMISE.

It is the duty of a trustee in bankruptcy under Bankr. Act, July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), which requires him to collect and reduce to money the property of the estate under direction of the court, to bring suits for that purpose when there is probable cause to believe that a right of action exists; and section 56a, providing that "creditors shall pass upon matters submitted to them at meetings by a majority vote in number and amount of claims," does not vest such majority at a special meeting with authority to direct the trustee to compromise and discontinue a pending suit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 231.*]

In the matter of Meadows, Williams & Co., bankrupts. On application for order directing trustee to compromise claim against Fannie B. How. Motion denied.

See, also, 173 Fed. 694.

Rogers, Locke & Babcock and Louis L. Babcock, for Fannie B. How.

Shire & Jellinek and Edward L. Jellinek, for trustee.

Clarence U. Carruth, for opposing creditors.

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

HAZEL, District Judge. Although the testimony on the examination before the referee concerning the conduct and property of the bankrupts is confusing and unsatisfactory, and raises a doubt in my mind as to whether the trustee may finally succeed in the action brought by him against Fannie B. How, I am nevertheless of the opinion that this court should not, without better reason than appears in the moving papers, interfere with the pending action in the state court, which is at issue and prepared for trial. The duties of the trustee are prescribed by the bankrupt act, and he must institute litigations whenever it is necessary for the purpose of collecting or reducing to money the assets of the bankrupt estate. By this obligation is not meant that he should burden the assets of the estate with costs and expenses arising out of all manner of questions that may be presented for litigation. There should be probable cause at least for believing that a right of action exists before the bankrupt estate is so burdened. His right to sue is incidental to the performance of his duties, and it is not thought strictly necessary for him to first obtain the consent of the creditors or leave of the court (Loveland on Bankruptcy [3d Ed.] p. 429), though perhaps the better practice is that he should do so (Collier [7th Ed.] 540).

In the present case, at a special meeting, creditors representing claims amounting to $340,311.35 favored a proposed compromise of the action brought by the trustee against Mrs. How. Creditors in a large amount did not appear, or signify their approval or disapproval, while the trustee and minority creditors, whose claims aggregate $53,854.36, objected thereto. It is now contended by the petitioner that, pursuant to section 56 of the bankrupt act (Act July 1, 1896, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3442]), which provides that "creditors shall pass upon matters submitted to them at meetings by majority vote in number and amount of claims," etc., the court should direct the trustee to accept the compromise offered. This section, however, cannot be given the effect claimed for it, as under section 55c the creditors could only take such steps at the special meeting as would tend to the promotion of the best interests of the estate; and, aside from this, such a construction would seem to be inconsistent with section 47 (2), specifying the duties of trustees.

The affidavits of counsel for the trustee, who conducted the examination before the referee, state that in his judgment a prima facie cause of action exists. In view of such affidavits and the rule hereinabove stated, applying to actions brought by trustees in bankruptcy, I must deny the application of the petitioner; but as a majority of the creditors in number and amount favor the proposed compromise, and are unwilling that the bankrupt estate should bear the costs and expenses of the litigation, a bond of indemnity must be executed and delivered within 30 days from the entry of the order herein by the creditors opposing the compromise, saving the bankrupt estate from costs, expenses, and counsel fees of the said litigation.

So ordered.

NORTHERN PAC. RY. CO. v. KING et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,815.

1. DEATH (§ 58*)—ISSUES—BURDEN OF PROOF.
Where, in an action for wrongful death, issue is taken on the fact of death, the burden of proving it is on the plaintiff.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 78; Dec. Dig. § 58.*]

2. DEATH (§ 75*)—PROOF—CIRCUMSTANTIAL EVIDENCE.
In an action for wrongful death, the fact of death may be proved by circumstantial evidence.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 93; Dec. Dig. § 75.*]

3. EVIDENCE (§ 288*)—PEDIGREE—DEATH—HEARSAY.
The rule that under some circumstances the fact of death, as well as of birth, marriage, pedigree, etc., may be proved by hearsay evidence, is limited to the members of the family; the tradition being admissible only when coming from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they spoke the truth and could not have been mistaken.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1147; Dec. Dig. § 288.*]

4. DEATH (§ 75*)—PROOF OF DEATH—INFERENCES.
Where a passenger was alleged to have died from injuries and the amputation of his leg, but it was affirmatively shown that he survived such injuries for a week or 10 days, no inference of his death could be properly drawn therefrom.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 93; Dec. Dig. § 75.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by Margaret King and others against the Northern Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Carroll B. Graves and C. A. Winders, for plaintiff in error.

Carl J. Smith and Frank C. Park, for defendants in error.

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

ROSS, Circuit Judge. This action was brought in the court below, on behalf of the two minor children named, against the Northern Pacific Railway Company, which is the plaintiff in error here, to recover damages alleged to have been sustained by reason of the alleged death of their father, H. A. King, which the complaint averred resulted from injuries received by him while attempting to board a passenger train of the plaintiff in error at its station called Taft, in the state of Montana. During the progress of the trial Mrs. King was joined as a party plaintiff.

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

The negligence charged in the complaint against the railway company was the alleged sudden starting of its train from the station, without giving H. A. King, who had purchased a passenger ticket from the company's agent at Taft, sufficient time to get upon the train, and in permitting snow and ice to remain between the front of its depot and its tracks at that station, thereby making it dangerous for passengers to attempt to board the trains of the company at that point.

The alleged serious injury of H. A. King in his attempt to board a train of the company at Taft station was not denied by the defendant company in its answer; but it did therein expressly deny his alleged death, and also put in issue each of the allegations in respect to negligence on its part, and pleaded affirmatively that the injuries sustained by King at the time in question were the result of his own negligence in attempting to board a moving train.

Inasmuch as the action was founded on the alleged death of King, in respect to which alleged fact issue was taken by the defendant company, the burden of proving his death was, of course, upon the plaintiffs. It is quite true that the fact of one's death may be proved by circumstantial evidence, provided the facts and circumstances going to show such death be sufficiently strong. We so held in the case of The San Rafael, 141 Fed. 270, 72 C. C. A. 388, and the Supreme Court so held in the case of Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.

It is also true that under some circumstances the fact of death, as well as of birth, marriage, pedigree, and the like, may be proved by hearsay evidence. "From necessity, in cases of pedigree," said the Supreme Court in the case of Stein v. Bowman, 13 Pet. 207, 219, 10 L. Ed. 129, "hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. 'It is not every statement or tradition in the family that can be admitted in evidence.' The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

It has been held by many courts that the death of an individual, though disconnected with any question of pedigree, and for whatever purpose sought to be established, may be proved by hearsay, subject to the same restrictions that are applicable to cases where matters of pedigree are involved; but no case has been cited, and we know of none, which holds that under circumstances like those here presented, it is competent to prove the basic and controverted

fact by hearsay testimony, pure and simple. Here the accident resulting in the injury of H. A. King had but recently occurred, and whether or not it resulted in his death was susceptible of easy proof. The record shows that the accident resulted in the amputation of one of his legs, that he received other injuries about his body, and that he was taken from Taft station to a hospital at Wallace, Idaho, by the witness Austin, who was questioned and answered on the trial, among other things, as follows:

"Q. After Mr. King was injured, you went down there and seen them take him out, did you? A. Those whistles brought me out, and they were picking up a man to bring him back where the cars was, to the station. I met a friend, Mr. Leisure, and says: 'What is the matter?' He says— Mr. Graves: Never mind about that. A. I came up there to inquire; and they said my friend was hurt, Mr. King. While these people carried him up to the hospital I goes along behind the station, kind of ahead of them, and followed him right into the hospital. After that they amputated his leg, and I took him to Wallace the same day on the train going west. Q. On the same train? A. No; on the train going west. Q. What was his condition as you saw it when you were taking him to Wallace? A. His condition was— There was— I had to hold my arm under his back all the way—moved my arm up and down his back all the way to Wallace. He complained about it hurting him along his back. I carried my arm under him all the way from Taft to Wallace. Q. Do you know what injuries he had internally there? A. No; I don't know what they were. I know he was injured, because I changed him off of my arms several different times. Q. One of his legs was amputated at that time? A. Yes, sir. Q. How about the bruises on his body? A. The bruises on the body was a cut on the head— I think two cuts on the head was all that I could see, and his hand was torn a little in places. Q. Did you see his body? A. No; I didn't see his body. Q. Did he complain of pain? A. Yes, sir; he complained of pain in his back and side. Q. How about his head? A. His head—he didn't complain of his head very much, but this other pain seemed to be such a strong pain. Q. How long did you stay at Wallace with him? A. I stayed that day and night with him. Q. What was his condition, as to whether it appeared to you he would survive or not, from these injuries? A. I did not think he would get through, according to the agony he was in going to Wallace from Taft. He suffered agony all the way. Q. How long after that did he die? Mr. Graves: I object to that, unless the witness has knowledge of the fact. The Court: Overruled; exception allowed. A. I think it was about a week or 10 days after that he died."

The witness Lynch was also permitted, over the objection and exception of the defendant, to give hearsay testimony of the death of H. A. King, as follows:

"Q. (By Mr. Park, Attorney for Plaintiffs). You went over to Wallace, Idaho, shortly after Mr. King's injury? A. The following day, or the day I got the telegram—left that evening. Q. You saw him there in the hospital, did you? A. Yes, sir. Q. What was his condition at that time, when you saw him? A. Well, the doctors didn't say— Q. What was his condition, if you know? A. Well, he looked pretty bad to me. He was lying there in the hospital, and he could hardly speak when I went in there. Q. Which one of his legs was amputated at that time? A. The right leg. Q. How about bruises or injuries, at that time, if any? A. Yes, sir; his arms were bruised up. He complained of a pain in his side—right in his back; I don't remember where it was; and his head was cut. Q. Do you remember whether or not his ribs were broken, or what his condition was there? A. No, sir; he said he could not move. It would hurt him when he moved. Q. And how about the bruises on his head? A. Well, was a big lump and a cut there. Q. How long after you were there did he die? Q. (By Mr. Graves). Were you there when he died? A. No, sir. Mr. Graves: We object to anything not within the witness' knowledge. The Court: I will overrule the objection; exception al-

lowed. Q. About how long after you were there did he die? A. I believe I stayed two days. I came back, and on the way I got word, two days after, that he was dead. I am not positive."

If it be true that King died as the result of the injuries received by him, certainly the fact could have been easily shown by his attending physician, or by the hospital attendants, or the undertaker, or by other direct evidence. Instead, the plaintiffs seem to have been content to introduce, over the objection and exception of the defendant, the statement of third persons, still alive, so far as appears, and whose names were not even given, to the effect that King died. As a matter of course, no inference of his death could be properly drawn merely from his injuries and the amputation of his leg; it having been affirmatively shown by the plaintiffs that he survived such injuries and amputation for a week or 10 days. See Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281; Wilson v. Brownlee, 24 Ark. 586, 91 Am. Dec. 523; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Carnes v. Crandall, 10 Iowa, 377; Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 South. 682; In re Estate of Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

For the error above pointed out, the judgment is reversed, and the cause remanded to the court below for a new trial.

HAAS BROS. v. HAMBURG-BREMEN FIRE INS. CO.†

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,783.

1. EVIDENCE (§ 417*)—PAROL EVIDENCE—WRITTEN CONTRACT.
Where a written instrument executed pursuant to a prior verbal agreement or negotiation does not express the entire agreement or understanding of the parties, parol evidence is admissible to show the contract entered into.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1899; Dec. Dig. § 417.*]

2. EVIDENCE (§ 450*)—PAROL EVIDENCE—WRITTEN CONTRACT—RECEIPT.
After the adjustment of a fire loss, plaintiff executed to defendant insurance company a receipt for an amount equal to 75 per cent. of the loss adjusted "in full of all such claims." Plaintiff claimed that the receipt was given pursuant to a contract of settlement because of defendant's alleged insolvency pursuant to which defendant paid 75 per cent. of its claims, and agreed that, if it should pay any other San Francisco creditor a higher amount, it would pay plaintiff the difference, while defendant claimed that the receipt was given in compromise of plaintiff's claim against defendant and of various differences of law and fact, and was in full settlement and satisfaction thereof. *Held*, that the words "in full of all such claims" were not conclusive terms of the receipt, but were ambiguous, and that parol evidence was admissible to show the agreement under which the receipt was executed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082; Dec. Dig. § 450.*]

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

† Rehearing denied November 23, 1910.

3. PLEADING (§ 249*)—NATURE OF ACTION—CONTRACT OR TORT—AMENDMENT.
Plaintiff after suit brought was not entitled to amend his complaint so as to change the cause of action from contract to tort.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 710–729; Dec. Dig. § 249.*]

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

Action by Haas Bros. against the Hamburg-Bremen Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed, with instructions.

Action at law by Haas Bros., a corporation, to recover from the Hamburg-Bremen Fire Insurance Company, a corporation, the sum of $3,869.36, being the difference between 98 per cent. of the amount adjusted and agreed upon as the loss and damage occasioned by fire and sustained by plaintiff in the San Francisco fire of April, 1906, and 75 per cent. of such loss. the amount paid to plaintiff by defendant on certain fire insurance policies issued by the defendant, insuring property belonging to plaintiff against fire. Judgment for defendant on the pleadings, and plaintiff brings error.

The action was originally brought in the state court and removed to the United States Circuit Court on the ground of diverse citizenship. The allegations of the complaint are substantially to the effect that the plaintiff, a California corporation, held six policies of fire insurance issued by the defendant, insuring certain property in San Francisco belonging to plaintiff against fire; that in April, 1906, the property so insured was damaged and partially destroyed by fire; that, in accordance with the terms of said policies of insurance, plaintiff gave immediate notice of such loss to the defendant, and in due time served upon defendant its verified proof of loss on forms approved by the defendant; that thereafter, and by agreement, the loss and damage occasioned by the fire was adjusted, and by such adjustment the sum of $16,823.29 was found due from the defendant to the plaintiff by reason of such damage and loss; that thereupon the defendant became indebted to the plaintiff in said sum of $16,823.29; that, after such adjustment, the defendant falsely and fraudulently represented to the plaintiff that it was insolvent and unable to pay its creditors in full; that it was able to pay to its policy holders who had suffered loss from such conflagration 75 per cent. of their respective claims, and no more; that it was making a uniform payment to each and every one of its creditors of 75 per cent. of their claims, and no more; that this course would be pursued by the defendant until it had finally settled all claims of its San Francisco creditors, and in no event could it pay to any of such creditors a larger percentage than 75 per cent.; that defendant promised plaintiff that, if plaintiff would accept the sum of 75 per cent. on its claims against the defendant and sign a receipt in full of such claims, the defendant would, in the event that it voluntarily paid more than 75 per cent. to any of its other San Francisco creditors, pay to the said plaintiff the difference between 75 per cent. on its claims and any percentage which it paid to any other of its San Francisco creditors; that plaintiff, relying upon the false and fraudulent statement of the defendant that it was insolvent, and relying upon the promise of the defendant that it would pay to the plaintiff the difference between 75 per cent. and any other per cent. which it paid to any other of its San Francisco creditors, received from the said defendant 75 per cent. upon its claims against the defendant, to wit, the sum of $12,617.87, and gave the defendant its receipt in full for such claims; that since the settlement and payment defendant has paid to other San Francisco creditors 98 per cent. of the face value of their claims as adjusted. Plaintiff accordingly demands judgment for the difference amounting to $3,869.36.

Defendant answered the complaint, admitting the insurance substantially as alleged in the complaint, the fire and partial destruction of plaintiff's property, the adjustment by agreement of the loss and damage occasioned by the fire, but denies that the parties adjusted the amount or thereby ascertain-

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

ed that any amount was due from defendant to plaintiff by reason of the latter's damage or loss on any of said policies, and in any amount whatsoever under all or any of them; denies that defendant from and after such alleged adjustment, or at any other time, became indebted to plaintiff in the alleged agreed or other sum of $16,823.29, or in any sum in excess of $12,617.87; denies that it promised to plaintiff that if the latter would accept the sum of 75 per cent. of its claims against defendant, and sign a receipt in full for such claims, defendant would, in the event that it voluntarily or otherwise paid more than 75 per cent. to any of its other said San Francisco creditors, pay to plaintiff the difference between said 75 per cent. of its claims and any percentage which it paid to any other of its said San Francisco creditors; admits that "plaintiff gave defendant its said receipt in full"; but alleges that it was "in compromise of plaintiff's said claim against the defendant and of various differences of law and fact which had theretofore arisen between them growing out of said claims and in full settlement and satisfaction thereof." Upon the filing of the answer defendant moved for judgment on the pleadings on the ground that the complaint did not either of itself or by the assistance of the averments contained in the answer thereto set forth a cause of action against the defendant. Thereafter it was stipulated "that the promise set forth in the complaint whereby defendant agreed to pay plaintiff the difference between seventy-five per cent. (75%) of its claims and any other amount which it might pay any other claimant was an oral promise." Plaintiff thereupon moved to amend the complaint in certain particulars. The court denied plaintiff's motion to amend the complaint, and entered a judgment in favor of the defendant on the pleadings. Plaintiff brings the case on a writ of error.

Thomas, Gerstle, Frick & Beedy, for plaintiff in error.
Page, McCutchen & Knight, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges

MORROW, Circuit Judge (after stating the facts as above). It is contended by the defendant in error that the question involved in this writ of error is whether parol evidence can be admitted to vary the terms of a written contract. The only written document executed by the plaintiff after the adjustment of its losses occasioned by the fire appears to be the receipt executed by the plaintiff and referred to in the allegation of the complaint acknowledging that plaintiff received from the defendant 75 per cent. upon its claims against the defendant as adjusted, to wit, the sum of $12,617.87, "and gave to the defendant its receipt in full for such claims."

We have here an allegation in the plaintiff's complaint and the admission of the defendant's answer that "plaintiff gave defendant its receipt in full for such claims." But the payment which the receipt acknowledged was not in full for the amount of plaintiff's loss and damage as ascertained by the agreed adjustment of plaintiff's claims. That sum was $16,823.29, while the amount paid to plaintiff by defendant was $12,617.87. What, then, was plaintiff's receipt in full of? Clearly it was not in full of plaintiff's claim as ascertained and determined by the agreed adjustment of plaintiff's loss and damage by fire. It must therefore have been in full of its claims under some agreement other than that of the adjustment for actual loss and damage by fire. What was that other agreement? The receipt is silent upon that subject. Plaintiff alleges that it received 75 per cent. of its claims as ascertained by the agreed adjustment, and that this 75 per cent. was received under an agreement that, if the defendant volun-

tarily paid more than 75 per cent. to any of its other San Francisco creditors, it would pay the plaintiff the difference between 75 per cent. of its claims and any percentage which it paid to any other of its San Francisco creditors. It was under this alleged agreement that plaintiff "gave to the defendant its receipt in full for such claims." The defendant alleges that:

"Plaintiff gave to defendant its said receipt in full, in compromise of plaintiff's said claims against defendant and of various differences of law and fact which had theretofore arisen between them growing out of said claims, and in full settlement and satisfaction thereof."

Neither party claims that the receipt contained all or any of the alleged terms of the agreement. other than the amount paid and received and the recital that it was in full of such claims. How, then, can the defendant say that the parol testimony shall not be admitted to prove plaintiff's alleged agreement when it sets up as a defense to the action an alleged agreement which requires parol testimony to establish? Manifestly this is not the law. The general rule upon the subject has been stated as follows:

"Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing." 17 Cyc. 741, 742.

Numerous cases are cited in support of this text. A reference to the California case, that of Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571, will be sufficient. In that case the written instrument executed by the defendant was a promissory note in consideration of a loan. No time of payment was specified in the instrument. In such case the law implied that the money would be paid on demand; but it had been agreed between the parties that the defendants should pay the sum named in the instrument whenever they should sell the real estate therein described. The sale had been made prior to the plaintiff's demand and the commencement of the action. It was objected by the defendants that oral testimony of the agreement was incompetent for the reason that the written instrument must be held to embrace all the terms of the agreement between the parties. The court in refusing to sustain this objection said:

"The instrument, therefore, being silent in respect to the time for the payment of the money, it was competent for the plaintiff to show that a period or event had been agreed upon between the parties thereto at which the payment should be made, and such agreement could be shown by oral testimony. This evidence did not contradict or vary any of the terms contained in the instrument. The rule which excludes evidence affecting the terms of a written instrument does not apply when the parties have not incorporated into the instrument all of the terms of their agreement, and when the evidence offered or the agreement sought to be proved is not inconsistent with the terms embodied in the instrument. Evidence of a contemporaneous oral agreement as to any matter upon which the instrument is silent, and which is not inconsistent with its terms, cannot be said to contradict or vary the terms of the written instrument."

Is the recital in the receipt under consideration that it is "in full for such claims" such a conclusive term of the instrument that it is

not open to explanation by parol? The weight of authority is that it is not such a term, and that it is open to explanation.

In Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539, the action was to recover a balance due plaintiff on a contract for the delivery of hides. Under the contract, defendant was to give plaintiff a bonus on each hide delivered. At the several deliveries payments of the value of the hides were made, and plaintiff gave receipts expressed to be in full. But the bonus was not paid. Judgment was rendered in favor of plaintiff. The court, in commenting upon these receipts, used the following illustration:

"There was due to the plaintiff a sum, certain—say $2,000, as an illustration. The defendants pay $1,500, and the plaintiff gives them a receipt in full for $2,000. If A. lends B. $2,000, and B. pays A. $1,500, which A. says, either orally or by writing, is in full of the loan, it, nevertheless, is not in full. A. may at once sue B. and recover the remaining $500. There is no consideration for the professed discharge. A man cannot by the payment of $1,500 pay an admitted debt of $2,000. This has ever been the law."

In Harden v. Gordon, 2 Mason, 541, Fed. Cas. No. 6,047, Mr. Justice Story said:

"When a receipt is given in full of all demands, it is not to be taken in the admiralty as conclusive. It is open to explanation and upon satisfactory evidence may be restrained in operation."

In Kahl v. Love, 37 N. J. Law, 5, 11, the court said:

"A receipt in law must be construed in connection with the facts connected with its origin; and, in the light of the circumstances, it may mean an acknowledgment of the absolute payment of the debt, or the conditional payment of the debt. The decisions are clear and abundant on the subject, and when the receipt or memorandum of the transaction speaks of payment, or even of payment in full, it shall, if the case calls for it, be interpreted as meaning conditional payment, to be in full when paid."

In Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95, the court said:

"The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They may always be explained by oral testimony."

The reason for this exception as stated in this case is given on the authority of Lord Ellenborough in Fitch v. Sutton, 5 East, 232, that there must be some consideration for the relinquishment of the excess due beyond the sum paid, something to show a possibility of benefit to the party thus relinquishing a legal right, otherwise the agreement is nudum pactum. Reference is also made to Pinnel's Case, 5 Co. 117, where it was resolved that payment of a less sum on the day, in satisfaction of the greater, cannot be a satisfaction of the whole, because it appeared to the judges that by no possibility a less sum of money can be a satisfaction to the plaintiff for a greater sum. But the case of Kellogg v. Richards, 14 Wend. (N. Y.) 116, is also referred to where a distinction is noticed and where it was held that, if a creditor on a compromise with his debtor accept the note of a third person for a less sum than the debt due him in full payment of such debt, the acceptance of such note may be pleaded as an accord and satisfaction in bar of an action to recover the balance due beyond the

amount thus received. This is precisely the distinction to be made by the defense set up in the present case. The defendant alleges that plaintiff gave the defendant its receipt in full in compromise of plaintiff's claims against the defendant; but, as this recital does not appear in the receipt, defendant proposed to show the fact by parol testimony, which, of course, it had the right to do; and, on the other hand, the plaintiff has the right to show by parol that the fact is that the receipt was for 75 per cent. of its claims as ascertained by the agreed adjustment with an agreement that, if defendant paid more than 75 per cent. to any of its other San Francisco creditors, then the defendant would pay plaintiff such additional amount as would make the total amount paid to plaintiff the equivalent of the amount paid any other San Francisco creditor. Furthermore, if a receipt in full is conclusive upon the party signing the receipt, it must also be conclusive upon the party who receives it. It cannot be binding on one party, and not on the other. The English case of Russel v. Dunskey, 6 Moore, 233, is in this respect the counterpart of the present case. By a memorandum of adjustment indorsed on the back of a policy it was stated that a particular loss of 54£ per cent. had been settled between the plaintiff (an underwriter) and defendant; that is to say, it had been paid in full. The person who signed this memorandum was called who proved that it had been previously agreed by parol between the plaintiff and defendant that, if the underwriter in the policy should eventually pay a less sum than 54£ per cent., the surplus, whatever it might be, should be returned to the underwriter. The parol testimony was held admissible.

But it is not necessary to multiply authorities. The question has been conclusively determined for this court by the case of Fire Insurance Association v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860. In that case the Supreme Court of the United States had before it a receipt for money paid in which it was recited:

"It being in full of all claims and demands for loss or damage by fire * * * and all further claims by virtue of said policy forever waived."

The insured claimed that this was intended to cover the cost of repairing the vessel destroyed, but was not intended to cover the cost of raising and saving the vessel. The court held that parol evidence was admissible to show the further claims of the insured against the insurer, using the following language:

"There is no doubt that, when a receipt embodies a contract, the rule applicable to contracts obtains, and parol evidence is inadmissible to vary or contradict it. But the only clause in these receipts which can possibly be claimed to partake of the nature of a contract is that providing for a cancellation and surrender of the policy. There was a similar provision indorsed on the policies. These, however, were inserted in pursuance of a clause in the policy to the effect that the insurance might be terminated at any time, at the option of the company, upon giving notice to the insured, and that in such case he should be entitled to claim a ratable proportion of the premium for the unexpired term for which the policy was to run. The court instructed the jury correctly upon this point that if they found that the policies were surrendered in consideration of the unearned premiums stated in the receipts, indorsed on the policies, the surrender was no defense; and, while it had a tendency to show the plaintiffs' relinquishment of all their

rights under the policy, it was not conclusive if the jury found that it was made in consideration of the unearned premiums."

We are of the opinion that parol testimony was admissible to prove the agreement alleged in the complaint, and that the motion for judgment on the pleadings should have been denied.

The ground upon which the court denied plaintiff's motion for leave to amend its complaint is not stated in the record; but it appears to be conceded by the argument of counsel in this court that it was for the purpose of changing the cause of action from contract to tort. An action for tort cannot be for the same cause as an action on a contract. Having determined that the complaint states a cause of action on a contract, the allegations of the proposed amendments charging false and fraudulent representations on the part of the defendant with intent to deceive and mislead the plaintiff would be irrelevant and immaterial.

Judgment reversed, with instructions to deny the motion for judgment on the pleadings, and for further proceedings as may be consistent with this opinion.

MARTIN v. BURFORD et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,712.

1. PUBLIC LANDS (§ 31*)—GENERAL LAND LAWS—APPLICATION TO ALASKA.
   The general land laws are not applicable to Alaska, though the government recognizes and sanctions the actual possession and use of public land in Alaska by any Indian or other person as provided by Act Cong. May 17, 1884, c. 53, 23 Stat. 24, 26.
   [Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 31.*]

2. FRAUD (§ 23*)—FALSE REPRESENTATIONS—OWNERSHIP OF PROPERTY—DUTY OF PURCHASER.
   Where defendants, in order to induce plaintiff to purchase an interest in a salmon packing outfit, falsely represented that the property consisted of a store building and site located in a place remote from that where the bargain was made, and practically inaccessible to plaintiff at the time, and defendants knew that plaintiff had no knowledge concerning such store building and site, except defendant's representations, plaintiff was not bound to exercise diligence to ascertain whether the representations were true or false, but was entitled to rely on the truth thereof and recover damages for their falsity.
   [Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2023; Dec. Dig. § 23.*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Action by J. W. Martin against George C. Burford and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

See, also, 176 Fed. 554, 100 C. C. A. 159.

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

E. M. Barnes, for plaintiff in error.
J. A. Hellenthal, for defendants in error.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was plaintiff in the court below, where by his complaint he sought to recover damages from the defendants in error, who were defendants there, resulting to him by reason of certain alleged false and fraudulent representations alleged to have been willfully and wantonly made by the defendants in a certain written instrument, which is set out at large in the complaint, and which is as follows:

"Know all men by these presents: That we, George C. Burford, and J. B. Caro & Company, of the town of Juneau, district of Alaska, for and in consideration of the sum of two thousand ($2,000.00) dollars, to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, transfer and assign unto J. W. Martin, of the town of Haines, Alaska, one-third (⅓) interest in and to the following described property, to wit:

"One scow 'Skagitt,' her lines, gear, etc.; one scow 'Volunteer,' her lines, gear, anchor, etc.; one log float; seine boat, and seines; seines; sale barrels, tierces; salmon troughs; and one store building and site situated at Farragut Bay, Alaska, together with all things pertaining to the fishing outfit known as the 'Arctic Fishing & Packing Company,' except the launch 'Tillicum,' which said launch is hereby expressly reserved.

"And the said parties of the first part hereby covenant that they are the owners and entitled to sell the said one-third interest of all of the above-described property, which said property is known as the said 'Arctic Fishing & Packing Company' and set over the same to the said second party.

"In testimony whereof we have hereunto set our hands and seals this 28th day of August, 1905. George C. Burford. [Seal.]
"J. B. Caro & Co. [Seal.]
"By Chas. E. Hooker.
"J. B. Caro.

"Signed, sealed, and delivered in presence of:
"C. A. MacGregor.
"L. B. Francis."

The complaint alleged, among other things, that the representation and covenant made by the defendants to the plaintiff to the effect that they then were the owners and entitled to sell the one-third interest in the store building and site situated at Farragut Bay were falsely and wantonly made in order to induce the plaintiff to make the payment of $2,000; that at no time did the defendants or either of them own that building or site, and that at no time were the defendants or either of them in the possession thereof or entitled to sell the building or site; that the representation and covenant as to their ownership of and right to sell the building and site were false and known by the defendants to be false at the time of making them, and were made with the intent to, and that they did, deceive the plaintiff; that the plaintiff was at the time wholly ignorant of the falsity of such representations and believed them to be true, and would not have paid the said sum of $2,000, or any part of it, but for such belief on his part, and that he had at the time no means of learning whether or not the said representations were true or false.

The answer filed by the defendant J. B. Caro, which by stipulation of counsel was made the answer of the other defendants also, put in

issue all the allegations in respect to the false and fraudulent representations made by them and as to the plaintiff being deceived by any such representations or damaged thereby, and alleged the fact to be that at the time of the transaction in question the defendant Burford was the owner of the fishing outfit described in the written instrument already set out, which the plaintiff calls a receipt and the defendants a bill of sale; that at that time Burford also had an option upon a certain store building and site at Farragut Bay, Alaska, and that he sold to the plaintiff Martin a one-third interest in the fishing outfit for $2,000, which the plaintiff agreed to pay, and at the same time Burford fully stated to the plaintiff the fact that he held an option upon the building and site and explained to him all the details in connection therewith, and agreed to exercise the option, and thereupon to convey to the plaintiff Martin a one-third interest therein as a part of the fishing outfit so purchased; that, upon the exercise by Burford of the right of purchase under the option, the plaintiff should become the owner of a one-third interest in the store building and site, and that Burford in no way concealed any of the facts from the plaintiff; that the firm of J. B. Caro & Co., which consisted of the defendants Hooker and Caro, was at one time interested in a copartnership business known as the "Arctic Fishing & Packing Company," and that the said defendant Hooker executed the instrument set out in the complaint for the firm of J. B. Caro & Co. "for no purpose except to convey to the plaintiff whatever interest said firm might still have in the outfit conveyed by reason of their former ownership and interest in and to the said Arctic Fishing & Packing Company, and for no other, further or different purpose whatsoever, all of which was well known and understood by the plaintiff at the time"; that the plaintiff agreed to pay for the one-third interest in the fishing outfit, store building, and site the sum of $2,000, to the defendant Burford, only a small portion of which the plaintiff paid in cash, and the balance in his promissory notes; that, because of the inaccessibility of Farragut Bay to the steamship companies, it became impossible to carry on the fishing business at that point, and that a short time after that fact became known to the parties the plaintiff and the defendant Burford entered by parol "into a new and different agreement and settlement concerning their several interests in said outfit," by which it was agreed that the Farragut Bay project should be abandoned, and that the business should be conducted in Wrangell Narrows; that the plaintiff should hold his one-third interest in the fishing outfit, with the exception of the store building and site at Farragut Bay, which store building and site were estimated by the plaintiff and the defendant Burford to be of no greater value than $250; that Burford should not exercise his option to purchase the building and site, and that the plaintiff should be relieved from the payment of one of the $500 notes given by him as a part of the original purchase price, which $500 note should be canceled and surrendered to the plaintiff; that the said note has never been presented by the defendant to the plaintiff, and that the defendant Burford was ready and willing to surrender the same to the plaintiff, and had not done so because the note had been left in Juneau and was not accessible at the time of such agreed cancellation. The

reply of the plaintiff put in issue the affirmative averments of the answer.

The plaintiff gave evidence tending to support the allegations of his complaint, and to show that the affirmative averments of the answer were not true; and there was contradictory evidence given on behalf of the defendants. The plaintiff also testified that merchandising was his regular business, and that the store building and site at Farragut Bay constituted the chief inducement to the purchase made by him.

The trial court instructed the jury, among other things, to the effect that:

"If the plaintiff was aware that the representations alleged to have been made to him were false, or if the representations and surrounding circumstances were such as ought to have aroused suspicion as to their truth in the mind of a person of ordinary business care and caution, then he cannot recover unless he exercised ordinary diligence in endeavoring to ascertain whether or not the representations were true or false; and if you find that the suspicions of an ordinarily prudent and careful business man would have been aroused thereby, and that plaintiff did not exercise such diligence, he cannot recover. And, before you return a verdict for the plaintiff in this cause, you must be satisfied by preponderance of the testimony as defined in these instructions, not only that the representations were of the character and made in the manner and with the intent as alleged, but that they were also made under such circumstances, and the conditions surrounding the transactions were such as to deceive a person acting with reasonable care and ordinary prudence and caution, and, in determining this question, you should consider all the circumstances under which the alleged representations appear from the evidence to have been made, and whether under such circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon, or such as would be likely to deceive such a person."

This instruction, to which exception was taken by the plaintiff, cannot be sustained. The case shows that the situs of the property involved in the negotiation was in the sparsely settled territory of Alaska and remote from the place where the bargain was made, and practically inaccessible to the plaintiff at the time. According to the plaintiff's testimony, it was a very material fact whether or not the defendants had a store building and site at Farragut Bay, a third interest in which they were entitled to sell, for his testimony is to the effect that, being engaged in the merchandise business, the principal inducement to his purchase was the store building and site at Farragut Bay in which to carry on that business. The defendants must have known whether they had such a store building and site at Farragut Bay, and whether or not they were entitled to sell to the plaintiff a one-third interest therein, for although, as is shown in the opinion of this court in the case of Heckman v. Sutter, 128 Fed. 393, 63 C. C. A. 135, the general land laws of the United States are not applicable to that territory, and therefore, unless the building and site in question was a part of some mineral claim, the legal title to the land is still in the government, still Act Cong. May 17, 1884, c. 53, 23 Stat. 24, 26, recognized and sanctioned the actual possession and use by any Indian or other person of any land in Alaska, so that if it were true that the defendants, as represented by them in the written instrument in question, had one store building and site situate on Farragut Bay, they were legally entitled to sell to the plaintiff a one-third interest therein,

which would have passed to him the right of possession and occupancy of such undivided interest as against every one but the government. See Heckman v. Sutter, supra. The facts in relation to the defendants' possession and occupancy of the building and site and of their ownership as against every one but the government were, as has been stated, within the knowledge of the defendants, and, according to the plaintiff's testimony, were entirely unknown to him, nor, in the nature of things, could they have been known to him, since it does not appear that he had up to that time ever been at Farragut Bay, and the place, according to the record, was practically inaccessible to him. Certainly under such circumstances the plaintiff was entitled to rely upon the representations of such material facts alleged to have been made by the defendants. Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42, was a case brought to set aside a contract for fraud based upon certain false representations concerning a gold mine in Virginia. The contract was made in New York. The purchaser did not visit the mine, but relied upon the representations of the vendor, which were found to be false. In sustaining the action the court said:

"We think we may safely lay down the principle that whenever a sale is made of property not present but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying upon its truth, then the representation in effect amounts to a warranty; at least, that the seller is bound to make good the representation."

In the case of Lisney v. Selby, 2 Ld. Raym. 1118, Lord Holt laid down the doctrine:

"That a fraudulent misrepresentation or false assertion respecting a fact material to show the value of the land, by which the purchaser is injured, will subject the seller to an action for the deceit, though it was in the power of the purchaser to ascertain whether the representations were true or not."

In cases like the present, where material facts connected with the subject-matter within the knowledge of the vendor are alleged to have been falsely and fraudulently stated by him, the vendee who believes them to be true is entitled to rely upon such representations, even though other means be open to him to ascertain the truth. The vendee in such a case is, as said by the court in Wilson v. Higbee (C. C.) 62 Fed. 723, "not bound under the law to go to the expense or trouble of verifying the truth or falsity of the statements made by the vendor, and the vendor is estopped from asserting that the vendee might readily have ascertained the truth if he had examined the records of the county where the land was situated. The liability of the vendor arises from his own fraud and falsehood, and is not in any manner affected by the want of diligence upon the part of the vendee"—citing numerous cases in support of the rule stated.

The judgment is reversed, and cause remanded to the court below for a new trial.

PACIFIC MAIL S. S. CO. v. WAIMANALO SUGAR CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,839.

SHIPPING (§ 75*)—HIRING—COMPENSATION—SERVICES RENDERED TO STRANDED VESSEL.

Libelant, as owner of a steam schooner which, at respondent's request, took off and landed the passengers of respondent's steamship Manchuria after her stranding in the bay of Waimanalo on the island of Oahu, Hawaii, *held* entitled to extra compensation therefor as for extraordinary or emergency service, in view of the attendant danger because of the roughness of the sea and the position of the Manchuria on the reef, but not to any extraordinary allowance for services subsequently rendered in transporting baggage, supplies, etc., to and from the steamship after libelant's representative had been asked and had refused to fix a price for the use of the schooner, and which services were not of an extraordinary or dangerous character.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 75.*]

Appeal from the District Court of the United States for the Territory of Hawaii.

Suit in admiralty by the Waimanalo Sugar Company against the Pacific Mail Steamship Company. Decree for libelant, and respondent appeals. Modified.

Kinney, McClanahan & Derby and Holmes, Stanley & Olsen, for appellant.

Nathan H. Frank, Irving H. Frank, Smith, Warren & Hemenway, and Henry E. Cooper, for appellee.

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

ROSS, Circuit Judge. This case grew out of the stranding of the Pacific Mail steamship Manchuria on a coral reef in the bay of Waimanalo, on the northeasterly side of the island of Oahu, on the 20th day of August, 1906, the details of which stranding are set forth in the case of Pacific Mail Steamship Company v. Commercial Pacific Cable Company, 173 Fed. 28, 97 C. C. A. 346. In the present case the appellee, which was the libelant in the court below, did not sue for salvage services, but brought its libel for services rendered by its steam schooner J. A. Cummings on that occasion at the alleged request of the agents of that company—such services being alleged in the libel to have been "of an extraordinary character, and rendered at the great risk, hazard, and peril to said steam schooner J. A. Cummings, and to the great benefit and advantage of said steamship Manchuria, her passengers, and cargo," and to have been reasonably worth $4,000.

The specific allegations of the libel are, in effect, that the Cummings, on the 20th of August, 1906, landed passengers and handbaggage from the Manchuria, carrying about 197 passengers in two trips; that on the 21st of August it was loading sugar, as was its custom, at Waimanalo, and, having placed on board about 400 bags, was by the agents of the steamship company requested to go to the Manchuria,

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

and in response to that request immediately went out and near to the stranded ship, but found the sea too rough to safely do anything, and consequently went on to Honolulu; that on the next day, the 22d, it took from the Manchuria and carried to Honolulu about 80 tons of passengers' baggage and 26 boxes of valuables, worth about $75,000; that on the 23d of August it carried anchors, cables, and other material to the Manchuria, and received baggage from her, which it transported to Honolulu; that on the 24th of August it carried supplies to the ship Restorer, which was then engaged in salving operations for the Manchuria; and that on the 25th, 26th, and 27th of August it remained at Honolulu, ready to respond, if wanted, under a general request from the agents of the stranded ship.

In its answer the steamship company set up that the only work of the schooner Cummings was performed on August 20th, 22d, and 23d; that on the 21st, at the request of the libelee's agents, she went out near the Manchuria and left without doing anything; that her work was not of an extraordinary character, nor difficult, nor dangerous; that there was no general request on the part of the steamship's agents for the schooner to be ready at call during the 25th, 26th, or 27th; and that she was used merely as a matter of convenience, and not as a matter of necessity, there being other vessels available which could have done the same work.

The court below held that, inasmuch as the libelant's pleading did not allege nor call upon the libelee to meet a claim for salvage, no award could be made to the libelant upon salvage principles, however much the evidence might tend to show that the services rendered by the libelant were of a salvage nature—citing Simms v. Guthrie, 13 U. S. 18, 24, 3 L. Ed. 642; Crockett v. Lee, 20 U. S. 522, 524, 5 L. Ed. 513; Harrison v. Nixon, 34 U. S. 483, 503, 9 L. Ed. 201; Boone v. Chiles, 35 U. S. 176, 207, 9 L. Ed. 388; Hobson v. McArthur, 41 U. S. 180, 194, 10 L. Ed. 930; Eyre v. Potter, 56 U. S. 41, 55, 14 L. Ed. 592. At the same time it gave in its opinion and judgment "much weight" to the stranded condition of the Manchuria.

The libel charges that the Cummings was a steam schooner of about 79 tons, carrying a crew of 15 men, besides the master, and was staunch and in every way fitted for the transportation of passengers and cargo to and from the several ports in the island of Oahu, within the territory of Hawaii, and was of a value of about $15,000. The court awarded the libelant for the services rendered the aggregate sum of $3,183, made up of these items:

For landing passengers	$1,970 00
Conveying valuables worth $75,000 to Honolulu	375 00
Conveying 160 tons of passengers' baggage	640 00
Carrying wrecking gear to Manchuria	98 00
Attempt of August 21st to get to Manchuria	50 00
Carrying supplies for Restorer and Manchuria	50 00

Since quantum meruit is the basis of the libelant's action, we are to inquire whether these allowances are, as appellant contends, excessive.

The record shows that the schooner Cummings was owned by the libelant, and that its principal business was the transportation of

freight between Honolulu and Waimanalo, which is the landing place for the libelant's plantation, and distant in a direct line about one mile from the place where the Manchuria was stranded, but about eight miles as boats are compelled to go because of the reef. The schooner also made trips to neighboring ports, and at times carried some passengers; the usual fare for such passengers from Waimanalo to Honolulu being $1. Ordinarily the schooner made two round trips a week; "emergency trips, five trips a week, when they are jammed with sugar at Waimanalo," said one of the libelant's agents, Mr. Whitney, testifying on its behalf. The Cummings was about to leave Honolulu for Waimanalo on one of its regular trips early in the morning of August 20th, when news was received there of the stranding of the Manchuria. With commendable promptness, Mr. Whitney directed the master of the schooner to proceed at once to the distressed ship, and render any and every possible service. Arriving there about 10 a. m., the service of the schooner was at once accepted by the ship for the landing of her cabin passengers and their hand baggage, to accomplish which the schooner was compelled to go to the starboard side of the Manchuria, which was the shore side as she lay upon the reef. The evidence tended to show, and the trial court found, that the water was at the time rough and boisterous, and, although the master of the schooner had long navigated and been familiar with the waters in the vicinity, it appears that he was not familiar with the character of the sea bottom on the lee side of the Manchuria, and did not take time to make soundings, but proceeded at once to tie up at the gangway of the ship and to take off 197 of her cabin passengers, with their hand baggage, and to land them at Waimanalo. The circumstances of this operation, as disclosed by the evidence, were such as clearly to justify the conclusion of the learned judge of the court below that they were "attended with enough uncertainty to include possible damage to the Cummings." Undoubtedly the service thus rendered by the Cummings was not only of a salvage nature, but highly commendable, and, if the pleadings permitted, should be allowed for on salvage principles. Even as the case is presented, this service may be justly and properly characterized, as it was by the libelant in the court below, as extraordinary, and may be properly compensated in that light.

No further service was rendered by the Cummings on the 20th of August, and the next day August 21st, while taking aboard sugar at Waimanalo in pursuance of her regular business, her captain received a note from the bookkeeper of the Waimanalo plantation to go to the Manchuria, and started to do so; but, on going outside the reef, and within about a mile of the stranded ship, the master of the schooner, according to his testimony, considered the water too rough, and proceeded to Honolulu, after stopping 15 or 20 minutes, "sizing up the situation." August 22d the Cummings again went to the Manchuria at the request of her agents, and took therefrom 80 tons of baggage and 26 boxes of valuables, of the agreed value of $75,000, consisting principally of watch cases and watch fixtures, which were liable to injury by salt water, and all of which valuables were turned over to the schooner by the ship upon the promise of the master of the schooner to deliver them safely at Honolulu, which he did on the same day.

The next day—August 23d—the Cummings, upon like request of the agents of the Manchuria, conveyed from Honolulu to the ship certain anchors, chains, and other salvage equipment, and carried back from the ship to Honolulu more of the baggage of the passengers, which the schooner there discharged the next day, to wit, August 24th. On August 24th the Cummings was sent by the libelant to Waimanalo on one of her regular trips for sugar, and in going carried to the Restorer some vegetables, washing, and ice, which the Cummings put on a launch at Waimanalo for the Restorer. And on August 28th the Cummings, in making one of her regular trips to Waimanalo, also took some provisions and washing to the Manchuria, which it delivered in the same way.

It is contended on the part of the libelant that from August 25th to August 27th, both inclusive, the schooner was held, upon the request of the agents of the Manchuria, by the libelant, on call. Since, as the court below found, the evidence does not show that the interruption of the Cummings' visits to other ports than Waimanalo caused any injury to the business of the libelant with such ports, or to its customers, and since it does show, as the court found, that during the period extending from August 24th to August 27th, both inclusive, the Cummings was sent by the libelant from Honolulu to Waimanalo in the transaction of the libelant's own business, it does not seem of importance to determine whether the fact be, as testified by Whitney, that the libelant was requested to hold the schooner on call during the 24th, 25th, 26th, and 27th of August, or whether the request of the libelee's agents was, as testified by McClanahan, that Mr. Whitney should keep the libelee advised as to when the schooner would not be available, and that in the absence of any notice from him the libelee was to assume that she was available.

The record shows that before the ship was salved the libelant presented to the agents of the Manchuria a bill for $4,000 for the services of the Cummings, therein stated to be "emergency services," the payment of which was refused on the ground that the demand was exorbitant. The record further shows that the usual charge of the Cummings for carrying passengers from Waimanalo to Honolulu was $1 each, and that its regularly established freight charges were but one-half of the allowances made by the court below for such services.

The services rendered by the Cummings on the first day—August 20th—were undoubtedly hazardous and extraordinary, and clearly entitled the libelant, even under its pleading, to a liberal allowance. But we do not think, in view of the record, that the same can be justly affirmed of the subsequent services of the schooner. Mr. Whitney, who was the libelant's superintendent at Honolulu, gave testimony in respect to his inquiries of the master of the schooner concerning the hazardous nature of her first day's services, and also in respect to his instructions to the master regarding the subsequent services. He was questioned and answered as follows:

"Q. Did he [the master of the schooner] say anything else about the hazardous character of the service, other than it was hazardous? A. I asked him, 'Did you get alongside the ship safely without any bumping, or anything of that kind?' and he said, 'Yes,' but he said, 'It was tricky work when I

went round the bow,' and I said, 'How did you get out?' He said, 'round the bow,' and I said, 'How could you get round her bow, when I understand it she is high and dry forward and the breakers round her?' He said there was sufficient water for him to get round, instead of having to turn round and back out. 'Well,' I said, 'don't take any chances any more.' I said, 'If you are going alongside the ship again, you be careful in your judgment, that you do not lose the steamer Cummings.' Q. Is that all he said to you about the hazardous character of the service? A. We had a long conversation about the taking of the passengers on board, and the difficulty he had in getting them off the ship; that they insisted on crowding them down the gangway, and he said it was only by the utmost exertion on his part and his officers that they could keep them from crowding down and tumbling off the gangway; and that he had to call to the mate several times to stop the passengers from coming down, as they were only endangering their lives by crowding them down, and that they were getting more than he could carry. I said, 'How many did you bring the first load?' and he said, 'About 100—half the passengers,' and I said, 'Do you think it is safe now for you to go alongside that ship any more, considering the position she is in?' and he said, 'Yes; by careful handling I can get alongside all right.' 'Well,' I said, 'if it breaks any more round her stern, don't you do it, whether your judgment tells you to or not. Don't take any chance that is endangering the vessel in any way, because, if we lose that steamer, we lose her insurance and the hull to the Waimanalo Plantation. They would be tied up with sugar, and they would be in a devil of a fix.' That is just about the way I put it."

It thus appears that the schooner was specifically directed by Whitney not to take any risk in rendering any subsequent service. Moreover, it appears that after the first day's service of the Cummings it was distinctly understood between the representatives of the respective parties that for any other or further service rendered by the schooner no extraordinary nor unusual charge should be made. Mr. McClanahan, who had charge of this particular business for the libelee, testified, among other things, that, in a conversation between him and Mr. Whitney, held on the 21st of August:

"The question of compensation for the use of the Cummings was then brought up, but no definite agreement arranged upon, Mr. Whitney sidetracking the subject-matter by saying generally that the amount of compensation was not in question at all, that the boat was at our disposal, and that there would be no question about the matter of charge. I am not attempting to give his exact words, for I don't remember them. The impression was conveyed, however, that compensation was a secondary matter, that they were only too glad to assist the Manchuria and Hackfeld & Co. in any way they could that would not interfere with the regular business of the Cummings."

In referring to the same conversation, Mr. Pfotenhauer, who was vice president of Hackfeld & Co., the Honolulu agents of the libelee, testified, among other things, as follows:

"Mr. Whitney came in and asked us if we wanted to have the steamer Cummings, and I didn't say whether we wanted her or not, and then he—Then I said, anyhow, 'What will you charge us for the service you might render us?' And he said, 'Never mind the charge; we won't charge you much. We will be very fair, and we don't want to make any money out of this business, because we are both in the steamship business, and the compensation will be a secondary consideration.'"

The witness Klebahn, who was the superintendent of the steamship department of Hackfeld & Co., testified to a conversation he had with Mr. Whitney the first time he went to the Manchuria, with reference to the Cummings, as follows:

"I asked him what his charge would be for the Cummings, and he told me, 'Don't bother your head about that; go ahead and use her, if we don't get a red cent for her.'"

On cross-examination by Mr. McClanahan, Mr. Whitney was questioned, and answered, among other things, as follows:

"Q. Did you have any conversation prior to going out there [to the Manchuria] with any one in Hackfeld & Co.'s about the charge? A. I think there was no mention of any charge made until you and Mr. Pfotenhauer and myself were talking, and I think mention was made of how much the service would be for what we had already performed, and I made the statement that as soon as you were through I would send in my bill. Q. You remember that conversation? A. Yes; that is as far as I remember. Q. Mr. Pfotenhauer and myself were present at that time? A. Yes. Q. It opened up by an inquiry as to what the charge would be? A. I cannot say how it arose. Q. At any rate, there was an inquiry what the charge would be? A. Yes. Q. And the result of the inquiry was nil? A. No definite answer. Q. That is, we got no definite answer from you? A. Not a bit. Q. But, on the contrary, you said you would make a charge when the service was completed? A. Yes; that I would render a bill for the service. Q. Now, this conversation, was it before or after the trip that you went out to the Manchuria? A. After the trip I made."

If the representative of the libelant entertained the intent to make any "emergency" or unusual charge for any services thereafter rendered by the Cummings, good faith required that the libelee be apprised of it. Pacific Mail Steamship Co. v. Commercial Pacific Cable Co., 173 Fed. 28, 44, 97 C. C. A. 346.

We are of opinion that for the services of the Cummings rendered subsequent to August 20th the libelant is entitled only to their actual value, based, not upon the theory that they were of any extraordinary nature, or rendered in the face of an emergency, but their reasonable value, considered with reference to like services rendered by the libelant under ordinary conditions.

Agreeing with the trial court, however, that the services of the schooner on the 20th of August were extraordinary and of a hazardous nature, we are of opinion that they should be compensated upon that basis—a liberal allowance for which we think is $1,000.

The cause is remanded, with directions to the court below to modify the judgment in accordance with the views herein indicated—each party to pay its own costs of this appeal.

THE JAMES McCAULLEY. THE MARIE PALMER. THE BLANCHE HOPKINS.

(Circuit Court of Appeals, Third Circuit. September 28, 1910.)

No. 1,345.

1. COLLISION (§ 66*)—SCHOONER AND TUG AND TOW MEETING—FAULT OF TUG.

The finding of the District Court that a tug with a schooner in tow on a hawser was solely in fault for a collision between her tow and a meeting schooner in Delaware Bay at night, on the ground that she held her course directly toward the meeting schooner until they were

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

so close that there was danger of collision, and then attempted to cross the schooner's bow with her tow, affirmed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*]

2. ADMIRALTY (§ 92*)—SUIT IN REM—LIMITATION OF RECOVERY BY STIPULATION FOR RELEASE OF VESSEL.

Where a vessel libeled in a suit in rem is released on a stipulation for value, the court is without jurisdiction to enter a decree against the stipulators for a greater sum than that named in the stipulation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 646–649; Dec. Dig. § 92.*]

Archbald, District Judge, dissenting

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

Suits in admiralty for collision by the schooner Marie Palmer against the Blanche Hopkins and the tug James McCaulley, and by the Hopkins against the McCaulley and the Palmer. Decree against the McCaulley in each case, and claimant appeals. Modified and affirmed.

For opinions below, see 155 Fed. 894, and 173 Fed. 569.

John F. Lewis and F. C. Adler, for appellant.

Howard M. Long, for appellee Marie Palmer.

Henry R. Edmunds, for appellee Blanche Hopkins.

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

LANNING, Circuit Judge. This case grows out of a collision of the two schooners Marie Palmer and Blanche Hopkins in Delaware Bay shortly after 3 o'clock on the morning of October 30, 1903. Both of the schooners were seriously damaged. The Palmer, towed by the tug James McCaulley, was passing down the bay and the Hopkins was coming up. There were two proceedings in the District Court, one on the libel of the master of the Palmer against the McCaulley and the Hopkins, and the other on the libel of the master of the Hopkins against the McCaulley, whose owner brought in, under the fifty-ninth admiralty rule, the Palmer. In these two proceedings the District Court held the McCaulley to have been solely at fault. See opinion, 155 Fed. 894. After a reference to a commissioner and the confirmation of his report, a decree was entered in each of the proceedings against the McCaulley in accordance with the opinion of the District Court in 173 Fed. 569. The two proceedings have been consolidated for the purposes of the present appeal. The master, mate, engineer, and steward of the McCaulley, the master, lookout, helmsman, and one of the crew of the Hopkins, and the master, second mate, and helmsman of the Palmer, were the witnesses in the two proceedings. Their testimony is conflicting. There would be little profit in discussing it in detail. We have read it with care, and are perfectly satisfied with the conclusion of the District Court that the Palmer was wholly free from fault. The real question in the case is whether the collision was due to the negligence of the McCaulley only, or to that of the Hopkins only, or to the joint negligence of the McCaulley and the Hopkins.

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

The substance of the testimony of the four witnesses for the Hopkins is that 8 or 10 minutes before the collision the red and green side lights of the tug McCaulley were seen about one point off the Hopkins' port bow; that, when near the Hopkins, the McCaulley crossed the bow of the Hopkins and barely escaped a collision; that the Hopkins, then discovering the Palmer about four points off the Hopkins' port bow, put her wheel hard up for the purpose of crossing and cutting the hawser running from the McCaulley to the Palmer, and thereby avoiding, if possible, collision with the Palmer; and that the Hopkins succeeded in cutting the hawser, but that the Palmer struck the Hopkins near the latter's stern.

The substance of the testimony of the witnesses for the McCaulley and the Palmer is that the Hopkins first showed to them her lights from one-fourth of one point to one point off their starboard bows; that a little later the Hopkins changed her course across the bows of the McCaulley and the Palmer; that the tug McCaulley then gave two blasts indicating her intention of passing the Hopkins starboard to starboard, and starboarded her wheel for that purpose; that, as the Hopkins continued her course across the McCaulley's bow, the McCaulley blew four blasts as a signal of danger and hard-starboarded her wheel; and that, although the McCaulley escaped, the two schooners collided.

It appears, also, that the McCaulley was on the easterly side of the channel, which was at least a mile wide. She should have been on the westerly side. The Hopkins was about in the midchannel, or possibly a little on the easterly side. The Palmer had no choice as she was the tug's tow. Whichever of the two conflicting stories is adopted, it is clear that the tug McCaulley attempted to cross the Hopkins' bow. Her own master says that if he had been at the wheel, and had seen the Hopkins' lights, he would not have attempted to cross the Hopkins' bow. Other witnesses say that if the tug had steered to the west instead of the east—that is, toward the port side of the Hopkins and the proper side of the channel—there would have been no collision.

There is no suggestion by any of the witnesses that the tug at any time changed her course toward the west. All the witnesses who testify on the subject say that her changes were toward the east. If, then, we accept as true the statements of the witnesses for the Hopkins that, when the lights of the tug were first seen from the Hopkins, they were on the Hopkins' port bow, and that the Hopkins did not change her course, the changes in the course of the tug took her and her tow across the Hopkins' bow, and the Hopkins is without fault. If, on the other hand, we accept as true the statements of the witnesses for the tug and the Palmer that, when the Hopkins' lights were first seen, they were off the starboard bows of the tug and the Palmer, and the tug's changes were toward the east, there could have been no collision unless the Hopkins had changed her course also toward the east. Of the four witnesses for the tug the mate is the only one who testifies that the Hopkins altered her course. Of the three witnesses for the Palmer two testify that the Hopkins altered her course. Of the four witnesses for the Hopkins the lookout says he could not tell whether the Hopkins altered her course as he was on

the lookout. The man at the wheel admits that the course of the Hopkins was changed one-fourth of a point toward the east, but we think his testimony is to the effect that the change was made before the lookout reported the lights of the tug. The master declares that no change in the course was made from the time of the lookout's report until after the tug had crossed the Hopkins' bow and blown her danger signals. The fourth witness, a member of the crew, is silent on the question of change in the course of the Hopkins.

Whether all the vessels were on the easterly side of the channel or not, we are satisfied that location was not the proximate cause of the collision. The Hopkins was a sailing vessel, and, as against the tug, was entitled to hold her course. The vessels were approaching each other at the time when their lights were first seen, nearly head on. The duty of the tug was to steer clear of the Hopkins. The District Court regarded it as incredible that the Hopkins, a sailing vessel, changed her course to the east, and attempted to cross the bow of the tug. We should not reverse the finding of that court except on a clear preponderance of evidence against the Hopkins. No reason for changing her course to the east is shown or suggested. All four of her witnesses expressly declare that, when the tug's lights were first seen by them, the tug was about one point off the Hopkins' port bow. If that be so, then, since the tug was concededly on the easterly side of the channel, the Hopkins was still further on that side, which was her proper side. Only the mate of the tug and the master and second mate of the Palmer claim to have seen the lights of the Hopkins when they were first discernible. After a careful consideration of all the evidence, we have concluded that there is not such a preponderance of proof of negligence on the part of the Hopkins as to warrant a reversal of the decree of the District Court.

The decree of the District Court in the proceeding instituted by the libel of the master of the Palmer against the tug McCaulley and the schooner Hopkins is divided into two parts, and declares:

(1) That the master of the Palmer recover from the claimant of the tug McCaulley and his stipulator the aggregate sum of $2,161.95 for damages to the Palmer and for interest, and also the sum of $398.13 for costs, making a total sum of $2,560.08.

(2) That the libel of the master of the Palmer be dismissed as to the schooner Hopkins, and that the master of the Hopkins recover from the master of the Palmer and his stipulator costs amounting to $284.20.

The decree in the proceeding instituted by the libel of the master of the Hopkins against the tug McCaulley and the schooner Palmer is also divided into two parts, and declares:

(1) That the master of the Hopkins recover from the claimant of the tug McCaulley and his stipulator for damages to the Hopkins, with interest, the aggregate sum of $7,326.08, and also for costs the sum of $660.70, making a total sum of $7,986.78.

(2) That the petition of the claimant of the tug McCaulley, filed under the fifty-ninth admiralty rule for the purpose of bringing in the schooner Palmer, be dismissed, and that the master of the Palmer

recover from the master of the tug McCaulley and his stipulator costs amounting to the sum of $72.75.

On November 4, 1903, a stipulation was entered into by the proctors of the Palmer and the Hopkins and their respective owners, setting forth the filing of libels by the master of the Palmer and the master of the Hopkins, and agreeing that the tug McCaulley might be released from attachment in each of the two cases upon a stipulation being given by the claimants of the tug, with sufficient surety, in the sum of $10,000, the agreed value of the tug. It was further agreed that:

"Said stipulation shall be for the benefit of the libelant in both of the above causes should anything hereafter be found to be due from the said tug 'James McCaulley,' in proportion to their respective claims."

Pursuant to the above-mentioned stipulation, James McCaulley, claimant of the tug James McCaulley, and Bonaparte Shoe, his stipulator, on November 5, 1903, entered into a bond acknowledging themselves to be jointly and severally indebted to the master of the Palmer and the master of the Hopkins in proportion to the amounts that might thereafter be adjudged to be due to the libelants, respectively, and, in accordance with the terms of the above mentioned stipulation, in the sum of $10,000, and on the same day the court entered an order releasing the tug James McCaulley from attachment. It will be observed that the aggregate amount of the decrees against the tug McCaulley exceeds the sum of $10,000. In one of the assignments of error this is complained of, and, under the authorities, the assignment must be sustained. In The Ann Caroline, 2 Wall. 538, 548, 17 L. Ed. 833, it was decided that a stipulation for the value of a vessel in an admiralty proceeding stands in the place of the vessel, and that the decree, as against the stipulators, cannot exceed the amount of the stipulation. "Whenever the obligation of the stipulator," said the court, "is for a definite sum named in the stipulation, the surety stipulating to pay that sum cannot be compelled to pay more than that amount. Same rule prevails whether the instrument is in form a bond or stipulation."

In The Steamer Webb, 14 Wall. 406, 418, 20 L. Ed. 774, the court said:

"The libel was in rem against the steamer, and the decree cannot be for more than is within the jurisdiction of the court. The steamer was discharged from arrest on stipulation in the sum of $18,000 for value and $250 for costs. The stipulators, to the extent of their stipulation, have been substituted for the steamer, and thus nothing but the $18,000 value and $250 for costs is within the control of the court. To that extent, and no greater, the stipulators have subjected themselves to the judgment of the court, and they cannot be made liable as stipulators beyond it. It was so determined in the case of The Ann Caroline, and we need not repeat what was then said. The decree in this case was largely in excess of the stipulation, and, while it is affirmed upon its merits, it must be modified in regard to the amount of damages recoverable from the stipulators. The decree of the Circuit Court is affirmed with the modification that it be reduced to the sum of $18,000 damages and $250 costs. And it is further ordered that each party pay his own costs in this court."

The record of the present case fails to disclose whether any bond for costs was given in the court below. It does appear that the court ordered an appeal bond to be given in the sum of $750. The order of this court will therefore be that the portion of the decree of the court

below entered in the proceeding instituted by the libel of the master of the schooner Marie Palmer for the aggregate sum of $2,560.08 for damages and interest, and the portion of the decree of the court below entered in the proceeding instituted by the libel of the master of the Blanche Hopkins for the aggregate sum of $7,986.78, be proportionately reduced so that these parts of the two decrees will equal the sum of $10,000. As thus modified, each of the decrees will be affirmed. The master of the Palmer and the master of the Hopkins are each entitled to recover against the claimant of the tug James McCaulley and his surety their costs on the appeal bond given by the claimant of the tug.

ARCHBALD, District Judge (dissenting). If the decree against the tug is to stand at all, I agree that it should be modified in the way proposed, but it is clear to my mind that the collision occurred solely because of the negligence of the Hopkins, and that the libels against the tug should therefore be dismissed. As seen from the Palmer, when the Hopkins was first observed some two miles off, she showed her green light and bore about a quarter of a point on the Palmer's starboard bow, proving that she was to the west of the tug and tow, pursuing a diverging course, and had she continued so to do, the accident would not have taken place. On sighting the Hopkins and noting her course, the tug, at the same time, as a precautionary and perfectly legitimate measure, veered slightly to the east, which would have increased the divergence, if followed by the Palmer, or even without that, and this would have given all parties plenty of room to pass. But the Hopkins, instead of continuing her course, as she was bound to do, when about a quarter of a mile off turned admittedly a quarter of a point to the east and probably more, shutting out her green light, and showing her red, and bringing her across the course of the tug. By that time, and as the result of this maneuvre, the vessels were so close in together that the tug, in order to escape being run down, had to veer sharply still further to the east, the Hopkins, as an emergency move, turning also again in the same direction to try and cross over between the tug and her tow, hoping to cut the hawser, but being struck by the Palmer before she could get by. If she had not, by her own errors, brought about the peril where this last move became necessary, it might have been justified. But the peril being of her own making by her previous change, of course, she is not to be let go upon any such plea. It is not to be conceived that the tug, after sighting the Hopkins, a mile or more away, would deliberately change over in the direction that she was coming in the attempt to carry her tow across the Hopkins' bow. Nor, on the other hand, is the Hopkins to be charged with similar foolhardiness, except as it clearly appears from the evidence that she had not observed the tug and tow as she should, when the change to the east was made. According to Nelsen, the man at the wheel of the Hopkins, they had not seen the lights of the tug, although she was almost upon them when this was done, which accounts for it all. "Q. What order did you get from your captain when you made that change of a quarter of a point? What were his words? A. Steer northwest by north, three-quarters north. Q. How had you steered before that?

You were steering by the compass? A. Northwest by north, one-half north. Q. You had not seen anything yourself of the tug's lights, when the change was made, or had you? A. No, sir. We seen her afterwards, about a point on the port bow—on the weather bow. Q. What lights of the boat did you see? A. Red light and green light; also the masthead lights. Q. How far away do you think that the tug was when you first saw her lights? A. She wasn't a very long distance. Shortly after we sighted her, the collision occurred."

It is true that, on being asked to fix the distance, he says it was between a mile and three-quarters of a mile, but it is clear from the other evidence in the case, if not from his own, that it was much less. Harvey, the captain, also says that the lookout reported the lights of the tug about seven or eight minutes before the collision, and that they had been steering their changed course before they made the lights; also, that the tug was not a length or two away when she (the tug) shifted her course and went across their bow, which could only refer to the second change, when the collision was imminent, by which the tug just escaped being run down. It is manifest from this that the Hopkins had not sighted the approaching tug and tow, although in plain view, and had not noticed, of course, that the tug had veered to the east, as she was bound to do, and that it was because of her failure to make this timely observation that she ventured to change her course, which, under existing conditions, she had no right to do. And the lack of a proper outlook on the Hopkins, to which no doubt all this is due, is emphasized by the fact that the lights on the Palmer were not seen at all until she was bearing down on the Hopkins, four points on her weather bow, the captain springing to the wheel at this juncture, and succeeding in getting his vessel off with a glancing blow. Being convinced from these and other considerations that the situation was of the Hopkins' own making, and that this is established by evidence which we are not entitled to disregard, I cannot reconcile myself to an affirmance of the decree holding the tug liable, and am therefore constrained to dissent.

PUGET SOUND ELECTRIC RY. v. FELT et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,831.

1. CARRIERS (§ 347*)—SETTING DOWN PASSENGERS—TIME TO ALIGHT—JUMPING FROM MOVING TRAIN—NEGLIGENCE.

Where a carrier either did not stop the train on which decedent was riding at all at the station where he desired to alight, or did not stop for a sufficient length of time to enable him to get off while the train was stationary, decedent was not per se negligent in alighting while the train was moving slowly.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1393, 1402; Dec. Dig. § 347.*]

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

2. CARRIERS (§ 333*)—ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.
A passenger is not negligent in alighting from a moving train if the speed of the train and all the surrounding circumstances are such that a person of ordinary prudence would have done the same thing.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1391–1393; Dec. Dig. § 333.*]

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

Action by Susan E. Felt and others against the Puget Sound Electric Railway. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 175 Fed. 477.

B. S. Grosscup and W. C. Morrow, for plaintiff in error.

W. C. Sharpstein, A. P. Black, George Clark, and Loveday, Kelley & McMillan, for defendants in error.

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

ROSS, Circuit Judge. This action was brought in the court below by the widow and minor children of Horace Felt, deceased, to recover damages alleged to have been sustained by reason of his death on the 20th of November, 1908. The deceased got upon the interurban electric railroad train of the plaintiff in error running from Seattle to Tacoma, in the state of Washington, at Auburn station, and purchased a ticket to Valley City station, where he intended to get off. The only alleged grounds of negligence on the part of the railroad company relied upon by the plaintiffs in the court below, who are the defendants in error here, were the alleged failure of the defendant to stop its train at Valley City a sufficient time to enable passengers to alight, and the alleged sudden starting of the train from Valley City station with a jerk, thereby causing the deceased to fall against and under the train, resulting in his death. The trial having resulted in a verdict and judgment for the plaintiffs, the defendant company has brought the cause here by writ of error, relying upon alleged error of the trial court in refusing to direct a verdict for the defendant, and its alleged errors in the giving and refusal to give certain instructions to the jury.

A careful perusal of the record fails to disclose any evidence tending to show the starting of the train from Valley City with a jerk. The evidence is substantially conflicting in respect to the length of time the train on which the deceased was a passenger stopped at that station, and, indeed, as to whether it stopped there at all on the occasion in question. More than one witness on behalf of the plaintiffs testified that it did not stop there, while there was some testimony on the part of the defendant company tending to show that it stopped for from 1 to 1½ minutes. The train consisted of three coaches, the first of which was a smoker, in which the deceased rode with a companion named Gentry, and one or two other men. There was evidence given going to show that the deceased and Gentry had passed the afternoon in a saloon in Auburn playing pool and cards, and boarded the train

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

at Auburn about 6 o'clock in the evening, and there was testimony tending to show that as the train reached Valley City the deceased was in the act of taking a drink from a flask or bottle of whisky, and that, upon discovering that the place was the station at which he desired to get off, he jumped from his seat and started for the door of the smoking car, and, upon reaching the lower step of the platform of that car, took hold of the hand-hold upon the car and jumped, holding onto the handle; that he was dragged a few feet and then fell between the platform and train; that the emergency bell was rung by the brakeman and the motorman brought the train to a stop about 150 or 200 feet from the south end of the platform, when the body of the deceased was removed. The brakeman referred to testified on behalf of the company that, "as they approached Valley City, he called the station several times, and assisted some old ladies with their baskets in alighting, jumping off the train before it stopped," and that, when he saw the deceased about to get off, he (the witness) jumped down to the bottom step of the second car and made a grab for the deceased. "He dragged," continued the witness, "over the first cattle guard all right, and, going across the road crossing, I said, 'For God's sake, let go.' I knew he would not let go. I didn't know whether he was hurt at the first crossing or not, but I knew the second cattle guard on the other side would catch him, because they were built opposite to the first cattle guard, and I jumped for the emergency bell, but we run for, I guess, 150 feet before we stopped." On cross-examination the brakeman testified that at the time he gave the signal to the motorman to go ahead from Valley City he did not see any one trying to get off the second car; that he did see some men on the platform of the smoker, but did not know whether they wanted to get off or had just gotten on. "Before I gave the signal to start the train," continued the witness, "I did not look to see whether there was anybody wanting to get off the smoker. I did not make any investigation to see whether there were other passengers to get off the train. I was in a hurry. We have to hurry to make the time and make the stops at the stations as short as possible in order to make the time we are required to make. It is jump and get from the minute you leave Seattle until you get to Tacoma."

E. S. Bateman, another witness for the defendant company, testified, among other things, that "the car was moving very slowly at the time Felt attempted to get off."

In view of the testimony here referred to, it is plain that, unless we are prepared to hold that the mere alighting by a passenger from a train while it is in motion is per se negligence, the trial court would not have been justified in taking this case from the jury. The cases in respect to that question are very numerous and are more or less conflicting. Our opinion is that where, as in the case in hand, there is testimony tending to show that the railroad company either did not stop at all, or did not stop at the station to which the passenger had purchased a ticket for a sufficient length of time to enable him to get off while the train remained stationary, the alighting by the passenger at such station while the train is moving very slowly is not necessarily negligence on his part, and that, if the speed of the train and all the surrounding

circumstances were such that a person of ordinary prudence would have done the same thing, such passenger cannot be justly said to have been guilty of contributory negligence.

Such was the effect of the instructions given to the jury by the learned judge of the court below, and, we being further of the opinion that the instructions given sufficiently covered the law of the case, we affirm the judgment.

The judgment is affirmed.

CATRON et al. v. SOUTH BUTTE MINING CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,811.

1. MINES AND MINERALS (§ 122*)—CONVEYANCE OF SURFACE—RIGHT TO SUPPORT.

Where the surface of land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface, the owner of the mineral right is bound to protect the surface, unless the right to destroy the surface has been expressly reserved in terms so plain as to admit of no doubt.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.*]

2. MINES AND MINERALS (§ 122*)—CONVEYANCE OF SURFACE—DEEDS—PROVISIONS FOR SUPPORT—CONSTRUCTION.

Certain co-owners of a mining claim conveyed the surface by separate conveyances at different times; each deed reserving the minerals and the right to extract the same, and covenanting not to excavate nearer to the surface than 20 feet. One deed contained a covenant by the grantors to conduct their mining operations so as not to injure the surface rights conveyed, and so as to protect the surface for a depth of 20 feet thereunder. The other deed, while covenanting that the grantors should leave 20 feet below the surface of the ground for support, expressly provided that they did not obligate themselves to support or maintain the surface by timber or otherwise. *Held*, that neither deed absolved the grantors from their obligation, implied in the grant of the surface, so to conduct their mining operations that the surface should at all times be sustained.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.*]

3. MINES AND MINERALS (§ 125*)—ACTIONS—ISSUES AND PROOF—DECREE.

Complainant, the owner of the surface of a mining claim, sued to quiet title against the owners of the minerals; and they by answer alleged the mineral ownership, with the right to extract all ores therefrom, provided that the surface should not be damaged or in any way interfered with. Complainant, in answer to defendant's cross-bill, alleged its right to the surface and all country rock underlying the same to a depth of 20 feet, with the right to have the same undisturbed, damaged, or in any way interfered with by any of defendants' mining operations. *Held*, that a decree enjoining defendants from extracting the minerals in such a way as to injure the surface, and requiring them at all times to pro-

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

tect the surface, was not beyond the issues, under the rule that, in rendering a final decree the court may look to all the pleadings in the case to determine the issues created.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 125.*]

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

Suit by the South Butte Mining Company against Lulu F. Largey Catron, as administratrix of the estate of Patrick A. Largey, deceased, and others. From a decree for complainant, defendants appeal. Affirmed.

On February 23, 1902, patent was issued to Patrick A. Largey, Noah Armstrong, and the heirs of Robert P. Hopkins, for the Otisco lode mining claim. Thereafter, Armstrong conveyed his interest to Largey, and on July 19, 1896, Largey and his wife executed to Emery, Colbert, and Tong, a deed for their undivided two-thirds interest in "the following described surface ground of the Otisco mining claim." Then followed the description of the portion conveyed, and the following: "It being understood that the surface only is hereby conveyed, and that all minerals and metals and ores below the surface, with the right to mine, prospect for, and extract the same, is hereby reserved to the parties of the first part, their heirs, representatives, and assigns, and excepted and excluded from and not passed by this conveyance. But the said parties of the first part, their heirs, representatives, and assigns, covenant and agree that they will not mine or excavate under the surface of that portion of the lot above described, and which is covered by the said Otisco lode, nearer to the surface than twenty (20) feet from the present surface of the ground, but will, in their mining operations, leave twenty (20) feet below the present surface of the ground for support. But they do not obligate themselves, or their heirs, representatives, or assigns, to support or maintain the said twenty (20) feet by timbers or otherwise, but only not to mine or excavate within twenty (20) feet of the present surface." Thereafter the Montana Central Railway Company, which had acquired the interest of Colbert, Emery, and Tong under said deed from Largey and wife, procured a conveyance from the heirs of Robert P. Hopkins, deceased, and later conveyed its interest to the South Butte Mining Company, the appellee herein. The deed from the heirs of Hopkins to the Montana Central Railway Company contained the following provision: "And the said parties of the first part, for themselves, their heirs, personal representatives, and assigns, covenant and agree that they will not mine or excavate under the surface of that portion of the said Otisco lode claim which is hereinbefore described, and hereby conveyed, nearer to the surface thereof than twenty (20) feet, but will so conduct their mining operations as not to injure the surface rights hereby conveyed, and so as to at all times abundantly protect said surface with a depth of twenty (20) feet thereunder."

The appellee, as complainant in the court below, brought the present suit to quiet its title as against the claims of the heirs at law of Patrick A. Largey, deceased, the appellants herein, and others. In its amended and supplemental bill, after describing the portion of the surface ground of the lode claim conveyed by Largey and wife to Emery, Tong, and Colbert, it proceeds to allege: "That there is excepted from the land herein described all the ore, quartz, and rock in place, lying beneath the surface and within the limits of the Otisco mining claim." All of the defendants in their answers and cross-bills asserted a claim of title in and to a portion of the lands described in the bill. Upon the issues made, the court below entered a decree, adjudging that the appellee is the owner in fee of the surface of the said land, together with the right to have the said surface, with 20 feet underlying the same, undisturbed by mining operations or otherwise, and also is the owner of the right to subjacent support for the said surface; that as to said lands a portion of the defendants (the appellants herein) are the owners of an undivided two-thirds interest in and to all the ores, leads, lodes, veins, and ledges, and all the minerals in the same, and the decree contains the

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

further provision: "Should mining operations be conducted underneath the said surface by the said defendants, or any of them, or their servants, agents, or successors in interest, they shall so conduct their mining operations as not to injure the said surface right, and so as to at all times abundantly protect said surface with a depth of twenty (20) feet thereunder."

McBride & McBride, T. W. Nowlin, and Crittenden Thornton, for appellants.

John A. Shelton, for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). The assignments of error bring in question the correctness of the decree in giving the appellee the right of subjacent support for the surface of its land and 20 feet thereunder, and requiring the appellants so to conduct their mining operations as not to injure the same. The appellants, the Largey heirs, owning two-thirds of the lode claim, and the Hopkins heirs, owning the other one-third, deeded by separate conveyances, at different dates, their interests in the surface ground to the grantors of the appellee, reserving in each deed the minerals and the right to extract the same, and covenanting not to mine or excavate nearer to the surface than 20 feet; the Hopkins heirs covenanting to conduct their mining operations so as not to injure the surface rights conveyed, and so as to protect the surface with a depth of 20 feet thereunder, and the Largey heirs covenanting to "leave twenty feet below the present surface of the ground for support," but declaring that they did not obligate themselves to support or maintain the said 20 feet by timber or otherwise. The appellants contend that by the insertion of this last clause in their deed they are absolved from any positive duty of protecting the surface.

When the surface of land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. In either case the obligation to protect the surface is the same. Dand v. Kingscote, 7 M. & W. 174; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812. And it is well settled that the grant of the surface, with a reservation of the minerals and the right to extract the same, does not permit the destruction of the surface, unless the right to do so has been expressed in terms so plain as to admit of no doubt. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 Atl. 559; Williams v. Hay, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Burgner v. Humphrey, 41 Ohio St. 340; Livingston v. Moingona Coal Co., 49 Iowa, 369, 31 Am. Rep. 150; Collins v. Gleason Coal Co., 140 Iowa, 114, 115 N. W. 497, 18 L. R. A. (N. S.) 736; 2 Lindley on Mines, § 818; 27 Cyc. 687, 788.

In Williams v. Hay it was held that a covenant to protect the surface will be implied in the absence of all words to that effect, and solely from the nature of the transaction. In that case the deed provided

that the grantor, in mining and removing mineral, "shall do as little damage to the surface as possible." It was contended that by these words there was granted the power to destroy the surface; but the court said that an absolute right to surface support was not to be taken away by a mere implication from language which did not necessarily import such a result. So in Burgner v. Humphrey the court held that a mining lease, in which it was stipulated that no mining operations should extend to or be so near the dwelling house or barn on the leased land as to injure the same, did not by implication give the lessee the right to injure the surface elsewhere; and in Livingston v. Moingona Coal Co., where there was a reservation of minerals and the right to mine the same, "without thereby incurring in any event whatever any liability for injury caused or damage done to the surface of the land in working coal mines, minerals," etc., the court held that the grantors were bound to support the surface, and that the intention to dispense with subjacent support had not been manifested by clear and unequivocal language. In Davis v. Treharne, 6 Law Reports, 460, Lord Watson said:

"When a proprietor of the surface and the subjacent strata grants a lease to the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of the contract."

Upon a careful consideration of the language of the deed of the appellants, in the light of the authorities, we are not convinced that the trial court erred in holding that the grantors therein were not absolved from the obligation to support the surface. That obligation, as we have seen, was implied in the grant itself. To qualify that obligation, the grantors stipulated that they did not bind themselves or their representatives or assigns to support or maintain the said 20 feet by timbers or otherwise, but only not to mine or excavate within 20 feet of the present surface. All that they can claim from these words of the deed is that they shall not be called upon to support by timbers or other artificial means the superincumbent 20 feet. They are not thereby absolved from their obligation, which is implied in the grant of the surface, so to conduct their mining operations that the surface shall at all times be sustained. This is all that the decree requires them to do.

The appellant contends that the decree is not supported by the bill, that the appellee seeks by its bill a decree quieting its title to the surface of the land in controversy, and that a complainant cannot, in a suit to quiet title to the surface only, obtain a decree enjoining defendants, who are admitted to own the minerals beneath the surface, from extracting the same in any way, especially in the absence of special allegations to justify such relief. It is true that the bill, so far as the Otisco mining claim is concerned, seeks only to quiet the appellee's title to a portion of the surface; but the court, in rendering a final decree, could properly look to all the pleadings in the case, and the issues thereby created. In the answer of the appellants to the amended and supplemental bill they alleged their ownership to the minerals lying beneath that portion of the surface of the Otisco claim described in the bill, with the right to mine and extract all ores therefrom, "pro-

vided that, in the exercise of such right, the surface of said ground shall not be damaged or in any wise interfered with"; and in its answer to the cross-bill of the appellants the appellee alleged its right to the surface, and all country rock underlying the same, and all of the ground within 20 feet underlying the same, "undisturbed, damaged, or in any way interfered with by any mining operations which may be carried on," etc., beneath the said 20 feet. The trial court, therefore, did not go beyond the issues in the case in awarding the appellee the relief which is specified in the decree.

The decree is affirmed.

LA FONCIERE COMPAGNIE D'ASSURANCES CONTRE LES RISQUES DE TRANSPORT DE TOUTE NATURE v. DOLLAR.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,688.

INSURANCE (§ 477*)—MARINE INSURANCE—GENERAL AVERAGE EXPENSE—TOWAGE TO PORT OF NECESSITY.

A steamer, insured under a term policy providing that the insurer should not be liable for any particular average loss not amounting to 5 per cent. net, was proceeding to Hoquiam, in Gray's Harbor, for a cargo of lumber for San Francisco, when, in entering the harbor, she broke her rudder, rendering her unseaworthy. It was agreed between owner and insurer that San Francisco was the nearest port where she could be properly repaired, and by agreement she was towed to Hoquiam, loaded with lumber, and towed to San Francisco, where she was repaired. *Held*, that the voyage to San Francisco was one of necessity to a port of repairs, and the expense of the towage was in the nature of a general average charge, for the benefit of both owner and insurer, and for which the insurer was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1248, 1249; Dec. Dig. § 477.*

Marine insurance, general average, see note to Pacific Mail S. S. Co. v. New York, H. & R. Min. Co., 20 C. C. A. 357.]

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

Suit in admiralty by Robert Dollar, trustee, against La Fonciere Compagnie D'Assurances Contre Les Risques De Transport De Toute Nature. Decree for libelant, and respondent appeals. Affirmed.

For opinion below, see 162 Fed. 563.

Andros & Hengstler, for appellant.

Charles Page, Edward J. McCutchen, and Samuel Knight, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant insured the interest of the appellee in the steamer Grace Dollar, at San Francisco, on the 20th day of January, 1903, for the term of one year, from loss by reason of perils of the sea; the insurer, however, not to be liable for any particular average loss not amounting to 5 per cent. net. The action was brought

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

in the court below by the appellee against the appellant upon that policy, and the case was there submitted upon an agreed statement of facts, which recites that:

"While the policy was in force, viz., on August 31, 1903, the steamer Grace Dollar sailed in ballast for Hoquiam, a loading port in Gray's Harbor, there to load a cargo of lumber and to bring the same back to San Francisco. While entering Gray's Harbor, the master, without fault on his part, and by reason of a sea peril, missed the channel and touched bottom, thereby severely injuring his vessel's rudder. A jury rudder was fitted on, and she was able to make the harbor under her own steam. From there she was towed to Hoquiam, where she was filled with lumber in her forward part, so that her stern was brought out of the water high enough to allow of her being beached, and a better jury rudder fitted. She was thereafter beached, a jury rudder was fitted, and she was again towed off, and then taken to Wood's Mill, in Gray's Harbor, where she loaded a full cargo of lumber; the insurers having consented to towage to San Francisco in her disabled condition, provided she should take a cargo of lumber. On September 13th she started for San Francisco in tow of the steam tug Rival, at which port she arrived in due course. There was no opportunity or facility at any of the points named, except San Francisco, to obtain the repairs necessary to make the ship seaworthy. Like facilities existed at Portland, Or., but by agreement between the parties San Francisco was accepted as the nearest port at which this could be done, and under this agreement the vessel proceeded as aforesaid to San Francisco, instead of Portland. Gray's Harbor is a safe place at which a vessel may lie protected against the weather at all times."

Upon her arrival at San Francisco, the damage sustained by the vessel was repaired, the costs of which, as well as the towage, being paid by her owners. Thereupon an adjustment was made in which the cost of towage to San Francisco was treated as a general average charge. The libelant, having paid the charges according to the adjustment so made, brought the action to recover the amount thereof from the insurance company, which denied liability on the ground that the cost of towage was not properly a general average charge, but a particular average expense, and was not equal to 5 per cent. of the value of the vessel.

The agreed statement of facts further shows that:

"If the said expense of towage to San Francisco be in law a particular average charge, the libelant's proportion of the amount of this and other charges of a particular average is less than 5 per cent. net of the amount insured by respondent's policy, and libelant under such conditions has no claim or loss thereunder, by reason of the limitation of clause 1 of the policy, which provides that no claim of partial loss or particular average shall in any event be paid under said policy unless amounting to at least 5 per cent. net. If the said towage expense was properly stated in the said adjustment as a general average charge, the insurance, including the respondent, would be liable, under the policy, for the amount thereof, and, in such event, the respondent's liability under the said policy for its proportional share of all general average expense is the sum of $41.25."

The sole question presented for decision is whether the cost of towing the Grace Dollar from Gray's Harbor to San Francisco was a general or a particular average expenditure. The court below held that it was in the nature of a general average expense, basing its decision largely upon the decision of Judge Story in the case of Potter v. Ocean Insurance Company, 3 Sumn. 27, Fed. Cas. No. 11,335.

That was an action on a policy of insurance dated March 4, 1836,

whereby the Ocean Insurance Company insured Potter "fourteen thousand dollars on the bark Hannah, at sea and in port, for and during the term of one year, commencing the risk on the 3d of March, 1836, at noon. Should this vessel be at sea on a passage on the expiration of the year, the risk to continue at pro rata premium until her arrival at her port of destination, paying one-half per cent. additional premium, etc., at and after the rate of five per cent. premium." The policy contained, among other things, a clause that "the company are not liable for wages or provisions, except for general average." On the trial it appeared in evidence that the bark Hannah sailed from New Orleans on the 4th of November, 1836, with a cargo destined for and to be landed at Tampico. In the course of the voyage, on the 9th of the same month, in a severe squall, both of the masts were carried away; and on the 11th of the same month a heavy gale was experienced, in which a heavy sea struck the stern boat from the stern and stove it to pieces; and on the 5th of December following the bark arrived at Tampico and delivered her cargo. The necessary repairs to enable the bark to prosecute any further voyage could not be obtained at Tampico, and the bark returned to New Orleans, and there the repairs were made. The amount of those repairs, and the incidental expenses of the return to New Orleans as in case of a general average, and the value of the stern boat, were claimed by the plaintiff from the insurance company. The company paid the amount admitted to be due on account of repairs, but contended that it was not liable for the wages, provisions, and other expenses incurred in the return voyage to New Orleans as a general average, (1) because the contemplated destination of the bark was, in the regular course of her projected voyage, intended to be directly back from Tampico to New Orleans; (2) because it could not be treated as a case of general average, since there was no cargo intended to be taken back from Tampico to New Orleans. The company also contended that they were not liable for the loss of the boat, as it was lost in another and a distinct storm, and that the loss would not amount to 5 per cent.

It appeared in evidence that the cargo was shipped at New Orleans, on a voyage "from New Orleans to Tampico, and from thence back to a port of discharge in the United States." The cargo was shipped under a charter party which contemplated the landing of the cargo at another port, Metamoras, at the election of the agent of the ship at Tampico. The master in his deposition swore that the voyage was not intended to be directly back to New Orleans; that, on the contrary, it was his intention, after delivery of the cargo, to employ the bark in that way which should be most for the interest of the owner. At the time he had in contemplation to go to Tabasco for a load of wood to carry to New York, but was prevented from employing her in that way, or any other, by the disaster. He also swore that his return to New Orleans was not in the regular course of the projected voyage, but solely for and from the necessity of the repairs to be made there as the nearest and most convenient port for that purpose. The counsel for the plaintiff contended (1) that under the circumstances the voyage to New Orleans was a voyage of necessity for repairs; that the company were liable to the usual expense of wages, provisions, etc., for that

voyage, as in the nature of general average; (2) that the loss of the boat was solely attributable to the disabled and crippled condition of the bark by the first storm, and her being unable to be kept from rolling in the trough of the sea by the want of any proper sails.

Mr. Justice Story, sitting as Circuit Judge in the case, held, among other things, that the wages, provisions, and other expenses of the voyage to the port of necessity, for the purpose of making repairs, constituted a general average; that it makes no difference, in the application of the principle to policies of insurance, that there happens to be no cargo on board, so that there is, in fact, no contribution to be made by the cargo or by freight; for general average does not depend upon the point whether there are different subject-matters to contribute, but whether there is a common sacrifice for the benefit of all who are or may be interested in the accomplishment of the voyage; nor does it make any difference in the application of the principle that the insurance on which the question arises is not for a particular voyage, but on time.

Appellant contends that there are substantial distinctions between the case cited and that at bar, and also contests its soundness. In so far as the question here involved is concerned, we see no substantial difference between the two cases. Here the parties, in effect, expressly stipulated that the voyage from Wood's Mill, in Gray's Harbor, to San Francisco (which was not, as said for the appellant, the voyage originally contemplated by the parties), was a voyage of necessity to a port of repair. The ship had not reached Hoquiam at the time she was disabled, and never did do so, so far as appears, and, as a necessary consequence, never did take aboard the cargo of lumber she engaged to take. When she became disabled on entering Gray's Harbor, there was, of necessity, but one of two things to be done—obtain repairs, or await eventual destruction. Being without cargo, there was no freight pending, and there were, consequently, but two interests then involved—the interest of the owners, and that of the insurer. That circumstance, however, does not preclude the adjustment occasioned by a voluntary sacrifice being made on general average principles. In that condition, and under those circumstances, the Grace Dollar was, according to the agreed statement of facts, "towed to Hoquiam, where she was filled with lumber in her forward part, so that her stern was brought out of the water high enough to allow of her being beached, and a better jury rudder fitted. She was thereafter beached, a jury rudder was fitted, and she was again towed off, and then taken to Wood's Mill, in Gray's Harbor, where she loaded a full cargo of lumber; the insurers having consented to towage to San Francisco in her disabled condition, provided she should take a cargo of lumber." The lumber taken on board by the disabled ship at the request of the insurer was manifestly for the better security of the vessel while being towed to San Francisco, and consequently for the benefit, in part, at least, of the insurer; the cost of which towage was, in our opinion, of a general average nature, and the payment of which was in the nature of salvage, and for the benefit of the insurer as well as the owners.

Not only are we unable to see any substantial distinction between the present case and that of Potter v. Ocean Insurance Co., but we think

the decision of Justice Story in that case in line with what was said by that eminent judge in delivering the opinion of the Supreme Court in the case of Columbian Insurance Co. v. Ashby, 13 Pet. 329, 10 L. Ed. 186. See, also, Greely v. Tremont Ins. Co., 9 Cush. (Mass.) 415; Steamship Carrisbrook Co. v. London, [1902] 2 K. B. 681; Montgomery v. Indemnity Mut., [1901] 1 K. B. 147, [1902] 734.

It seems to be conceded by both parties to the present controversy that whether an act is general or particular average must depend upon the nature of the sacrifice, and not on whether there is more than one contributory interest.

The judgment is affirmed.

CŒUR D'ALENE LUMBER CO. v. GOODWIN.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,813.

1. TRIAL (§ 419*)—MOTION FOR NONSUIT—WAIVER.
   Denial of a motion for nonsuit at the close of plaintiff's evidence is waived by defendant introducing its evidence.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

2. PLEADING (§ 34*)—COMPLAINT—CONSTRUCTION.
   Where defendant has answered, the complaint should receive a liberal construction, especially when challenged by an objection to the introduction of evidence.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. § 72; Dec. Dig. § 34.*]

3. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—COMPLAINT.
   Where a complaint for injuries to plaintiff as off-bearer from an edger in defendant's sawmill alleged that plaintiff was put to work in a box of rather small dimensions, with planks coming away from the edger passing him on both sides, requiring him to remove the edgings as they came by, that he was inexperienced in the service, and was not warned or instructed relative to the danger thereof, and that he was struck and injured by a plank propelled along the table, the complaint stated a cause of action.
   [Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.
   In an action for injuries to an off-bearer from an edger in a sawmill, whether defendant, in view of plaintiff's ignorance, was negligent in failing to give plaintiff special instructions, intended to prevent injury, *held* for the jury.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1044–1050; Dec. Dig. § 286.*]

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

Action by George Goodwin against the Cœur d'Alene Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action for damages, arising on account of personal injuries received, alleged to have been caused by the negligence of the plaintiff in error.

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

Plaintiff below, the defendant here, was injured while at work in an edger pit or box tailing the edgings from boards or planks as they came from a double edger. The table which carried the boards was 5 feet and 1 or 2 inches wide, and was provided with rollers, over which the boards were moved as they came from the machine. These rollers were four in number after leaving the press rollers. The press rollers were arranged one set in front and one aft of the edger saws, and were used for holding the planks in place while passing through the machine. The edger pit was an open space left in the table between two of the rollers over which the planks were carried away. In dimensions it was about 5 feet 1 inch in width, the width being crosswise of the table, 2½ feet in length, and 2 feet 9 inches in depth. The last roller formed the back end of the edger pit, in front of which was constructed a fender about 8 inches in width, extending from near the top of the roller downward on an incline within the pit. The purpose of the fender was to guide the boards as the ends came across the pit above the roller and allow them to pass on to the table below. The plaintiff was put to work in the edger pit; his duty being to shove or cast the edgings from the planks to the outside of the table, to be carried away. The edger being of the double pattern, boards were edged at the same time upon both sides of the table, and the man in the pit was required to stand between these boards, as they came away from the machine, and perform the work. His position was facing the edger; but his work required him to shift or turn about more or less to clear the table of the edgings as they came down the table along with the planks. The distance from the last pair of press rollers, or those just aft of the edger, was about 18 feet, or possibly 18 feet 6 inches, to the edge of the pit, and 21 feet to the roller at the after edge. The boards, while passing through the pressure rollers, were driven through with considerable force by the power of the machinery; but, when released, were carried on by their own momentum, and could be checked or stopped by a person in the pit, but not otherwise.

Now, in view of this construction of the edger, the table for carrying away the boards and edgings, the edger pit, and its relation to the edger, and the manner in which the whole was operated, it is alleged in purport by the plaintiff that defendant, in May, 1907, employed plaintiff to work in and about its sawmill; that plaintiff was at the time wholly inexperienced with respect to the working and operation of the machinery of sawmills; that he was first set to work on the log decks in getting logs out of the water, and about a month later was directed to work in the edger pit "tailing the edger." After describing the duties required of plaintiff in that position, the operation of the edger and edger table, the dimensions of the table, the dimensions of the edger pit, and the workman's position therein, the complaint continues as follows:

"That said work which plaintiff did, and which plaintiff was directed to do by the said defendant as aforesaid, was dangerous work; that the place where plaintiff was directed to stand in performing said work and labor was not large enough to permit plaintiff or any laborer to stand therein and work and labor with safety to himself; that the work required by defendant of plaintiff as aforesaid was too great for one person to perform, and in the attempted performance thereof was fraught with great danger to plaintiff, or any person engaged in the operation of such work; that the plaintiff at said time was ignorant of the danger attendant upon the performance of said labor, and was ignorant and inexperienced as aforesaid, and did not know or appreciate the danger incident to the performance thereof, but that the defendant at all of said times, and at the time of putting plaintiff to work as aforesaid, did know and fully realize that said work was dangerous, and that the labor required was too great to be performed by one ordinary man in safety, and did know that the place provided for plaintiff to work was not sufficiently large to enable plaintiff to work with safety to himself; but that said defendant did not, nor did any of its agents or officers, give plaintiff any instructions whatever as to the dangers attendant upon such work, or inform him of the dangerous place in which he was required to work, or of the fact that more work was required of him than could be safely performed by one laborer; that the mill of defendant in which plaintiff was put to work as aforesaid is a very large mill, having a large capacity for the manufacture of lumber, and that it is the

custom in mills of such capacity universally to have more than one man employed to do the work required to be done by plaintiff as aforesaid, all of which facts were known to defendant, but unknown to plaintiff. * * *

"That plaintiff at the time of said accident was of the age of 26 years, and had not had ordinary experience, and did not at said time have even ordinary knowledge of dangers incident to and connected with the operation of sawmills in general, and of the work as aforesaid in particular, and had not the ability and understanding to know and appreciate the dangers of said position, or even common ordinary dangers incident to and in connection with the operation of sawmill machinery and of machinery in general, and then and there knew no more about such machinery, or any machinery, than a child of the age of 14 years and of ordinary intelligence.

"That on or about June 9, 1907, and after plaintiff had been employed for eight days tailing the edger as aforesaid, and while plaintiff was in the discharge of his duties as aforesaid, and exercising reasonable care and caution, and without any fault, negligence, or carelessness on the part of plaintiff, plaintiff's right leg was caught between a board passing from the edger table to the table with live rollers beyond the place where plaintiff was standing, and plaintiff was pushed and dragged by means thereof until his leg was fastened and pinioned against the said table beyond said edger table, and pinched and crowded between said table and the said board, and the flesh, muscles, tendons, bones, and blood vessels of plaintiff's said right leg were bruised, wounded, lacerated, and mangled in a most shocking and painful manner, and the cords and ligaments of said leg were so cut, bruised, and mangled that plaintiff was forced to quit said employment as aforesaid; and plaintiff went to a hospital and received treatment therein at the town of Cœur d'Alene, and afterwards at other places, and was in the care of physicians until finally in December, 1907, after two operations had been performed in a vain attempt to cure said injury, it became necessary to amputate and cut off said leg in order to save plaintiff's life, and in December, 1907, said leg was amputated and removed at a point about two inches above the knee joint; that said amputation of said leg was caused and made necessary by the injury received by plaintiff as aforesaid in the mill of defendant. * * * And said board which caught plaintiff's leg as aforesaid was a very wide board, and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in, and left no remaining room sufficient for plaintiff to stand and perform the labor required of him."

To this complaint a demurrer was interposed, on the ground that it did not state facts sufficient to constitute a cause of action, and was overruled by the court. After answer, and the cause having gone to trial, the sufficiency of the complaint was again objected to by way of demurrer to the evidence. This objection was also overruled. At the close of plaintiff's testimony, defendant moved for a nonsuit. This was denied. Again, at the close of all the testimony, the defendant moved for an instructed verdict dismissing the cause, which was also denied. The cause being submitted, and verdict and judgment rendered for plaintiff, the defendant prosecutes its writ of error.

R. E. McFarland, for plaintiff in error.

R. T. Morgan and Edwin McBee, for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). Two questions are presented on this record for consideration: First, whether the complaint is sufficient; and, second, whether the motion for a directed verdict should have been allowed. The motion for a nonsuit was waived by the defendant introducing its evidence after the motion was denied by the court.

The sufficiency of the complaint is challenged upon the theory that it reveals too much, in that it shows that the hazard of the employment, whatever it was, was an open and obvious one, and that, by engaging in the service, the plaintiff assumed whatever risk of danger attended it. The defendant having answered, the complaint should now receive a liberal construction; and this would be equally so when challenged by objection to the introduction of evidence to support it. It must be conceded that there is some ambiguity in the complaint, and much that is conclusion merely; but it does show that the plaintiff was put to work in a box of rather small dimensions, as stated in the complaint, about two feet wide and three feet long, with planks coming away from the edger passing him upon both sides, and required to remove the edgings as they came by, which, coupled with the allegation that he was inexperienced in the service, and was not warned nor instructed relative to the danger attending it, would seem to exhibit a good cause of action, all intendments being in favor of the sufficiency of the complaint. The first objection is therefore not well assigned.

As to the next question, the evidence tends to show that, after the plaintiff had worked about four weeks on and about the decks rolling logs and pulling them out of the water, he was put to work by the foreman of the mill in the edger pit; that he was wholly inexperienced in that service, and so advised the foreman, but that the foreman, notwithstanding, did not warn him of any danger, nor instruct him how to avoid such as impended; that the foreman agreed to pay him $2.75 per day, which was 25 cents per day more than he had been getting previously, and that much more than was paid to the man whose place he took in the edger pit. In telling how the accident happened, the plaintiff says:

"There was a whole lot of edgings come out at the same time together, and a few boards probably, and there was a whole lot of edgings come out at this time; and I stooped over to get the edgings, and I raised up my leg to stoop over to catch them, and a wide board, about 18 or 20 feet long, I should judge, came out from the edger and struck me here, under the knee, and jammed my leg up against the roller and bruised it, and then there was another board come out and kept pushing that one on; and I stayed in there for a good while, and the boards kept pushing out—it couldn't go back—the saw was there."

He further relates that there were two band saws composing the edger; that one is called the "big side" and the other the "small side"; that one of them cuts all the big logs, and the other the small logs; that at the time two boards came out at the same time, there being two edger men working at the double edger; and that his duty was to push the edgings off the table and cast them down on an endless chain at the sides to be carried away to the slasher. Further on, he states that, when the edgings were getting away from him, he turned right around from the saw to catch the edgings, turning to his left, and the board came out from the big saw, and struck him under the right knee from behind—the big edger, when facing the same, being on his right. Further, he says:

"I tussled with the board for quite a while until I got it out. I screamed and hollered, and nobody came to me, so I got out as best I could. I lifted

the end of the board up as well as I could, and when I lifted it up, of course, the saws pushed it out, and it run along."

This occurred in the afternoon; but plaintiff went back to work, and continued all the next day, and the day following until noon, when he told the foreman of his injury. The foreman directed him to go to the office and get a ticket to the hospital, which he did. He remained at the hospital about two days. Not liking the physician, he left, and employed another doctor, and afterwards went to work elsewhere. He worked from place to place until December, when, becoming very ill, he went to the Harrison hospital. On examination by the physician in charge, it was found that he was afflicted with acute inflammation of the bone, about the knee joint and above and below it, termed "osteomyelitis," which culminated in amputation of his leg at the upper third of the thigh.

A witness who seemed to be familiar with the operation of the double edger testified that there was danger in the pit, providing the board was so long that it was not released from the press rollers when the end of it crossed the pit.

Among the witnesses for the defendant was one H. W. Strathern, who was a millwright and of long experience in the operation of sawmills. He described the edger pit minutely by dimensions as described in the statement preceding this opinion. As to the roller back of the pit, he says:

"There is a plank put in so that if a board— They are liable to bend up or bend down as the case may be, so there is a plank set at an angle so that it will strike that plank and work up to the roll and go straight over the roll."

In the witness' opinion the edger pit was a safe place in which to work. He described a board passing through the edger as coming pretty fast, but said that after it leaves the edger the force dies off, and that if it should strike a man it would be without force. On cross-examination, when asked whether a green hand in the pit was liable to get hurt, he answered:

"I don't think a man would put a man in there unless he notified him. I know I never do."

And further, in effect, that, as a prudent millman, he would give such warning.

The foreman testified that, when he employed plaintiff, he told him that the only danger was "that the boards would catch him and shove him out of the hole." Further, that at the time of the accident the mill was running on logs in length from 12 to 16 feet, with once in a while a small log from 18 to 20 feet; that he had seen a man pushed out upon this table; that the man who succeeded plaintiff got pushed out by looking around to the back of the mill; and that a 20-foot board would just about catch a man, was all.

John F. Smith, a millwright, and another witness for the defendant, testified as follows:

"Q. Now, suppose that a man while tailing that edger should turn with his right side towards the edgers and stoop over with his hand near the rollers behind him, stand on one foot and raise his right leg until his knee

is on a level with the surface of the edger table, and an 18-foot board were to come out of the edgers and down the table and strike him in the knee joint, the inside of the knee joint, on the right-hand side, would it have force enough to drag or push him up against this roller so as to injure his knee? A. If he turned his right side to the edger? Q. Yes, sir. A. I don't think it would strike him with force enough to pin him in there. It might push him over the rolls if it got a square strike at him. I don't see how it could pin him in there."

A little later the witness continued:

"It requires a certain amount of skill there, or a man must get accustomed to the kind of work that he is doing. It is a pretty busy place when small stuff is coming through that edger."

There is a dispute in the evidence as to the length of time the plaintiff had a helper; the plaintiff saying but a short time, while the defendant claims that there was one present during the whole time plaintiff worked in the pit.

Such, in effect, is the testimony adduced bearing upon the particular controversy submitted for consideration.

Counsel for plaintiff in error has reduced the inquiry to a narrow limit. By his seventh assignment of error he alleges and shows that the trial court took the question whether the defendant had provided the plaintiff with a reasonably safe place in which to work from the jury, saying to them that the evidence offered by the plaintiff was insufficient upon which to warrant them in finding upon that issue. The other point, whether the plaintiff had or had not a helper, is now immaterial, as it is not shown that the helper in any way instructed him touching the danger attending the service.

That the service was attended with much danger, dependent upon the length of the board being edged and trimmed, there can be but little question. If the boards were of the length of 20 feet or more, they would be driven across the edger pit with great force by the action of the press rollers, and if the workman was caught by them he would be forced out of the box. It is quite evident that a person might be caught just as plaintiff claims his injury occurred. Even if the board was not of the length of 20 feet, it might be driven forward by another board following it through the press rollers, and do a like damage.

The plaintiff was an adult, being 26 years of age, and the presumption obtains that he would comprehend and appreciate the ordinary dangers attending the operation of machinery with which he was familiar, or about which he had worked for some length of time. In this instance, however, his position was behind the edger, and 18 or 20 feet away from it, and having nothing to do with its operation. When set to work in the box, he advised the foreman that he was wholly inexperienced in that service; but, notwithstanding, he was neither instructed as to the operation of the machine nor warned of the especial danger that would attend him in his work. At least, there was evidence to this effect to go to the jury. For the uninformed and unwary, the edger pit constituted a veritable trap, as, when the boards were coming from the edger across the pit loose, there was no danger, but when long and rigid, being not yet released from the press rollers, or when being driven forward by another board from behind, there

was abundant peril and the liability to injury was great. The peculiar situation, and the latent danger attending it, required of the foreman, when advised of the inexperience of the employé, that he give special instructions that injury might be avoided. Upon the whole, we are of the opinion that the court properly submitted the cause to the jury upon this question alone. See Stager v. Troy Laundry Company, 38 Or. 480, 63 Pac. 645, 53 L. R. A. 459; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364.

Some question is made that the damages assessed are excessive, based upon the contention that the necessity for the amputation of the limb was not caused by the hurt that plaintiff received, but sprang from an independent trouble. However this may be, we do not find that the question was ever submitted to the court below, and it is not properly here for our consideration.

The judgment is affirmed.

In re T. A. McINTYRE & CO.

(Circuit Court of Appeals, Second Circuit. August 11, 1910.)

No. 314.

1. CORPORATIONS (§ 123*)—REPLEDGE BY PLEDGEE.

Where a stock certificate was pledged to stockbrokers as security to protect them against loss from transactions on the market for the pledgor's account, the brokers had no right to pledge the certificate for their own debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 509, 510; Dec. Dig. § 123.*

Rights and liabilities of pledgees of stock, see note to Frater v. Old Nat. Bank, 42 C. C. A. 135.]

2. EMBEZZLEMENT (§ 16*)—REPLEDGE OF PLEDGED COLLATERALS.

Where a customer pledged stock with brokers to secure them against losses from transactions on the market for the customer's account, a repledge of the customer's stock by the brokers to secure their own debts at a time when the customer had no transaction pending with them, and when they were indebted to him, constituted larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 17, 18, 21; Dec. Dig. § 16.*]

3. CORPORATIONS (§ 123*)—TITLE TO PLEDGED PROPERTY—ESTOPPEL.

Where the owner of stock pledged the certificate with brokers to secure them against losses in transactions to be had for his account, indorsing a transfer of the certificate in blank, he thereby exposed himself to the risk of losing the stock which was subsequently pledged by the brokers for their own debts, if the pledgee in good faith and for a valuable consideration found it necessary to sell the stock in order to secure payment of advances, under the doctrine of estoppel, but did not by such transfer part with his title to the stock in the event the pledgee found it unnecessary to sell the stock in order to satisfy the debt for which it was pledged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 539; Dec. Dig. § 123.*]

4. BANKRUPTCY (§ 140*)—PLEDGED PROPERTY—IDENTIFICATION—RECOVERY.

The owner of a stock certificate pledged it with his brokers as security for losses that might occur in certain contemplated stock transac-

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

tions, and they without authority, and while the owner has no transaction pending and was not in debt to them, pledged the stock, with other securities, for a loan. After the brokers became bankrupt, the pledgee satisfied the loan out of other securities, retaining the original certificate so pledged until it was delivered to the bankrupts' trustee. *Held*, that the pledgor was entitled to recover the certificate as his sole property from the bankrupts' trustees, and was not required to suffer the same to be sold with the remaining securities pledged for such loan, and to contribute proportionately with all the securities pledged to the payment of the loan.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

5. CORPORATIONS (§ 123*)—PLEDGE OF STOCK—USE OF PROPERTY BY BAILEE—RECOVERY.

Petitioner owned stock, which she loaned to brokers, with permission to use the same in their business; the stock to continue her property, and remain in her name on the books of the corporation, and dividends to be paid to her. The brokers pledged the stock, with other collateral, as security for a loan, and after the brokers became bankrupts the loan was paid by the application of other collateral, and the stock was delivered to the bankrupts' trustees. At the time of bankruptcy it was worth $10,350, and at the time it was ordered sold by the trustee it was worth $16,750. *Held*, that the stock was not unlawfully pledged, it having survived the risks to which petitioners' contract with the brokers exposed it, and, having been fully identified, it remained her stock, subject to such liens and obligations as had accrued against it with her consent, and that, though it was bound to contribute with the other stock to the payment of the loan for which it was pledged it was only bound to contribute on the basis of its value at the time of bankruptcy.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 123.*]

Petitions to Review and Appeals from an Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings by T. A. McIntyre & Co. Mary H. Hudson and another petition to review, and appeal from, an order of the District Court of the Southern District of New York disposing of certain property of which the bankrupts' trustees had taken possession. Reversed and remanded.

See, also, 174 Fed. 627, 98 C. C. A. 381; 176 Fed. 552, 100 C. C. A. 140; 181 Fed. 960.

Ceylon H. Lewis and Will B. Crowley, for appellant Hudson.

Putney, Twombly & Putney (L. H. Hall, of counsel), for petitioner and appellant Pippey.

Irving L. Ernest and Wellman, Gooch & Smyth (Frederich Scofield, of counsel), for appellee Stone.

Edward P. Ward, for appellee and respondent Connor.

D. Raymond Cobb, for respondent trustees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. For some time prior to April 24, 1908, the firm of T. A. McIntyre & Co. had been engaged in the general brokerage business in the city of New York. On that day the petition in bankruptcy was filed against the firm and the individual members thereof, and receivers were appointed. Adjudication fol-

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

lowed on May 21, 1908, and on July 24, 1908, trustees were elected and qualified.

On March 4, 1908, the Metropolitan Trust Company made a loan to the firm of $200,000, receiving as collateral therefor certain certified checks, bonds, and certificates of stock indorsed so as to pass by delivery. It was agreed between them that substitutions might from time to time be made in the securities pledged. After bankruptcy, and on April 24th, the trust company applied the certified checks toward the payment of the loan, and thereafter from time to time proceeded to sell some of the pledged securities, until on May 6th it had realized enough to repay the principal and interest of the loan. It then held a cash balance of $832.16 and the following securities, which it had not found it necessary to sell, viz.: 300 shares International Power Company, common; 200 shares American Can Company, preferred; 18 shares Pullman Company; and 66 shares United States Steel, preferred.

On May 26th an order was made directing the trust company to turn over this cash balance and these securities to the receivers, which was done, and receivers or trustees have ever since held possession of them. The order further directed all persons making claim to any of the stock, bonds, and securities to file their claims with the referee in bankruptcy, to whom as special master was referred the determination of all rights, titles, and interests in and to any and all of the said certificates of stock or the proceeds thereof, and the special master was directed to "adjust, determine, and adjudicate the rights, titles, interests, equities, claims, and liens in and to any of the certificates of stock or the proceeds thereof, pledged," etc.

Appeal of Pippey.

On March 14, 1908, Pippey, being then the owner of certificate No. 10,277 for 18 shares of Pullman Company common stock standing in his name, indorsed a transfer in blank on the certificate and delivered the same to McIntyre & Co. as security for transactions thereafter to be had between them, no authority to repledge the stock being given to McIntyre & Co. Transactions were had, some stock was bought and sold, and on April 9th all pending transactions were closed out by the sale of 100 shares Union Pacific, and the firm owed to Pippey about $500. On April 23d McIntyre & Co. pledged Pippey's Pullman stock with the trust company as a substituted collateral security for the loan of $200,000. On April 25th Pippey applied to the receivers for the return of his certificate, and was informed that it was in the possession of the trust company. On April 30th he demanded it from the trust company, and directed them not to sell the same. By May 6th the company had liquidated its claim of $200,000 out of the securities sold, and still held Pippey's certificate for 18 shares of Pullman Company. On May 16th he again demanded return of the stock, and, that being refused, brought a replevin action against the trust company in the Supreme Court of the state to recover said stock. The order directing the trust company to turn over the certificate to the receivers and enjoining Pippey from prosecuting his replevin suit was made on May 26th.

It is now contended that the District Court had no jurisdiction to make such an order, so far as Pippey and his stock were concerned. Whether or not that court had jurisdiction to authorize its officers to take possession of the property of a third person, not then held by the bankrupt, but in the hands of another person, who asserted no title to it, a controversy as to its possession between the owner and the custodian being then actually pending in the state court, so that the property had been brought within the jurisdiction of such state court, is a question we need not now decide. No appeal from or petition to revise this order was taken within the time allowed; but Pippey appeared before the special master and litigated his case. It will be necessary only to determine whether or not he is now entitled to the return of his stock, the identity of which has at no time been lost. The certificate No. 10,277, which the trustees now hold, is the very same one which he intrusted to McIntyre & Co. on March 14, 1908. The stock was deposited with McIntyre & Co. merely as security to protect them against any losses from transactions on the market for Pippey's account. The firm had no right to pledge them for any of its own debts. When it did pledge them to the trust company, the day before its failure, the firm had no transaction pending and was itself indebted to Pippey. This was a larceny of his stock. Tompkins v. Morton Trust Co., 91 App. Div. 274, 86 N. Y. Supp. 520; Kavanaugh v. McIntyre, 128 App. Div. 722, 112 N. Y. Supp. 987. No one disputes that proposition. By reason of the circumstances that when he left the certificate with the brokers it was duly indorsed with a transfer in blank executed by himself, he exposed himself to risk of losing his stock if the person to whom it was pledged, in good faith, for a valuable consideration, found it necessary to sell it in order to secure payment of his advances. That would be solely because Pippey would be estopped from asserting his title against the person who had parted with value on the faith of the transfer he had signed. But the pledgee has not found it necessary to sell the Pullman stock, It has repaid itself from other items of the pledged property. It no longer has any lien on such property. It can no longer avail of any doctrine of estoppel. Pippey's title to his stock is absolute. He is entitled to the certificate which represents that title. The trustees, in the language of the United States Supreme Court, "have no better right in [it] than the bankrupt." Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845.

Instead of directing the trustees to return his stock to Pippey, the court has ordered it to be sold and the proceeds put into a fund with the proceeds of the 300 shares International Power Company and the 200 shares American Can Company and the $832.16 surplus realized by the trust company from the securities which it sold to repay the $200,000 loan. In this fund Pippey is to share with others whose stock was improperly pledged by the brokers with the trust company and sold by it. The amount coming to him would be less than his stock. This is practically applying the principle of general average to the situation. The pledge is treated as a common adventure, the securities sold as a sacrifice for the common benefit, to which all in-

terests are required to contribute. We do not think Pippey can be thus required to contribute. If he had been left undisturbed to prosecute the replevin suit, he would have recovered the specific piece of property, which he owned, had identified, and was entitled to. By not appealing from the original order, and by prosecuting his claim of his stock in the bankruptcy court, he did not abandon any of his legal rights, nor obligate himself to contribute to the reimbursement of any one whose stock had been sold.

The only authorities cited in support of the proposition contended for are Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 185; Gould v. Central Trust Co., 6 Abb. N. C. (N. Y.) 381; Whitlock v. Seaboard Bank, 29 Misc. Rep. 84, 60 N. Y. Supp. 611. The first of these had no application to the facts of this case. The other two are Special Term decisions, which have been held by the Appellate Division not to control when property stolen from its real owner is found unsold in the possession of the assignee of the thief. Tompkins v. Morton Trust Co., 91 App. Div. 285, 86 N. Y. Supp. 520.

So much of the order as relates to Pippey's stock is reversed, and cause remanded, with instructions to direct the trustee to return his stock to him, or, if it has been sold, to turn the proceeds over to him.

Appeal of Mary H. Hudson.

Mrs. Hudson is the owner of the "200 shares American Can Company, preferred," which was not sold by the trust company, and was identified and demanded by the appellant. The facts differ from those in Pippey's Case in an important particular. Mrs. Hudson did not deposit her stock with McIntyre & Co. as security for transactions on her account. She loaned it to the firm for use in its business; it being agreed between them that the stock "was to continue the property of Mrs. Hudson, and to remain in her name on the books of the respective companies, and the dividends are to be paid to her." She brought no replevin suit. The original certificates remained with the trust company until after it had repaid itself by the sale of other securities, and were then turned over to the trustee. At the time of the bankruptcy, her stock was worth $10,350. At the time the order now under review was made it was worth $16,750. The order required the stock to be sold, and the whole amount paid into the fund, but liquidated Mrs. Hudson's claim against the fund at $10,350 only, on which basis she is to share and contribute.

The stock could have been "used by the firm in its business," at the same time continuing her property, only in the way in which McIntyre & Co. used it, viz., as collateral to loans which the firm effected. It cannot, therefore, be treated as "stolen stock," as in Pippey's Case, although, having survived all the risks to which her contract with the firm exposed it and been fully identified, it remained her stock, subject to such liens and obligations as have accrued against it with her consent. It should therefore contribute with the other securities similarly situated, sold and unsold, to the payment of the loans to secure which it was rightfully pledged. But when it has responded to that obligation it remains her property, and she is entitled to have it

returned to her. This would be effected by delivering the stock to her upon her paying into the fund the sum of $10,350, which was its value at the time of the bankruptcy, treating it as if it had been then used to repay the loan. On that basis it should contribute to repay the loan, and on the same basis Mrs. Hudson should share in any surplus. There is no equity in selling her stock at $16,750 and allowing her to share on the basis of $10,350 only.

We see no reason to disturb the finding of the District Court as to disbursements charged against this particular fund.

The order is reversed as to Pippey and Hudson, and cause remanded, with instructions to take further action in conformity with this opinion.

In re T. A. McINTYRE & CO.

(Circuit Court of Appeals, Second Circuit. August 11, 1910.)

No. 291.

1. TRUSTS (§ 358*)—CONVERSION BY TRUSTEE—SUBSEQUENT REPLACEMENT OF MONEY.

Where a trustee has drawn out of a deposit moneys which belonged to several different persons, and thereafter makes a deposit to the same account, the deposit will be considered as a general restoration, in which all the defrauded cestuis que trust will share ratably.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

2. BANKRUPTCY (§ 155*)—OWNERSHIP OF PROPERTY PLEDGED—RECOVERY.

Bankrupts, who were stockbrokers holding stock for a customer, used the stock as their own, pledging the same, with other stock, for loans. When they failed, there were 95 shares of the kind of stock so purchased among collateral deposited with the C. Bank, 10 shares were pledged on another loan, and there were 2 shares in the bankrupts' vault. They owed to their customers 1,651 shares of that variety of stock, and there was no identification of the 95 shares, or any of them, as those bought for a particular customer. *Held*, that the customer for whom 200 shares were purchased could not recover the certificates so pledged, under the rule that persons whose stock has been so used cannot establish title to specific certificates of the stock found after bankruptcy pledged as collateral to a loan, unless they can identify the certificates as representing the shares which the bankrupt took from them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

Petitions to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of T. A. McIntyre & Co. Petition by Mary D. Grace and others to review an order of the District Court for the Southern District of New York in disposing of their claims to certain pledged securities. Order affirmed.

See, also, 174 Fed. 627, 98 C. C. A. 381; 176 Fed. 552, 100 C. C. A. 140; 181 Fed. 955.

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

Wm. J. Grace, for petitioner Grace.
Moore, Bleecker & Wheeler (C. M. Bleecker, of counsel), for petitioner Ingersoll.
Esselstyn & Haughwort, for petitioner Talbot.
Nathan Burkan, for petitioner Dippel.
Wm. H. Van Steenbergh, for petitioner Von Frantzius Co.
Irving L. Ernst and D. Raymond Cobb, for respondent trustees.
B. B. Aylesworth, for respondent Bradley.
W. A. Mackenzie for claimants C. C. Bradley & Son.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This is another group of controversies growing out of the bankruptcy of T. A. McIntyre & Co., referred to in two other opinions handed down to-day, Burlingham v. Crouse, 181 Fed. 479, and Petition of Pippey, 181 Fed. 955. The firm on April 22, 1908, two days before bankruptcy, effected a loan of $200,000 from the National Bank of Commerce, giving as collateral therefor certain securities, some of which belonged to their customers. On April 23d some substitutions of securities were made. On the day of the failure the bankrupts had in the same bank a balance to their credit on ordinary deposit and check account of $11,924.83. The bank applied this balance toward payment of the loan, and proceeded from time to time to sell some of the collateral securities, applying the proceeds in the same way. On May 6, 1908, the loan was fully paid, and the bank held a balance of $32,177.92 in cash and some bonds and stocks, all of which were turned over to the trustees in bankruptcy. Various persons presented claims against this fund.

We agree with the District Judge that it will serve no useful purpose to discuss the details of the several claims. The report of the master is voluminous and exhaustive. His discussion of the legal questions presented is most careful, and presents a very full citation of authorities. A brief statement of the separate questions which have been presented on this argument will be sufficient. The bankrupts disposed of securities which belonged to several of their customers, and deposited the proceeds in one of their general bank accounts. Their drawings exhausted their own funds therein, and also such proceeds. Subsequently deposits were made, and at the time of failure there was over $11,924.83 balance in bankrupt's favor. The proposition presented is this: When a trustee has drawn out moneys which belonged to several different persons, and thereafter makes a deposit, shall such deposit be considered as a general restoration, in which all the defrauded cestuis que trust will share ratably, or is it to be treated as making good so far as it will go the separate amounts converted from each in the order in which they were abstracted? We concur with the special master and the District Judge in the conclusion that it is to be assumed the defaulter intended whatever repayment he made to apply on the entire default, and did not intend to prefer the person whose money he first abstracted, by first making him whole at the expense of all the others.

Bankrupts bought 200 shares of a certain stock for a customer. They did not keep this stock, but used it as they would their own in

the general transaction of their business. They did the same with other customers who had bought like stock. When they failed there were 95 shares of this kind of stock among the Bank of Commerce collateral, 10 shares were pledged on another loan, and there were 2 shares in their vault. They owed their customers 1,651 shares of this variety of stock. We cannot find from the record any satisfactory identification of the 95 shares (or any of them) as being those bought for this particular customer, rather than those bought for some one else. He is not in the position of Pippey (see opinion filed to-day in Re McIntyre, 181 Fed. 955), and is not entitled to the certificates.

We also concur in the conclusion of the District Judge that persons whose stock has been used by a bankrupt for his own purposes cannot establish title to specific certificates of stock, found after bankruptcy as collateral to some loan, unless they identify those certificates as representing the shares which the bankrupt took from the claimant.

The order is affirmed.

UNITED S. S. CO. et al. v. HASKINS et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,821.

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

The finding of a commissioner appointed in an admiralty cause, on a question of fact depending largely on the credit to be given to the various witnesses testifying before him, confirmed by the court, has every reasonable presumption in its favor; and an appellate court is not justified in setting aside or modifying the decree based thereon, unless there clearly appears to have been error or mistake in the finding or the conclusion drawn therefrom.

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

2. SHIPPING (§ 132*)—ACTION FOR DAMAGE TO CARGO—EVIDENCE OF DAMAGES.

Where a shipment of coffee was damaged on the voyage through the fault or negligence of the carrier, who had knowledge of the damage after its arrival, the consignee was not bound to sell it at public sale or on public notice, but in a suit against the ship to recover the damage may show that its market value in its damaged condition was no greater than the price for which it was sold at private sale.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

3. SHIPPING (§ 131*)—ACTION FOR DAMAGE TO CARGO—MEASURE OF DAMAGES.

The measure of damages recoverable from a carrier for damage to cargo through its fault is the difference between the market value of the cargo at the time and place of delivery in the condition in which it would have arrived but for the carrier's fault and its market value in the condition in which by reason of such fault it did arrive, with interest from the time of delivery.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 467; Dec. Dig. § 131.*]

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

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

Suit in admiralty by Thomas Haskins and Max Schwabacher, partners as Leege & Haskins, against the steamer Santa Rita, the United Steamship Company, claimant, and others. Decree for libelants, and claimant and others appeal. Affirmed.

Page, McCutchen & Knight, for appellants.
William Denman, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. It is alleged in the libel that in the month of October, 1906, Arbuckle Bros. shipped on board the steamer Santa Rita from the port of New York, to be carried and transported in said steamer to the port of San Francisco and delivered to the libelants, 1,067 bags of Santos coffee, weighing 152,764 pounds, the said coffee then being in good order and well conditioned, to be delivered to libelants in like good order; that the said steamer did steam on said voyage, and thereafter arrived at the port of San Francisco, and delivered to the libelants the said coffee, but not in the like good order as when delivered to the said ship; but, on the contrary, the said coffee, when delivered to the libelants at the said port of San Francisco, was badly damaged by contact with oil and water, which damage was inflicted upon the said cargo while in the possession of the said ship on the said voyage. It is alleged that the injury to the cargo received on the voyage was more than $10,000.

In claimants' answer the shipment, carriage, and transportation of the coffee from New York to San Francisco, and its delivery to the libelants, is admitted; but it denies upon information and belief that at the time of such delivery said coffee was badly or at all damaged by contact with oil and water, or either thereof, and, on the other hand, avers the fact to be that said coffee, if damaged at all, was damaged by a cause specified in the bill of lading as exempting said carrier from liability, to wit, from leakage, breakage, contact with other goods, and perils of the sea.

The matter coming on to be heard by the court, it was admitted at the hearing that the allegations of the libel as to the ownership of the cargo, its receipt by the vessel in good condition, and its delivery in a somewhat damaged condition were true. The court found that the damage to the coffee was not caused by leakage, breakage, contact with other goods, and perils of the sea, or any of them, as alleged in the answer, or at all. The case was thereupon referred to the commissioner to take testimony and assess damages, who heard the testimony introduced by the respective parties and found that:

The consignment of coffee upon which the damage was to be assessed, and for which the steamer Santa Rita had been found liable, arrived at the port of San Francisco during the month of January, 1907; that the coffee was taken from the dock of the steamer's discharge on January 30, 1907, and within six or seven days thereafter, through the agency of a broker, sold as damaged coffee to a coffee jobber in San Francisco for 5¼ cents per pound, and within a week thereafter again sold by the purchaser to a coffee buyer in St. Louis for 6¾ cents per pound; that considerable expense was had in conditioning

the coffee and preparing it for shipment; that other coffee, part of the same general cargo of the steamer, consigned to a coffee firm in San Francisco and damaged from the same cause, was sold in San Francisco in the month of September, 1907, for 6 cents per pound; that the market value of Santos coffee in sound condition in the market of San Francisco at the date of arrival of the Santa Rita was 10½ cents per pound; that the number of pounds of coffee shipped in good order was 152,764 pounds, consisting of 1,067 bags; that the total weight of the coffee delivered was practically the same as the weight shipped.

As a conclusion from the finding the commissioner found the market value of the coffee in sound condition to be:

152,764 pounds at 10½ cents per pound	$16,040 22
The value of the damaged coffee, to be 152,764 pounds, at 5¼ cents per pound	8,020 11
	$ 8,020 11
It was admitted that there was unpaid freight amounting to	56 57
	$ 7,963 54
The interest on this sum was found to be	1,112 24
Total amount of damage	$ 9,075 78

The report of the commissioner was confirmed by the court, and a decree entered accordingly. From this decree the claimant of the vessel appeals.

The appellants seek to review the single question as to the value of the coffee in its damaged condition, claiming that its value was at least 6 cents per pound. The question is one of fact, depending very largely upon the credit to be given to the various witnesses seen and heard by the commissioner. Under these circumstances not only is there every reasonable presumption in favor of the commissioner's finding, and the decree of the District Court based upon such finding, but this court would not be justified in setting aside or modifying the decree, unless there clearly appears to have been error or mistake in the finding of the commissioner or the conclusion drawn therefrom. Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 39 L. Ed. 289; Gaffner v. Pigott, 116 Fed. 486, 487, 54 C. C. A. 641; Wabash v. Compton, 172 Fed. 17, 21, 96 C. C. A. 603.

It is objected by the appellants that no notice of the sale of the coffee for whom it might concern had been given to any one representing the vessel; that no public sale was made, or sale on public notice; and that no opportunity was offered appellants to secure a bidder for the coffee, and thereby minimize the damage by obtaining the best price it would bring. The agent of the vessel knew, upon her arrival and the discharge of her cargo, that the coffee was damaged. Prima facie the vessel was liable, and the burden was upon the owner to clear the vessel of this liability. The coffee remained on the dock for a week or more. The bill of lading did not provide for a notice of sale of damaged cargo, or that it should be by public sale or upon public notice, and

there is no evidence that, had such public sale been made or public notice given, a better price would have been obtained.

The evidence introduced by the claimants that other coffee from the same vessel and in about the same condition was sold in August or September, 1907, for 6 cents per pound, furnishes evidence of but little weight as to the value of the coffee in the first week in February, 1907. Likewise the evidence of the resale of the coffee in question in St. Louis at 6¾ cents per pound does not necessarily contradict the testimony of a number of other witnesses that the value of the coffee was 5¼ cents per pound in San Francisco at the time of the arrival of the Santa Rita.

The measure of damages recoverable from a carrier for damage to cargo through its fault is the difference between the market value of the cargo at the time and place of delivery in the condition in which it would have arrived but for the carrier's fault and its market value in the condition in which by reason of such fault it did arrive, with interest from the time of delivery. The Compta, 6 Fed. Cas. 233 (No. 3,070); The Nith (D. C.) 36 Fed. 86; Ringgold v. Haven, 1 Cal. 108, 118; New York, etc., Railroad Co. v. Estill, 147 U. S. 591, 616, 617, 13 Sup. Ct. 444, 37 L. Ed. 292; The Berengere (D. C.) 155 Fed. 439, 440. This was the valuation adopted by the court below, and there was evidence sufficient to support the decree based upon such valuation.

We have read the evidence carefully, and we do not see how the commissioner could have made any other finding or reached any other conclusion than he did.

The decree of the District Court is therefore affirmed.

UNITED S. S. CO. et al. v. A. SCHILLING & CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,822.

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

Suit in admiralty by A. Schilling & Co., a corporation, against the steamer Santa Rita, the United Steamship Company, claimant, and others. Decree for libelant, and claimant and others appeal. Affirmed.

Page, McCutchen & Knight, for appellants.

William Denman, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The facts in this case are substantially the same as in the case of United Steamship Co. v. Thomas Haskins and Max Schwabacher, 181 Fed. 962, and for the reasons stated in that case the decree of the District Court is affirmed.

SNOW et al. v. HAZLEWOOD et al.

MASTERSON et al. v. SNOW et al.

(Circuit Court of Appeals, Fifth Circuit. October 3, 1910.)

Nos. 2,018, 2,030.

On petitions for rehearing. Amended, and rehearing denied.

For former opinion, see 179 Fed. 182.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The petitions for rehearing call our attention to the fact that in the opinion and decree herein rendered two mistakes were made in computing the liability of the Hogg-Swayne Syndicate and R. R. Hazlewood—one, in not deducting from the amount charged in the complainant's original bill the Keith Ward settlement; and, second, in stating the settlement of the Hogg-Swayne Syndicate for 15 acres as and for the sum of $6,000, instead of $5,000, the actual amount shown by the record. The effect of these two mistakes was to improperly increase the joint liability of the Hogg-Swayne Syndicate and R. R. Hazlewood in the sum of $3,500.

To correct these mistakes, we amend the decree heretofore entered in the case, to the effect that said R. R. Hazlewood, J. 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 James S. Hogg, deceased, and Harris Masterson, be, and they are, hereby condemned to pay the complainants the sum of $18,327.21, with interest at 6 per cent. from April 6, 1903, in lieu of the sum of $21,827.21.

With our decree thus amended, the petitions for rehearing are denied.

UNION TYPEWRITER CO. v. L. C. SMITH & BROS. TYPEWRITER CO. et al.

(Circuit Court of Appeals, Third Circuit. September 21, 1910.)

No. 57 (1,350).

1 PATENTS (§ 136*)—VALIDITY—DOUBLE PATENTING.

Where the claims of a patent are narrower than the real invention, the error or mistake cannot be corrected by inserting the broader claims in a subsequent patent for improvements on the first, but only by a reissue.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 136.*]

2. PATENTS (§ 328*)—ANTICIPATION—DOUBLE PATENTING—TYPEWRITER.

The Daugherty patent, No. 481,477, for a typewriter, is, as stated in the application, for improvements in the construction of parts of the machines described in patents Nos. 457,258 and 470,990 to the same patentee; but claims 37 and 38, introduced by amendment, are not for such improvements, but are for combinations disclosed in said patent No. 470,990, and void for anticipation thereby.

*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 Western District of Pennsylvania.

Suit in equity by the Union Typewriter Company against L. C. Smith & Bros. Typewriter Company and E. N. Price. Decree for defendants (173 Fed. 288), and complainant appeals. Affirmed.

H. D. Donnelly and Clarence P. Byrnes, for appellant.

James A. Watson and Livingston Gifford, for appellees.

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

LANNING, Circuit Judge. The following are conceded facts in this case:

On May 2, 1890, James D. Daugherty filed an application for a patent for improvements in typewriting machines. On June 1, 1891, he voluntarily canceled certain of the claims then standing in the application, giving notice in his letter of cancellation that the canceled claims would be made the subject of a divisional application within a few days. On June 9, 1891, the divisional application was filed, in which he said:

"I do not make any claim in this application to the pivoted shifting frame carrying the type-bars, whereby either the upper or lower case of type are brought to the printing point, as this is made the subject-matter of my pending application filed May 2, 1890."

The divisional application was allowed in patent No. 457,258 on August 4, 1891. The remaining claims of the application filed May 2, 1890, appeared in patent No. 470,990, which was allowed March 15, 1892, and in which claims a pivoted shifting frame carrying type-bars is an element. It is to be noted, however, that the two claims 37 and 38, hereinafter quoted, were not included in 470,990, notwithstanding Daugherty, as early as January 21, 1892, in an interference proceeding on his application for 470,990, had been found by the Patent Office to be entitled to them.

On March 8, 1892, just a week before patent 470,990 was allowed, Daugherty filed an application for another patent for improvements in typewriting machines, containing 53 claims. It was sworn to on March 4, 1892. In it he said:

"My invention relates to typewriting machines, and it consists in certain improvements in the construction of the parts shown and described in patents No. 457,258, dated August 4, 1891, and No. 470,990, dated March 15, 1892, both of which are granted to me."

How the date of allowing patent 470,990, or its number, came to be inserted in the application, does not appear, nor is it material. The application also contained the following language:

"The type-bar shifting frame, 12, has its outer ends pivoted between vertical lugs, which extend from opposite sides of the base, A, and which is shifted at its inner end for the purpose of bringing the proper character at the outer end of the type-bars, 9, to the printing point, as fully described and shown in the said patents [that is, in patents 457,258 and 470,990]. *The type-bars, 9, each carry several characters and are of the same construction substantially as that shown and described in the said patents* [that is, patents 457,258 and 470,990], *as are also the key levers, 14, neither of which need*

therefore be more fully or particularly referred to in this application, as they form no part of the present invention."

On April 26, 1892, more than a month after patent 470,990 had been allowed, Daugherty eliminated from the application the above italicized sentence. On July 9, 1892, nearly three months after patent 470,990 had been allowed, and after the 53 claims of the application filed March 8, 1892, had been reduced by rejections and cancellations to 36 in number, Daugherty eliminated from the application the words, "as fully described and shown in the said patents," with which the sentence immediately preceding the italicized sentence ends, and substituted therefor the following:

"The frame differs radically from that described in said patents, in that a shifting frame pivoted between its ends is not herein used for carrying the type, but the type are carried by the frame, 12, which is pivoted at its outer end in this instance, and has its inner free end shifted by means of a lever, H, and arm, J, as before described."

With the amendment containing this last-mentioned elimination, Daugherty also added two wholly new claims. The amendment was verified by his supplemental oath, because, as he said, "the claims presented were not originally in the case." These two claims, being 37 and 38, appeared with the other 36 claims in patent No. 481,477, allowed August 23, 1892. They are the claims, and the only claims, now in suit. They read as follows:

"37. In a typewriter, the combination, with a series of individual pivoted type-bars carrying two or more type, of a vertically shifting frame for sustaining said bars and suitable means for shifting said frame to bring either of the type in proper position to make an impression.

"38. In a typewriter, the combination, with a series of type-bars provided with two or more type, of a vertically shifting frame for sustaining said type-bars concentrically, a series of key levers connected with said type-bars, and a series of keys for operating said levers."

From these conceded facts it will be observed:

1. That in his divisional application, which ripened into patent 457,258, Daugherty disclaimed a pivoted shifting frame carrying the type-bars, saying that such a claim was the subject-matter of the application which subsequently ripened into patent 470,990.

2. That in his patent 470,990 there are claims which include such a pivoted shifting frame, though claims 37 and 38 were omitted therefrom.

3. That when the application for patent 481,477 was first filed it declared that the pivoted type-bar shifting frame therein mentioned was fully described and shown in patents 457,258 and 470,990, and that the type-bars and key levers therein mentioned were substantially of the same construction as those of said patents, and that the type-bars and key levers formed no part of the invention described in the application for patent 481,477.

4. That after the application for patent 481,477 was first filed, and after patent 470,990 had been allowed, the application for patent 481,477 was amended in such manner as to include what had not before been claimed therein, by changes in the specification and by adding claims 37 and 38.

Daugherty admits that all the elements of these two claims are found in patent 470,990. The complainant's counsel, also, in their brief, say:

"There can be no doubt that these claims, taken in their plain ordinary meaning, cover broadly the forms shown in both Daugherty patents; they embody the broad combination disclosed in both these patents and in defendants' machine, and could properly be drawn in either."

With these concessions before us, we think the decree of the Circuit Court should be affirmed. The combinations of the claims in suit were disclosed in the proceedings for patent 470,990, issued to the same inventor nearly three months before the claims in suit were filed. We think it was too late then to amend the specification in the application for patent 481,477 in such manner as to open the way for adding claims 37 and 38. The application for 481,477 was not a divisional application of 470,990. It was for improvements in the construction of certain parts of 470,990. Up to July 9, 1892, reference was made in the application for 481,477 for the construction and method of operation of the type-bar shifting frame to patents 457,258 and 470,990, where, it was said, they were "fully described and shown," and the type-bars and key levers were declared to "form no part of the present invention." The interjection into the application for 481,477, on July 9, 1892, of claims 37 and 38 for combinations to effect certain methods of type action, was recognized by Daugherty as an amendment not within the scope of his application as filed on March 8, 1892, for otherwise he would not have accompanied it with his supplemental oath. These claims, properly interpreted, are not for "improvements in the construction of the parts shown and described in patents No. 457,258, dated August 4, 1891, and No. 470,990, dated March 15, 1892," but are, as both Daugherty and the counsel for the complainant admit, for combinations disclosed in patent 470,990. Indeed, we think the Circuit Court has correctly concluded "that the claims of the patent in controversy, upon any such reading of them as is contended for, are inclusive of claims 1 and 2 of No. 470,990." See opinion of that court, 173 Fed. 288. If the claims of 470,990 were narrower than Daugherty's real invention, or if claims 37 and 38 were omitted from that patent by mistake, the error or mistake should have been corrected in a reissue. It cannot be corrected, as we understand the patent law, by inserting the broader claims to which he might have been entitled on a reissue of 470,990 in a patent for improvements in the construction of certain parts of 470,990.

We think the decree of the Circuit Court should be affirmed, with costs; and it is so ordered.

PATTERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1910.)

No. 1,810.

PERJURY (§ 11*)—PATENT LAWS—COMMISSIONERS' RULES—OFFENSES—PERJURY.

Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), requires an applicant for a patent to make oath that he fairly believes himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent, that he does not know and does not believe that the same was ever before known or used, and shall state of what country he is a citizen. The Commissioner of patents, with the approval of the Secretary of Interior, under authority to make rules, promulgated rule 46, providing that the applicant shall make oath or affirmation that he does verily believe himself to be the original and first inventor and discoverer of the art, and also to state whether he is the "sole"or joint inventor of the invention claimed in his application. Section 5392 (page 3653) declares that every person who, in any case in which a law of the United States authorizes an oath to be administered, willfully and contrary to his oath states any material matter which he does not believe to be true, is guilty of perjury. *Held* that, since the Interior Department could not by rule or regulation add any word or words to the statutory oath, an applicant for a patent was not guilty of perjury, though he falsely stated that he was the "sole" inventor of the article for which a patent was applied.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 48; Dec. Dig. § 11.*]

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

Charles A. Patterson was convicted of perjury, and he brings error. Reversed.

H. H. Riddell, for plaintiff in error.

Walter H. Evans, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was charged by indictment in the court below with the crime of perjury, assigned upon an oath taken by him before a notary public in support of an application for a patent for a one-piece harness buckle.

The statute relating to such patents contains these, among other, provisions:

"Sec. 4886. (Rev. St.) Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, obtain a patent therefor." (U. S. Comp. St. 1901, p. 3382.)

"Sec. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor in writing to the Commissioner of Patents, and shall file in the Patent Office a written de-

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

scription of the same, and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same; and in case of a machine he shall explain the principle thereof and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the particular improvement or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor, and attested by two witnesses." (Page 3383.)

"Sec. 4892. The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, charge d'affaires, consul, or commercial agent holding a commission under the government of the United States, or before any notary public of the foreign country in which the applicant may be. (Page 3384.)

"Sec. 4893. On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery, and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor."

Provision is also made by the statute for the purchase by any person of the inventor or discoverer of any patentable article prior to the application by the inventor or discoverer for a patent thereof, and also for the assignment of patents. Sections 4899, 4898, Rev. St. (U. S. Comp. St. 1901, p. 3387). For the purpose of carrying out these statutory provisions, the Commissioner of Patents, with the approval of the Secretary of the Interior, prescribed certain rules and regulations, among which is rule numbered 46, which is in these words:

"The applicant, if the inventor, must make oath or affirmation that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used, and shall state of what country he is a citizen and where he resides, and whether he is a sole or joint inventor of the invention claimed in his application."

By section 5392 of the Revised Statutes (page 3653, U. S. Comp. St. 1901), it is provided:

"Sec. 5392. Every person who, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any writing, testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished [in a prescribed way]."

The record shows that upon the trial of the present case there was testimony going to show that about January, 1905, one Larsen, having pending in the Patent Office an application for a patent for an improvement in a one-piece harness buckle, entered into negotiations with the plaintiff in error, which culminated about April, 1905, in an assignment by Larsen to the plaintiff in error, one Van Emon, and a Mrs. Parrish, of all his rights in and to the application and buckle, that the

application made by Larsen was rejected by the Patent Office, and that shortly after the assignment mentioned a projecting lip was added by Van Emon and the plaintiff in error to the rear cross-bar which connected the side pieces of the Larsen buckle, which addition was designed as an improvement on the buckle of Larsen. A joint application was thereupon made to the Patent Office by the plaintiff in error, Van Emon, and Mrs. Parrish, for a patent upon the buckle as so improved, which application was subsequently abandoned. While in his testimony Van Emon claimed that the added lip was suggested by him, the plaintiff in error testified that he was the originator of the suggestion, and his testimony is quite full to the effect that from the time of his negotiations with Larsen he worked upon the buckle, made various models and drawings thereof, and that, when in the early part of 1907 he had gotten his conception freed of objections that had been made to it, he "approached Mr. Van Emon and Mrs. Parrish, and I (said the witness) asked them again to join me in making a new application—new blue prints—and that I felt confident from the correspondence that I had had that I could obtain a patent on my buckle, and I was willing that they should join me. They both refused. Mr. Van Emon says, 'Your buckle without the loop for the back band, and loop for the belly band, and for the Yankee breeching, would be worthless,' and he says, 'I shall not spend another cent to try to get a patent on that buckle. I am disgusted with it.' Mrs. Parrish told me the same thing. She says: 'I won't do it at all.' Then the 20th of March, nearly two years after we had purchased the buckle from Mr. Larsen, I made application on this buckle, which was a different feature altogether. It was not the buckle which we had bought."

The testimony on the part of the government was, in some respects, in conflict with this testimony of the plaintiff in error, but we state the latter in order to present clearly the main point in the case.

The affidavit made by the plaintiff in error in support of the last application referred to is the basis of the indictment against him, which charges, among other things, that he took an oath before C. W. Hodson, a notary public:

"That he verily believes himself to be the original, first, and sole inventor of the improvement in buckles described and claimed in the annexed specification, that he does not know, and does not believe, that the same was ever known or used before his invention or discovery thereof; * * * whereas, in truth and in fact, the said Charles A. Patterson at the time when he so swore and made his said declaration and affidavit as aforesaid well knew that he was not the original, first and sole inventor of said improvement in buckles," etc., and that he "well knew and believed that the same had been known and used before his alleged invention and discovery thereof."

The theory upon which the case was tried, and that upon which the court instructed the jury, was, as said by the learned judge of the court below in his opinion denying the motion for a new trial which was made by the defendant in the case:

"That the charge of perjury was based upon the words contained in the oath, namely: 'That he verily believes himself to be the original, first, and sole inventor of the improvement in buckles.' This is indicated by the instruction of the court, as follows: 'Was it Van Emon or was it the defendant who was the inventor of this new improvement? Both of these men

claimed to be the original or first inventor of said improvement. If the defendant was the original, first, and sole inventor of such improvement, then that is the end of this case; because, if so, his oath or declaration would be true, and he would not be guilty of perjury under the indictment, but if Van Emon was the original, first, and sole inventor—and this you must ascertain—then another question will arise which has two aspects, namely, whether the defendant knew that Van Emon was such original, first, and sole inventor, and, having such knowledge, took the oath or made the declaration in question, or whether he had no knowledge of such fact, but, knowing that he himself was not such inventor, verified said oath or declaration—because in either event he could not have believed the alleged facts stated in such oath or declaration to be true.' It will be seen that the word 'sole' has a material bearing both on the theory upon which the case was tried, and on that upon which it was put to the jury by the instruction of the court. If perjury cannot be predicated upon the use of that word in connection with the words 'original' and 'first,' the oath having been made in a proceeding to obtain a patent, then a new trial should be granted; otherwise, it must be conceded that the judgment is proper." United States v. Patterson (D. C.) 172 Fed. 241, 245, 246.

The contention is made in support of the judgment that inasmuch as the statute in section 4886, supra, provides that the applicant for such a patent "may, upon payment of the fees required by law, and other due proceedings had, obtain a patent," etc., the department of the government charged with the duty of executing the law could legally prescribe by rule that in the affidavit required by section 4892 of the statute to be made by the applicant he shall also swear whether he is the sole or joint inventor of the invention claimed in his application. Granted that such a requirement can be legally made by rule of the department in order to determine whether or not the applicant was alone entitled to the patent applied for, or only in conjunction with some one else, it by no means follows that the department can by any rule or regulation add any word or words to the statutory oath, making that a crime which Congress did not make such. The law is thoroughly well settled that crimes in such matters are such only as the statutes have defined and declared. Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; United States v. United Verde Copper Co., 196 U. S. 215, 25 Sup. Ct. 222, 49 L. Ed. 449; United States v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305; Robnett v. United States, 169 Fed. 778, 95 C. C. A. 244; United States v. Lamson (C. C.) 165 Fed. 80; United States v. Maid (D. C.) 116 Fed. 650; United States v. Blasingame (D. C.) 116 Fed. 654; London v. United States, 171 Fed. 82, 96 C. C. A. 186; Dwyer v. United States, 170 Fed. 160, 95 C. C. A. 416; Kettenbach v. United States, 170 Fed. 167, 95 C. C. A. 423; United States v. Grimaud (D. C.) 170 Fed. 205; United States v. Bedgood (D. C.) 49 Fed. 58.

In the instance in hand, the statute has defined the matters the willful false swearing to which is made to constitute the crime of perjury. Whether or not an applicant for a patent is the "sole" inventor of the thing claimed is not among the elements of the crime denounced by the statute. Therefore false swearing in respect to that matter cannot be a crime.

The testimony tends to show that both Van Emon and the plaintiff in error worked upon the buckle after the assignment by Larsen of whatever right he had, and that both Van Emon and the plaintiff in error contended in their testimony that the buckle as patented was the result of his own inventive genius. The testimony was such that the jury may have concluded that the buckle patented was the result of the joint genius of the two, in which event they may, under the instruction of the court to which reference has been made, have found the plaintiff in error guilty as charged on the ground that he was not the "sole" inventor of the patented buckle; but, as has already been said, inasmuch as the statute did not require the applicant for such a patent to swear that he was, that circumstance constituted no element of the crime of perjury. For this error, the judgment must be reversed, and the cause remanded to the court below for a new trial.

It is so ordered.

LEWIS BLIND STITCH CO. et al. v. ARBETTER FELLING MACH. CO. et al.

(Circuit Court, N. D. Illinois, E. D. October 17, 1910.)

No. 30,043.

1. PATENTS (§ 114*)—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—SUIT TO OBTAIN ISSUANCE OF PATENT.

The provision of section 1 of the federal judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470), as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), that "no civil suit shall be brought * * * against any person * * * in any other district than that whereof he is an inhabitant, * * *" applies only to the civil suits specified in said section, of which the federal and state courts have concurrent jurisdiction, and does not affect a suit brought, under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, of which a Circuit Court is given exclusive jurisdiction, regardless of the citizenship of the parties or the amount in controversy, and such a suit may be brought in any district where valid service can be had on the defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. ABATEMENT AND REVIVAL (§ 3*)—JURISDICTION—DETERMINATION OF QUESTION.

Where a question of jurisdiction is purely one of law, it may be raised either by motion or plea in abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 7–24; Dec. Dig. § 3.*]

In Equity. Suit by the Lewis Blind Stitch Company and John G. Lewis against the Arbetter Felling Machine Company, Wolf Arbetter, and Edward B. Moore, Commissioner of Patents. On plea in abatement. Plea overruled.

George T. May, Jr., and Edward Rector, for complainants.
Nathan Heard, for defendant Arbetter Felling Mach. Co.

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

SANBORN, District Judge. Plea in abatement to the jurisdiction, setting up that the defendant corporation is organized in Maine, but qualified to do business in Illinois, having therein a regular and established place of business and an agent to receive service of process, and upon whom the subpœna was regularly served, for the defendant corporation. Defendant Arbetter is an inhabitant of Massachusetts, and Moore of the city of Washington, D. C. Process was not served on Arbetter or Moore, nor is objection made on that ground, nor as to the manner of service on the corporation; but the plea raises the question whether the latter can be compelled to answer under the venue clause of the act of March 3, 1887, providing that no civil suit shall be brought in the Circuit or District Court in a district of which the defendant is not an inhabitant. It is conceded that the Arbetter Company is an inhabitant of the district of Maine, under the rule settled in Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. The suit is in the exclusive jurisdiction of the Circuit Court, brought under section 4915 of the Revised Statutes, to secure the issuance of a patent for an invention. Lewis and Arbetter each claimed priority of invention, and Arbetter's claim was sustained by the Court of Appeals of the District of Columbia, as a result of interference proceedings in the Patent Office between Arbetter and Lewis. Lewis' right having been assigned to the plaintiff company, it seeks to sustain its right to a patent in this action. The sole question is whether the act of 1887 applies to suits in the exclusive jurisdiction of the Circuit Court; Arbetter and Moore being proper, but not necessary, parties under the act of 1839 (section 737, Rev. St. [U. S. Comp. St. 1901, p. 587]), and Shields v. Barrow, 17 How. 130, 15 L. Ed. 158. Exclusive jurisdiction in patent cases was vested in the Circuit Court by the act of July 8, 1870, and earlier statutes (section 711, Rev. St. [U. S. Comp. St. 1901, p. 578]); that act not providing in what district suit should be brought, nor otherwise fixing the venue. Section 4915, under which this suit was brought, provides that the court, "on notice to adverse parties and other due proceedings had," may adjudge that complainant is entitled to a patent.

The original judiciary act of 1789 prescribes the jurisdiction of the federal courts, and their procedure. Most of its provisions are still in force, scattered through the Revised Statutes. By section 9 the jurisdiction of the District Court is fixed, exclusive, concurrent with the Circuit Court, and concurrent with the state courts. All its provisions are still in force, with some modifications. Section 11, superseded by the act of March 3, 1875, and that in turn by the act of March 3, 1887, relates to the jurisdiction of the Circuit Court, concurrent with the state courts, in all the civil cases referred to in section 11, exclusive criminal jurisdiction where the fine exceeded $100, and jurisdiction concurrent with the District Court of all other federal crimes. Section 11 also fixes the venue or district where suit should be brought, in all civil suits in both District and Circuit Courts, and in both the original and concurrent jurisdiction given by sections 9 and 11. Section 11 in its original shape, and as superseded by the later acts, is as follows; changes introduced in 1875 being indicated by parentheses, and in 1887 by brackets:

"The Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law and in equity, where the matter in dispute exceeds, exclusive of [interest and] costs, the sum or value of five hundred [two thousand] dollars, (and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority), or in which the United States are plaintiffs or petitioners, or an alien is a party (or there is a controversy between citizens of a state and foreign states, citizens or subjects) [in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid] or the suit is between a citizen of the state where the suit is brought, and a citizen of another state ([or in which there shall be a controversy between citizens of different states]) [in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid] ([or a controversy between citizens of the same state claiming lands under grants of different states]). * * * But no person shall be arrested in one district for trial in another, in any civil action before a District or Circuit Court. ([Last sentence repeated in both later acts.]) And no civil suit shall be brought before either of said courts against an inhabitant of the United States ([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 the writ (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) [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 defendant]."

Section 9 of the act of 1789 contains the following:

"The District Courts shall also have cognizance, concurrent with the courts of the several states, or the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as aforesaid, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice consuls."

By comparison of these two sections it is readily seen that in civil suits the Circuit Court is given jurisdiction concurrent with state courts of the cases mentioned in both sections, and that the District Court is given like concurrent jurisdiction in suits by aliens for certain torts and actions at law by the United States, and exclusive jurisdiction of suits against foreign consuls and vice consuls. The conclusion is therefore irresistible that, when section 11 provides that no civil suit shall be brought in either the District or Circuit Court except where defendant inhabits or is found, it refers to the concurrent jurisdiction of both courts, and the concurrent jurisdiction of the District Court in actions at law by the United States. And it is equally logical to say that this clause refers both to the concurrent state and federal jurisdiction of the Circuit Court, and the concurrent federal jurisdiction of the same court in the two cases referred to in section 9, because the words "no civil suit" most clearly include all those mentioned. Nor is there anything in the acts of 1875 and 1887, or either of them, which in any way interferes with these conclusions, so far as cases covered by the original statute are concerned, because the provisions of section 9, with slight modification, are still in force. But the ques-

tion which arises in this particular case, relating to exclusive federal jurisdiction not referred to in the act of 1789, is quite a different one.

That question may be thus stated: Does the first section of the act of 1887, superseding section 11 of the original judiciary act and the first section of the act of 1875, in giving jurisdiction of cases arising under the federal Constitution, law, or treaty (also given by the act of 1875), involving more than $2,000, and fixing the district of suit in such cases, refer to suits authorized by special acts of Congress, of which the Circuit Court is given exclusive jurisdiction without regard to the amount in controversy? This question is squarely answered in the negative, in a case not relating to place of suit, by Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. In that case the act of 1887 was held inapplicable to trade-mark cases because the trade-mark act of 1881 (Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401]) gave federal jurisdiction without regard to the amount in controversy. Identical reasoning may be fairly applied to suits to establish patents under section 4915, which gives federal jurisdiction based on subject-matter alone, and where there is no definite amount in controversy. Indeed, it often happens that a suit under section 4915 is merely an administrative proceeding, with no adverse party, being merely a continuation of the patent application.

Every case ever decided by the Supreme Court, except Butterworth v. Hill, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. Ed. 119, where the point was not necessary to the conclusion reached, agrees with the Watch Companies Case cited. As early as 1825 it was held that the venue clause of section 11 of the act of 1789 did not apply to suits in rem in admiralty. Manro v. Almeida, 10 Wheat. 473, 6 L. Ed. 369. The same rule was held again in 1873, in Atkins v. Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841, and finally in Re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991; but it is true that the ground of these decisions was that admiralty causes are not "civil suits" within the meaning of the venue clause, and not on the reasoning applied in the Watch Companies Case. And the cases of United States v. Mooney, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550, In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, and In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, although not cases to establish patents, and the decision turned on other questions, are yet so satisfactory in their reasoning that they have been finally followed in all the federal courts except two, in cases involving substantially the question now presented.

United States v. Mooney was an action to recover the value of goods claimed to have been forfeited under the revenue laws. Action was commenced in the Circuit Court, notwithstanding the ninth section of the judiciary act of 1789, vesting in the District Court exclusive cognizance of all suits for penalties and forfeitures incurred under the laws of the United States. The question squarely presented in this case was: Did the general act of 1875 affect the jurisdiction of federal courts specially conferred by prior statute? The answer of the Supreme Court is in the negative. In the latter part of the opinion, Mr. Justice Woods says:

"The act of 1875 confers jurisdiction on the Circuit Courts only in cases where the matter in dispute exceeds $500. If that act is intended to supersede previous acts conferring jurisdiction on the Circuit Courts, then those courts are left without jurisdiction in any of the cases above specified where the amount in controversy does not exceed the sum of $500, and in the several classes of cases; for instance, in suits arising under the patent or copyright laws, neither the Circuit nor the District Courts of the United States would have jurisdiction when the amount in controversy is less than $500. But by section 711, par. 5, of the Revised Statutes, the jurisdiction of the state courts in cases arising under the patent or copyright laws is excluded. Therefore, when the matter in dispute in the case arising under these laws is less than $500, if we yield to the contention of plaintiffs, it would follow that no court whatever has jurisdiction. A construction which involves such results was clearly not contemplated by Congress. The act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases, and other particular subjects. Third Nat. Bank of St. Louis v. Harrison [C. C.] 3 McCrary, 162 [8 Fed. 721]."

In the Hohorst Case, which was decided in 1893, the complainant, Hohorst, brought suit for patent infringement in the Southern district of New York against Hamburg-American Packet Company, a German corporation doing business in the city of New York; service being had upon the New York agent of the alien corporation. In delivering the opinion of the court, Mr. Justice Gray states, inter alia:

"By Act March 3, 1887, c. 373, § 1, as corrected by Act Aug. 13, 1888, c. 866, 'the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states' 'or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects.' 24 Stat. 552; 25 Stat. 434. The intention of Congress is manifest, at least as to cases of which the courts of the several states have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies above mentioned. Moreover, the present suit is for the infringement of a patent for an invention, the jurisdiction of the national courts over which depends upon the subject-matter, and not upon the parties; and, by statutes in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction, 'exclusive of the courts of the several states,' 'of all cases arising under the patent right or copyright laws of the United States,' without regard to the amount or value in dispute. Rev. St. § 629, cl. 9, and section 711, cl. 5 [U. S. Comp. St. 1901, pp. 504, 578]. The section now in question, at the outset, speaks only of so much of the civil jurisdiction of the Circuit Courts of the United States as is 'concurrent with the courts of the several states' and as concerns cases in which the matter in dispute exceeds $2,000 in amount or value. The grant to the Circuit Courts of the United States, in this section, of jurisdiction over a class of cases described generally as 'arising under the Constitution and laws of the United States' does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class. If the clause of this section defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount or value must be held to be equally applicable, with the result that no court in the country, national or state, would have jurisdiction of patent suits in-

volving a less amount or value. It is impossible to adopt a construction which necessarily leads to such a result. United States v. Mooney, 116 U. S. 104, 107 [6 Sup. Ct. 304] 29 L. Ed. 550, 551; Miller-Magee Co. v. Carpenter [C. C.] 34 Fed. 433."

The Keasbey Case came before the Supreme Court in 1895 on petition for mandamus to compel the Circuit Court to take jurisdiction in a trade-mark suit, brought by a Pennsylvania corporation against a Massachusetts corporation doing business in New York; the bill of complaint containing allegations that the suit arose under the laws of the United States, and also was a controversy between citizens of different states, and that the matter in controversy exceeded the monetary value of $2,000. Mandamus was denied. The court construes In re Hohorst, supra, the language of Mr. Justice Gray (who, it will be noted, rendered also the decision in the Hohorst Case) being as follows:

"In the case of Re Hohorst, 150 U. S. 653 [14 Sup. Ct. 221] 37 L. Ed. 1211, on which the petitioner in this case principally relied, the decision was that the provision of the act of 1888, forbidding suits to be brought in any other district than that of which the defendant is an inhabitant, had no application to an alien or a foreign corporation sued here, and especially in a suit for infringement of a patent right, and therefore such a firm or corporation might be so sued by a citizen of a state of the Union in any district in which valid service could be made on the defendant. That case is distinguishable from the one now before the court in two essential particulars: First, it was a suit against a foreign corporation, which, like an alien, is not a citizen or inhabitant of any district within the United States, and was therefore not within the scope or intent of the provision requiring suit to be brought in the district of which the defendant is an inhabitant. See Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496 [14 Sup. Ct. 401] 38 L. Ed. 248. Second, it was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the Circuit Courts of the United States by Rev. St. U. S. § 629, cl. 9, and section 711, cl. 5, re-enacting earlier acts of Congress, and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states."

Since the decision of the Keasbey Case the Circuit Courts have quite generally accepted its conclusions, and held that the act of 1887 has no application to cases where prior statutes gave exclusive jurisdiction. Kalispell Lbr. Co. v. Great N. R. Co. (C. C.) 157 Fed. 845; Ware Kramer Tobacco Co. v. American Tobacco Co. (C. C.) 178 Fed. 117; Button Works v. Wade (C. C.) 72 Fed. 298; Noonan v. Chester Park Co. (C. C.) 75 Fed. 334; Consolidated Co. v. Columbian Co. (C. C.) 73 Fed. 829; Earle v. So. Pac. Co. (C. C.) 75 Fed. 609, 82 Fed. 691, 27 C. C. A. 185; Westinghouse Co. v. Great Northern Ry. Co., 88 Fed. 258, 31 C. C. A. 525; Spears v. Flynn (C. C.) 102 Fed. 6; Lederer v. Rankin (C. C.) 90 Fed. 449; Lederer v. Ferris (C. C.) 149 Fed. 250; Van Patten v. C., M. & St. P. R. Co. (C. C.) 74 Fed. 981; U. S. v. Standard Oil Co. (C. C.) 152 Fed. 290; Lumber Co. v. Great Northern R. Co. (C. C.) 157 Fed. 845; No. Pac. R. Co. v. Lumber Association, 165 Fed. 1, 91 C. C. A. 39; United S. M. Co. v. Duplessis I. S. M. Co. (C. C.) 133 Fed. 933; Bowers v. Atlantic Co. (C. C.) 104 Fed. 887. Two courts have not followed it: Gorham Mfg. Co. v. Watson (C. C.) 74 Fed. 418, and Memphis Cotton Oil Co. v. Illinois Cent. R. Co. (C. C.) 164 Fed. 290.

Prior to the Keasbey & Mattison Case most of the decisions held that the acts of 1875 and 1887 applied to patent cases. After that decision, as cases came up in the different circuits, the earlier rule began to be reversed, so there was apparent conflict. A bill was therefore introduced in Congress applicable to patent infringement, resulting in the passage of the act of March 3, 1897, under which infringement suits may be where defendant inhabits, or where he commits acts of infringement and has a regular and established place of business. Act March 3, 1897, c. 395, 29 Stat. 695, 5 Fed. St. Ann. 566 (U. S. Comp. St. 1901, p. 589). The congressional proceedings show that it was the understanding of members of Congress that infringers could be sued only in the district of their residence; corporate infringers being suable only where organized. All the decisions up to February, 1897, were before Congress, and it appeared that judicial decision was in conflict, showing the wisdom at that time of legislation. Cases holding the act of 1875 or 1887 applicable to suits in the exclusive jurisdiction are as follows: Patent cases: First circuit, National Typewriter Co. v. Pope Mfg. Co. (C. C.) 56 Fed. 849; Second circuit, Halstead v. Manning (C. C.) 34 Fed. 565, and Adriance v. McCormick Harvesting M. Co. (C. C.) 55 Fed. 287; Sixth circuit, Miller-Magee Co. v. Carpenter (C. C.) 34 Fed. 433; Seventh circuit, Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (C. C.) 34 Fed. 818; Preston v. Fire Extinguisher Mfg. Co. (C. C.) 36 Fed. 721, and Bicycle Stepladder Co. v. Gordon (C. C.) 57 Fed. 529; Eighth circuit, Reinstadler v. Reeves (C. C.) 33 Fed. 308, and McBride v. Grand De Tour Plow Co. (C. C.) 40 Fed. 162; Ninth circuit, Cramer v. Singer Mfg. Co. (C. C.) 59 Fed. 74.

Inasmuch as all the civil jurisdiction given by section 11 of the act of 1789, and section 1 of the acts of 1875 and 1887, is concurrent with that of the state courts, and is made to depend on the amount in controversy, except in suits by the United States and suits under conflicting state land grants, it is logical to regard the venue provisions of the later statutes as intended to refer only to the concurrent jurisdiction of the Circuit Court, notwithstanding that a broader construction should be given the original judiciary act, and not to cases in its exclusive cognizance. The Supreme Court has often expressed this view.

Butterworth v. Hill, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. Ed. 119, decided in 1884, was a suit under section 4915, brought in the district of Vermont, against the Commissioner of Patents, who was an inhabitant of the District of Columbia, and was there served with process. He did not appear, and a decree in favor of complainant was reversed for want of jurisdiction. The decision was put upon the ground that the act of 1875 was applicable. It is clear, however, that the jurisdiction could not have been sustained on any ground, and that the decision is not a binding authority, in view of the later cases in the same court.

The plea in abatement to the jurisdiction presents a pure question of law, since it is admitted that defendant company is doing business in this district. It would be properly suable here, if the case were one

where the basis of the federal jurisdiction was diverse citizenship. The usual practice in this circuit is to raise questions of fact by motion, and not by plea, both when defendant is properly suable in the district, but not properly served, and when it is not doing business in the district. Wall v. Chesapeake & O. R. Co., 95 Fed. 398, 37 C. C. A. 129; Forrest v. Pittsburg Bridge Co., 116 Fed. 357, 53 C. C. A. 577. This practice is preferred, because more expeditious, avoiding a jury trial of the facts, and because the pendency of the suit is not affected, but only service of the process. A better service may be had, or defendant may afterwards transact business in the district, so as to be properly suable there. But in the present case defendant is engaged in business in this district. It contends that it can never be suable here under any circumstances, thus raising a question of law, which may be raised either by plea or motion. If the plea were sustained, the suit would properly be dismissed. See Jackson v. Delaware River Co. (C. C.) 131 Fed. 134.

Plea overruled, with leave to answer in 30 days.

In re FAULKNER.

(District Court, D. Connecticut. October 6, 1910.)

No. 2,313, in Bankruptcy.

BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALES.

Under Gen. St. Conn. 1902, §§ 4864, 4865, which require contracts of conditional sale to be executed and recorded, and provide that all sales not made in conformity with such requirement shall be held to be absolute sales, except as between vendor and vendee, as construed by the Supreme Court of Errors of the state, the purchaser, by a conditional sale contract not so executed and recorded, takes a title which he could have transferred, and under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), an absolute title passes to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

In the matter of Thomas D. Faulkner, bankrupt. On review of order of referee, denying petition of the American Slicing Machine Company for possession of a slicing machine. Affirmed.

The following is the opinion of George A. Kellogg, Referee:

The facts set forth in the foregoing petition, and admitted by counsel for the petitioner and by the attorney for the trustee, raise the question of the validity of the title of the petitioner (vendor) to a machine delivered to the bankrupt, some months prior to bankruptcy, under a conditional sale contract reserving title in the vendor until full payment of the price agreed upon.

Section 70a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) vests in the trustee of the estate of a bankrupt, by operation of law, the title of the bankrupt, as of the date he was adjudged a bankrupt, to property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. In bankruptcy, the construction and validity of a conditional sale contract must be determined by the local laws of the state. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup.

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

Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Bryant v. Swofford Bros. Co., 22 Am. Bankr. Rep. 116, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997.

The contract in question was not executed and recorded as required by section 4864, General Statutes of Connecticut of 1902. Section 4865, General Statutes of Connecticut of 1902, provides that all conditional sales of personal property, not made in accordance with the provisions of section 4864, shall be held to be absolute sales, except as between the vendor and vendee, or their personal representatives, and that all such property shall be liable to be taken by attachment and execution for the debts of the vendee. As to the creditors of the bankrupt, therefore, under this statute, the sale was absolute, and at the time of the adjudication in bankruptcy the bankrupt, so far as his creditors were concerned, had absolute title to the machine. The trustee of the bankrupt, who under the decision of the Supreme Court of our state is more than a personal representative of the bankrupt (vendee), took absolute title to the machine in question, and properly sold it as an asset of the estate.

I am unable to find in any of the cases cited by counsel for the petitioner any reason that conflicts with the above conclusion. In no case cited do I find a local law like our Connecticut statute in the positive quality of the barrier that is raised to prevent the building up of credit upon false appearances. It is true, as stated in York Mfg. Co. v. Cassell that the "trustee takes no better title than the title of the bankrupt"; but by our Connecticut statute the bankrupt himself by operation of the statute had the absolute title to the machine demanded by the petitioner to the extent that he could have transferred it, or that it might have been levied upon by his creditors. In re Wilcox & Howe Company, 70 Conn. 221, 39 Atl. 163; In re Yukon Woollen Co. (In re Legg), 2 Am. Bankr. Rep., page 805, 96 Fed. 326; Security Warehousing Co. v. Hand, 206 U. S. 425, 27 Sup. Ct. 720, 51 L. E. 1117.

The petition is denied, with costs of the proceedings thereon taxed against the petitioner.

L. A. Howard, for petitioner.
F. H. Parker, for trustee.

PLATT, District Judge. The only question decided by the referee is stated by him as follows:

"Does the trustee of a bankrupt in the state of Connecticut take absolute title to property in possession of the bankrupt at the time of the adjudication, said property having been delivered to said bankrupt by the vendor thereof under a conditional sale agreement, which provided that the title should remain in the vendor until the price agreed upon should be fully paid, which contract was never executed and recorded as prescribed by the statutes of Connecticut?"

Let me add only a word to his memorandum, which succinctly states the reason for his decision. Connecticut was perhaps the first of the states in which it was made plain by law that a trader could not make a parade of property belonging to some one else in such a manner as to bolster up his credit and give him a rating in the business world to which he was not entitled. Gen. St. §§ 4864 and 4865, as construed by our highest court, are obviously finger marks pointing in that direction.

A petition asking for an adjudication in bankruptcy is, as I have recently had occasion to say, in its essential nature an equitable proceeding between the petitioner and his creditors. He states his misfortune, professes his honesty, presents his liabilities, offers up his property, and asks for a discharge from such portion of his debts as his property, equitably distributed, shall fail to pay. His creditors are

called together and select, if they can agree, the person who shall take the property offered up and administer upon it. The trustee takes such property as the bankrupt, before adjudication, could have transferred, or which his creditors might have taken in satisfaction of their debts. Section 70a (5), Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). The slicing machine here in dispute plainly comes within that kind of property.

York Manufacturing Co. v. Cassell, etc., 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, at first blush brightens the petitioner's prospects; but upon closer examination it will be seen that the Ohio statute about conditional sales had not been interpreted by the Ohio court, and therefore the Supreme Court exercised its manifest right to decide the question of local law, and came to the conclusion that the condition would only be void as to such creditors as had "fastened upon the property" by specific liens prior to the filing of the conditional contract. "As to creditors who had no such lien, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract." Page 351 of 201 U. S., page 484 of 26 Sup. Ct. (50 L. Ed. 782).

Our Supreme Court has interpreted our local law in a manner which leaves no standing ground for the petitioner. In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163.

The decision of the referee is affirmed.

THE C. H. NORTHAM.

(District Court, D. Massachusetts. March 30, 1909.)

No. 88.

SHIPPING (§ 204*)—LIMITATION OF LIABILITY—"VESSEL" TO WHICH LIMITATION APPLIES.

A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a "vessel," within the meaning of Rev. St. § 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (U. S. Comp. St. 1901, p. 2945); and her owners may maintain proceedings for a limitation of liability for damage done by her, where she floated and went adrift in a storm without their knowledge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 639, 640; Dec. Dig. § 204.*

For other definitions, see Words and Phrases, vol. 8, pp. 7297–7301.

Limitation of liability of vessel owner, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. Petition for limitation of liability by Thomas Butler and others, as owners of the steamer C. H. Northam. On motion to dismiss for want of jurisdiction. Motion denied.

See, also, 181 Fed. 985, 986.

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

Carver, Wardner & Goodwin, for petitioners.
Edgar O. Achorn, for claimants.

DODGE, District Judge. In this case there has been a reference to a master to ascertain the value of the C. H. Northam and her pending freight, in order that the court may fix the amount of stipulation to be given therefor. The present motion to dismiss is based partly upon the allegations in the petition and partly upon facts found by the master in his report.

It is contended that upon these allegations and findings the C. H. Northam cannot properly be considered a "vessel," within the meaning of the limited liability schedules. When the damage was done which is set forth in the petition, the C. H. Northam was adrift without any one on board. Her owners had left her on shore at Wood Island. In a storm she floated and went adrift without their knowledge.

Her owners had taken her to Wood Island to dismantle her, and were engaged in doing so at the time. Her masts had been removed, also her engines, and she was entirely without motive power of her own. Part of her machinery still remained on board the hull, with a derrick and dummy engine, belonging to her owner, which were being used in the dismantling process. Under these conditions, she drifted all the way across from Wood Island to Harbor View, and was afterwards towed back to Wood Island. She was, therefore, whatever her deficiencies for use as a barge, capable of floating, of carrying cargo, and of being towed from place to place. Since canal boats, barges, and lighters are vessels for the purposes of the limited liability statutes, by the express terms of Rev. St. U. S. § 4289, as amended in 1886 (Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, p. 2945]), it is difficult to see why, so far as capacity for use in navigation is concerned, she is not to be regarded as a vessel within the meaning of those statutes. In Re Eastern Dredging Co., 138 Fed. 942, a dumping scow was held to be a vessel in that sense. That a wreck, kept afloat only by steam pumps, and capable of navigation only by being towed, may be a vessel, in the sense referred to, is settled in Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

It is urged that the question is one to be determined according to the intention or absence of intention of her owners to use her as a vessel, and that in this case the owners had given up all intention of so doing, and were proceeding to dismantle her as rapidly as possible, in order to get at the metal which she contained by burning her. Admitting these to be the facts, I am unable to believe that she ceased to be a vessel, for the purposes of the statutes referred to, until the dismantling process had gone so far as to render her wholly incapable of navigation. However high up on the beach she may have been placed, and whether or not holes had been bored in her bottom to let out water which she contained, that stage of the process had not been reached, and the owners might still have changed their plans without having to make a new vessel out of a mere wreck. If negligence in her management, without the owners' privity and knowledge, did in fact cause

the damage against which limitation of liability is sought, the negligence did not differ in character, so far as appears, from the negligence which would have been the cause of the same damage if the craft placed on the beach and negligently permitted to go adrift had been in every respect a complete vessel.

The motion to dismiss is denied.

THE C. H. NORTHAM.

(District Court, D. Massachusetts. April 29, 1909.)

No. 88.

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—VALUATION OF VESSEL.

Where a vessel, at the time of the commission of injuries for which her owners seek limitation of liability, had been so far dismantled as to have no market value as a vessel, for the purpose of fixing the amount of the stipulation to be given by petitioners, the net value of the materials in her after she is broken up may properly be taken; but in such computation the value of a dummy engine placed on board for use in removing her machinery, and which was no part of her equipment, should be excluded.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 656–658; Dec. Dig. § 209.*

Limitation of liability of vessel owner, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. Petition for limitation of liability by Thomas Butler and others, as owners of the steamer C. H. Northam. On exceptions to master's report. Exceptions overruled.

See, also, 181 Fed. 986.

Carver, Wardner & Goodwin, for petitioners.

Edgar O. Achorn, for claimants.

DODGE, District Judge. I have held in an opinion in this case dated March 30, 1909 (181 Fed. 983), that the Northam must be considered a vessel for the purposes of this petition; but on the facts found by the master it can hardly be said that the ordinary rule for ascertaining the market value of a vessel is possible of application in her case. Evidently in the ordinary market for vessels she had no value, for the reasons stated by the master, and, instead of directing the inquiry to the market value, it was necessary to resort to other methods of appraisal.

The master has taken the total value of the material contained in her, has deducted the total expense of breaking her up and getting the material out, and has allowed the balance of $413.79, then remaining, as her value for the purposes of this case. I am unable to see why this method of arriving at her value is not proper and just under the circumstances.

I think that the master was right in excluding the value of the dummy engine on board the Northam at the time of the alleged dam-

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

age done by her. This was no part of her tackle, apparel, or furniture. It never had been, and could not be, of any use in navigating her. It was not, and never had been, on board her for any such purpose.

The exceptions must be overruled, the master's report confirmed, and the petitioner ordered to stipulate in the sum of $413.79 as the value of his interest in the vessel.

THE C. H. NORTHAM.

(District Court, D. Massachusetts. August 17, 1909.)

No. 88.

SHIPPING (§ 208*)—VESSEL BREAKING FROM MOORINGS IN STORM—INEVITABLE ACCIDENT.

A steamer owned by petitioners was placed by them on the beach, where she had been for several weeks, and had been partially broken up and her machinery removed, when during a storm and high tide at night she floated, broke from her moorings, and drifted across the bay. She did not float at ordinary high tide, and lay in a hollow, with a bank between her and the sea. She was made fast by five hawsers, three of which parted, and the others slipped from their fastenings. A watchman was on board. The storm and height of the tide were extraordinary, and exceeded any that had been known for several years, and many other vessels dragged their anchors or broke from their moorings. The direction of the wind at high water was such as to force the vessel off shore, but in most storms occurring at that time of year the wind blows on shore. *Held:* (1) That there was no absence of reasonable care or skill on the part of petitioners, which would charge them with privity or knowledge, such as to prevent them from limiting their liability; and (2) that the breaking away of the steamer was due to inevitable accident or vis major, and she could not be held liable for injuries to other vessels into which she may have drifted.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 645; Dec. Dig. § 208.*]

In Admiralty. Petition for limitation of liability by Thomas Butler and others, as owners of the steamer C. H. Northam. On questions of petitioners' privity or knowledge, and their liability for damage to claimants. Decree for petitioners, and claims dismissed.

See, also, 181 Fed. 983, 985.

Carver, Wardner & Goodwin, for petitioners.

Edgar O. Achorn, for claimants.

DODGE, District Judge. The petitioners had placed their steamship C. H. Northam on the beach which lies north of Wood Island Park and east of the Revere Beach and Lynn Railroad bridge at East Boston, and were engaged in dismantling her there. On the night of Wednesday, November 6, 1907, during a storm accompanied by a high tide and heavy wind, she floated, broke from her moorings, and drifted in a northerly direction across the bay or cove which lies between Wood Island Park and that part of East Boston called Harbor View, until she grounded at the latter place. A quantity of beams,

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

spars, planking, and other wooden material, either taken from the Northam in the process of dismantling her or to be used in that process, and lying, when the storm came, in the water between the Northam and the shore, or on the shore alongside her, also went adrift when she did, and drifted toward the opposite shore. It was found next morning strewn along that shore for a considerable distance. The respondents Crosby, Mayer, De Gaust, and Frederick were the respective owners of certain small vessels or boats, which on the evening of November 6th were moored in apparent safety at various points between Wood Island and Harbor View, but were found on the morning of November 7th ashore and more or less damaged at or near Harbor View. The respondent Nelson owned a wharf at Harbor View and certain small boats there, also found on the morning of November 7th to have sustained some damage. The respondents contend, and the petitioners for limitation deny, that the Northam and the wooden material referred to drifted from Wood Island by reason of negligence for which the petitioners, as her owners, are responsible; also that the damage to the various craft belonging to them, or to the wharf, was the result of that negligence. They also contend, and the petitioners deny, that the petitioners are chargeable with privity or knowledge in respect to said negligence.

I first consider the question whether any negligence is established on the petitioners' part as owners of the Northam. They were, of course, bound to use due care to prevent her from getting away from her moorings. In the condition to which they had reduced her, she could not have been navigated without danger to such other craft as she might encounter, and the fact that on the night in question she was for a time found drifting about the harbor and not under control creates a presumption against her in favor of any vessel or structure that she may have damaged while so drifting. The presumption, however, is one which she may meet by showing, if she can, that her drifting "was the result of inevitable accident or a vis major, which human skill and precaution and a proper display of nautical skill could not have prevented." The Louisiana, 3 Wall. 164, 173, 18 L. Ed. 85; Eastern Dredging Co., Petitioner, 159 Fed. 549; Eastern Dredging Co. v. Winnisimmet Co., 162 Fed. 860, 89 C. C. A. 550.

In The Louisiana, above cited, a vessel moored got adrift by reason of a change in the direction of the tide and a rising of the wind. It appeared that the wind, though increased in force, was "only of such a character that its effects might have been anticipated, and by proper precaution prevented"; that it was only a "half gale," a "stiff breeze," or a "little more than the ordinary"; and that, out of numerous other vessels in the vicinity, not one was caused to break adrift by it. It was held that the presumption of negligence had not been met.

Negligence is therefore established on the petitioners' part, unless they have sustained the burden of showing (1) that they used the required degree of skill and precaution to guard against all such contingencies as ought reasonably to have been anticipated, tending to set their vessel adrift; and (2) that she was, notwithstanding such skill and precaution, caused to go adrift by the occurrence of circumstances

so extraordinary as to render unreasonable any claim that they should have been anticipated

1. The Northam had been on the beach referred to in the same place and secured in the same way for several weeks. At ordinary high tide she did not float. This happened only on an extra high tide, and, of course, when it happened, she would remain afloat for a very short time only. She was in a bed or hollow formed in the bottom, and the bank outside her would, under all ordinary circumstances, have prevented her from drifting away, even while she did float. She was moored by five different hawsers of sizes ordinarily used for such a purpose, and the shore ends of these hawsers were made fast in various ways; two of them to large rocks on shore, two of them to posts driven into the ground, and one of them to an A frame, so called, which was secured to the shore, and which was being used to assist in the dismantling process. She had a lighter alongside on her outer side; this craft being anchored. A schooner was anchored at a little distance outside the lighter. She was attached by lines to both these craft. It appears that three of the lines attaching her to the shore parted when she went adrift, and that the remaining two dragged from around the rocks to which they were fastened; also that the lighter and the schooner dragged or parted from their anchors. The evidence regarding the fastenings used has not seemed to me to show any lack of skill and diligence on the petitioners' part in providing against all such contingencies as were reasonably to be anticipated. Of course, storms were to be expected at that time of the year. Such storms, however, ordinarily came from the northward and eastward, and no storm from those directions would have tended to part the fastenings. It would, on the contrary, have tended to keep the steamer where she was. In view of these facts, and of the bank outside the steamer, it seems to me that the petitioners have satisfactorily proved that they used the required degree of care in fastening the vessel, unless the storm which set her adrift was only of such a character that its unexpected effects ought to have been expected and anticipated. There was evidence tending to show that the hawsers used, or some of them, were not new, and not, therefore, as strong as they should have been, and that sufficient precaution had not been taken to prevent those which were fastened to rocks from slipping off or dragging under. There was also evidence tending to show that some of these deficiencies had been called to the attention of the persons in charge of the steamer before the day on which the storm arose, but without inducing them to pay any attention to the criticisms made. This evidence, however, has not seemed to me sufficient to overcome the evidence which tends to show due care. It was, of course, most important to the petitioners that their vessel should not be allowed to break adrift. The loss to them involved in her doing so would be more serious than any damages she would be likely to inflict on any one else. I do not think that any want of due care is disclosed by all the evidence regarding the hawsers or the manner in which they were made fast. A watchman was always kept on board the steamer at night, and there were two men on board on the night of the storm. When the danger of the steamer being blown off manifested itself, it was late in the even-

ing, and they had no reasonable opportunity to prevent it. They opened the seacocks when she began to float; but this did not prove sufficient. Nothing more seems to have been reasonably within their power at that time.

2. The evidence regarding the character of the storm satisfies me that the violence of the wind was extraordinary, and that the tide rose to an extraordinary height, but that in neither respect was the storm such as to be wholly unprecedented. There had been nothing like it, however, for several years, and two facts about it appear which seem to me to justify the finding that it was of such a character as to make it unreasonable to expect the petitioners to anticipate and guard against the effect which it had upon this vessel. The first is that, while the storm began as a storm from the east and northeast, and the warning published by the Weather Bureau at 10 a. m. of the same day had been a warning of a northeast storm, the wind afterward changed rapidly in direction to the southward and then to the westward, so as to blow with great violence from the latter direction at the time the tide was at its height, and thus to be forcing the Northam away from shore just when the tide had floated her and made it most possible for her to break away. The second is that a very large proportion of the other craft left at anchor off the shore, not only in that vicinity, but in other parts of the harbor, during the same night, yielded to the violence of the storm, parted their moorings or dragged their anchors, and were found stranded at various points along shore the morning after. In view of all the evidence, my conclusion must be that the petitioners have sustained the burden of proof required of them in order to entitle them to ascribe the breaking away of the steamer to causes for which they are not responsible. See Transfer No. 2, 56 Fed. 313; The Mary L. Cushing, 60 Fed. 110; The Waterloo, 100 Fed. 332, 40 C. C. A. 386, as compared with The Andrew Welch, 122 Fed. 557; The Drumcraig, 133 Fed. 804; Bleakley v. City, 139 Fed. 807; The William E. Reis, 152 Fed. 673, 82 C. C. A. 21.

If the steamer had not broken away, the timber and other wooden material above referred to would not have got adrift. It, or at least all that part of it which can reasonably be supposed in any event to have done any damage, was on the steamer's inshore side, and thus secured by the various moorings which held her to the shore, so that it would not have got adrift at all, had she remained fast to the shore.

If, as I am obliged to hold, the breaking away of the steamer and other material cannot fairly be ascribed to negligence on the petitioners' part, there was no privity or knowledge regarding it which can be charged to them. These conclusions render it unnecessary to inquire how much, if any, of the injuries sustained by property belonging to the damage claimants, could, in any event, be fairly ascribed to the breaking away of the steamer as their cause. As to some of those injuries, the evidence that they were really caused by the steamer, or by any of the material which drifted across from where she lay, seems to me far from convincing.

All the claims presented by the respondents above named must be disallowed.

PEORIA WATERWORKS CO. v. PEORIA RY. CO.

(Circuit Court, N. D. Illinois, E. D. September 30, 1910.)

No. 24,193.

1. ELECTRICITY (§ 9*)—INJURIES INCIDENT—SCOPE OF INJUNCTION.
A court of equity has no power to prescribe by injunction the use by an electric street railway company of any particular system of circuit or negative return, even though it is shown that the system in use results in the continuous injury, and will result in the destruction by electrolysis by its return current of the pipes of a water company, but the utmost possible relief which the court can grant is to restrain the continuance of the injury, and punish the company and its officers for contempt in case of disobedience, leaving the means to be adopted to cure and prevent the injury entirely to its discretion.
[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 9.*]

2. ELECTRICITY (§ 9*)—INJURY TO PIPES OF WATER COMPANY BY ELECTROLYSIS—INJUNCTION—MEASURE OF RELIEF.
In a suit by a water company against an electric street railway company to enjoin defendant from injuring the mains and service pipes of complainant by electrolysis caused by electricity generated by defendant, the evidence showed that both parties used in part the same streets under franchises granted by the city; that defendant operated its line by the single trolley system using the rails as return conductors; that complainants' pipes were being injured by electricity which passed to them from the rails through the earth, but not to the serious extent claimed, and that the injury was being lessened by means adopted by defendant by the use of brazed rail bonds and by feeder wires from the rails to the negative side of the dynamos. The weight of the expert testimony also tended to show that, while the escape of electricity from the rails to the water pipes and consequent injury to the latter by electrolysis could not be entirely prevented in the system used by defendant, it could be so lessened by the means defendant was adopting or other means suggested and used elsewhere as to practically prevent serious injury to the pipes of complainant. *Held*, that it was the legal duty of defendant to prevent such injury by all reasonable and practical means; that it would be enjoined from continuing such injury, but would be left free to adopt within a reasonable time such means to that end as it should be advised.
[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 9.*]

3. WORDS AND PHRASES—"C. G. S. SYSTEM"—"CENTIMETER-GRAM-SECOND SYSTEM."
Units of electrical force and volume have been fixed by law with reference to what is known as the centimeter-gram-second system, generally referred to as the "C. G. S. system." This system was adopted with reference to length, expressed by the centimeter, mass, expressed by the gram, and time, expressed by the second. These are the fundamental units of scientific work.

4. WORDS AND PHRASES—"UNIT OF FORCE."
The unit of force, in scientific work, is that force which, when acting on a body weighing one gram, will give it an acceleration of one centimeter in one second.

5. WORDS AND PHRASES—"OHM"—"UNIT OF RESISTANCE."
The unit of resistance, called the "ohm," is 1,000,000,000 units of the C. G. S. system.

6. WORDS AND PHRASES—"UNIT OF VOLUME"—"AMPERE."
The unit of volume, called the "ampere," is one-tenth unit of the C. G. S. system.

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

7. WORDS AND PHRASES—"UNIT OF PRESSURE"—"VOLT."
The unit of pressure, called the "volt," is that electrical force which when steadily applied to a wire or other conductor having a resistance of 1,000,000,000 units of the C. G. S. system will produce a current of one-tenth of a unit per second of that system.

8. WORDS AND PHRASES—"UNIT OF POWER"—"WATT"—"HORSE POWER."
The unit of power, called the "watt," equals 10,000,000 units of power in the C. G. S. system, or one ampere times one volt. One horse power is 746 watts or ¾ kilowatts.

9. WORDS AND PHRASES—"ELECTROLYSIS"—"ELECTROLYTE."
"Electrolysis" is the decomposition of a metal solution in water, liquid ammonia, etc., accompanied by decomposition of the water into oxygen and hydrogen, or of a mass of molten metal, by having an electric current passed through it. The solution or melted mass is known as an "electrolyte."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2343.]

In Equity. Suit by the Peoria Waterworks Company against the Peoria Railway Company, successor to the Central Railway Company. Decree for complainant.

John S. Stevens, John J. Herrick, and William T. Abbott, for complainant.

I. C. Pinkney and John P. Wilson, for defendant.

SANBORN, District Judge. Bill for injunction against injury to water mains by electrolysis. The case was twice referred to Mr. Wean as special master. His findings of facts and legal conclusions on both references, filed April 30, 1910, follow:

"(1) On the 8th day of January, 1894, the Atlantic Trust Company of New York filed a bill in the United States Circuit Court for the Northern District of Illinois, Southern Division, to foreclose a mortgage of the Peoria Water Company, a corporation of the state of Illinois, upon the waterworks system and plant of said company in Peoria, Ill., securing outstanding bonds of the company, which suit was duly removed to the Northern Division of said District. On the 8th day of January, 1894, Cornelius B. Gold of New York was appointed receiver in said cause, and on the 20th day of July, 1897, a decree of foreclosure and sale was entered by this honorable court, in and by which decree a special master in chancery was appointed and directed to make sale of the property of said defendant on terms mentioned in said decree, provided the amount found in said decree to be due from the said defendant should not be paid as in said decree provided. In accordance with the provisions of said decree, the said property was by the special master offered for sale on the 14th day of January, 1898, and on that day was struck off to William D. Barbour, Edward Oothout, and Herbert C. Warren, constituting the authorized committee of the holders of the bonds of said defendant Peoria Water Company. The said William D. Barbour and Edward Oothout were at that time and at the time of the filing of the petition of the receiver herein both citizens of the state of New York, and the said Herbert C. Warren was at said times a citizen of the state of Connecticut. On March 4, 1898, the special master filed a preliminary report of his proceedings up to that date, which were approved and confirmed by order of this court, but at that time payment had not been completed by the purchasers, the deed had not been delivered, the property had not been surrendered. The decree of foreclosure specifically provided that the receiver should remain in possession of the mortgaged property, and continue to operate the same after the sale and until the surrender thereof. While affairs were in this condition, and on the 21st day of March,

1898, the said Cornelius B. Gold, receiver, presented his petition, in which it was alleged that the railway companies therein named were destroying the plant and property in his custody as receiver by electrolysis; the prayer of said petition being for an injunction operative after a reasonable limit of time against the further operation of electric cars until the defendants have made use of such appliances as will prevent the grounding of electric currents and their coming in contact with the pipes and mains of the waterworks system. The petition recited that the receiver was a resident and citizen of the state of New York. It recited the sale to the members of the bondholders' committee, and that the petition was filed not only on the receiver's behalf for the protection of his possession and custody as receiver, but for the use of the purchasers, their successors, and assigns, and that the said purchasers were citizens of other states than the state of Illinois. On the same day the petition was filed a rule to show cause was entered by the court, and service of the same was made upon the defendants on the 26th day of March, 1898, as appears by the return of the United States marshal now on file in the office of the clerk of this court. On the 11th day of April, 1898, the defendant railway companies answered the petition upon the merits, but alleged in such answer that at the time of the filing of the receiver's petition aforesaid the title, custody, and control of said property had become divested in this court and in the said receiver, and had passed to the purchasers at the sale of said property, and that this court by reason of such sale and transfer of title to said property had no further interest in the protection of the same, that the said receiver had no further right or authority to act as receiver of this court in connection therewith, and that any adjudication made by this court of the questions and matters complained of by said Gold, as receiver, 'in his bill of complaint herein,' would not be binding upon the real parties in interest or the owners of the said property. Subsequent to the filing of the answers above mentioned, the purchasers hereinbefore named complied with their bid by surrendering the old bonds and coupons, and assigned their interest to the Peoria Waterworks Company, a corporation organized under the laws of New Jersey. At the request of the purchasers, a deed was made to their assignee, the Peoria Waterworks Company, by the said special master, which deed is dated the 13th day of July, 1898, and was filed in the Recorder's Office of Peoria County, Illinois, on the 5th day of August, 1898. After the delivery of this deed, the special master again reported his doings to the court in a report filed the 4th day of August, 1898. On the 4th day of August, 1898, the court entered an order confirming the report last above mentioned, in and by which order there was set forth the pendency of the proceeding against the railway companies, and the discharge of the receiver was ordered to be without prejudice to such suit. By order of court made on the same day, the Peoria Waterworks Company, a corporation of New Jersey, then the owner of the property, was, by amendment, substituted for the receiver, as complainant in said petition, and thereafter, as hereinabove stated, evidence was taken by agreement of the parties in the cities of Peoria and Chicago, Ill., Cincinnati, Ohio, New York City, Brooklyn, and Albany, N. Y., Philadelphia and Pittsburg, Pa., Milwaukee, Wis., and Terre Haute, Ind. On August 26, 1899, by consent, there was filed an amendment to the said petition, and on the 17th day of October, 1899, by consent of parties, an amendment was filed to the answer of the Central Railway Company and the Peoria & Prospect Heights Railway Company, which amendment relates wholly to the merits of the case made by said petition as amended.

"(2) The Peoria Waterworks Company, complainant as aforesaid, is the owner of an 'improved, enlarged, and extended' system of waterworks in the city of Peoria, Ill., which system includes about 85 miles of mains and 5,000 service pipes, and is operating the same under an ordinance passed by the common council of the city of Peoria on the 4th day of May, 1889, and amended on the 23d day of July, 1889, and the 5th day of August, 1890. The preamble of said ordinance is as follows: 'An ordinance, for an improved, enlarged and extended system of waterworks, for the city of Peoria, Illinois, and its inhabitants, and to supply them with water for all public and private purposes, and to sell to John G. Moffett, Henry C. Hodgkins, John V. Clarke, and Charles T. Moffett, doing business under the firm name of Moffett, Hodgkins

& Clarke, of Watertown, New York, the present existing system of waterworks of the city of Peoria, as an entirety, and granting to the said Moffett, Hodgkins & Clarke, the franchise and license to rebuild, enlarge and extend the present system of waterworks, and to construct, maintain and operate as a whole, the new, improved, enlarged and extended system of waterworks, in, near and for the said city of Peoria, and contracting with the said Moffett, Hodgkins & Clarke for water for fire protection and other public uses for the city of Peoria, and granting to the said Moffett, Hodgkins & Clarke the right and license to furnish, deliver and sell water to the inhabitants of the city of Peoria, and reserving to the said city of Peoria the right to purchase the said waterworks system, after its enlargement, improvement and extension, all as hereinafter provided for.'

"The said ordinance of May 4, 1889, under which as amended, complainant is operating, contains the following:

" 'Sec. 4. And the said city of Peoria hereby grants this franchise and license to the said grantees, for and during the term of thirty years from the sale and delivery of the present waterworks system, subject only to the right of purchase, and conditions herein provided, and also the right to operate the said present system of waterworks, and to enlarge, extend, improve, maintain and operate the same in, near and for the said city of Peoria for supplying the city of Peoria and its inhabitants, and those in its immediate vicinity, with water for public and private uses, and to use within the present and future limits of the city of Peoria, subject to the restrictions, limitations, and in the manner herein provided, the streets, alleys and other public ways or lands, for the purpose of laying, taking up, repairing or otherwise maintaining and operating mains, pipes, hydrants and other appurtenances.'

" 'Sec. 20. The city of Peoria reserves the right to disturb the pipes of the said grantees when it shall become necessary for building or repairing sewers, or for the making of other city improvements, the same to be so done as to cause the least damage to the grantees possible. But nothing herein shall be so construed as to release contractors with the city from liability for damage caused by disturbing said pipes. * * *'

" 'Sec. 14. The pressure, capacity and efficiency of said waterworks system shall be kept at all times during said period of thirty years fully up to the standard prescribed in this ordinance, and for the purpose of determining the amount of pressure and efficiency of said waterworks as a fire protection from time to time, the city council reserves the right to order a test of said works and pressure in any and all parts of the city of Peoria at least once each year during said period of thirty years.'

" 'Sec. 15. * * * The city of Peoria will adopt ordinances protecting the grantees in the safe and unmolested exercise of the franchise and license hereby granted. * * *'

"Some of the other provisions of the ordinance are in substance: (1) That the proposed grantees should assume the payment, according to their terms, of the $450,000 of water bonds of the city of Peoria outstanding, and that such payment should be secured by a good and sufficient first mortgage upon all the waterworks property then existing or afterwards acquired, including all improvements and betterments. On the 30th day of October, 1889, such a mortgage was executed and delivered. (2) That the grantees at all times shall furnish an adequate supply of water for city, sanitary, and fire protection purposes, and that the system shall be kept and maintained to a high standard of quality and efficiency, as prescribed by the ordinance. (3) That at the expiration of 10 years from the date of the passage of the ordinance or at any five-year period thereafter, the city of Peoria, as a municipal corporation, shall have the right to purchase the waterworks of the grantees and all things pertaining thereto, as in said ordinance provided, on certain conditions and at a valuation to be fixed by appraisers at the time of such proposed purchase.

"(3) The Central Railway Company and the Peoria & Prospect Heights Railway Company, defendants, are corporations of the state of Illinois, and at the time of filing the petition herein were operating all the street railway lines then existing in the city of Peoria and vicinity, consisting of about 43 single track miles of electric street railway, and the cars on all of the said lines were at the time aforesaid being operated by electric motive power generated

in and supplied by the power station of the Central Railway Company. The original ordinance authorizing the Central Railway Company to use electricity in the propulsion of its cars was granted by the common council of the city of Peoria on the 16th day of May, 1889.

"Among other provisions this ordinance contained the following:

" 'Sec. 2. Said company shall operate said railway and propel its cars by electric motive power and not otherwise.'

" 'Sec. 22. Said Central Railway Company shall be liable for and pay to the persons, companies or corporations injured, all damages which may result from the passage of this ordinance or from carelessness, negligence or misconduct of said company or any agent or servant of said company in the operation of said railway or railways which it may build, own, lease or control.'

"Other ordinances have been passed by the common council of the city of Peoria from time to time, granting privileges, with certain qualifications, to the defendants and other street railway companies then existing in the city of Peoria, but there is no material change made by any of these ordinances, of the provisions above quoted. None of these ordinances prescribed the particular system of operating by electricity to be used by the defendant companies.

"(4) There are at present $17\,^{84}/_{100}$ miles of streets in the city of Peoria in which complainant's water mains are laid and on which same streets defendants' street railway lines are located and operated. Of this mileage, 15½ miles of water mains, now constituting an important part of complainant's system, were in existence, laid in these streets before any license was granted by the city to lay street railway tracks or to operate any kind of a street railway.

"(5) The defendants, at the commencement of this action and for a considerable period of time prior thereto, were 'operating their railway lines by what is commonly known as the overhead single trolley system.' The electricity generated in the power station of the defendant Central Railway Company, and used to operate the motors under the cars, is conveyed to them by an overhead wire and a single arm or pole, attached to the car, and carrying a contact wheel which runs along and presses up underneath the overhead wire. The current passes from this wire down through the wheel and arm to and through the motors; thence to the wheels of the car, and from them to the car tracks or rails. The current then finds its way back to the generator in the power station, and, in accordance with an established law of electricity, in so doing 'follows the paths of least resistance.'

"(6) The railway tracks of defendants' railways are necessarily electrically uninsulated from, and in electrical contact with the earth, although in the business portion of the city of Peoria the streets upon which such tracks are laid are, for the most part, paved with a brick pavement laid upon a concrete foundation. A part of the returning electric current, after going through the car motors to the tracks, finds its way from the rails, through the ground, to the water pipes of the complainant, and makes use of the same as a part of its circuit back to the generator in the power station. Wherever this current (in compliance with the law above referred to) escapes from these pipes into the moist earth, it sets up a chemical action which causes a decomposition of the metal pipes that is similar to the action which takes place in an electro plating bath. This is called 'electrolysis.'

"(7) The soil in and around Peoria in which the water pipes and mains of complainant's system are laid is of a moist, sandy character, and often furnishes a path of comparatively low resistance to the electric current. Samples of soil which were taken from the immediate vicinity of complainant's service pipes show traces of lead which had been deposited there by the action of the electric current, and the metal from these water pipes is frequently found deposited in the form of some of its compounds along the path of the current from the pipe to the rails of the defendant companies.

"(8) Samples were analyzed from pits in complainant's water pipes and from the soil in the vicinity of such pipes. The materials which came from the pits in the cast iron water pipes were found to be the products of decomposition of the metal in the pipes, resulting from the defendants' electric current passing through the salts in the surrounding soil. This action produced as aforesaid, has destroyed many lead service pipes of the complainant, and

has resulted, so far, in pitting and weakening many of the pipes and mains of its water distributing system.

"(9) In the months of May and June, 1894, an extended examination of the water piping system, then in possession of the aforesaid receiver, was made by electrical experts and more than 1,000 electrical measurements taken, which showed that at that time there was in every instance a difference of potential, indicating flow of electric current between rails and pipes. This difference of potential or electrical pressure was found to vary in different cases from a fraction of a volt up to 45 volts. The measurements showed that in some places the flow of current was from the rails into the pipes, and in others from the pipes into the rails. Actual tests made at that time showed a loss of metal in single service pipes of over a pound of metal per month, the observations indicating that many other pipes were deteriorating at the same rate. Excavations were made in a number of places for the purpose of inspecting the pipes to ascertain their actual condition. Many of these pipes were found to be wasting away, and there was evidence that rapid electrolytic action was taking place.

"(10) On April 6, 1894, the receiver of the Peoria Water Company, who was in possession and operating the waterworks plant, caused notification to be made to the Central Railway Company 'that the Peoria Water Company has been for a long time past, and is now, daily suffering and sustaining great injury and damage to its lead and iron pipes and other underground property in the streets and alleys of Peoria; that it is put to great labor, expense, and trouble in making and keeping up repairs on its said pipes by reason of the improper and unlawful use by you of the ground as a return conductor for electrical currents, and by the illegal, careless, and improper use of electrical currents generated by you.' Similar notice was given to the mayor and common council of the city of Peoria on or about November 24, 1893, December 8, 1893, December 19, 1893, January 2, 1894, and on February 7, 1898, which said notices called upon the city for protection under the waterworks ordinance against damages which the notices alleged were then being suffered.

"(11) Another examination of the water piping system now owned and operated by the complainant, but then in the possession and custody of the said receiver, was made in the early part of 1898 by the same experts who made the examination in 1894. An electrical survey was made with a view to a comparison between the conditions existing in 1894 and 1898. The experts found and reported that the destruction was taking place more rapidly in 1898 than in 1894, and that it was being caused by electric currents generated by the defendants herein.

"(12) During the progress of the taking of defendants' testimony in this case, it appeared from the evidence that some of complainant's iron gate boxes were located near the rails of defendants' track, and it was contended by defendants' counsel and experts that enough current was diverted by reason of the proximity of these gate boxes to account for all the electrolysis claimed by the complainant. It was contended by complainant and its experts that in no case did any actual contact exist between the gate box and the rail except in instances while a car was passing over the box. Nevertheless, 35 of these gate boxes were taken out and replaced by vitrified tile pipe, a nonconductor of electricity. In other cases the gate boxes were entirely removed, and not replaced because not needed. This change left no gate boxes within one foot from the rails. Examination and tests made by both parties after this change in the gate boxes showed large quantities of electric current from defendants' system still traveling upon complainant's pipes.

"(13) In June, 1899, and after considerable improvement had been made by the railway companies in the way of heavier rails and better bonding, and an improved return feeder system, another electrical survey was made of the existing conditions between the rails of the railway companies and the water mains of the complainant. This survey showed that a large volume of current was still flowing between the rails of the defendants and the pipes of the complainant, the volt meter showing 10 different readings of 10 volts and over, the highest found being 35 volts, rails positive to pipes.

"(14) A difference in potential of the fraction of a volt will cause electrolysis, and from the conditions hereinabove found and stated the ultimate de-

struction of complainant's pipes by the currents of electricity allowed to escape from defendants' system is a question only of time and pressure.

"(15) The evidence discloses no known method by which the complainant by its own action can protect its water distributing system of pipes and mains from the electric currents of the defendants' single trolley railways.

"(16) The evidence discloses no complete remedy for the injury to these water pipes except the entire removal of electric current from the water mains. Such removal is impossible so long as the return currents of the electric railways are grounded or in electrical contact with the earth. The other methods which have been suggested by the defendants in this case do not in practice and cannot prevent the escape of a portion of the current into the ground and water pipes.

"(17) The defendants can prevent the injury by controlling the current generated as aforesaid by means of the use of a complete metallic circuit, insulated from the rails and ground, providing a channel for the return of the current to the generator as perfect as the channel that is provided to supply the power along the street for use. In the District of Columbia, outside of the City of Washington, the double trolley has been and is being installed by a number of roads under acts of Congress providing, in substance, that, where the overhead trolley is used, it must be the double trolley, and also that no portion of the electrical circuit shall under any circumstances be allowed to pass through the earth, and that neither pole or any dynamo furnishing power to the line shall be grounded. This action by Congress was caused by the interference of the electric current of the single trolley railways with underground metallic structure in Washington and the surrounding territory. The overhead double trolley system has been used in Cincinnati, Ohio, for 10 years, and has been shown by experience during that time to be practical, economical, and satisfactory, and the evidence shows that by its use in this case the return current might be carried back to the dynamo without coming in contact with the earth at all, and the difficulty from electrolysis thus be completely overcome. The original cost for installation of the double trolley system is considerably more than for the single trolley system. While the evidence in the record as to the exact cost of changing the defendants' system from the single to the double trolley is conflicting and unsatisfactory, it is sufficient to determine the fact that such cost would not be so unreasonable and excessive as to make it impossible for the defendants to adopt the double trolley system.

"(18) The defendants' negative return system is as good or better than the average used by overhead single trolley electric street railways in cities of the size of Peoria, and the defendants have done all that can be done under the present state of the art, so long as the single trolley is used, to care for the safe return of their electric currents. Notwithstanding this, it clearly appears from the evidence that a portion of the returning current continues to escape to complainant's piping system and necessarily causes injury, and ultimately destruction thereto.

"(19) At least 25 miles of complainant's water mains are laid under streets paved with permanent and expensive pavement, and practically no access can be had to these mains except when made necessary by actual breaks in the pipes. The fact of injury to these mains in this territory from the electric current of defendants is capable of demonstration and has been demonstrated in this case, though it is impossible to determine the exact extent of the injury to the whole system at any given time.

"(20) The ultimate facts disclosed by the evidence may be briefly summarized as follows: (1) The injury complained of exists. (2) The injury is permanent and continuing. (3) The injury has been and is being caused by the defendants. (4) The complainant can do nothing to prevent the injury. (5) The defendants can prevent it by use of the overhead double trolley system, or by any system which provides a completely insulated metallic circuit for the electric current. (6) The overhead double trolley system, though more expensive to install, has been demonstrated by use and experience to be as safe, economical, and satisfactory in its operation as the single trolley system.

"Conclusions of Law.

"(1) The court has jurisdiction over the subject-matter in this proceeding, because: (a) The suit as originally instituted by the receiver was ancillary to the main suit in which the receiver was appointed and was cognizable in the circuit court, regardless of the citizenship of the parties. (b) When the receiver turned over possession of the property to the Peoria Waterworks Company, as assignee of the purchasers, that corporation was properly substituted as complainant in the petition in place of the receiver, because it then had both the custody and title to the property and was a citizen of New Jersey, while the defendants were citizens of Illinois, and the cause of action remained the same.

"(2) The court has jurisdiction over the parties to this proceeding because the citizenship is sufficient, and the defendants, by coming into the Northern Division of the District and answering the petition filed there, without objecting to the jurisdiction over the person, have consented to be sued in that division of the district, and objection which might have been made on that ground is waived by consent.

"(3) In Illinois there is vested in municipal corporations the power of exclusive control over the streets, and in many cases a fee-simple title to the streets, and, under the power of exclusive control over the streets, it is well settled by the decisions of the state courts that the municipal authorities may do anything with or allow any use of streets, which is not incompatible with the ends for which they are established, and that use for the purpose of water pipes is among those for which the use of streets may be granted, and that the laying of water pipes under ground is much less of an obstruction and interference with the ordinary purposes of a street than the laying and maintaining of a railway track upon its surface.

"(4) In view of the law of Illinois relating to the use of streets, which has become a 'rule of property' and therefore will be followed by the federal courts, it cannot be held that the use of the streets for water pipes is in any sense subservient to the use for electric street railway purposes, assuming that both uses have been granted by the municipality in the proper exercise of its authority.

"(5) Both parties to this suit acquired their rights in the streets by a grant under statutory authority from the city of Peoria by ordinance passed by the common council. Each occupies the streets by legal authority. Each is performing a duty to the public, and each is compelled, under the ordinance of the city and the law, to serve the public. Each has money and property invested in its system and plant, a considerable portion of which in each case occupies the streets by such legal authority. Both are entitled to the equal protection of the laws against the invasion of their rights and property by others.

"(6) The injury which is being done to complainant's water pipes by the defendants' currents of electricity is not a mere incidental injury or inconvenience, but is a permanent, continuing injury to a legal right, which will, in effect, if the injury is permitted to go on, ultimately result in the absolute destruction of complainant's plant and property. This would amount to nothing less than the taking away from complainant of the use of its property by the defendant street railway companies which, if it be done under their license from the city, authorizing them to propel their cars by electric motive power, would be a taking of private property for public use. The Constitution of Illinois provides that 'private property shall not be taken or damaged for public use without just compensation.'

"(7) The license from the city of Peoria to the defendants, while it grants the right to them to lay their tracks and 'propel their cars by electric motive power' does not assume to give the 'right' to so construct or operate their systems as to damage the property of others who have equal rights to the use and enjoyment of their own property. A fortiori, this is true because of the fact that it is possible for the defendants to so construct and operate their railways by electric motive power as not to interfere with or injure the water pipes of the complainant. But, even if such license did not assume to grant the 'right' to operate in the manner in which the defendants are operating, re-

gardless of injury to others, the law would not tolerate such use because of the provisions of the Constitution above quoted.

"(8) The injury complained of in this case, is the direct and immediate result of defendants' acts—as much so as if the defendants were to deliberately uncover and destroy by any other means, the water pipes of complainant. The defendants, by taking the necessary, reasonable precautions in operating their railways, would be able to avoid the injury, and, this being true, their failure to take such precautions, must be considered as negligence. It is as much the duty of the defendants, then, to refrain from injuring the property of the complainant by the one method as it is by the other. The complainant is as much entitled to protection against the injury from defendants' electric currents negligently allowed to stray upon its property, as it would be to protection from the wanton destruction of its property by any other direct means which might be employed by the defendants. The maxim "Sic utere tuo ut alienum non lædas" applies even under the strictest limitations of the rule which have ever been applied by the courts in any case.

"(9) Although the defendants are operating their railways under ordinances from the city, granting them a license to propel cars by electric motive power, and in so doing are interfering with the property and water pipes of complainant, such interference and injury is not damnum absque injuria because: (1) It is possible for the defendants to so operate their railways by electric motive power as not to injure the complainant's property. (2) It is impossible by any known method for the complainant to protect its property from such injury. (3) Where there are two methods of accomplishing a legal result and one method will work an injury to another and the other method will not, it is the duty of the person doing the thing to use that method which will not result in injury to such other person. (4) The failure on the part of the defendants to observe such duty constitutes negligence, and, when it results in damage to another, such damage is actionable.

"(10) The injury found to be going on in this case is the direct consequence of the unnecessary and wrongful acts of the defendants in accomplishing a legal result—that is, the propulsion of cars—and, unless the defendants are protected by their license from the city, they are liable to the complainant for such injury. These acts, unnecessary and wrongful in themselves, are not rendered lawful by the ordinance granting the use of the streets for the purpose of propelling cars by electric motive power, and, inasmuch as they work hurt, inconvenience, and damage to the complainant, they constitute a nuisance which is actionable at the suit of the injured party.

"(11) The injury complained of being actionable, there can be no doubt of the power of the court to grant some remedy. The damage already done is chargeable to the defendants, and, so far as such damage is capable of being definitely ascertained, the defendants should be held liable in a suit at law. But a suit and recovery at law would not stop the injury which is and must necessarily be continuous under existing conditions. The very life of complainant's plant and franchise is threatened. The only adequate remedy is therefore by injunction as prayed in the petition. The special master's conclusion is that the bill and evidence make a case of equitable jurisdiction, and that an injunction should be issued as prayed, subject to such reasonable conditions as to the court may seem right."

There was a hearing on the question of jurisdiction, which was sustained, and also on the merits. The difficulty of the case and the importance of the interests involved led to a re-reference after considerable delay. On October 25, 1907, the case was recommitted to the same master. By the first reference, made May 26, 1898, the master was directed to take evidence and report the same to the court, together with his conclusions. By the second order a like direction is given, and he is directed to hear and consider further evidence on the following points:

(a) What remedies can be applied to substantially minimize or prevent the injury, if any, to complainant's water distributing mains and

system in and near the city of Peoria, Ill., by the return electrical currents employed by the defendant in the operation of its street railway lines in said city?

(b) The relative merits of the single overhead trolley system and insulated circuit systems of operating street railways, with relation to the leakage of electrical current, and the resulting injury to the underground metallic structures of other public service corporations or in any other respect material to the issues herein, as shown by the results of experience or otherwise, since the closing of the proofs in this case.

(c) What are the means now employed by the defendant herein to prevent injury to the underground metallic structures in the streets of Peoria by the return electrical current of the defendant, and the results of the means so employed.

(d) To what extent, if any, have the distributing mains of the complainant company located in the public highways in the city of Peoria been injured or destroyed by the return current of the defendant company, so far as shown by examinations made, or anything occurring or ascertained since the closing of the proofs in this case before the Special Master.

(e) What improvements, if any, have been made by the defendant herein in its electrical return system since the close of defendant's evidence, on the former hearing before said Special Master?

Evidence under the second reference was taken in March and April, 1908, and the master made his report June 1, 1909, as follows:

"First. Points 'c' and 'd.' In March, 1908, the defendant was operating about 50 single track miles of railway lines in the city of Peoria and vicinity. The rails in use were largely of the girder type, 7 inches high, 60 feet long, and weighing 80 pounds per lineal yard. On the streets in the business parts of Peoria these rails were laid on hardwood ties, the latter embedded in concrete, and the space between the rails and between the tracks paved with a hard, vitrified brick, set on edge so as to bring the surface of such pavement even with the top of the rails, the portion of the street adjoining said tracks being also paved with like material and in a similar manner. Defendant's return system at the same time consisted of its rails, bonded at each rail joint with two no. copper wires, in a manner commonly known as the 'channel pin bond.' At the time above specified the defendant was engaged in the application to the rail joints of its system of 'the brazed bond,' and in March, 1908, the latter had been applied to the rail joints of about three miles of track. This brazed bond, according to the evidence, is one of the most efficient devices for continuing the electrical conductivity of the rail return at the rail joints, but is no more efficient in that respect than the welded joint, or certain other methods of bonding, which have been in use for a long time. Where special work existed in the track construction, the rails and tracks were cross-bonded. The defendant also had as a part of such return system about six miles of negative overhead return wires running from its power generating station to different parts of the system, these negative returns at the terminals being connected with rail and tracks, and at the power station with the negative bus-bar of the dynamo. A considerable portion of this work had been done since the close of defendant's evidence on the former hearing, and is in the nature of an improvement to the conductivity of the return system in the way of heavier rails, double rail bonds, cross-bonding, additional negative return feeders, and, so far as had been applied, the brazed bond; but during the same period the average load on defendant's system had been largely increased, probably doubled, and, owing to this increase, and the fact that the large interurban cars are being run over some of the tracks in Peoria, it is more difficult to prevent the escape of electric current to the water pipes of complainant.

While the principal purpose of such improvement has been to prevent the escape of the current from defendant's system, the evidence shows that notwithstanding the means so employed the current flow upon complainant's system has gradually increased, a portion of the current has continued to escape and work damage and injury to the proximate underground metallic structures, especially to the complainant's water pipes.

"Second. Point 'd.' Since the closing of proofs on the former hearing, the complainant's distributing mains in many instances have been injured, and in some rendered useless, by the return current of the defendant company. In these distributing mains since 1893 there have been discovered joint leaks in the 30-inch mains, 119; in the 20-inch mains, 4; in the 16-inch mains, 43; in other mains, 47. Two breaks have occurred in the 30-inch mains and 9 in the 20-inch mains. Electrical surveys made as late as March 25, 1908, showed the most current flowing on the pipes in about the places where the greatest number of joint leaks and breaks occurred. The pittings in the mains caused by flow of current from defendant's system have been constantly increasing in depth. On South Adams street, where the depth of the pitting, according to the evidence under the former reference, was ⅛ of an inch, in March, 1908, instances were found where the depth of pitting was $^{55}/_{100}$ of an inch in a main, the total thickness of which is ⅞ of an inch. The evidence appears conclusive that these pittings, leaks, and breaks have been largely caused by the electric current escaping from the defendant's railway system.

"Third. Point 'b.' No competent, direct evidence was offered by either party on said question.

"Fourth. Point 'a.' The defendant offered witnesses who testified, in substance, that 'all danger of injury' to complainant's water mains and system from electrical currents generated by defendant in the operation of its street railway could be prevented by the use of the brazed bond on all rail joints in addition to the present bonding, together with proper cross-bonding and 'jumpers,' thoroughly connecting all rails with each other, in all special work, and proper maintenance of overhead negative return wires as described in said testimony. Some of these same witnesses, also, on cross-examination, testified, in effect, that the plan proposed would not, and could not, wholly prevent the escape of electric current from defendant's system to the water system of complainant, but that the portion of the current that would still leave the rails would be so small and so distributed along complainant's system as to do no damage on leaving the pipes. Complainant's witnesses testified in effect that the plan proposed as aforesaid would not prevent the escape of some current and could not prevent the injury, and that any amount of electric current flowing upon and off the water pipes will cause injury where it leaves the pipe through moist soil, and that such injury is directly proportional to the amount of current flowing during any given period, and this proposition is established by a large preponderance of all the evidence.

"Fifth. The evidence offered on this re-reference, and herewith reported, as aforesaid, fails to disclose any method which will completely or substantially prevent the injury complained of, and all the evidence fails to disclose the discovery, since the hearing under the previous order of reference of any new principle or fundamental law regarding the nature and effect of electric currents or of any new method of preventing the escape of such current different in principle from those known at the time of the former hearing. In other words, the evidence on this reference, taken as a whole, tends to confirm the findings and conclusions stated in this special master's former report, numbered 14, 15, and 16, which are as follows:

" '(14) A difference in potential of the fraction of a volt may cause electrolysis; and from the conditions hereinabove found and stated the ultimate destruction of complainant's pipes by the currents of electricity allowed to escape from defendant's system is a question only of time and pressure.

" '(15) The evidence discloses no known method by which the complainant by its own action can protect its water distributing system of pipes and mains from the electric currents of the defendant's single trolley railways.

" '(16) The evidence discloses no complete remedy for the injury to these water pipes, except the entire removal of electric current from the water mains. Such removal is impossible so long as the return currents of the electric rail-

way are grounded or in electrical contact with the earth. The other methods which have been suggested by the defendants in this case do not in practice, and cannot, prevent the escape of a portion of the current into the ground and water pipes.'

"The master finds and concludes that all the evidence offered on the present reference fails to disclose any sufficient ground for changing or reversing the aforesaid conclusions."

A definition of some of the terms used by the expert witnesses and by the master in his report is necessary to clearness of discussion.

The "C. G. S. system." Units of electrical force and volume have been fixed by law with reference to what is known as the "centimeter-gram-second system," generally referred to as "C. G. S." This system was adopted with reference to length, expressed by the centimeter of $^{39}/_{100}$ inches, mass, expressed by the gram, weighing about 15½ grains avoirdupois, and time, expressed by the second. These are the fundamental units of scientific work. Thus the unit of force is that which, when acting on a body weighing one gram, will accelerate that body one centimeter in one second. All electrical measurements are based solely on this force unit, and the electrical units of force, resistance, and volume have been defined by Congress with reference to the C. G. S. system. The unit of resistance, called the "ohm," is 1,000,000,000 units of the C. G. S. system. The unit of volume, called the "ampere," is one-tenth unit of the C. G. S. system. The unit of pressure, called the "volt," is that electrical force which, when steadily applied to a wire or other conductor having a resistance of 1,000,000,000 units of the C. G. S. system, will produce a current of one-tenth of a unit per second of that system. And the unit of power, called the "watt," equals 10,000,000 units of power in the C. G. S. system, or one ampere times one volt.

"Potential, volt." For practical purposes, it may be said that a dynamo generates electricity and sends it out over the lighting wire or trolley wire at a pressure represented by that number of volts indicated by the work done by the lights or street cars, expressed in watts, kilowatts (1,000 watts), or watt hours, where the work continues one or more hours. One horse power is 746 watts or ¾ kilowatts. Volts multiplied by amperes give watts. Thus 110 volts on a lighting wire carrying one-half ampere of volume create a power of 55 watts. The greater pressure which sends the current out on the circuit over the trolley wire and back through the rails, ground, and water pipes to the dynamo is known as "potential," which may be likened to a head of water in a dam. When the current is leaving the rails and moving into the earth and upon the pipes, the rails are said to be positive to earth and pipes; and, when the current moves from the pipes to the rails, the former are positive to the latter. All the battery or dynamo does is to create a difference of potential, or difference of electrical pressure, between two points in an electrical circuit. The unit of that pressure is the volt, equal to the number of units mentioned.

"Electrolysis" is the decomposition of a metal solution in water, liquid ammonia, etc., accompanied by decomposition of the water into oxygen and hydrogen, or of a mass of molten metal, by having an electric current passed through it. The metals, carbon, and pure sub-

stances generally conduct electricity without any decomposition whatever, except at elevated temperatures. The solution or melted mass is known as an "electrolyte." The current is introduced to and taken from the electrolyte by means of strips or portions of metal or carbon called "electrodes," connected with wires forming part of the electrical circuit; that by which the current enters being known as the "anode," and the other as the "cathode." In the process of electrolysis minute portions of the metal in solution, and sometimes of the metal in the anode, together with the hydrogen, are deposited upon the cathode, as in silver platings. The oxygen goes to the anode, and tends to oxydize it. The anode is sometimes decomposed in the process, and sometimes not, depending on its composition and that of the solution. As applied to water pipes, electrolysis is the stripping off of small particles of the iron when a suitable electrolytic solution is present, leaving the carbon of which the pipe is partly composed intact. What the cathode is in this process of decomposition does not clearly appear, but it may be assumed to be the adjoining water pipe, a gas pipe, lead water-service pipe, street car rail, or some metallic deposit in the soil; one or more of these being part of the circuit of the current operating on the water main, and flowing toward the negative side of the dynamo in the railway power station. Pure water, being a nonconductor of electricity, cannot be an electrolyte, but readily becomes such when a portion of metal is dissolved in it, as copper sulphate (blue vitriol), zinc sulphate, silver nitrate, iron oxide (rust), etc. The breaking up of the water into hydrogen and oxygen at once introduces a new resistence to the current, tending to put an immediate end to electrolysis. This resistance, known as "polarization," may be overcome in a variety of ways, among others by applying a higher voltage or potential or by an alternating current. The oxygen going to the water pipe from which the current is passing oxidizes or rusts the pipe, and the coating of rust acts as an insulator, tending to prevent further corrosion of the pipe at that point.

Complainant's contentions are as follows: Defendant is using the water mains and service pipes as a part of its negative return system, inducing electrolysis or chemical decomposition of mains and pipes. Owing to the necessarily jointed construction of the mains, being connected by lead joints forming an imperfect electrical connection between the pipes, electrolysis results by the passage of a current through the wet earth around each joint; the "anode" joint being injured. Similar damage is claimed to result at those places on the pipe where the current leaves it to pass to other underground structures or back to the railroad track; and also upon the lead service pipes of complainant. It is further claimed that the smallest fraction of a volt difference in pressure or potential on the pipes will cause their gradual decomposition and destruction. It is alleged, and found by the master, that the ultimate destruction of complainants' system is only a question of time and pressure, under present conditions; that complainant can do nothing to lessen the injury while it is feasible for defendant by putting in an insulated metallic circuit by means of the double trolley or otherwise to entirely prevent the escape of current from its circuit.

Defendant has objected to the jurisdiction, not by plea, demurrer, or motion, but by answer alleging that, when the bill was filed by the receiver, he had no interest in the property, it being then owned by the purchasers at the foreclosure sale. On the merits it contends as follows: By the ordinance recited in the master's report, it is required to operate the plant by the single overhead trolley system, and it cannot therefore be required by the court to install another system. As found by the master, defendant has done everything possible for the safe return of current, in the present state of the art, so long as the single trolley is used. Defendant's acts are claimed to be authorized by legislative authority, and, even though incidental injury be done to the water system, it is damnum absque injuria; nor is the evidence, it is argued, or master's report, sufficient to justify an injunction against operation without an insulated circuit. It is further insisted, even if serious injury is being done to the water pipes, that the remedy suggested calls for the exercise of the police power for protection of the public safety to be applied only by the legislature or city council, and not by the court. In other words, the court can exercise only judicial, not legislative, functions. Generally it is contended that the running of street railroads by electricity is practically in its infancy. New discoveries are being constantly made. Injury by electrolysis is not clearly understood, nor rationally capable of explanation, in the present state of scientific knowledge. Experts are changing their views in respect to the alleged danger of injury. The attitude of municipal authorities has been one of waiting and experiment. Some 1,600 single trolley systems exist in the United States, and only 1 or 2 double trolley systems. The injury in Peoria is not one general to the whole piping system, but is localized to the region near the power station; and the damage is growing continuously less and less by better methods of negative return all over the country, and particularly in Peoria. There is no great or irreparable injury, it is said, sufficient to justify the restraining of the public service of carrying passengers in defendant's cars, except on conditions of installing the double trolley, or other insulated system; further, that the installation of the double trolley is unreasonably expensive, and its use is dangerous, nor will it entirely prevent the escape of electric current into the ground, and upon the water pipes, so as to cause injury.

At the outset it may be said that the court has no power to prescribe by injunction the use of any particular system of circuit or negative return. It is doubtful, indeed, whether the judicial power would extend to the making of a decree restraining the defendant from continuing to serve the public unless it shall cease injuring complainants' water system. The utmost possible relief is to restrain defendant from continuing the injury, assuming for the present that sufficient damage is shown, and punishing it and its officers for contempt in case of disobedience, leaving the means of curing the injury entirely to its discretion. In case of such a result, a decree might be rendered in contempt proceedings brought in this suit on the equitable side, awarding compensation for such injury as might be shown, with incidental punishment. Or a proceeding for a criminal contempt might be brought in case of deliberate disobedience in which a fine or imprisonment

might be imposed. Bessette v. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. That no specific system can be imposed by the court is settled by general decisions, passing on the essential distinctions between legislative and judicial power. "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation." Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 682, 4 Sup. Ct. 192, 28 L. Ed. 297, cited in W. U. Tel. Co. v. Myatt (C. C.) 98 Fed. 335, 343. "In this way, it seems to us, the court has made an arrangement for the business intercourse of these companies (express and railway), such as, in its opinion, they ought to have made for themselves. The regulation of matters of this kind is legislative in its character, not judicial." Express Cases, 117 U. S. 1, 6 Sup. Ct. 628, 29 L. Ed. 791. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind." Justice Holmes in Prentis v. Atlantic Coast Line, 211 U. S. 210, 226, 29 Sup. Ct. 68, 53 L. Ed. 150. The reasonableness or propriety of the means to be adopted by electric railroads to prevent or lessen injury to gas pipes, water pipes, etc., is essentially an administrative inquiry, legislative in its nature when considered and administered by the Legislature, city council, or public service commission, administrative when considered and applied by the corporation itself. Spring Valley W. Co. v. San Francisco (C. C.) 165 Fed. 667, 678. And in Dayton v. City R. Co., 12 Ohio Dec. 258, affirmed on appeal 16 Ohio Cir. Dec. 736, the same rule was substantially applied. Cumberland T. & T. Co. v. United Elec. R. Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544, seems opposed to this view of the law.

The whole duty of defendant is to make the damage as little as possible by using the best means reasonably within its power, the selection of such means to be left to its discretion, and at its peril of failure to exercise such discretion in a fair, bona fide way. The master reported that the injury is continuous, permanent, and constantly increasing by reason of increased traffic, extension of the railway line, and the running of heavier cars, including interurban cars, and that the ultimate destruction of the water pipes is inevitable; that a difference of potential of the fraction of a volt may cause electrolysis; that there is no complete remedy except the entire removal of electric current from the water mains, and no method except an insulated circuit will prevent the escape of a portion of the current into the ground and water pipes. Exceptions to these conclusions have been filed, and are now presented for approval or modification.

Damage to the water pipes by electrolysis in Peoria is inferred by the witnesses from the conditions found to exist on examination of the pipe, and is described in the testimony substantially as follows:

In order that electric power may be available for use, there must be a circuit. In the case of the telephone and telegraph, requiring only a small degree of force, the circuit is made up of the wires and the earth. An electric railway, requiring much greater power, must have a metallic circuit. This consists, in the single trolley system, of the trolley wire, trolley pole, motor, car wheels and rails, the last called the "return" or "negative" part of the circuit. In the double trolley system, used in Cincinnati, and to some extent in the District of Columbia, the circuit consists of two wires, and insulation between motor and rails, so that the current is theoretically prevented from reaching the rails at all. In the underground system, used in the cities of New York and Washington, the positive and negative wires are inclosed in an underground circuit. There are about 1,600 single trolley plants in the United States, and 1 or 2 double trolley systems. The same amount of electrical power (not the same electricity), measured in amperes, must get back to the dynamo as is generated by it. The rails, although having greater conductivity than the trolley wire, not being insulated because laid in the earth, or in concrete (a better electrical conductor than earth), and often being imperfectly bonded or joined at their ends, offer considerable resistance to the return current flow. A single rail offers much less resistance to the current than the wire which supplies the current to the trolley. Although the earth offers immense resistance to the electrical current as compared with the rails, yet it is impossible to prevent the escape of some portion of the current into the earth, especially when it is wet, from which it is attracted by the water pipes or gas pipes in the same or adjoining streets. From the pipes the current tends to return through the earth to the negative side of the dynamo, either by ordinary conduction or by electrolysis when the requisite conditions exist. It is, indeed, stated by some of the expert witnesses that wherever the current leaves a pipe electrolysis occurs, stripping off small particles of the pipe metal, and gradually destroying it, in direct proportion to the amperage, or volume of current flowing on the pipe. But under all the testimony, and from common observation, it is clear that the mere passage of electricity from one substance to another is not electrolysis; the metals being conductors, without decomposition, and is not necessarily attended with injury at the point of escape. Mr. Waterman, an experienced electrical and railway engineer, testified that the water around a pipe will carry electricity either conductively, without damage or decomposition, or electrolytically, with injury to the pipe and decomposition of the solution; also, that there may be electrolysis of the solution without injury to the pipe. Prof. D. C. Jackson, who has made a thorough study of the practical side of electrolysis to water mains for many years, and is a most accomplished electrical engineer, says that if the anode is crude copper, containing also iron and silver, only the copper may be carried to the cathode, while the iron and silver may go to the bottom of the tank. This illustrates the position sustained by the evidence as a whole, that electrolysis is a question of surrounding conditions, and that current leaving a pipe may or may not be attended with injury to the pipe. Prof. Jackson's experiments tend to show that cast iron and lead plates embedded in moist earth

will suffer electrolysis when a current is applied. But he did not cover the plates with scilica, asphalt, or other insulator, nor does he state current volume or voltage. He did not make any test with pieces of pipe covered with iron rust, which is an insulating protector. It is inferable from the evidence as a whole that wet earth, surrounding a water pipe, may, by containing some solution not described, possibly iron, iron rust, common salt, sulphate of zinc, nitrate of soda or carbonate of lime become an electrolyte, decomposable by having an electric current pass through it; and also, under some conditions not described, and apparently unknown, particles of the iron pipe or anode may be stripped off and pass into the electrolyte solution, or possibly be carried over to some unknown cathode, as in the process of silver plating. Analysis of samples of soil taken from two places above a water main showed from 2½ to 3⅓ per cent. of iron, and ½ per cent. to 1 per cent. of soluble salts, composed of sodium chloride, potassium nitrate, lime, and a small amount of sulphates. The testimony shows that one ampere constantly leaving a pipe for 18 hours a day under electrolytic conditions will take away 15 pounds of iron per annum. Yet in 8½ years not a single break in a water main occurred, although the rails were at that time very poorly bonded. Prof. Jackson during this peroid found a volume of 75 amperes on some of the water mains.

Injury to the ends of water pipes, near the joint, may also result from the current flowing from one pipe to another. The pieces of pipe are 12 feet long, and are covered with a nonconducting coating. It is not convenient to so join the pipe sections as to obtain a complete metallic contact between them, on account of the coating, and the oakum and lead used in the joints. Oakum is not a good conductor, and the lead, while a good conductor, is not put into electrical contact with the cast iron of the pipe, though preventing leakage of water. As a result there is a break in the conductivity of the pipe every 12 feet. However, the joint resistance is very much less than the soil resistance around the main, as well as of the water in it, pure water being nearly a nonconductor, although absolutely pure water has probably never been produced. It follows, therefore, that the current will take the path of least resistance through the joints, rather than the path of much higher resistance around them, unless an electrolyte is found near the joint, or in the water in the pipes, of such a character as to divert the current from its natural path. Complainants' witness Maury, speaking of a volume of 50 to 100 amperes, says:

"If it left the pipe to flow along the conductor connection to the pipe, it would not necessarily injure the pipe at the point of leaving. If it left to flow through the electrolyte, it would cause very serious injury."

Another witness testifies:

"It is generally accepted that the current has to leave the pipe by a nonconductor path to produce injury."

Another, speaking of electrolysis, says:

"There must be an electrolyte. If the pipe was in dry, sandy soil, conditions would be entirely different."

When this shunting will occur, or how often, no one knows. Many of the witnesses say that the joint resistance becomes so great that the

current will shunt around the joint through the outside earth, or the water in the pipe, and that, when it leaves the pipe, it causes injury. It appears that most of the joints must make a high resistance. If the current were shunted around these joints, and invariably resulted in injury to the pipe, it would not take long to destroy the whole water system. In many years there was not a single break in a water main from electrolysis. During the same period only 88 out of 5,000 service pipes were destroyed by it. Out of 9,000 service pipes there were 12 breaks in 1905, 8 in 1906, 5 in 1907, and 2 in the first four months of 1908. During the same four months there were 2 joint leaks, 4 in 1907, 12 in 1906, 7 in 1905, 9 in 1904, and 14 in 1903. As a result of three tests at different places of a large number of pipes, made in 1903, 1904, and 1906, the percentage of pipe damage was found to be 20 in 1903, 15 in 1904, and 10 in 1906. The same test showed the average current in the water pipes in 1903 5½ amperes, 4 in 1904, and 6 in 1906, and a test in 1908 showed an average of 24. These tests were by no means universal of the system, and should not be given any undue weight. But they tend to show a progressively lessening average damage. In particular places, especially near the power station, steadily increasing damage by electrolysis appears, but on the average the evidence shows it is lessening. One reason for improvement is better bonding of rails, and more attention to negative return feeders. Another seems to be that as electrolysis proceeds, and the pipes become rusted, the oxide formed increases the electrical resistance of the pipe coating, and thus prevents further electrolysis except under unusual conditions. Mr. Herrick, who testified at great length on both references, and whose testimony will be again referred to in connection with different systems of return, testified that while in case of lead pipes electrolysis carries sulphate or carbonate of lead into adjacent soil, and thus lessens the electrical resistance, yet in the case of iron pipes the resistance is increased by the iron decomposition in the soil. The oxide surface formed on water pipes by current flow diminishes subsequent chemical action by current leaving such surface. This is corroborated by some other witnesses. Tests made by Mr. Herrick in Peoria showed a constant rise in resistance as current continues to flow from the pipes, with some variation depending on moisture. A thin surface is formed protecting the pipe from further action, because the current is prevented from passing through the adjacent electrolyte. It seems, also, that the decomposition of the water in the electrolyte sets up a great resistance to further electrolysis, and tends to stop it. The proof as a whole conclusively shows that no dependence whatever is to be placed upon the numerous general statements of the expert witnesses to the effect that wherever current leaves a pipe injury occurs. With an increasing current there is found diminishing damage. These experts have entirely failed to harmonize the undisputed facts shown by actual inspection of pipes and actual tests of current flow with their theories of decomposition of metallic substances in the earth by electrolysis attended by decomposition of the pipes themselves.

Especially unsatisfactory is the theory of complainants' witnesses adopted by the master that the smallest amount of current may cause

injury; that "a difference in potential of a fraction of a volt may cause electrolysis." As a laboratory theory this sometimes is true, and sometimes not, but, as applied to a general system of water pipes, it is utterly untrustworthy. The inference is made by some of the witnesses because a small pressure is sometimes found on a pipe showing small damage, made at some other time, and by some other pressure, both absolutely unknown. One witness made a laboratory test by passing $^1/_{100}$ of an ampere under pressure of $^1/_8$ volt through an electrolyte of sulphate of zinc, similar to solutions in the earth, and with zinc electrodes, and got electrolysis of the zinc anode. Whether cast iron electrodes covered with insulating material, like that used on water pipes or pieces of oxidized iron would have given a like result he does not state. Again, it is not explained how or why the weak current on the pipe does not pass through the joint rather than seek a path through a weak electrolyte near by. While this theory finds some little support in the evidence, it is so inconsistent with established facts as to leave the finding without any sufficient foundation. Mr. Waterman says that an iron anode is not always corroded by the escaping current even when the electrolyte is itself split up, and that the silicon found on the water pipes will prevent corrosion; and he concludes that it is impossible to tell what amount of current it is safe to draw per square foot from the surface of a pipe. Defendant's experts generally agree that a small amount of current is not injurious. Complainants' witnesses are convinced to the contrary, and the master has followed them; but the finding is quite unsatisfactory, and so inconsistent with the nature of electrolytic action, and with the facts clearly established by undisputed evidence as to actual damage, that it cannot be sustained. It is also inconsistent with the theory of increased resistance due to water decomposition in electrolysis.

Lead service pipes have also to some extent been injured by electrolysis, especially near the power station. Altogether there are about 9,000 of them. During the 19 years, from 1890 to 1909, there have been 217 breaks in service pipes attributed to electrolysis, and many more from other causes. From electrolysis there were 12 breaks of service pipes in 1905, 8 in 1906, 5 in 1907, and 2 in the first five months of 1908. These service pipes are many of them under the street railroad tracks, and the theory of damage is that when the iron pipes are positive to the rails the current flows from the mains through the lead pipes, and then through some electrolyte in the earth to the rails, decomposing the service pipe as it goes. This injury, like that to the mains, is shown to be lessening, and the percentage of damage is not enough to show danger of the ultimate destruction of these lead pipes, even of those in the region of the power station where almost all the breaks have occurred. Repairs to service pipes are paid for by the water consumer. It may be that the use of galvanized iron service pipes instead of lead, near the power station, might be an improvement, but this will be left to the judgment of complainant.

Complainants' waterworks system is being damaged by electrolysis caused by electricity generated by defendant, but not so seriously as reported by the master. This injury should be stopped. Complainant cannot in the present state of development find any reasonably

practical way to cure it. Both parties insist that the injury is curable, but they differ as to means. The subject has been most seriously studied by many engineers, and there is a difference of opinion among them whether anything short of a metallic circuit will be a complete remedy. Many other plans have been tried. The effort has been to so protect the rail return as to prevent escape of current into the earth. No claim is made that this can be fully done, but some 11 witnesses testified on the second reference that the rails can be so bonded and cross-bonded as to practically stop electrolysis of the water pipes, with the assistance of other means of negative return. Nearly as many other witnesses are of opinion that no such thing is possible, and the master agrees with them, and has recommended the compulsory installation of a metallic, nonrail return circuit.

Four plans of improving the rail return are explained by defendant's witnesses, which they think practically efficient. They have been used more or less since 1899. All of them contemplate the use of the brazed rail bond, of which defendant had installed about six miles at the time the testimony was closed on the second reference. This bond consists of a number of leaves of thin copper folded back and forth on themselves, with a piece of brass wound around the end, and applied to the side of the ball of the rail near the end. The rail is first ground with an emery wheel to make it clean and bright. Then the end of the bond is clamped between a carbon plug and the rail, and subjected to a current of 2,000 amperes passed through bond and joint until the brass melts and flows upon the clean rail surface, thus making a perfect and permanent electrical contact. Each bond is equivalent in conductivity to three feet of rail—that is, to one-fourth as great a conductivity as that of a continuous rail—and each has a greater conductivity than the trolley wire.

The first plan consists in the use of some efficient form of rail return, as the brazed bond, welded joint, etc., with cross-wires between rails and assisting the return by feeder wires from rail to negative side of dynamo at regular distances from the power house. This is the system now in use in Peoria. The second plan is called the "quadrilateral" or "constant potential system" and is simply a modification of the first, with additional bonding at crossings and switches. This system is recommended for Peoria by defendant's witnesses, with a possible addition suggested by Mr. Winters. It was called "quadrilateral" because of its supposed application to the case of a railway surrounding the center of a city, and forming a four-sided network of rails, requiring a four-sided system of negative return copper wires from the track, and bringing them together to the negative side of the dynamo. The purpose is to reduce to a constant potential all the negative feeder points, and by extending the feeders in the shape of a fan, to equalize the pressure all over the rail system, thus preventing as much as possible the escape of current from the rails and its return to the power house. The system was installed in Richmond, Va., by Mr. Waterman, and he claims to have reduced the amperage on the water pipes from a varying current of considerable size to a max-

imum of less than one ampere. It is also being put in at Toronto The underlying idea is that the tendency to leakage of current from the rails varies as the square of the distance between feeders, so that the putting in of an additional feeder divides the distance by two and the leakage by four. In Richmond four copper wires, three-quarters of an inch in diameter, were attached at one end to the negative bus bar at the station, and at the other each to an extended network of smaller wires attached to the rails. Each system of wires extended in a different direction.

The third plan is called the "drainage system," often used to protect the sheaths of telephone cables. In this the rails and pipes are regarded as a parallel conductor system of return feeders; pipes and rails being connected by copper wire. This can only be put in when the owners of both systems are working in harmony. It is in use in Rochester, N. Y., where it is claimed to have avoided trouble from complaint of electrolysis. The testimony as to its efficiency is conflicting.

The last plan is not fully described in the proofs. By this it is sought to constantly keep the whole piping system negative to the rails, so that no current can flow from pipe to rail. This may be done by copper wire, or by a "negative booster," an additional dynamo so connected with the pipes as to produce upon them a lower potential than upon the rails.

The quadrilateral or constant potential system is recommended for Peoria by defendant's witnesses, and Mr. Winters also suggests a limited use of the drainage system in addition to the other, but thinks it would not be necessary for the protection of the pipes.

Defendant's expert witnesses agree in testifying that no system will prevent all leakage of current, but think that the quadrilateral plan will be a substantial success. Complainants' witnesses believe it to be necessary to keep all the current from the rails by the double trolley or other insulated system, and that, if any current whatever gets upon the pipes, they will be destroyed. This conclusion is not established by the evidence.

The fourteenth, sixteenth, seventeenth, and paragraphs 5 and 6 of the twentieth findings of the master on the first reference are not sustained by the proofs. The findings on the second reference need modification according to this opinion.

Defendant should be enjoined from continuing the injury to the complainants' water mains and service pipes, and should be given a reasonable time to take such measures, or put in such improvements to its negative return, as will substantially prevent injury. This should be upon condition that complainant co-operate with defendant so far as reasonable and proper in aiding it to prevent or lessen the escape of current from its rails, or in preventing the escape of current from the water pipes in such manner as to cause injury thereto. The matter of the terms of the decree in these respects, as well as the modification of the findings, will be further considered on application for decree.

As to costs, I am inclined to think that neither party should have costs as against the other, and that clerks', marshals', and master's

fees should be equally divided between the parties. Fees and expenses of witnesses, experts and engineers, and for examinations and tests, should be borne by the party calling the witness, or requesting the services.

CASCADE TOWN CO. v. EMPIRE WATER & POWER CO. et al.

BIGGER v. SAME.

(Circuit Court, D. Colorado. October 3, 1910.)

1. WATER AND WATER COURSES (§ 35*)—APPROPRIATION OF WATER—RIPARIAN RIGHTS.

There are no riparian rights in Colorado as against a valid appropriation of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 27, 28; Dec. Dig. § 35.*]

2. WATERS AND WATER COURSES (§ 132*)—APPROPRIATION OF WATER—PURPOSE—GENERATION OF ELECTRICITY.

The impounding and piping of the waters of a creek to generate electricity to be sold to the public as a commodity is a valid appropriation of the waters under the Constitution and laws of Colorado.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 132.*]

3. WATERS AND WATER COURSES (§ 128*)—UNAPPROPRIATED WATER—DEDICATION—CONSTITUTIONAL PROVISIONS.

By Const. Colo. art. 16, §§ 5, 6, providing that the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied, the people of the state dedicated to the public all unappropriated waters of every natural stream within its borders, and made the same subject to appropriation as private property.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 128.*]

4. WATERS AND WATER COURSES (§ 132*)—APPROPRIATION—"BENEFICIAL USE."

Complainant owned several hundred acres of land, which it improved at great expense for a summer resort. On the lands is Cascade Cañon through which a small, precipitous stream flows. The seepage from the flow of the stream and the mist and spray from its falls produces a luxuriant and exceptionally beautiful growth of vegetation on the floor and sides of the cañon, thus rendering the cañon and the stream with its falls flowing through it rare in beauty and the chief attraction of the resort, and they were so advertised by complainant. *Held*, that such use of the cañon and the stream and its falls therein constituted a "beneficial use" and operated as an appropriation of the waters in said stream within the requirements of Const. Colo. art. 16, § 6, conferring the right to divert the unappropriated waters of any natural stream to beneficial uses, and that said waters could not thereafter be impounded above the cañon and falls and piped away by defendant and used to generate electricity for sale as a commodity.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 132.*

For other definitions, see Words and Phrases, vol. 1, p. 749.]

In Equity. Actions by the Cascade Town Company and by Leander A. Bigger against the Empire Water & Power Company and others. Decree for complainant Cascade Town Company, and bill of complainant Bigger dismissed.

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

E. F. Ware, for complainants.
R. L. Holland, for respondents.

I.

LEWIS, District Judge. Complainant, the Cascade Town Company, owns several hundred acres of land up Ute Pass, about eleven miles from Colorado Springs. Fountain Creek flows through Ute Pass in an easterly direction, and as it passes the lands of the complainant company its waters are augmented by those of Cascade Creek—short in length of flow but precipitous—which comes down from the watershed on the northerly slope of Pike's Peak to the westerly. The said complainant company and its predecessors in title have owned these lands for many years, and they began improving them as a summer resort more than twenty years ago, and have maintained them as such ever since and have not sought to utilize them otherwise. For that purpose they have constructed hotels there and built cottages, roads and trails on its lands extending up through Cascade Cañon, through which the stream of the same name flows, and on beyond into the mountains, laid out, dedicated to the public and improved a small park in said cañon, made a lake and fountain, built a pavilion or auditorium for conventions, and otherwise improved its grounds, thereby adding to the attractions of the place as left by nature. The complainant company and its predecessors are not, and were not, municipal corporations, but business ventures created for the purpose of maintaining their property as a resort for tourists during the summer season. The place is known as Cascade. The Midland Railway, which traverses Ute Pass, has a station there. The complainant company has sold some of its property to persons who desired to improve the same as summer homes, and the complainant Bigger has spent about $15,000 in improving his home on land bought from the company, lying on both sides of Cascade Creek just below the cañon. The company obtains an income from those who stop at its hotels and enjoy other accommodations which it offers. It has spent a large amount of money in improvements. The roads and trails up Cascade Cañon and on into the mountains were constructed at an expense of fifteen or twenty thousand dollars. It also built a small waterworks to supply the cottages and its hotels. It advertises the place for the purpose of inducing the public to go there, and for the past quarter of a century it has been visited annually by twelve or fifteen thousand people. It has a permanent population of fifty or sixty people. Among other attractions held out in its advertisements are Cascade Cañon and the falls of Cascade Creek through the cañon. The cañon and falls are rare in beauty and constitute the chief attraction. Without them the place would not be much unlike any other part of Ute Pass. The cañon is about three-quarters of a mile long and very deep; its floor and sides are covered with an exceptionally luxuriant growth of trees, shrubbery and flowers. This exceptional vegetation is produced by the flow of Cascade Creek through the cañon and the mist and spray from its falls. Some of these falls are as much as thirty feet in height, but the difference in elevation between the foot and the head of the cañon is

so great that the falls are almost continuous from the head down. The volume of water is the greatest during the summer season. It comes from the melting snows on the north slope of Pike's Peak. But the flow is fairly even, due to the fact that the upper stretches of the watershed are composed of disintegrated granite into which the water first sinks and gradually percolates until gathered into the bed of the stream. The volume is said to be equivalent to a stream about eight feet wide and six to eight inches in depth. The vegetation in the cañon and up its sides consists, in part, of pine, spruce, fir, balsam, aspen, black birch, Japanese maple, thimble berry, wild cherry, choke cherry, and aster, columbine, larkspur, wild rose, the red raspberry, wild gooseberry, ferns, mosses, and many other kinds of trees, shrubs and flowers. The stream is annually stocked with trout. The birds which are found in the cañon, some grouse, a few squirrels, and perhaps a few other wild animals there, are protected by the complainant company. The complainant called a florist of twenty-five years experience and a landscape gardener of thirty-five years experience as witnesses. They tell us that the native flora of the country is quite extensive in Cascade Cañon, that the evergreen features are perfect, that there are three or four varieties of pines, three of juniper and three of spruce, probably twenty-five varieties of native shrubs, about fifty varieties of native perennials, and several varieties of moss growth, and a large variety of wild flowers and flowering shrubs, that the waterfalls create a spray and mist which, together with the underground seepage down the sides of the cañon, produce this very luxuriant growth, there being at least two hundred varieties of vegetation, and that it is far superior in that respect to any other cañon in the neighborhood, and exceptional. The seepage and the mist and spray give life to the foliage.

The defendant was incorporated for the purpose, among other things, of generating electricity by water power, and to dispose of the same as a commodity; and to execute that purpose it sent its agents on to the watershed of Pike's Peak, above the head of Cascade Cañon, and located a reservoir site and did some acts, at small expense, looking to the execution of that purpose, whereby it intended and expected to impound the waters in such reservoir and later conduct it in pipes down the mountain to and beyond the property of the complainant company. And thereupon these complainants filed their several bills asking that the defendant be enjoined from so doing,—as a threatened injury to their vested rights.

It is found as a fact that if the defendant do impound the waters of Cascade Creek above the falls and conduct it therefrom in pipes as aforesaid, the falls in the cañon and the vegetation on its floor and sides will be largely, if not wholly, destroyed and the cañon hence become a dry gulch, and that all the waters flowing in said stream are needed by complainant company, and are necessary for the aforesaid purposes to which they have been applied by said complainant.

II.

1. The first contention of both complainants is that the government, while it was the owner of the lands on which the cañon and the falls are situate, had riparian rights in the stream and that those rights were

conveyed by patent from it, and through mesne conveyances, to the complainants.

This contention cannot be accepted. There are no riparian rights in Colorado as against a valid appropriation of water.

In Sternberger v. Seaton Co., 45 Colo. 401, 404, 102 Pac. 168, 169, it is said:

"The doctrine in this state that the common law rule of continuous flow of natural streams is abolished, is so firmly established by our constitution, the statutes of the territory and the state, and by many decisions of this court, that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance."

And again, page 403 of 45 Colo., page 169 of 102 Pac.:

"The Supreme Court of the United States, in several cases, has approved and indicated its satisfaction with the decisions of the state courts which hold that the common law doctrine has been abolished, and has said that each state, without interference by the federal courts, may for itself, and as between rival individual claimants, determine which doctrine shall be therein enforced."

In Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446, it is said:

"It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artifical irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriaton, and a great part of the value of all this property is at once destroyed.

"The right to water in this country, by priority of appropriation thereof, we think is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant.

"The act of congress protecting in patents such right in water appropriated, when recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790.

"We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water

from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

Congress, as early as 1866, recognized the necessity of the abolition of the common law doctrine of riparian rights in the arid states. Speaking of the act of July 26th, 1866, the Supreme Court, in U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 704, 19 Sup. Ct. 770, 775, 43 L. Ed. 1136, said:

"The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water."

And again, at page 702 of 174 U. S., page 775 of 19 Sup. Ct. (43 L. Ed. 1136):

"While this is undoubted (the rule of the common law as to riparian rights). and the rule obtains in those states in the union which have simply adopted the common law, it is also true that as to every stream within its domain a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise."

In Gutierres v. Albuquerque Land Co., 188 U. S. 545, 552, 23 Sup. Ct. 338, 341 (47 L. Ed. 588), it is said:

"We think, in view of the legislation of congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 704–706 [19 Sup. Ct. 770, 43 L. Ed. 1136], the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26th, 1866, 14 Stat. 253, congress recognized, as respects the public domain, 'so far as the United States are concerned the validity of the local customs, laws and decisions of courts in respect to the appropriation of water.'"

Also Clark v. Nash, 198 U. S. 361, 370, 25 Sup. Ct. 676, 679 (49 L. Ed. 1085):

"The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western States, by their constitution and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."

This question had direct consideration by the Circuit Court of Appeals for this Circuit in the case of Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, opinion in which was filed August 4th, 1910. In that case it is said:

"The common law doctrine in respect of the rights of riparian proprietors in the waters of natural streams never has obtained in Colorado. From the earliest times in that jurisdiction the local customs, laws and decisions of courts have united in rejecting that doctrine and in adopting a different one which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and superior right. Yunker v. Nichols, 1 Colo. 551; Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447; Platte Water

Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 531 [21 Pac. 711]; Crippen v. White, 28 Colo. 298 [64 Pac. 184]. In so choosing between these two inconsistent doctrines Colorado acted within the limits of her authority, first as a territory and then as a state, and her choice was recognized and sanctioned by congress, so far as the public lands of the United States were concerned."

And again:

"It needs only to be added that, by the settled rule of decision in the Supreme Court of the United States, conveyances by the United States of public lands on non-navigable streams and lakes, when it is not provided otherwise, are to be construed and have effect according to the law of the state in which the lands are situate, in so far as the rights and incidents of riparian proprietorship are concerned. Hardin v. Jordan, 140 U. S. 370, 384, 402 [11 Sup. Ct. 808, 838, 35 L. Ed. 428]; Hardin v. Shedd, 190 U. S. 508, 519 [23 Sup. Ct. 685, 47 L. Ed. 1156]; Whitaker v. McBride, 197 U. S. 510 [25 Sup. Ct. 530, 49 L. Ed. 857]; Harrison v. Fite, 78 C. C. A. 447, 449, 148 Fed. 781, 783. Here it is not provided otherwise, either by statute or by the patent, and, as has been seen, the local law does not recognize a conveyance of the land as carrying any right to the unappropriated waters of the stream."

It is therefore believed that the patent from the government did not pass, and the patentee did not take, riparian rights to the waters in question, but that said lands are held by the complainants subject to the law of appropriation of waters as established in this state. And inasmuch as there is no testimony showing any right to the waters of Cascade Creek in the complainant Bigger, other than that of a riparian owner, the finding of the Court must be against him and his case dismissed, if the alleged threatened acts would constitute a valid appropriation.

2. If the defendant were permitted to impound and pipe the waters of Cascade Creek for the purpose of generating electricity to be sold by it as a commodity, as charged in the bill it was threatening to do and admitted in the answer and shown by the proof it intended to do, such acts would have constituted a valid appropriation of said waters under the constitution and laws of the state of Colorado, as they have been construed by the court of last resort in this state. Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; Sternberger v. Seaton M. Co., 45 Colo. 401, 102 Pac. 168. See, also, Schwab v. Beam (C. C.) 86 Fed. 41, 43.

3. Does the testimony show an appropriation of the waters of Cascade Creek by the complainant company or its predecessors in title, along the falls as they flow through Cascade Cañon?

The people of Colorado dedicated to the public all unappropriated waters of every natural stream within its borders, and made them subject to appropriation as private property. Const. of Colo. art. 16, §§ 5 and 6.

Section 6 reads, in part, as follows:

"The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."

But neither the manner of making such appropriation nor the acts necessary to be done to constitute an appropriation has been definitely fixed by the constitution, by the statutes or by the decisions of the courts. Nor has the term "beneficial uses," as used in section 6, su-

pra, been definitely fixed and limited in its meaning. I cannot better express my own views as to the meaning of that phrase, applicable to the facts here, than to quote a part of the brief of the learned solicitor for complainant:

"The courts have not defined, because they as yet are unable to define, the exact boundaries of the territory known as 'beneficial use.'

"Mr. Kinney, in his work on Irrigation, says:

" 'The purpose contemplated for the use of the water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic or any other purpose for which water is needed to supply the natural and artificial wants of man provided it be for a beneficial use' (Section 150).

"Pomeroy says (section 47):

" 'The purpose may be mining, milling, manufacturing, irrigating, agricultural, horticultural, domestic or otherwise; but there must be some actual, positive, beneficial purpose, existing at the time, or contemplated in the future, as the subject for which the water is to be utilized.'

"The public health is a beneficial use, and for that purpose, among others, a city may condemn streams of water. The water, when so obtained, may be used and is used in any manner that will promote the public health; it is used for sprinkling the streets, washing the pavements and flushing the sewers.

"Rest and recreation is a beneficial use, and for that purpose water is used to make beautiful lawns, shady avenues, attractive homes, and public parks with fountains, lakelets and streams, and artificial scenic beauty.

"Cities condemn water, and use water for the foregoing purposes. No one questions but that public health, rest and recreation is a domestic use, as well as a beneficial use. No one, we may add, questions the right to these uses.

"The law inside of a city is not different from the law outside of the city. In one sense there is no commercial value to fountains and parks; they do not bring in a revenue, but they are vastly beneficial to the public health, rest and recreation, and such fact is recognized the world over, and there can be no question but that water, applied to their maintenance and creation is a 'beneficial use.'

"We say that the creation of a summer resort is a beneficial use. Is it no benefit to the public to spend money in making a beautiful place in nature visible and enjoyable? Is it not in line with public health, rest and recreation? If a person takes a stream and, after putting in water-falls, ponds, bridges, walls, shrubbery and blue-grass sod, works it into a beautiful home, that is a beneficial use. It is a benefit to the weary, ailing and feeble that they can have the wild beauties of nature placed at their convenient disposal. Is a piece of canvas valuable only for a tent-fly but worthless as a painting? Is a block of stone beneficially used when put into the walls of a dam, and not beneficially used when carved into a piece of statuary? Is the test dollars, or has beauty of scenery, rest, recreation, health, enjoyment something to do with it? Is there no beneficial use except that which is purely commercial?

"It would seem that parks and playgrounds and blue grass are benefits and their uses beneficial although there is no profit derived from them; if not, then the contention of the defendant corporation must be maintained that nothing but money-making schemes are beneficial. The world delights in scenic beauty, but must scenic beauty disappear because it has no appraised cash value? If this defendant corporation takes the water out of Cascade Cañon, it can take the water out of the Seven Falls and Cheyenne Cañon, and Glen Eyrie, and the beautiful parks, and homes and summer resorts of the state. We feel compelled to say that there are other beneficial uses of the fall of water than the mere production of commodities in competition with others now existing. When the defendant company says the complainants are putting the fall of the water to no beneficial use, it means that the complainants are not ruining the beautiful scenery for cash."

It is therefore held that the maintenance of the vegetation in Cascade Cañon, for the purposes to which it has been devoted by the com-

plainant, by the flow and seepage, and mist and spray of the stream and its falls as it passes through the cañon, is a beneficial use of such waters within the meaning of said section 6, art. 16 of the Constitution, that the complainant intended to use the waters of Cascade Creek for that purpose, and has so used them for many years and thereby appropriated the same. The complainant is not required to construct ditches or artificial ways through which the water might be taken from the stream, in order that it might appropriate the same. The only indispensable requirements are that the appropriator, in order to constitute a valid appropriation, first, must intend to use the waters for a beneficial use, and second, actually apply them to a beneficial use. There is express statutory recognition of utilization of lands from natural over-flow as one means of appropriation, as in the flooding of meadows by natural over-flow without the use of any artificial means whatever. Rev. St. Colo. 1908, § 3165; Humphreys Co. v. Frank, 46 Colo. 524, 105 Pac. 1093; Broad Run Inv. Co. v. Deuel & Snyder Imp. Co. (Colo.) 108 Pac. 755.

The supreme court of this state, in considering the means necessary to constitute appropriation, in Thomas v. Guiraud, 6 Colo. 530, 533, said:

"We do not agree with counsel for plaintiff in error in their position, as we understand it, that the appropriation of water by Guiraud in 1862 was not valid or permanent because he constructed no ditches. Some of the witnesses testify that he did construct ditches, but it is unnecessary for us to weigh the testimony and determine the preponderance thereof upon this question. If a dam or contrivance of any kind will suffice to turn water from the stream and moisten the land sought to be cultivated, it is sufficient, though no ditch is needed or constructed. Or if land be rendered productive by the natural overflow of the water thereon, without the aid of any appliances whatever, the cultivation of such land by means of the water so naturally moistening the same is a sufficient appropriation of such water, or so much thereof as is reasonably necessary for such use. The true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial."

And again, considering the same question, that court, in Larimer Co. R. Co. v. People ex rel., 8 Colo. 614, 616, 9 Pac. 794, 795, declares:

"It is claimed that when the constitution recognizes the right to appropriate water by diversion, it excludes the appropriation thereof in any other manner. Further, that the word 'divert' means to take or carry it away from the bed or channel of the stream; that therefore respondent's act of utilizing a natural reservoir in the bed of the stream, and thus storing surplus water for future use, not being a diversion in the sense of the constitutional provision cited, is in conflict therewith. We are not prepared to concede the correctness of counsel's position. It is our opinion that the above is not the most natural and reasonable view to adopt concerning the meaning of the constitution. The word 'divert' must be interpreted in connection with the word 'appropriation,' and with other language used in the remaining sections of that instrument referring to the subject of irrigation. We think there may be a constitutional appropriation of water without its being at the instant taken from the bed of the stream. This court has held that 'the true test of the appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial.' Thomas v. Guiraud, 6 Colo. 530."

See, also, Ft. Morgan L. & C. Co. v. South Platte Ditch Co., 18 Colo. 1, 5, 30 Pac. 1032, 36 Am. St. Rep. 259.

In Offield v. Ish, 21 Wash. 277, 57 Pac. 809, it is said:

"The right to use the water is the essence of appropriation. The means by which it is done are incidental."

See, also, McCall v. Porter, 42 Or. 49, 70 Pac. 820, 822.

It therefore appears that the waters of Cascade Creek, which the defendant threatens to impound and carry away in pipes, has already been appropriated by the complainant, the Cascade Town Company, for beneficial uses and that it has a vested property right therein which the defendant's contemplated acts, if executed, will destroy. The complainant company may have a decree as prayed, with costs. The bill of complainant Bigger will be dismissed, with costs to the defendant against him.

In re HOLLANDER.

(District Court, D. Maryland. October 21, 1910.)

1. GARNISHMENT (§ 58*)—BANKRUPTCY—DIVIDENDS.

Dividends in the hands of a trustee in bankruptcy are not subject to attachment, though the state law permits attachment of money in the hands of a trustee appointed by a court of chancery, after the amount to be paid out by him has been definitely ascertained by the court and nothing remains for him to do but to pay the sum over to the person whose credits are attached.

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

2. BANKRUPTCY (§ 360*)—DIVIDENDS—PAYMENT.

Where petitioner neither claimed title to nor a specific lien on a fund in the hands of a bankrupt's trustee, payable as dividends to a creditor, and did not procure the appointment of a receiver, who had succeeded to the creditor's title, the bankruptcy court would not suspend payment of the dividend to the creditor and order payment to the petitioner.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 360.*]

In the matter of Max I. Hollander, bankrupt. On petition of S. John Lion for permission to attach in the hands of the bankrupt's trustee money belonging to a creditor of the bankrupt and payable to the creditor as a dividend out of the bankrupt's estate, or for an order of the bankruptcy court directing the trustee to pay over the dividend to the petitioner. Denied.

Walter C. Mylander, for petitioner.

E. H. Young, for respondent.

ROSE, District Judge. In this case Louisa V. Gallion is a creditor of the bankrupt. Her claim has been duly filed and allowed. The referee has stated a distribution account, and she is awarded a dividend of $224.42.

A petition has been filed by S. John Lion, in which he sets forth that he has recovered in the circuit court of Cecil county, Md., judgment

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

against her for $457.37. The petition then alleges that, under the law of Maryland, he would be allowed to attach in the hands of a third person money due to her, and that she has no property within the reach of execution, and that he is helpless unless he shall be allowed to proceed against such funds of the bankrupt estate now in the hands of the trustee as are or may become due therefrom to her. He prays that the trustee be directed to pay the judgment out of the money due, or which may become due, by the bankrupt estate to the judgment debtor, and for such other and further relief as the court may think proper.

Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions. But where, as in this case, the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend. In re Kohlsaat, 14 Fed. Cas. 833.

If it be clear, as above stated, that the court has no legal right to do what is asked, it is quite as certain that it would be very unfortunate, from a practical standpoint, if the rule of law were otherwise. If the specific relief asked in this case could be granted, every person who had obtained a judgment, not only in a court of record, but before a justice of the peace, for any sum, however small, against any one who was entitled to a dividend in a bankruptcy case, could come into this court to obtain payment out of such dividend. He would likely, in many cases, be met by claims of assignees, who would assert that the dividend had been assigned to them prior to the date of the recovery of the judgment. This court would be called upon to pass upon many cases of small importance, but likely to be bitterly contested, and over which it was never contemplated it should have any jurisdiction.

It has been suggested that, under the prayer for general relief, this court may authorize the petitioner to sue out in a state court an attachment and lay the same in the hands of the trustee in bankruptcy. In Maryland, and in many other states, the law permits an attachment to be laid in the hands of a trustee appointed by a court of chancery to bind the funds in his hands, after the amount to be paid out by him has been definitely ascertained by the court, and nothing remains for him to do but to pay the sum over to the person whose credits are attached. McPherson v. Snowden, 19 Md. 197; Drake on Attachments, § 409 a; Groome v. Lewis, 23 Md. 152, 87 Am. Dec. 563.

It may not be possible satisfactorily to distinguish the case of such a trustee from that of a trustee in bankruptcy; but the law is well settled that the dividends in the hands of a trustee in bankruptcy are not subject to attachment. In re Cunningham, 6 Fed. Cas. 958; In re Chisolm, 5 Fed. Cas. 640; Gilbert v. Quimby (C. C.) 1 Fed. 111; In re Bridgman, 4 Fed. Cas. 112; Cowart v. Caldwell (Ga.) 68 S. E. 500, 24 Am. Bankr. Rep. 546; Colby v. Coates, 6 Cush. (Mass.) 558.

It is probable that such attachments are not allowed, as a part of the general and wise policy of avoiding, as far as may be, every opportunity for possible conflict between a court of the state and the United States, and between either of these courts and the officers of the other.

It follows that the petition must be dismissed.

MEMORANDUM DECISIONS.

A. C. McCLURG & CO. et al. v. DOWIE. (Circuit Court of Appeals, Seventh Circuit. June 7, 1910.) No. 1,052. Petition to Review and Revise Order of District Court of the United States for the Northern District of Illinois. John H. S. Lee, for appellants. Jacob Newman, for respondent.

PER CURIAM. Petition to review and revise dismissed, on motion of respondent.

BRAY et al. v. UNITED STATES FIDELITY & GUARANTY CO. et al. (Circuit Court of Appeals, Fourth Circuit. July 14, 1909.) Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg. Decree of Circuit Court reversed, with costs, 170 Fed. 689, 96 C. C. A. 9. William M. Hall, J. A. Dupuy, and V. B. Archer, for appellants. B. M. Ambler, for appellees.

PER CURIAM. Order allowing appeal to the Supreme Court of the United States filed.

CHICAGO MOTOR VEHICLE CO. v. AMERICAN OAK LEATHER CO. et al. (Circuit Court of Appeals, Seventh Circuit. June 7, 1910.) No. 1,174. On Petition to Review and Revise Order of District Court of the United States for the Northern District of Illinois. See, also, 141 Fed. 518, 72 C. C. A. 576. S. M. Meeks and E. E. McKay, for appellant. Jacob Newman, for respondents.

PER CURIAM. Petition to review and revise dismissed, on motion of respondent.

In re HANYAN. (Circuit Court of Appeals, Second Circuit. July 5, 1910.) No. 331. Appeal from the District Court of the United States for the Southern District of New York. In the matter of David I. Hanyan, bankrupt. From an order of adjudication (180 Fed. 498), the bankrupt appeals. Affirmed. James Jenkins, for appellant. Graham Witschief, for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Affirmed, upon the opinion of the District Judge. 180 Fed. 498.

JAMES v. STONE & CO. (Circuit Court of Appeals, Fourth Circuit. August 13, 1910.) No. 967. Appeal from the District Court of the United States for the Eastern District of North Carolina, at Wilmington, in Bankruptcy. Decree of District Court affirmed, with costs, 181 Fed. 476. H. L. Stevens and Henry R. Miller, for appellant.

PER CURIAM. Order allowing appeal to the Supreme Court of the United States filed.

H. MUELLER MFG. CO. v. GLAUBER. (Circuit Court of Appeals, Seventh Circuit. May 27, 1910.) No. 1,699. On Petition for Leave to File a Bill of Review. See, also, 169 Fed. 110. A. H. Adams, Chas. E. Pickard, and John L. Jackson, for appellant. W. Clyde Jones and Chas. C. Linthicum, for respondent.

PER CURIAM. Petition for leave to file a bill of review denied.

KARGES et al. v. UNION PAC. R. CO. (Circuit Court of Appeals, Eighth Circuit. May 16, 1910.) No. 3,326. Appeal from the Circuit Court of the United States for the District of Nebraska. See, also, 169 Fed. 459. A. M. Post, for appellants. Edson Rich, for appellee.

PER CURIAM. Dismissed, with costs, on motion of appellee, for failure to print record and file brief.

KAW VALLEY DRAINAGE DIST. et al. v. UNION PAC. R. CO. et al. (Circuit Court of Appeals, Eighth Circuit. December 21, 1909.) No. 2,865. Appeal from the Circuit Court of the United States for the District of Kansas. Keplinger & Trickett, for appellants. I. P. Dana, H. A. Scandrett, B. W. Scandrett, R. W. Blair, M. A. Low, O. L. Miller, F. H. Wood, Paul E. Walker, and S. W. Moore, for appellees.

PER CURIAM. Dismissed, on motion of appellants, without costs to either party in this court.

KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY, KAN., et al. v. UNION PAC. R. CO. et al. (Circuit Court of Appeals, Eighth Circuit. December 21, 1909.) No. 2,785. Appeal from the Circuit Court of the United States for the District of Kansas. See, also, 163 Fed. 836, 90 C. C. A. 320. Keplinger & Trickett, for appellants. C. F. Hutchings, O. L. Miller, S. W. Moore, Fred H. Wood, I. P. Dana, M. A. Low, Paul E. Walker, N. H. Loomis, R. W. Blair, and H. A. Scandrett, for appellees.

PER CURIAM. Dismissed, on motion of appellants, without costs to either party in this court.

McCUE et al. v. NORTHWESTERN MUT. LIFE INS. CO. et al. (Circuit Court of Appeals, Fourth Circuit. October 29, 1909.) No. 739. In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg. Judgment of Circuit Court reversed, with costs, 167 Fed. 435, 93 C. C. A. 71. Daniel Harmon and G. B. Sinclair, for plaintiffs in error. William H. White and William H. White, Jr., for defendants in error.

PER CURIAM. Writ of certiorari to the Supreme Court of the United States presented, and cause certified to the Supreme Court.

POWHATAN COAL & COKE CO. v. NORFOLK & W. RY. CO. (Circuit Court of Appeals, Fourth Circuit. March 5, 1910.) No. 917. Appeal from the Circuit Court of the United States for the Western District of Virginia, at Lynchburg. Decree of Circuit Court affirmed, with costs, 178 Fed. 266. Chapman & Gillespie and A. B. Hayes, for appellant. Lucian H. Cocke, John H. Holt, Joseph I. Doran, and Theodore W. Reath, for appellee.

PER CURIAM. Order granting appeal to the Supreme Court of the United States filed.

TREDEGAR CO. v. PRITCHARD. (Circuit Court of Appeals, Fourth Circuit. July 13, 1909.) No. 914. On petition for a writ of mandamus requiring

the allowance of an appeal from a decree entered in the Circuit Court of the United States for the Eastern District of Virginia on March 13, 1908, in case of the Seaboard Air Line Ry. Co. v. Continental Trust Co. Wyndham R. Meredith, for petitioner.

PER CURIAM. Petition for mandamus dismissed, on motion of petitioner.

WESTFELDT et al. v. NORTH CAROLINA MINING CO. (Circuit Court of Appeals, Fourth Circuit. June 12, 1909.) No. 745. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville. Decree of Circuit Court reversed, with costs, 166 Fed. 706, 92 C. C. A. 378. See, also, 177 Fed. 132, 100 C. C. A. 552. F. A. Sondley, Julius C. Martin, Alf. S. Barnard, and D. Ralph Millard, for appellants. James H. Merrimon, Charles A. Moore, J. J. Hooker, and Hannis Taylor, for appellee.

PER CURIAM. Order allowing appeal to the Supreme Court filed.

WINGERT v. FIRST NAT. BANK OF HAGERSTOWN, MD., et al. (Circuit Court of Appeals, Fourth Circuit. December 17, 1909.) No. 937. Appeal from the Circuit Court of the United States for the District of Maryland, at Baltimore. Decree of Circuit Court affirmed, with costs, 175 Fed. 739, 99 C. C. A. 315. H. F. Wingert and Miller Wingert, for appellant. Charles A. Little and George R. Gaither, for appellees.

PER CURIAM. Order allowing appeal to the Supreme Court of the United States filed.

WRIGHT et al. v. ST. LOUIS & S. W. RY. CO. (Circuit Court of Appeals, Eighth Circuit. June 6, 1910.) No. 3,389. Appeal from the Circuit Court of the United States for the Western District of Arkansas. See, also, 175 Fed. 845. Henry Moore, Jr., for appellants.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellant.

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§ 54. Under Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264, there is no limitation of the time within which an alien prostitute may be deported to three years after her entry; but, if found practicing prostitution at any time since the enactment of the amendment, she is subject to deportation.—United States v. Weis (D. C.) 860.

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Review in admiralty, see Admiralty, § 118.
Review in bankruptcy, see Bankruptcy, §§ 467, 468.
Review of criminal prosecutions, see Criminal Law, §§ 1053–1059.
Review of decision of Board of General Appraisers, see Customs Duties, § 85.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

Costs on reversal for want of jurisdiction, see Costs, § 238.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

§ 151. Parties who have secured all the relief they seek cannot appeal or sue out a writ of error, nor can they by assigning cross-errors confer jurisdiction on an appellate court to consider alleged erroneous rulings not otherwise prejudicial.—Midland Valley R. Co. v. Fulgham (C. C. A.) 91.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Criminal prosecutions, see Criminal Law, §§ 1053–1059.

(A) Issues and Questions in Lower Court.

§ 169. A point asserted in support of an assignment of error will not be reviewed on ap-

peal when it was not presented to the trial court.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

(B) Objections and Motions, and Rulings Thereon.

§ 185. The Circuit Court of Appeals of its own motion will inquire whether the trial court had jurisdiction of the controversy.—Hare v. Birkenfield (C. C. A.) 825.

§ 231. An objection to expunging matter from a paragraph admitted in evidence over objection cannot be reviewed, where objector did not ask to have that matter read.—Mann v. Dempster (C. C. A.) 76.

(C) Exceptions.

Criminal prosecutions, see Criminal Law, §§ 1053–1059.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

Bond on appeal to pay judgment on affirmance as payment or satisfaction of judgment, see Judgment, § 875.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 548. Where the writ of error challenges the rulings of the Circuit Court on exceptions to the referee's report in an action at law, a bill of exceptions setting forth the evidence is indispensable on appeal.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

XI. ASSIGNMENT OF ERRORS.

Assignment of cross-errors in federal court, see Courts, § 356.
In federal courts, see Courts, §§ 356, 405.

§ 724. Where a motion to direct a verdict for insufficiency of the evidence is denied, an assignment of the denial as error *held* sufficient to raise question on review, without statement of the reasons why it is erroneous.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

XII. BRIEFS.

In circuit court of appeals, see Courts, § 405.

XVI. REVIEW.

Bankruptcy proceedings, see Bankruptcy, § 467.
In admiralty, see Admiralty, § 118.

(E) Presumptions.

§ 924. The legal presumption on appeal, in the absence of evidence in the bill of exceptions, is that a referee in an action at law conformed to the statute of the state as to returning the evidence.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

(F) Discretion of Lower Court.

§ 977. In the federal courts the ruling of the trial court on motion for new trial is not reviewable.—Latchtimacker v. Jacksonville Towing & Wreckage Co. (C. C.) 276.

(G) Questions of Fact, Verdicts, and Findings.

§ 1004. The size of a verdict for plaintiff in libel is not reviewable in the Circuit Court of Appeals.—Mann v. Dempster (C. C. A.) 76.

(H) Harmless Error.

§ 1033. Any error against defendant in libel in expunging matter from a paragraph admitted in evidence was harmless, where the matter contained allusions which would have tended to inflame the jury against him.—Mann v. Dempster (C. C. A.) 76.

(I) Error Waived in Appellate Court.

§ 1078. Assignments of error not discussed in plaintiff in error's brief need not be reviewed.—Mann v. Dempster (C. C. A.) 76.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Costs on reversal for want of jurisdiction, see Costs, § 238.

(D) Reversal.

§ 1166. Where, on appeal to a federal appellate court, jurisdiction of the court below does not affirmatively appear, it is incumbent on the court of its own motion to reverse, without reviewing the merits.—Newcomb v. Burbank (C. C. A.) 334.

(F) Mandate and Proceedings in Lower Court.

Amendment in federal courts after remand, see Courts, § 356.
Bankruptcy proceedings, see Bankruptcy, § 468.
Rehearing after decision on appeal in bankruptcy proceedings, see Bankruptcy, § 468.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

Bond on appeal to pay judgment on affirmance as payment or satisfaction of judgment, see Judgment, § 875.

APPLICATION.

For new trial, see New Trial, § 117.
For patent, see Patents, §§ 101–114.
Of proceeds of sale of bankrupt's property, see Bankruptcy, § 267.

APPOINTMENT.

Of receivers for insolvent corporations, see Corporations, § 559.

APPRAISERS.

Purchase of property of bankrupt by appraisers of estate, see Bankruptcy, §§ 263, 269.

APPROPRIATION.

Of property to public use, see Eminent Domain.

Of water rights, see Waters and Water Courses, §§ 2–21, 128–144 ½.

APPROVAL.

By architects, arbitrators, or others of work done under contract, see Contracts, §§ 289–306.

ARBITRATION AND AWARD.

See Reference.

ARCHITECTS.

Approval or certificate of architects, arbitrators, or others of performance of contract, see Contracts, §§ 289–306.

ASSENT.

Of owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, §§ 73–76.

ASSESSMENT.

Of damages in general, see Damages, § 208.

ASSIGNEES.

Deposits by assignee in bankruptcy, see Bankruptcy, § 273.

ASSIGNMENT OF ERRORS.

See Appeal and Error, § 724; Courts, §§ 356, 405.

ASSIGNMENTS.

In bankruptcy, see Bankruptcy, §§ 140–155.
Of patents for inventions, see Patents, §§ 196–202, 286.
Of royalties under mining lease of Indian land, see Indians, § 16.
Right of assignee of good will in business of corporation to use corporate name, see Good Will, § 6.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 140–372.

ASSUMPSIT, ACTION OF.

Particular implied contracts as ground of action, see Work and Labor.

ASSUMPTION.

As to facts by trial court in instructing jury, see Criminal Law, § 761.
Of debt by purchaser of mortgaged property, see Mortgages, § 281.
Of risk by employé, see Master and Servant, § 221.

ATTACHMENT.

See Garnishment.
Exemptions, see Exemptions.

II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see Exemptions.

ATTORNEY AND CLIENT.

Attorneys in fact, see Principal and Agent.
Liability of attorney for violation of injunction, see Injunction, § 228.
Validity of purchase of property of bankrupt's estate by attorney for appraisers, see Bankruptcy, § 263.

IV. COMPENSATION AND LIEN OF ATTORNEY.

Right of assignee in bankruptcy to retain funds for legal services, see Bankruptcy, § 273.

ATTORNEYS IN FACT.

See Principal and Agent.

AUDITORS.

See Reference.

AUTHORITY.

Of officers and agents of corporations in general, see Corporations, §§ 298–306.
To make admission binding another, see Evidence, § 244.

AUTHORS.

Rights in respect to literary work, see Copyrights.

AVOIDANCE.

Of contract, see Contracts, § 270.
Of insurance policy, see Insurance, §§ 248, 249.

BAD FAITH.

Necessity of proof of bad faith in suit for infringement of trade-mark, see Trade-Marks and Trade-Names, § 93.

BAILMENT.

Carriage of goods, see Carriers, §§ 67–69; Shipping, §§ 108–132.

BANKRUPTCY.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

§ 60. The appointment of a receiver for a corporation *held* not shown to have been made "because of insolvency" so as to constitute an act of bankruptcy under Bankr. Act July 1,

1898, c. 541, § 3a (4) 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).—In re Boston & Oaxaca Mining Co. (D. C.) 422.

§ 74. Where a debtor made a general assignment which was an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a(4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), and entitled the nonassenting creditors to file a petition in involuntary bankruptcy under section 4b, which they did, the debtor and the assenting creditors could not defeat such right by a settlement and release of the claims of such creditors which reduced the debtor's indebtedness below $1,000.—In re Jacobson (D. C.) 870.

(D) Warrant and Custody of Property.

§ 115. Receivers in bankruptcy cannot maintain a suit to set aside a transfer of property by the bankrupt as fraudulent or preferential.—Frost v. Latham & Co. (C. C.) 866.

§ 117. The bankrupt, having delivered property to a third person after the institution of proceedings on the theory that the latter was the owner and that the bankrupt was only a bailee, *held* guilty of contempt.—In re Potteiger (D. C.) 640.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 140. The owner of stock pledged to brokers to secure losses which did not occur, and which was pledged by the brokers with other securities for loan, but not used to pay the loan, *held* entitled to recover the stock identified as his own from the brokers' trustees in bankruptcy.—In re T. A. McIntyre & Co. (C. C. A.) 955.

§ 140. Under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), a trustee in bankruptcy takes an absolute title to property delivered to the bankrupt in Connecticut under a contract of conditional sale not executed and recorded as required by Gen. St. Conn. 1902, §§ 4864, 4865.—In re Faulkner (D. C.) 981.

§ 143. Where, on the intervention of bankruptcy, one of the bankrupts had certain policies on which the insurance company had loaned a sum equal to the full surrender value, the policies did not pass to the bankrupt's trustee, under Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70.—Burlingham v. Crouse (C. C. A.) 479.

§ 155. Where stock purchased by a bankrupt stockbroker for a client was used in the broker's business and pledged as collateral for loans to the broker, the client could not recover the certificates after bankruptcy, unless he could identify them.—In re T. A. McIntyre & Co. (C. C. A.) 960.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 165. An assignment to a bank of accounts receivable by a corporation, more than four months prior to its bankruptcy, to secure an indebtedness then created and any other indebtedness then owed by the corporation, then due or to become due, *held* to entitle the bank to hold such accounts as security for a prior note of the corporation.—In re Reese-Hammond Fire Brick Co. (C. C. A.) 641.

§ 165. A substitution of securities by an insolvent corporation within four months prior to its bankruptcy is not a voidable preference, within Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), where the security given up was valid and of equal value.—In re Reese-Hammond Fire Brick Co. (C. C. A.) 641.

§ 172. Cotton shipped by bankrupts to defendants under an agreement to pledge the same, but on a bill of lading to the order of bankrupts, with direction to notify defendants, which bill was retained by bankrupts until their bankruptcy, *held* not to have been delivered under the agreement, but to have passed to the trustee in bankruptcy.—Lovell v. H. Hentz & Co. (C. C.) 555.

§ 179. A mortgage or conveyance of exempt property good against the debtor under the state law is good against his trustee in bankruptcy.—In re National Grocer Co. (C. C. A.) 33.

§ 184. A receiver of a bankrupt is entitled to attack a chattel mortgage, void as to creditors for failure to file as required by the state law.—In re Schmidt (C. C. A.) 73.

§ 209. Bankr. Act July 1, 1898, c. 541, § 64b(2), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), as amended by Act Feb. 5, 1903, c. 487, § 14, 32 Stat. 800 (U. S. Comp. St. Supp. 1909, p. 1315), impliedly recognizes the right of a creditor to maintain a suit to set aside a transfer of property by the bankrupt to third parties either actually fraudulent or preferential, and where such a suit is pending when a trustee is elected he is entitled to become a party plaintiff therein.—Frost v. Latham & Co. (C. C.) 866.

(D) Administration of Estate.

§ 231. It is the duty of a trustee, under Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), to bring suits to recover assets when there is probable cause to believe that a right of action exists; and section 56a does not vest in a majority of the creditors at a special meeting authority to direct the compromise and discontinuance of a pending suit.—In re Meadows, Williams & Co. (D. C.) 911.

§ 252. A settlement agreed to by a trustee in bankruptcy, by which he was to discontinue litigation to set aside a judgment against the bankrupt as an illegal preference, leaving such judgment a lien upon realty sold by the bankrupt by warranty deed which bound him to satisfy such judgment, *held* inequitable as

against the grantee and beyond the right of the trustee which was no greater than that of the bankrupt.—In re Geiselhart (D. C.) 622.

§ 255. The bankruptcy of a lessee does not sever the relation of landlord and tenant, and the tenant's obligation to pay rent under his lease is not discharged as to the future, unless the trustee elects to retain the lease as an asset.—In re Roth & Appel (C. C. A.) 667.

§ 258. Property of a bankrupt incumbered by mortgage liens given in good faith and duly recorded more than four months prior to the filing of the petition, which it is provided by Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), "shall not be affected by this act," should not be ordered sold by the trustee unless it appears that the liens will not be affected, and that the sale will benefit the estate.—In re Foster (D. C.) 703.

§ 263. An appraiser of a bankrupt's estate and his attorney *held* disqualified both by public policy and by Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70b, to purchase the bankrupt's assets at the public sale thereof.—In re Frazin & Oppenheim (C. C. A.) 307.

§ 267. A wife's dower interest in real estate of her husband sold as a part of his estate in bankruptcy must be determined by the state law.—In re Hays (C. C. A.) 674.

§ 267. Under Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), the dower right of a bankrupt's wife in his real estate is no part of his estate in bankruptcy.—In re Hays (C. C. A.) 674.

§ 267. Under Ohio Rev. St. § 4188, where a bankrupt's land, subject to a purchase-money mortgage, was sold by his trustee, his wife was entitled to dower only in the surplus remaining after payment of the mortgage.—In re Hays (C. C. A.) 674.

§ 269. Evidence *held* to warrant a finding that a bankrupt's trustee had no individual interest in the sale of the bankrupt's estate.—In re Frazin & Oppenheim (C. C. A.) 307.

§ 269. Where a sale of a bankrupt's assets to one of the appraisers was invalid, the sale would be set aside notwithstanding subsequent changes in the condition of the property, and the parties would be placed in statu quo as nearly as possible.—In re Frazin & Oppenheim (C. C. A.) 307.

§ 273. Under Bankruptcy Act March 2, 1867, c. 176, § 17, 14 Stat. 524 (Rev. St. § 5059), an assignee is required to deposit all money of the estate coming into his possession in a designated depository bank and has no right to retain therefrom fees for legal services or disbursements made by him.—In re Kyle (C. C.) 617.

(E) Actions by or Against Trustee.

§ 294. A Circuit Court of the United States as a court of equity has jurisdiction of a suit by a creditor of a bankrupt or by a trustee in bankruptcy to recover property transferred by the bankrupt either fraudulently or preferentially; such jurisdiction not being affected by the provisions of Bankr. Act July 1, 1898, c. 541, §§ 23b, 60b, 67e, 30 Stat. 552, 562, 564, 565 (U. S. Comp. St. 1901, pp. 3431, 3445, 3446, 3449, 3450), as amended by Act Feb. 5, 1903, c. 487, §§ 7, 13, 16, 32 Stat. 798, 799, 800 (U. S. Comp. St. Supp. 1909, pp. 1312, 1314, 1315, 1316), authorizing such suits by the trustee to be brought in a court of bankruptcy.—Frost v. Latham & Co. (C. C.) 866.

(F) Claims Against and Distribution of Estate.

Dividend as property subject to attachment, see Garnishment, § 58.

§ 318. A claim for installments of rent accruing after bankruptcy of the lessee is not for a "fixed liability * * * absolutely owing at the time of the filing of the petition," within Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), and is not provable against the estate.—In re Roth & Appel (C. C. A.) 667.

§ 318. A provision of a lease that in case of the bankruptcy of the lessee the lease shall terminate, and the lessor shall have the right to re-enter, and that in such case the lessee shall indemnify the lessor against loss of rent during the term, creates a liability which is wholly contingent at the time of the filing of the petition, and cannot be proved as a debt against the estate, under Bankr. Act July 1, 1898, c. 541, § 63a (1), or (4), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).—In re Roth & Appel (C. C. A.) 667.

§ 318. A contract between lessee and one subsequently bankrupt held to reserve the entire right to maintain distress for rent in the original lessor, precluding the lessee from maintaining a claim against the bankrupt for rent in arrears.—Witherow v. South Side Trust Co. of Pittsburgh (C. C. A.) 753.

§ 318. A contract under which a machine was delivered to a bankrupt, who gave his notes for so-called rent, which was in fact purchase money, construed under the law of Pennsylvania, and the seller, who retook possession of the machine on the bankruptcy, *held* not entitled to also prove the unpaid notes against the estate.—In re Norton (D. C.) 901.

§ 323. A pledgee of certain insurance policies on the life of a bankrupt *held* bound to apply the net proceeds after deducting advances for premiums and interest, first, to the indebtedness on special account to which the policies were pledged, and then to the bankrupt's general debt.—Burlingham v. Crouse (C. C. A.) 479.

§ 328. The court has no power, under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), to permit the proof of claims after the expiration of a year from the adjudication, even though the creditor was misled, and no proof made, because of the fraudulent concealment of assets by the bankrupt.—In re Meyer (D. C.) 904.

§ 343. Filing or presentation of claims in some form in bankruptcy proceedings in addition to proof thereof required by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U.

S. Comp. St. 1901, p. 3444), is essential to prevent them from being barred by section 57n. —In re French (D. C.) 583.

§ 345. A court of bankruptcy in adjudicating upon the claim of a creditor is without authority to adjudge such claim priority over the claims of certain other creditors on ground which would ordinarily be the basis for an action for deceit, where, although such other creditors appeared, no such issues were formulated and presented against them either severally or jointly.—Davis v. Louisville Trust Co. (C. C. A.) 10.

§ 345. On the distribution of the estate of a bankrupt corporation, the value of the consideration paid by a stockholder for his stock is not in issue, and, no actual fraud being shown, his claim as a creditor cannot be deprived of its right to share in the distribution on the ground that such consideration, which was accepted and used by the corporation was in fact of no value, and that he is indebted to the other creditors for the amount of his stock.—In re L. M. Alleman Hardware Co. (C. C. A.) 810.

§ 348. A statement in a claim filed against the estate of a bankrupt that it is for "wages due deponent as clerk and manager and is a preferred claim" is not sufficient to entitle the claimant to priority of payment, in the absence of either statement or proof that such wages were earned within three months before the filing of the petition.—In re Dunn (D. C.) 701.

§ 360. Where petitioner neither claimed title to nor a lien on dividends payable to a bankrupt's creditor, the bankruptcy court would not delay payment, nor direct payment to petitioner.—In re Hollander (D. C.) 1019.

(G) Accounting and Discharge of Trustee.

§ 365. A bankrupt's trustee *held* not required to account for profits made by a corporation in which he was interested on sales made to himself and another as receivers of the bankrupt's estate.—In re Frazin & Oppenheim (C. C. A.) 307.

§ 372. A petition to reopen a bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 2a(8), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), on the ground that it was closed before fully administered, can only be filed by one who has an interest and will be benefited thereby.—In re Meyer (D. C.) 904.

IV. COMPOSITION.

§ 381. Where all the requirements of Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), relating to composition, had been complied with, the court would not refuse confirmation on objection of creditors whose claims had not been filed, presented, or allowed within the time prescribed by section 57n.—In re French (D. C.) 583.

§ 384. A bankrupt *held* authorized to oppose objections by creditors, whose claims were barred, to the confirmation of a composition.—In re French (D. C.) 583.

§ 385. Creditors of a bankrupt whose claims are barred under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), have no standing in composition proceedings.—In re French (D. C.) 583.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

Authority in federal court of decisions of state court as to exemptions, see Courts, § 366.

§ 399. A mortgagee of the exempt property of a bankrupt expressly given the right to select such property *held* entitled to exercise such right by selection of the bankrupt's exemptions in his stead.—In re National Grocer Co. (C. C. A.) 33.

§ 399. The exemptions given a debtor by the laws of the state and to which he is entitled on his bankruptcy under Bankr. Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), can only be claimed from property of which he was the owner at the time of his bankruptcy, and he is not entitled to such exemptions out of property which he had previously conveyed to a creditor as a preference or to defraud creditors after it has been recovered by, or surrendered to, his trustee.—In re Wishnefsky (D. C.) 896.

§ 407. A bankrupt's intent to deceive by a false financial statement will be presumed.—In re Augspurger (D. C.) 174.

§ 407. Bankrupt *held* not entitled to a discharge over exceptions by a creditor who extended credit to the bankrupt relying on a false financial statement by the bankrupt to a commercial agency.—In re Augspurger (D. C.) 174.

§ 407. Debts owing by a bankrupt to his father and his wife, which he concealed in a financial statement to a commercial agency, *held* to have been intentionally concealed with a purpose to deceive.—In re Augspurger (D. C.) 174.

§ 407. Where a bankrupt was insolvent in fact at the time he made a financial statement in which he concealed certain of his debts, he would be presumed to have had knowledge thereof.—In re Augspurger (D. C.) 174.

§ 408. A bankrupt, who, while insolvent, but more than four months before his bankruptcy, concealed property with intent to defraud his creditors, and kept the same concealed until the four-month period, "concealed" it within the four months within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b (4), 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).—In re James (C. C. A.) 476.

§ 414. Evidence *held* to sustain specifications of objection to a bankrupt's discharge on the ground of concealment of goods or the proceeds thereof with intent to hinder, delay, and defraud creditors.—In re Margolis (D. C.) 591.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

§ 439. Under Rev. St. § 4986, which is a part of Bankruptcy Act March 2, 1867, c. 176,

§ 2, 14 Stat. 518, giving the Circuit Court "general superintendence and jurisdiction of all cases and questions arising in the District Court * * * when sitting as a court of bankruptcy," such supervisory jurisdiction may be exercised in a matter, before the District Court has taken final or even interlocutory action thereon, if it has been considered and an opinion rendered.—In re Kyle (C. C.) 617.

(B) Appeal.

§ 467. The finding of a referee in bankruptcy that bankrupt was solvent at a particular time is conclusive on appeal.—Ellsworth v. Lyons (C. C. A.) 55.

§ 467. The Circuit Court of Appeals in bankruptcy is not required to weigh the evidence, where the issue is doubtful and it is desirable that it be first passed on by the District Court or referee.—In re Straschnow (C. C. A.) 337.

§ 468. Where an order of a District Court in bankruptcy has been reversed by the Circuit Court of Appeals on appeal, it is annulled for all purposes, and cannot be amended by the District Court.—In re Lesains (C. C. A.) 690.

§ 468. After an adjudication of bankruptcy has been affirmed by the Circuit Court of Appeals, and a mandate sent down, the District Court is without power to grant a rehearing on the ground that the appellate court erroneously interpreted the record.—In re Lennox (D. C.) 428.

VII. COSTS AND FEES.

§ 475. On presentation of a petition and schedules in voluntary bankruptcy together with an affidavit in compliance with Bankr. Act July 1, 1898, c. 541, § 51a(2) 30 Stat. 558 (U. S. Comp. St. 1901, p. 3441), that the petitioner is without and cannot obtain the money to pay the fees of the clerk, referee, and trustee, it is the duty of the clerk to file the papers and proceed without such payment, but any money shown by the schedules in the possession or under the control of the petitioner is subject to an order for the payment of such fees, regardless of state exemption laws.—In re Mason (D. C.) 899.

BANKS AND BANKING.

IV. NATIONAL BANKS.

Estoppel to deny ownership of stock, see Estoppel, § 63.

Instructions assuming facts in prosecution for false entries, see Criminal Law, § 761.

§ 256. Provision of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) relating to aiders and abettors, does not apply to national bank officers making false entries in the books or reports of the bank, whether by themselves or through the agency of others.—Richardson v. United States (C. C. A.) 1.

§ 256. The making of false entries in the books or reports of a national bank is equally an offense, whether it is done by the officer of the bank himself, or he procures it to be done by others.—Richardson v. United States (C. C. A.) 1.

§ 257. An indictment against a national bank cashier for false entries, *held* not indefinite because it did not allege the names of the clerks by whose hand the false entries were in fact made.—Richardson v. United States (C. C. A.) 1

§ 257. Proof of the making of false entries by the officers of a national bank *held* to sustain a finding of an intent on the part of the officer to injure and defraud the bank.—Richardson v. United States (C. C. A.) 1.

§ 257. Where a national bank cashier was charged with procuring and causing false entries to be made, and also with making such entries, proof of one of the charges was sufficient after verdict to sustain the conviction.—Richardson v. United States (C. C. A.) 1.

§ 257. The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid.—Richardson v. United States (C. C. A.) 1.

BAR.

Of dower, see Dower, §§ 45–49.

BARROOMS.

See Intoxicating Liquors.

BENEFICIAL USE.

Appropriation of waters, see Waters and Water Courses, § 132.

BENEFICIARIES.

Of trust, see Trusts.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 400; Evidence, § 178.

BETTERMENTS.

Liens for improvements on real estate, see Mechanics' Liens.

BILL IN EQUITY.

See Equity, § 153.

BILL OF PEACE.

See Injunction, § 26.

BILL OF RIGHTS.

See Constitutional Law.

BILL QUIA TIMET.

See Injunction, § 26.

BILLS AND NOTES.

Payment of debts in general by bill, note or check, see Payment, § 18.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 49. In an action by the receiver of a national bank against the maker of an accommodation note, indorsed to the bank in payment for stock issued to a director, defendant's liability *held* to depend on whether the note was given for the accommodation of the director or of the bank, which was one of fact for the jury.—Lyons v. Westwater (C. C. A.) 681.

(E) Consideration.

Note of county, see Counties, § 171.

VII. PAYMENT AND DISCHARGE.

Payment of debts in general by bill, note or check, see Payment, § 18.

VIII. ACTIONS.

§ 537. In an action by the receiver of a national bank against the maker of an accommodation note, indorsed to the bank in payment for stock issued to a director, defendant's liability *held* to depend on whether the note was given for the accommodation of the director or of the bank, which was one of fact for the jury.—Lyons v. Westwater (C. C. A.) 681.

BIRTH.

Declarations as to birth, see Evidence, § 288.

BLUE PRINTING.

Patentable invention relating to art of blue printing, see Patents, § 16.

BOARDS.

Restraining acts of public boards, see Injunction, § 85.

BOATS.

See Collision.

BONA FIDE PURCHASERS.

Of corporate bonds, see Corporations, § 473.

BONDS.

Importer's withdrawal bond, see Customs Duties, § 86.
Security for costs, see Costs, § 136.
Street railroad bonds, see Street Railroads, § 52.

V. ACTIONS.

Parol evidence of identity of lease secured by bond, see Evidence, § 460.

§ 128. In an action on a bond given to secure performance of a lease, evidence offered by the defendants *held* erroneously excluded under the issues.—Henderson v. Mound Coal Co. (C. C. A.) 487.

BOOKS OF ACCOUNT.

As documentary evidence, see Evidence, § 355.

BOROUGHS.

See Municipal Corporations.

BOUNDARIES.

Of mining location or claim, see Mines and Minerals, § 20.

BRANDS.

Forfeiture of misbranded articles of food, see Food, § 24.
Misbranding drugs, see Druggists, § 11.
Regulations as to branding of liquors, see Intoxicating Liquors, § 122.
Restraining enforcement of unauthorized orders as to branding of liquor, see Injunction, § 85.

BREACH.

Of conditions of importer's bond, see Customs Duties, § 86.
Of contract in general, see Contracts, §§ 289–306.

BRIEFS.

On appeal or writ of error, see Courts, § 405.

BROKERS.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

Repledge of stock pledged to stockbrokers, see Corporations, § 123.

IV. COMPENSATION AND LIEN.

§ 53. Whether a broker has been the procuring cause of a sale of land depends largely on the continuity of the transaction.—In re Breon Lumber Co. (D. C.) 909.

§ 56. A broker, though not having procured a sale by his own efforts, having induced such sale with the assistance of others for a less price than that specified, *held* entitled to the reasonable value of his services.—In re Breon Lumber Co. (D. C.) 909.

BUILDING CONTRACTS.

Compensation for extra work, see Contracts, § 232.
Liens for labor and materials, see Mechanics' Liens.

BUILDINGS.

Lien for construction or repair, see Mechanics' Liens.

BUSINESS.

Good will, see Good Will.
Regulation of conduct of business as regulation of commerce, see Commerce, § 61.

CANCELLATION.

Of claims of patent, see Patents, § 168.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.
Cancellation of insurance policies, see Insurance, §§ 248, 249.
Cancellation of patents for public lands, see Public Lands, § 120.

CAPITAL.

Corporate capital in general, see Corporations, §§ 80–156.

CARELESSNESS.

See Negligence.

CARGO.

Of vessel, carriage in general, see Shipping, §§ 108–132.
Of vessel, salvage, see Salvage.

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.
Person undertaking towage contract as common carrier, see Towage, § 4.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Regulation of, as regulation of commerce, see Commerce, § 33.

(A) In General.

§ 13. A carrier's special contract to furnish a shipper a specified number of cars at specified times and places is not contrary to public policy as discriminatory.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

(B) Interstate and International Transportation.

Accrual of cause of action for discrimination, see Limitation of Actions, § 99.
Regulation by state as interference with interstate commerce, see Commerce, § 33.
Violation of quarantine regulations, see Animals, § 34.

§ 32. A railroad company *held* under the evidence chargeable with discrimination in rates between coal shippers in allowing for use tracks and equipment of shipper in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155).—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 32. A shipper of coal *held* not entitled to recover damages from a railroad company for discrimination in rates because of rebates paid to a shipper of coke from another district; the rate on coke from such district with the rebates deducted being higher than that paid by plaintiff.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 32. Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), which prohibits a carrier from charging to one shipper a greater or less compensation for a service than is charged to another for a like and "contemporaneous service," services rendered to a complaining and a favored shipper are "contemporaneous" as long as the discriminating rates remain in force, and, for the purpose of comparison, they need not be rendered on the same day, nor during the same week or month.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 34. Under Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 13, 15, 16, 24 Stat. 383, 384 (U. S. Comp. St. 1901, pp. 3164, 3165), and notwithstanding sections 9, 22, 23, the United States Circuit Court *held* without jurisdiction to enjoin an advance in freight rates.—Wickwire Steel Co. v. New York Cent. & H. R. R. Co. (C. C. A.) 316.

§ 34. Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), a freight rate filed with the Interstate Commerce Commission *held* in force, though not posted, as affecting the Circuit Court's jurisdiction to enjoin it.—Wickwire Steel Co. v. New York Cent. & H. R. R. Co. (C. C. A.) 316.

§ 36. In an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for discrimination in rates charged on coal from the mines in violation of section 2, plaintiff is entitled only to recover for such discrimination as gave his competitor an unfair advantage in the same market.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 36. In an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for unlawful discrimination in rates on coal shipped between plaintiff and other shippers, where the statement of claim alleged damages in certain sums per ton on shipments from its different mines, its recovery is limited to such sums.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 36. To entitle a shipper to maintain an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for being unjustly discriminated against in rates, it is not necessary that he should have paid the freight charged under protest.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

§ 37. A carrier, which receives and transports stock which has been kept in confinement for more than 28 consecutive hours by the connecting carrier from which it was received, violates the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), and is liable to the penalty therefor, notwithstanding the first carrier has been prosecuted and has paid the fine for its own violation.—United States v. Northern Pac. Terminal Co. (C. C.) 879.

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.

§ 67. A carrier's inability to furnish cars contracted for owing to unusually heavy traffic *held* no defense to an action for breach of contract.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

§ 69. A complaint in an action against a carrier for failure to perform a contract to furnish refrigerator cars to move plaintiff's apple crop *held* to state a cause of action.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

(F) Loss of or Injury to Goods.

By vessel, see Shipping, §§ 123–132.

III. CARRIAGE OF LIVE STOCK.

Criminal responsibility for violation of quarantine regulations, see Animals, § 34.

§ 211. Section 2 of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 608 [U. S. Comp. St. Supp. 1909, p. 1179], construed, and *held* not to enlarge the time for loading or unloading stock for watering and feeding, to include the time spent in switching in terminal yards.—United States v. Northern Pac. Terminal Co. (C. C.) 879.

§ 211. A stockyards company owning tracks connecting its yards with trunk line railroads, which it operated alone with its own engines and crews, *held* a railroad company and a common carrier of freight subject to the provisions of Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).—United States v. St. Joseph Stockyards Co. (D. C.) 625.

§ 219. A terminal railroad company, which receives cars of live stock from other railroad companies for transportation and delivery to another company or to stockyards, is a connecting carrier whose road forms a part of the line of road over which the shipment is made, within the meaning of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), and is subject to its provisions as to interstate shipments.—United States v. Northern Pac. Terminal Co. (C. C.) 879.

§ 219. Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), is remedial, its main purpose being to prevent cruelty to the animals shipped, and it cannot be construed as not applicable to a defendant carrier because such carrier did not know how long a connecting carrier from which it received cars of cattle had kept such cattle in confinement without food or water, but it must learn such fact at its peril.—United States v. St. Joseph Stockyards Co. (D. C.) 625.

§ 219. That a defendant carrier, after receiving from a connecting carrier cars of cattle which had been confined without food or water beyond the prescribed period, acted promptly in unloading the same, is not a defense to an action to recover the penalty prescribed by Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), but is in mitigation.—United States v. St. Joseph Stockyards Co. (D. C.) 625.

IV. CARRIAGE OF PASSENGERS.

(E) Contributory Negligence of Person Injured.

§ 333. A passenger is not negligent in alighting from a moving train if the speed of the train and all the surrounding circumstances are such that a person of ordinary prudence would have done the same thing.—Puget Sound Electric Ry. v. Felt (C. C. A.) 938.

§ 347. A passenger is not per se negligent in alighting at his station while the train is moving slowly.—Puget Sound Electric Ry. v. Felt (C. C. A.) 938.

CARS.

In general, see Carriers; Railroads.
Public policy affecting validity of carrier's contract to furnish cars, see Carriers, § 13.

CATTLE.

See Animals.

CAUSE OF ACTION.

See Action.
Joinder, see Admiralty, § 30.

CESTUI QUE TRUST.

See Trusts.

CHANCE.

Disposition of money or property by chance, see Lotteries.

CHANCERY.

See Equity.

CHANNELS.

Collision in channels, see Collision, § 94.

CHARACTER.

Of parties as determining jurisdiction of federal courts, see Courts, §§ 311–322; Removal of Causes, § 26.

CHARGE.

By carrier, see Carriers, §§ 32–37.
Criminal accusation, see Indictment and Information.
Instructions to jury, see Criminal Law, §§ 761–763, 764; Trial, § 273.

CHARTER.

Liability of charterer for collision, see Collision, § 115.

CHATTEL MORTGAGES.

Right of mortgagee of bankrupt to select exempt property, see Bankruptcy, § 399.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 50. Under Comp. Laws Mich. § 10,322, subd. 8, which exempts a debtor's stock in trade to the value of $250, and the law of the state which permits the mortgage of after-acquired property, a mortgage by a merchant of all his stock which is or may be exempt is not invalid for indefiniteness of description of the property.—In re National Grocer Co. (C. C. A.) 33.

II. FILING, RECORDING, AND REGISTRATION.

(A) Original.

§ 86. Under Lien Law N. Y. 1897, c. 418, § 90, a chattel mortgage not filed for nearly three months after execution is void.—In re Schmidt (C. C. A.) 73.

(B) Renewal.

§ 97. Under Lien Law N. Y. (Laws 1897, c. 418) § 95, a chattel mortgage is absolutely void at the expiration of a year from the date of original filing, where the statement required is not filed, and cannot be resuscitated by filing a statement some five months thereafter.—In re Watts-Woodward Press (C. C. A.) 71.

V. RIGHTS AND REMEDIES OF CREDITORS.

Right of receiver in bankruptcy to assail mortgage, see Bankruptcy, § 184.

§ 197. Under Lien Law N. Y. 1897, c. 418, § 90, declaring that an unfiled chattel mortgage shall be void as against creditors of the mortgagor, it is void as against all creditors, and not only those prejudiced by failure to file.—In re Schmidt (C. C. A.) 73.

CHINESE.

Exclusion or expulsion, see Aliens, § 21.

CIRCUIT COURTS OF APPEALS.

See Courts, §§ 405–407.

CIRCUMSTANTIAL EVIDENCE.

Of death, see Death, § 75.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens; Indians.
Admission of aliens to citizenship, see Aliens, §§ 67, 68.
Citizenship as ground of jurisdiction of United States courts, see Courts, §§ 311–322; Removal of Causes, § 26.

CIVIL ACTION.

See Action.

CIVIL RIGHTS.

Deprivation of life, liberty, or property without due process of law, see Constitutional Law, § 280.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 318–360.
Against property in hands of receiver, see Receivers, § 154.
Mining claims, see Mines and Minerals, §§ 20–27.
Of patent, see Patents, § 101.

CLASSIFICATION.

Of imports, see Customs Duties, § 44.

CLERICAL ERRORS.

In claims of patent, see Patents, § 160.

CLOUD ON TITLE.

See Quieting Title.
Suit by citizen for benefit of town, see Municipal Corporations, § 999.

COLLATERAL ATTACK.

On judgment, see Judgment, § 501.
On mortgage foreclosure sale, see Mortgages, § 526.

COLLATERAL SECURITY.

Substitution of securities by bankrupt as voidable preference, see Bankruptcy, § 165.

COLLISION.

III. STEAM VESSELS MEETING OR CROSSING.

§ 39. A steamer *held* solely in fault for a collision with a meeting yacht on the Hudson river.—The Volund (C. C. A.) 643.

IV. STEAM VESSELS AND SAIL VESSELS.

§ 45. A collision at sea at night between a steamer and a bark meeting on slightly converging courses *held* due solely to the fault of the steamer in changing her course and continuing at full speed, instead of stopping and reversing when in doubt as to the course of the bark.—The Diana (D. C.) 263.

V. OVERTAKING VESSELS.

§ 51. Under article 24 of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which requires an overtaking vessel to keep out of the way of the overtaken vessel, it is her duty to pass at a safe distance and at a safe point.—The Sif (D. C.) 412.

§ 55. Under article 24 of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which requires an overtaking vessel to keep out of the way of the overtaken vessel, in case of collision, the overtaking vessel has the burden of proof to show that it was occasioned by no fault on her part, but by some fault or neglect of duty on the part of the overtaken vessel.—The Sif (D. C.) 412.

VI. VESSELS IN TOW.

§ 61. A tug *held* solely in fault for a collision between her tow and a meeting schooner in the main ship channel to New York Bay.—The Anna W. (D. C.) 604.

§ 63. A steamer *held* in fault for a collision at night in Long Island Sound with a barge constituting one of the tows of a meeting tug, and the tug *held* also in fault for using hawsers more than 75 fathoms in length in violation of the regulations made pursuant to Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 1100).—The Manhattan (D. C.) 229.

§ 64. A steamer *held* in fault for a collision at night in Long Island Sound with a barge constituting one of the tows of a meeting tug, and two of the tows *held* also in fault for using hawsers more than 75 fathoms in length, in violation of the regulations made pursuant to Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 1100).—The Manhattan (D. C.) 229.

§ 66. In a libel for injury to a tow due to a collision, evidence *held* to require a finding that the main fault was in the negligent navigation of one of the tugs.—The Ashbourne (C. C. A.) 815.

§ 66. The finding of a District Court that a tug with a tow was solely in fault for a collision in Delaware Bay at night between her tow and a meeting schooner affirmed.—The James McCaulley (C. C. A.) 932.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

§ 69. A collision at night between a steamer entering the port of Providence, R. I., and a coal barge anchored in the upper harbor near the west side of the dredged channel in a customary and proper place, *held* due solely to the fault of the steamer.—The Tennessee (D. C.) 287.

VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

§ 77. The absence of a lookout on a vessel stationed where he should be will not render such vessel in fault for a collision, where she was navigated exactly as she should have been had there been a lookout reporting the situation.—The Anna W. (D. C.) 604.

IX. FOG OR THICK WEATHER.

§ 80. When dense fog obscures a waterway through which there is a well-defined track for moving vessels, prudence requires vessels then moving therein to continue with extreme caution, availing of such sights and sounds as they can make out, till they reach some anchorage to which they can withdraw from the regular track, leaving the thoroughfare unobstructed by their presence.—The Persian (C. C. A.) 439.

§ 81. A vessel moored at a dock in a fog is not required to sound fog signals.—The P. R. R. No. 5 (C. C. A.) 833.

§ 83. A collision off the Massachusetts coast near the entrance to Pollock Rip Slue at night in a dense fog between the steamship Persian proceeding northward and the steamship Hesperides, which had anchored on account of the fog, *held* due to the fault of both vessels; the Hesperides for anchoring in the fairway, and the Persian for not navigating with more care in the fog.—The Persian (C. C. A.) 439.

§ 85. A tug with a car float on her side *held* solely in fault for a collision between the float and a tug moored at a dock at Hoboken in a dense fog for navigating in the fog at such speed that she could not stop in time to avoid collision after the moored vessel could be seen.—The P. R. R. No. 5 (C. C. A.) 833.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

§ 94. A collision between overtaking steamships *held* due solely to the fault of the overtaking vessel in passing so close that her suction caused the slower vessel to sheer.—The Sif (D. C.) 412.

XII. SUITS FOR DAMAGES.

Enforcement of state laws authorizing recovery for wrongful death in court of admiralty, see Admiralty, § 21.

(A) Right of Action and Defenses.

§ 114. The owner of the cargo of a vessel sunk in collision which occurred through the sole fault of the other vessel is entitled to recover his damages against the vessel so in fault.—The Anna W. (D. C.) 604.

§ 115. A time charter construed, and *held* not a demise of the vessel and not to render the charterer liable for a collision due to improper navigation by a supercargo employed by him

who was at the time acting as pilot.—The Volund (C. C. A.) 643.

(C) Evidence.

§ 123. The vessel primarily at fault for a collision is chargeable with the damages sustained, unless clear proof of contributory negligence by the other vessel is presented, in which case only can the damages be divided.—The Ashbourne (C. C. A.) 815.

(D) Damages.

Division of damages in action for injury to tow, see Towage, § 15.

§ 139. The fact that a person killed in a collision, for which both vessels were in fault, was on board one of them without right and without the knowledge of her officers at the time of collision, is no defense to an action for his death against the owner of the other vessel.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

§ 139. Where both vessels were in fault for a collision in the waters of a state, an action may be maintained under a state statute against the owners of both to recover for the death of members of one of the crews caused by such collision.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

§ 146. A libelant in a suit for collision, although suing only as owner of the injured vessel, nevertheless is a party personally, and subjects himself and all his property to the hazard of the litigation, and, if he was also the owner of one or more other vessels concerned in the collision and found chargeable with contributory fault, such vessels must be taken into account, although they have not been formally brought into the suit and his recovery correspondingly reduced.—The Manhattan (D. C.) 229.

§ 146. Damages apportioned between the owners of vessels *held* in fault for a collision.—The Manhattan (D. C.) 229.

(E) Trial or Hearing, Judgment, and Review.

§ 154. On recovery for collision it is proper to allow the libelant as a part of his costs the premiums paid to a surety company for furnishing his stipulation for costs.—The Volund (C. C. A.) 643.

COMBINATIONS.

See Monopolies, § 28.

As constituting patentable inventions, see Patents, § 26.

Infringement of patents for combinations, see Patents, § 247.

COMITY.

Between courts, see Courts, § 508.

COMMERCE.

Carriage of goods and passengers, see Carriers; Shipping.

Combination in restraint of interstate commerce, see Monopolies, § 28.

Construction and operation of regulations in respect to interstate or international transportation, see Carriers, §§ 32–37.

Forfeiture of adulterated articles of food, see Food, § 24.

Sufficiency of proof of engaging in interstate commerce, see Evidence, § 594.

I. POWER TO REGULATE IN GENERAL.

§ 8. While the states may enact valid legislation incidentally affecting interstate commerce in many ways, when Congress has acted in any matter pertaining to the regulation of such commerce, no state can by legislation interfere with, burden, or control it.—St. Louis & S. F. R. Co. v. Allen (C. C.) 710.

II. SUBJECTS OF REGULATION.

§ 33. Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), is within the constitutional power of Congress to regulate interstate commerce.—United States v. Seventy-Four Cases of Grape Juice (D. C.) 629.

§ 35. The transportation of cattle from a point in another state to the chutes at the stockyards at South St. Joseph, Mo., is a continuous shipment, all of which, including the transportation by the stockyards company over its own tracks, is of an interstate character and covered by Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).—United States v. St. Joseph Stockyards Co. (D. C.) 625.

§ 41. Taking samples from packages of asafœtida transported in interstate commerce only to ascertain the quality, strength, and purity thereof did not constitute a breaking of the original package within Pure Food and Drug Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]) § 10.—United States v. Five Boxes of Asafœtida (D. C.) 561; Same v. Nine Boxes of Asafœtida (D. C.) 568.

III. MEANS AND METHODS OF REGULATION.

Entrapment as defense to prosecution under food and drugs act, see Criminal Law, § 37.

§ 61. The Lacey Act of May 25, 1900, c. 553, 31 Stat. 187 (U. S. Comp. St. 1901, p. 3181) prohibiting the shipment or transportation in interstate commerce of game killed in violation of local laws, *held* constitutional.—Rupert v. United States (C. C. A.) 87.

§ 61. Rule 44 of the Railroad Commission of the state of Arkansas, which provides that, "in case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate," as applied to interstate shipments, is unconstitutional as an interference with interstate commerce.—St. Louis & S. F. R. Co. v. Allen (C. C.) 710.

COMMERCIAL AGENCIES.

False statement in report to agency as ground for rescission of subscription to corporate stock, see Corporations, § 80.
False statement to agency as grounds for refusal of discharge of bankrupt, see Bankruptcy, § 407.
Right to rely on representation to agency, see Fraud, § 21.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

State railroad commission, jurisdiction of federal court of suit against, see Courts, § 303.

COMMISSIONER OF INTERNAL REVENUE.

Regulations as to branding of liquors, see Intoxicating Liquors, § 122.

COMMISSIONERS.

County commissioners, see Counties, § 50.
State railroad commission, jurisdiction of federal court of suit against, see Courts, § 303.

COMMON CARRIERS.

See Carriers.
Person undertaking towage contract as common carrier, see Towage, § 4.

COMMON KNOWLEDGE.

Judicial notice of matters of common knowledge, see Evidence, §§ 10–47.

COMMON LAW.

Common-law doctrine of riparian rights, see Waters and Water Courses, § 34.

COMPANIES.

See Corporations.

COMPENSATION.

Compensatory damages, see Damages, §§ 23–45.
For performance of contract, see Contracts, § 232.
For property taken for public use, see Eminent Domain, § 98.
For salvage services, see Salvage.
For services rendered to stranded vessel, see Shipping, § 75.
For towage services, see Towage, § 7.

Of particular classes of officers or other persons.

See Seamen, § 17.
Brokers, see Brokers, §§ 53–56.
Corporate officers and agents in general, see Corporations, § 308.

COMPENSATORY DAMAGES.

See Damages.

COMPETITION.

Combinations to lessen or stifle free conpetition in trade, see Monopolies, § 28.

COMPLAINT.

In civil actions, see Equity, § 153; Pleading.
In criminal prosecutions, see Indictment and Information.

COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see Bankruptcy, §§ 381–385.

COMPOUNDING FELONY.

Obstructing criminal prosecutions, see Obstructing Justice.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction.
Admissibility of evidence of offer to compromise as an admission, see Evidence, § 213.
Authority of trustee in bankruptcy to compromise claim, see Bankruptcy, § 252.
Power of creditors of bankrupt to direct trustee to compromise and discontinue suit, see Bankruptcy, § 231.

COMPUTATION.

Of period of limitation of civil actions, see Limitation of Actions, §§ 58–127.

CONCLUSIVENESS.

Of decision of land office, see Public Lands, § 108.
Of judgment, see Judgment, § 668.
Of verdicts and findings, see Appeal and Error, § 1004.

CONCURRENT JURISDICTION.

Of courts in general, see Courts, § 508.

CONDEMNATION.

Of adulterated articles of food, see Food, § 24.
Of adulterated or misbranded drugs, see Druggists, § 11.
Taking property for public use, see Eminent Domain.

CONDITIONS.

In contracts and conveyances.

Statement in memorandum required by statute of frauds, see Frauds, Statute of.

Precedent to actions or other proceedings.

Allegations in prosecution for violation of food laws, see Food, § 20.

Forfeiture of adulterated or misbranded articles of food, see Food, § 24.
For injuries to servant, see Master and Servant, § 252.

CONFIDENTIAL RELATIONS.

See Brokers; Principal and Agent; Trusts.

CONFIRMATION.

Of composition in bankruptcy, see Bankruptcy, § 384.
Of sale on foreclosure of mortgage, see Mortgages, § 526.

CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.
To mine locations, see Mines and Minerals, § 27.

CONFLICT OF LAWS.

As to dower interest of wife of bankrupt, see Bankruptcy, § 267.
Conflicting jurisdiction of courts, see Courts, § 508.

CONFORMITY.

Of United States courts to state practice, see Courts, §§ 332–357.

CONGRESS.

Power to regulate commerce, see Commerce, § 8.

CONJUGAL RIGHTS.

See Husband and Wife.

CONNECTING CARRIERS.

See Carriers, § 219.

CONSENT.

Of owner of property, to improvements thereon as affecting right to lien, see Mechanics' Liens, §§ 73–76.

CONSEQUENTIAL DAMAGES.

See Damages, §§ 23–45.

CONSIDERATION.

Of license for patent, see Patents, § 209.
Of note of county, see Counties, § 171.

CONSPIRACY.

Combinations to monopolize trade, see Monopolies, § 28.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

Averments as to time of offense, see Indictment and Information, § 87.
Duplicity in indictment, see Indictment and Information, § 125.

CONSTITUTIONAL LAW.

Authority in federal courts of decisions of state courts as to validity and construction of state constitutions, see Courts, § 366.
Jurisdiction of federal courts in cases arising under Constitution of United States, see Courts, § 282.

Provisions relating to particular subjects.

See Game, § 3½; Waters and Water Courses, § 112S.
Regulation of commerce, see Commerce, § 8.

IV. POLICE POWER IN GENERAL.

See Game, § 3½.

XI. DUE PROCESS OF LAW.

§ 280. An attempt by a city without statutory authority to take complainant's property for public use constitutes an attempt to deprive complainant of his property without due process of law, in violation of the fourteenth amendment of the federal Constitution.—Portland Ry., Light & Power Co. v. City of Portland (C. C.) 632.

CONSTRUCTION.

Parol or extrinsic evidence to aid construction of written instruments, see Evidence, §§ 450–460.

Of contracts, instruments, or judicial acts or proceedings.

See Mortgages, § 183.
Chinese exclusion acts, see Aliens, § 21.
Contracts, see Contracts, § 232.
Contracts of insurance, see Insurance, § 173.
Letters patent, see Patents, §§ 160–178.
License under patent, see Patents, § 211.
Pleadings, see Pleading, § 34.

CONSTRUCTIVE NOTICE.

To principal, from knowledge of or notice to agent, see Principal and Agent, § 177.
To purchaser of land of claims or liens against property, see Vendor and Purchaser, §§ 229–331.

CONTAGIOUS DISEASES.

Of animals, see Animals, § 34.

CONTEMPT.

Transfer of property by bankrupt after filing of petition, see Bankruptcy, § 117.
Violation of injunction, see Injunction, §§ 228–230.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 3. A "criminal contempt" is one evincing a deliberate purpose to condemn the authority of the court.—In re Rice (C. C.) 217.

§ 4. A "civil contempt" is one affecting only the rights of parties litigant.—In re Rice (C. C.) 217.

§ 17. Mere absence or concealment to avoid service before suit is brought is not a contempt, but an attempt to avoid service of subsequent orders after suit is brought is contemptuous.—In re Rice (C. C.) 217.

§ 27. A contempt affecting the rights of parties litigant only may be condoned, but not so where the act evinces a deliberate purpose to contemn the authority of the court.—In re Rice (C. C.) 217.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

Violation of injunction, see Injunction, § 230.

§ 54. The objection that a rule in contempt proceeding was made on a complaint based on information and belief supported by evidence of the same character was too late after the contemnor admitted the act charged.—In re Rice (C. C.) 217.

§ 61. Courts in contempt proceedings will not tolerate defiance or evasion of their commands by artifice or contrivance of any kind, but in contempt proceedings will draw any inference from the facts that a jury may legitimately draw therefrom.—In re Rice (C. C.) 217.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.
As claims provable against bankrupt's estate, see Bankruptcy, § 318.
Expenses incurred as damages for breach, see Damages, § 45.
Ground for mechanics' liens, see Mechanics' Liens, §§ 73–76.
In restraint of trade, see Monopolies, § 28.
Operation and effect of customs or usages, see Customs and Usages.
Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 450–460.
Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 417.
Separate or subsequent oral agreement affecting written contract, see Evidence, § 445.
Specific performance, see Specific Performance.

Contracts of particular classes of persons.

See Carriers, §§ 67–69; Corporations, §§ 473–478.
Insurance companies, see Insurance.
Shipowners, see Shipping, §§ 75, 108.

Contracts relating to particular subjects.

See Good Will, § 6; Insurance.
Assumption of mortgage debt by purchaser of mortgaged property, see Mortgages, § 281.
Services to stranded vessel, see Shipping, § 75.
Transportation of goods, see Carriers, §§ 67–69; Shipping, § 108.

Particular classes of express contracts.

See Bills and Notes; Bonds.
Affreightment, see Shipping, § 108.
Agency, see Principal and Agent.
Insurance policies, see Insurance.
Leases, see Landlord and Tenant.
Maritime contracts, see Shipping, § 108.
Sales of realty, see Vendor and Purchaser.

Particular classes of implied contracts.

See Work and Labor.

I. REQUISITES AND VALIDITY.

To sustain mechanic's lien, see Mechanics' Liens, § 73.

(B) Parties, Proposals, and Acceptance.

Implied contract for towage, see Towage, § 7.

(C) Formal Requisites.

Of mortgage, see Chattel Mortgages, § 50.

(D) Consideration.

Of license under patent, see Patents, § 209.

(F) Legality of Object and of Consideration.

Public policy affecting validity of contract of carrier to furnish cars, see Carriers, § 13.

§ 108. A court should declare a contract contrary to public policy only in a clear case and where the injury to the public is substantial, and not theoretical or problematical.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

II. CONSTRUCTION AND OPERATION.

Effect of express contract on implied obligation to pay for services rendered and materials furnished incident thereto, see Work and Labor, § 12.
Of insurance contract, see Insurance, § 173.
Of mortgage, see Mortgages, § 183.

(A) General Rules of Construction.

Parol evidence as to usury, see Usury, § 115.
Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 450–460.
Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 417.
Separate or subsequent oral agreement affecting written contract, see Evidence, § 445.

(C) Subject-Matter.

Parol or extrinsic evidence to identify subject-matter, see Evidence, § 460.

(F) Compensation.

§ 232. A contract for the construction of a power plant construed with respect to the commissions recoverable by the contractor thereunder.—Bankers' Trust Co. of New York v. T. A. Gillespie Co. of New Jersey (C. C. A.) 448.

IV. RESCISSION AND ABANDONMENT.

Rescission of insurance policy, see Insurance, §§ 248, 249.

§ 270. A claimant who was induced by fraudulent representations to purchase stock in a corporation and who sought to rescind prior to the bankruptcy of the corporation *held* not barred by laches and entitled to prove his claim in bankruptcy for the purchase price of the stock.—Davis v. Louisville Trust Co. (C. C. A.) 10.

§ 270. The defense of laches to defeat the right to rescind a contract for fraud will not be entertained unless it is made to appear that it would be inequitable to deny it.—Davis v. Louisville Trust Co. (C. C. A.) 10.

V. PERFORMANCE OR BREACH.

Enforcement of specific performance, see Specific Performance.
Recovery on quantum meruit where performance of services is not according to terms of contract, see Work and Labor, § 12.

§ 289. Where a builder was to be paid only on an architect's certificates, which were refused, he could recover on the contract on proof of substantial performance and fraudulent withholding of the certificate.—Cope v. Beaumont (C. C. A.) 756.

§ 306. Damages for delay in performance *held* not lost by unexercised option to complete the work in the event of delay.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

VI. ACTIONS FOR BREACH.

Amendment of pleading changing cause of action from contract to tort, see Pleading, § 249.
Damages, natural and probable consequences, see Damages, § 23.
Effect of express contract on right to recover on quantum meruit, see Work and Labor, § 12.
Joinder of claims in contract and tort in libel in admiralty, see Admiralty, § 30.
Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 450–460.
Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 417.
Separate or subsequent oral agreement affecting written contract, see Evidence, § 445.

§ 353. In an action for the balance due on a building contract, payable only on an architect's certificate which had been refused, an instruction authorizing a recovery, if the architect ought reasonably to have been satisfied and issued his certificate, *held* error.—Cope v. Beaumont (C. C. A.) 756.

CONTRIBUTORY INFRINGEMENT.

Of patent, see Patents, § 259.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 82.

CONVEYANCES.

Contracts to convey, see Vendor and Purchaser.

Conveyances by or to particular classes of persons.

See Husband and Wife, § 14; Insane Persons, §§ 70, 71.
Mortgagors, see Mortgages, § 281.
Wife as bar to dower, see Dower, § 49.

Conveyances of particular species of, or estates or interests in, property.

Mortgaged property, see Mortgages, § 281.
Personal property in general, see Chattel Mortgages.
Real property in general, see Mortgages; Vendor and Purchaser.

Particular classes of conveyances.

See Chattel Mortgages; Mortgages.

COPYRIGHTS.

III. INFRINGEMENT.

(B) Actions.

§ 85. Where a publication by defendant contains matter which infringes a copyright intermingled with other matter which does not, the entire publication may be enjoined, leaving it to defendant to apply for a modification of the injunction after he has eliminated the objectionable matter.—Park & Pollard Co. v. Kellerstrass (C. C.) 431.

CORPORATIONS.

Admissions in report to mercantile agency, see Evidence, § 244.

Particular classes of corporations.

See Carriers; Municipal Corporations; Railroads.
Banks, see Banks and Banking.
Insurance companies, see Insurance.
Stockyards company, see Carriers, § 211.
Street railroad companies, see Street Railroads.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

Right of assignee of good will and business to use corporate name, see Good Will, § 6.

§ 49. In an action to restrain use of plaintiff corporation's name, ignorance of plaintiff's incorporation *held* immaterial where the name was that of another company from which complainant derived its rights.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 80. A subscriber to the treasury stock of a corporation *held* entitled to rely on statements made by its president in a report to a mercantile agency, and to rescind the purchase on discovering that such statements were materially false

and fraudulent.—Davis v. Louisville Trust Co. (C. C. A.) 10.

(D) Transfer of Shares.

Criminal responsibility for repledge of pledged stock, see Embezzlement, § 16.

§ 123. Stock deposited with brokers as security only is not subject to pledge by them for their own debts.—In re T. A. McIntyre & Co. (C. C. A.) 955.

§ 123. Stock loaned to certain brokers for use in their business, and pledged with other collaterals to secure a loan, *held* liable to contribute pro tanto with the other securities to the payment of the loan, but only at the value of the stock at the intervention of the bankruptcy.—In re T. A. McIntyre & Co. (C. C. A.) 955.

§ 123. Where an owner of certain stock transferred the same in blank and deposited the certificate with his brokers as security for losses and stock transactions that might follow, and the stock was pledged by the brokers for their own debt, but not sold to pay the same, the original owner's title was not lost.—In re T. A. McIntyre & Co. (C. C. A.) 955.

(E) Interest, Dividends, and New Stock.

§ 156. A holder of preferred stock under Comp. Laws Mich. 1897, § 7073, is a stockholder, and not a creditor.—Ellsworth v. Lyons (C. C. A.) 55.

§ 156. Under Comp. Laws Mich. 1897, § 7073, dividends on preferred stock *held* payable only from net earnings.—Ellsworth v. Lyons (C. C. A.) 55.

V. MEMBERS AND STOCKHOLDERS.

Estoppel to attack validity of patent, see Patents, § 129.

Intervention by stockholders in creditors' suit against insolvent street railroad company, see Street Railroads, § 58.

(D) Liability for Corporate Debts and Acts.

Application of general statutes of limitation to action to enforce liability, see Limitation of Actions, §§ 58, 106.

Jurisdiction of federal court in action to enforce liability as dependent on citizenship of parties, see Courts, § 311.

§ 235. A stockholder of a reorganized railroad company of Ohio *held* subject to statutory liability for the debts of the old company assumed by the new company.—Irvine v. Bankard (C. C.) 206.

VI. OFFICERS AND AGENTS.

Admissions in report to mercantile agencies, see Evidence, § 244.

Of banks, see Banks and Banking, §§ 256, 257.

(B) Authority and Functions.

Liability for infringement of patent by corporation, see Patents, § 287.

§ 298. In the absence of any statute, by-law, or practice of a corporation fixing the time or method of calling meetings of the executive committee or board of directors, a reasonable notice is necessary to the validity of such meetings.—Hayes v. Canada, Atlantic & Plant S. S. Co. (C. C. A.) 289.

§ 298. Notice of a meeting of directors of a corporation *held* insufficient and the action taken at such meeting not binding on the corporation.—Hayes v. Canada, Atlantic & Plant S. S. Co. (C. C. A.) 289.

§ 299. The charter and by-laws of a Canadian corporation construed, and *held* to confer on the executive committee of the directors only power in respect to the ordinary business operations of the corporations, and not to appoint or remove officers or fix their salaries.—Hayes v. Canada, Atlantic & Plant S. S. Co. (C. C. A.) 289.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308. A corporation authorized by statute to adopt by-laws fixing the compensation of its officers cannot fix such compensation by a mere resolution of its directors.—Hayes v. Canada, Atlantic & Plant S. S. Co. (C. C. A.) 289.

§ 308. By the common law relating to corporations, neither the president nor any director is entitled to any salary unless there is an authoritative vote granting it and establishing the amount of the same.—Hayes v. Canada, Atlantic & Plant S. S. Co. (C. C. A.) 289.

(D) Liability for Corporate Debts and Acts.

Estoppel as to limitation of action to enforce liability, see Limitation of Actions, § 13.

Liability of bank officers, see Banks and Banking, §§ 256, 257.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

Admissions in reports to mercantile agencies, see Evidence, § 244.

Declarations by officers and agents as evidence against corporation, see Evidence, § 244.

(D) Contracts and Indebtedness.

Payment of debt secured by lien, see Mechanics' Liens, § 239.

§ 473. Under the rule of the federal courts, any holder of negotiable bonds of a corporation secured by mortgage who acquired the same in good faith for a valuable consideration is affected only by what he actually knew, and not at all by what he might have known by the use of ordinary diligence, and this applies not only to the bonds themselves, but to the security by way of mortgage which each bond assumes to carry with it.—Central Trust Co. of New York v. Bodwell Water Power Co. (C. C.) 735.

§ 478. The lien of a mortgage given by a corporation to secure bonds, as to such bonds

as were sold to bona fide holders before any default by the mortgagor, *held* superior to mechanics' liens arising under Rev. St. Me. c. 93, § 29, upon contracts made by the mortgagor after the mortgage had been executed and recorded.—Central Trust Co. of New York v. Bodwell Water Power Co. (C. C.) 735.

(E) Torts.

Liabilities of carriers, see Carriers, §§ 211–219.
Liabilities of railroad companies, see Railroads, §§ 327–350, 358.

(F) Civil Actions.

By or against carriers, see Carriers, § 37.
By or against insurance companies, see Insurance, § 635.
Declarations by officers and agents as evidence against corporation, see Evidence, § 244.

VIII. INSOLVENCY AND RECEIVERS.

Application of general statutes of limitation to action by receiver, see Limitation of Actions, § 58.
Application of general statute of limitations to action to enforce liabilities of officers or stockholders, see Limitation of Actions, § 58.
Appointment of receiver as act of bankruptcy, see Bankruptcy, § 60.
Estoppel as to limitation of action to enforce liabilities of officers or stockholders, see Limitation of Actions, § 13.
Intervention by stockholders in creditor's suit against street railroad company, see Street Railroads, § 58.

§ 545. A corporation *held* unable, as against its creditors, to secure the retirement of preferred stock issued under Comp. Laws Mich. 1897, § 7073, by appropriating assets otherwise available to creditors.—Ellsworth v. Lyons (C. C. A.) 55.

§ 545. A contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all corporate debts are paid is contrary to public policy and void.—Ellsworth v. Lyons (C. C. A.) 55.

§ 545. A corporation can secure one class of stockholders over another.—Ellsworth v. Lyons (C. C. A.) 55.

§ 559. Appointment of a receiver for a corporation deprives it of the right to bind the corporation or its assets by contract.—Barker v. Southern Building & Loan Ass'n (C. C.) 636.

XII. FOREIGN CORPORATIONS.

§ 661. A foreign corporation may sue to enjoin the use of its name by a domestic corporation.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

§ 661. The failure of a New Jersey corporation to pay its taxes in New Jersey does not disqualify it to sue to enjoin the use of its name by a corporation in New York.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

§ 661. General Corporation Law of New York (Consol. Laws, c. 23) § 15, *held* not to prevent suit in state courts by foreign corporation to enjoin wrongful use of name.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

§ 661. That New Jersey corporation fails to take out license as required by General Corporation Law of New York (Consol. Laws, c. 23) § 15, *held* not to prevent its successor from suing to enjoin use of name by New York corporation.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

§ 661. That New Jersey corporation violated New York law as to taking out license *held* not to deprive it of remedy in federal court in equity where state statute leaves state courts open.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

§ 661. Tax Law N. Y. (Laws 1909, c. 62 [Consol. Laws, c. 60]) § 181, requiring foreign corporations doing business in the state to pay a license tax, and providing that in default thereof "no action shall be maintained or recovery had in any of the courts of this state by such foreign corporation," does not affect the right of such a corporation to maintain an action in a federal court in the state.—Richmond Cedar Works v. Buckner (C. C.) 424.

§ 661. The provision of General Corporation Law N. Y. (Laws 1909, c. 28 [Consol. Laws, c. 23]) § 15, that no foreign corporation doing business in the state shall maintain any action in the state on a contract made therein unless, prior to the making thereof, it had procured the certificate from the Secretary of State required by such act, does not preclude an action on such a contract in a federal court.—Richmond Cedar Works v. Buckner (C. C.) 424.

§ 688. A franchise tax laid under the laws of New Jersey upon an insolvent corporation organized under the laws of that state but having its business situs and property in another state will not be enforced by a court of equity, in the latter state, which is administering its assets and given priority of payment over the claims of bona fide local creditors.—Franklin Trust Co. v. State of New Jersey (C. C. A.) 769.

CORROBORATION.

Of testimony of accomplices in criminal prosecution, see Criminal Law, § 510.

CORRUPTION.

In general, see Fraud.

CO-SERVANTS.

See Master and Servant, § 182.

COSTS.

In action for infringement of patent, see Patents, § 325.
In bankruptcy proceedings, see Bankruptcy, § 475.

IV. SECURITY FOR PAYMENT.

Power of federal court to require security, see Courts, § 357.

§ 136. The right of a defendant to require a nonresident plaintiff to give security for costs may be waived or lost by laches.—Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C.) 751.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 238. Where a judgment is reversed because the record failed to show jurisdictional facts, to which defendant in error did not object, neither party would be allowed costs of the appeal, and the case would be dismissed without costs, unless the complaint was amended.—Newcomb v. Burbank (C. C. A.) 334.

COUNTIES.

See Counties; Municipal Corporations.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

§ 50. Under St. Ky. 1894, § 1834, a power from the county fiscal court to two of its members to ascertain the amount of claims and to settle with claimant *held* an invalid attempt to delegate powers vested in the court.—Ohio County, Ky., v. Baird (C. C. A.) 49.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 171. A note purporting to be signed by a county fiscal court may be defended against for want of consideration whether it was to take the place of a note paid or for claims against the county not allowed by the proper authority.—Ohio County, Ky., v. Baird (C. C. A.) 49.

V. CLAIMS AGAINST COUNTY.

Secondary evidence of lost claims, see Evidence, § 178.

COUNTY BOARDS.

See Counties, § 50.

COUNTY COMMISSIONERS.

See Counties, § 50.

COURTS.

See Judgment.
Contempt of court, see Contempt.
Presumptions as to judicial proceedings in general, see Evidence, § 82.
Province of court and jury, see Criminal Law, §§ 761–763, 764.
Removal of action from state court to United States Court, see Removal of Causes.

Jurisdiction of proceedings affecting particular classes of persons.

See Aliens, § 67.
Bankrupts, see Bankruptcy, § 294.
Trustees in bankruptcy, see Bankruptcy, § 294.

Jurisdiction of proceedings relating to particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 294.

Jurisdiction of particular actions or proceedings.

Against trustee in bankruptcy, see Bankruptcy, § 294.
For infringement of patent, see Patents, § 288.
Naturalization proceedings, see Aliens, § 67.
To review fraud orders of postmaster general, see Post Office, § 26.

Special jurisdictions and particular classes of courts.

See Admiralty.
Equity jurisdiction, see Equity, § 42.
Federal courts in bankruptcy proceedings, see Bankruptcy, § 294.
Naturalization, see Aliens, § 67.
Review of proceedings for appraisal of goods subject to duty, see Customs Duties, § 85.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Objections to jurisdiction ground for abatement, see Abatement and Revival, § 3.
Review of questions of jurisdiction, see Appeal and Error, §§ 185, 1166.

§ 1. "Jurisdiction" defined.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

V. COURTS OF PROBATE JURISDICTION.

Power to order sale of property of insane person, see Insane Persons, § 70.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

District in which suit must be brought to compel issuance of patent, see Patents, § 114.
Jurisdiction of suit for infringement of patent, see Patents, § 288.
Jurisdiction to review fraud orders of postmaster general, see Post Office, § 26.

§ 256. Act Cong. April 5, 1910, c. 143, 36 Stat. 291, amending the employers' liability act (April 22, 1908, c. 149, § 6, 35 Stat. 66 [U. S. Comp. St. Supp. 1909, p. 1173]), *held* not retroactive so as to confer jurisdiction on federal courts in districts other than defendant's residence, notwithstanding Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 30, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).—Newell v. Baltimore & O. R. Co. (C. C.) 698.

§ 270. In a suit in a federal court against numerous defendants on a contract binding

them jointly and severally, the jurisdiction of the court is not defeated because some of the defendants are not inhabitants of nor served within the district, but the case may proceed against those who have been served.—Richmond Cedar Works v. Buckner (C. C.) 424.

§ 272. Where, after suit brought March 5, 1910, by a citizen of Pennsylvania in the Circuit Court sitting in that state against a Maryland corporation, the statement of claim was so amended as to state a cause of action under the employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), the court was thereby deprived of jurisdiction.—Newell v. Baltimore & O. R. Co. (C. C.) 698.

§ 279. There is no presumption in favor of the jurisdiction of a federal court which must affirmatively appear of record.—Newcomb v. Burbank (C. C. A.) 334.

§ 280. It is the duty of a federal court to dismiss of its own motion, if jurisdiction does not affirmatively appear.—Newcomb v. Burbank (C. C. A.) 334.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

Admiralty jurisdiction, see Admiralty, § 21.

§ 282. A federal court has jurisdiction of a suit to restrain a city from taking complainant's property without due process of law, for street purposes.—Portland Ry., Light & Power Co. v. City of Portland (C. C.) 632.

§ 285. A bill to restrain a continuing trespass on complainant's homestead entry *held* not to state a cause of action within the jurisdiction of the federal courts on the theory that it depended on the construction of the Constitution, laws, and treaties of the United States.—Hare v. Birkenfield (C. C. A.) 825.

§ 299. Federal jurisdiction on the ground of controversy arising under the Constitution and laws of the United States exists only when plaintiff's statement of his own cause of action shows that the case substantially involves a controversy as to the effect and construction of the Constitution or some law or treaty.—Hare v. Birkenfield (C. C. A.) 825.

§ 299. A bill by a railroad company to restrain suits at law or in equity to prevent the removal of its division point to a different location *held* not to show federal jurisdiction as involving a federal question.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

Citizenship or alienage as ground for removal of cause to federal court, see Removal of Causes, § 26.

§ 303. A suit against the members of a State Railroad Commission and the prosecuting attorney for a district of the state to enjoin the enforcement of an order made by the commission which is unconstitutional and without authority of law is not a suit against the state within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court of equity.—St. Louis & S. F. R. Co. v. Allen (C. C.) 710.

§ 311. A receiver appointed under Rev. St. Ohio 1908, § 3260d, in a creditors' suit against an insolvent corporation to collect assessments made against stockholders on their statutory liability, may maintain an action against a stockholder in a federal court in another state; his own citizenship, and not that of the creditors, being the test of jurisdiction.—Irvine v. Bankard (C. C.) 206.

§ 322. On writ of error, federal jurisdiction *held* not shown by the pleading requiring reversal and remand.—Newcomb v. Burbank (C. C. A.) 334.

(E) Procedure, and Adoption of Practice of State Courts.

§ 332. The practice of the federal courts in equity regarding abatement and revival is regulated by the practice of the High Court of Chancery in England in 1842, when rule 90 was adopted.—Childs v. Ferguson (C. C. A.) 795.

§ 339. Federal courts are not required by act of conformity (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]), to conform to practice of state courts, where it would unwisely incumber the administration of law or defeat the ends of justice.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 343. In the federal courts, death of a sole defendant in equity, which transferred his interest to others, abated the suit, in the absence of revival.—Childs v. Ferguson (C. C. A.) 795.

§ 343. Where a suit in equity has been heard and submitted, the subsequent death of defendant brings no abatement.—Childs v. Ferguson (C. C. A.) 795.

§ 347. The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) applies especially to the form and order of pleading, which in actions at law must conform to the requirements of the state statutes and practice.—Brown v. Cumberland Telephone & Telegraph Co. (C. C.) 246.

§ 352. A bill of exceptions by referee *held* not essential to review in United States court of his rulings in an action at law in Missouri.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 353. In the federal courts, the ruling of the trial court on a motion for new trial is a matter of discretion, not affected by the conformity statute nor the state practice.—Latchtimacker v. Jacksonville Towing & Wrecking Co. (C. C.) 276.

§ 354. The Pennsylvania practice act of April 22, 1905 (P. L. 286), relating to the entry of judgment non obstante veredicto, is adaptable to the federal courts, and they are required to follow it by the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]).—Smith v. Jones (C. C. A.) 819.

§ 356. Cross-errors are not assignable in United States courts.—Midland Valley R. Co. v. Fulgham (C. C. A.) 91.

§ 356. Where a reversal is necessitated because the record did not show federal jurisdiction, plaintiff, on remand, might be permitted to amend to cure the defect.—Newcomb v. Burbank (C. C. A.) 334.

§ 356. Motion for new trial is not essential to a review of the rulings of the trial court under the federal practice.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 356. The federal court can extend the time for filing exceptions, where a party had received no notice of the time of filing within four days, for seven days.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 356. The methods of review of the rulings of federal courts are prescribed by acts of Congress, the ancient English statutes, and the practice of courts of the United States, and are not affected by the act of conformity (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]), state statutes, or the practice of their courts.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 357. A federal court of equity has power to require a nonresident plaintiff to give security for costs, without any statute or rule of court specially providing therefor.—Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C.) 751.

(F) State Laws as Rules of Decision.

§ 363. Where the constitutional laws of a state governing descent of property conflict with practice of federal courts in equity, the former prevail.—Childs v. Ferguson (C. C. A.) 795.

§ 366. In applying exemption laws the bankruptcy courts are bound by the construction placed on such laws by the highest court of the state whose statute is involved, and also by the settled local law on the question of the validity of instruments affecting exemptions.—In re National Grocer Co. (C. C. A.) 33.

§ 366. The sufficiency of a notice of a servant's injury served under the New York employer's liability act (Laws 1902, c. 600) would be determined in the federal courts in accordance with the construction of the act by the New York court of last resort.—Pennsylvania Steel Co. v. Lakkonen (C. C. A.) 325.

§ 367. A unanimous decision of the highest court of a state construing a writing relating to the sale of a vein of coal underlying land in that state, and holding it to be an option and not a contract of sale, establishes a rule of property, and will be followed by a federal court in construing another contract relating also to property in that state and identical in terms.—Fretts v. Shriver (C. C.) 279.

§ 371. State legislation conflicting with the distinction between law and equity as observed in federal courts is unenforceable.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

§ 376. Rev. St. § 858, as amended by Act June 29, 1906, c. 3608, 34 Stat. 618 (U. S. Comp. St. Supp. 1909, p. 242), which provides that "the competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held" applies as well to suits in equity as to actions at law.—Rowland v. Biesecker (C. C.) 128.

(H) Circuit Courts of Appeals.

§ 405. Assignment of error to admission of evidence contained in a writing *held* insufficient under rule 2 of the Court of Appeals.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 405. Rule 24 of Court of Appeals as to requirements of briefs construed.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 405. Where counsel consider a point they present too trivial to cite in their brief the place in the record where it was ruled upon and preserved by exceptions, the court will not search out the record to consider the ruling.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 407. An order denying a motion to dissolve a preliminary injunction is not one "continuing" the injunction, within the meaning of Act March 3, 1891, c. 517, § 7, 26 Stat. 828 (U. S. Comp. St. 1901, p. 550), and is not appealable thereunder.—Pioneer Lace Mfg. Co. v. Dodd (C. C. A.) 688.

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.

§ 508. Under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), a federal court has no power to grant an injunction to stay an action, civil or criminal, pending in a state court when the bill is filed, and based on a state statute, although such statute as therein sought to be enforced is unconstitutional and an invasion of property rights.—St. Louis & S. F. R. Co. v. Allen (C. C.) 710.

COVERTURE.

See Husband and Wife.

CREDITORS.

See Bankruptcy; Exemptions; Garnishment.

Rights and remedies as to mortgage by debtor, see Chattel Mortgages, § 197.

CREW.

Of vessel, see Seamen.

CRIMES.

See Criminal Law.

CRIMINAL LAW.

Indictment, information, or complaint, see Indictment and Information.

Offenses by particular classes of persons.

Carriers of live stock, see Animals, § 34.
Officers and agents of banks, see Banks and Banking, §§ 256, 257.

Particular offenses.

See Contempt; Embezzlement; Obstructing Justice; Perjury.
Transportation of live stock from quarantined district, see Animals, § 34.
Violations of banking laws, see Banks and Banking, §§ 256, 257.
Violations of bankrupt laws, ground for refusal of discharge of bankrupt, see Bankruptcy, § 408.
Violations of postal laws, see Post Office, § 34.
Violations of regulations relating to articles of food or drink, see Food, § 20.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 37. The fact alone that the only interstate shipment shown of a misbranded food article by the manufacturer was secretly induced by an agent of the Department of Agriculture is not a defense to a prosecution therefor under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), the reasons for the action of such agent not appearing.—United States v. Morgan (C. C.) 587.

III. PARTIES TO OFFENSES.

False entries in books of national bank, see Banks and Banking, § 256.

§ 59. In order for a person to be a principal in a felony, he must be either actually or constructively present while the other commits the offense.—Richardson v. United States (C. C. A.) 1.

§ 59. Where an act is done by the procurement of a person it is his act in effect, even where it is made a crime.—Richardson v. United States (C. C. A.) 1.

§ 59. Where an offense is a misdemeanor all participants are principals.—Richardson v. United States (C. C. A.) 1.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

In prosecution for making false entries in bank books, see Banks and Banking, § 257.

(E) Best and Secondary and Demonstrative Evidence.

§ 400. In a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna, *held* proper to admit secondary evidence of the contents of a cipher telegram from the fugitive witness.—Heinze v. United States (C. C. A.) 322.

(J) Testimony of Accomplices and Codefendants.

§ 510. There is nothing which forbids the conviction of a defendant at common law or in the federal courts on the uncorroborated testimony of an accomplice.—Richardson v. United States (C. C. A.) 1.

XII. TRIAL.

(F) Province of Court and Jury in General.

§ 761. In a prosecution of a national bank officer for false entries, requests assuming that the clerks who made the entries were accomplices *held* properly refused.—Richardson v. United States (C. C. A.) 1.

§§ 763, 764. An instruction that the credibility of a witness who is an accomplice is weakened by the absence of corroboration *held* properly refused.—Richardson v. United States (C. C. A.) 1.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1053. On review of a conviction, conduct of the trial judge not excepted to cannot be considered.—Heinze v. United States (C. C. A.) 322.

§ 1059. An exception to the direction of a verdict in favor of accused is insufficient to raise the question of variance on appeal.—Richardson v. United States (C. C. A.) 1.

CROSS-ERRORS.

Assignment in federal court, see Courts, § 356.

CROSSINGS.

Railroad crossings, accidents at, see Railroads, §§ 327–350.

CURTESY.

See Dower.

CUSTODIA LEGIS.

Garnishment of property in custody of the law, see Garnishment, § 58.

CUSTODY.

Of debtor's property pending bankruptcy proceedings, see Bankruptcy, §§ 115–117.

CUSTOMS AND USAGES.

Local customs as affecting appropriation of water, see Waters and Water Courses, § 9.

§ 19. A custom asserted as to the construction of a written contract will not be considered where the witnesses differ with reference thereto.—Herr v. Tweedie Trading Co. (C. C. A.) 483.

CUSTOMS DUTIES.

Excise duties and other internal taxes, see Internal Revenue.

II. GOODS SUBJECT TO DUTY, RATE, AND AMOUNT.

§ 44. Shida baskets, composed of vegetable fiber derived from ferns, are not dutiable by similitude as manufactures of grass, etc., under Tariff Act July 24, 1897, c. 11, § 1, Sched. N. par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678).—Butler Bros. v. United States (C. C.) 402.

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

§ 85. The provision in Act May 27, 1908, c. 205, § 2, 35 Stat. 404, that "hereafter" parties litigant should introduce all their evidence before the Board of General Appraisers, applied to cases decided by the Board after said act became effective, even though they had arisen, and been submitted while the former Act (June 10, 1890, c. 407, § 15, 26 Stat. 138) which it amends, was in effect, permitting additional evidence to be taken on appeal.—Beer v. United States (C. C.) 402.

§ 86. A bond for the return of merchandise to the collector of internal revenue after examination and appraisal of samples sent to the public store *held* not breached unless 10 days elapsed without compliance with the collector's demand for return.—United States v. Psaki (C. C.) 635.

DAMAGES.

Compensation for property taken for public use, see Eminent Domain, § 98.

Damages for particular injuries.

See Collision, §§ 139–146; Death, § 99; Libel and Slander, § 120.

Discrimination by carrier, see Carriers, § 36.

Loss of or injury to tow, see Towage, § 15.

Violations of anti-trust laws, see Monopolies, § 28.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 23. Damages which are the natural and probable result of a breach of contract *held* recoverable.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 23. Elements of damages recoverable in absence of proof aliunde of knowledge by the defaulting party when a contract was made for special circumstances determined.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 23. Knowledge by defaulting party when contract is made of special circumstances rendering other damages than those implied from the contract probable *held* to warrant recovery thereof.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

§ 45. Defendant *held* liable to plaintiff for damages caused by delay in delivery of boilers for steamship.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

V. EXEMPLARY DAMAGES.

For libel, see Libel and Slander, § 120.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

For causing death, see Death, § 99.

§ 132. A verdict for $10,000 to a plaintiff 27 years old with an earning capacity of $20 per month, and an expectancy of 37 years, for a personal injury necessitating the amputation of one arm and one leg, *held* excessive, and a remittitur reducing it to $4,826 required to avoid a new trial.—Latchtimacker v. Jacksonville Towing & Wrecking Co. (C. C.) 276.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

Damages for discrimination by carrier, see Carriers, § 36.

(C) Proceedings for Assessment.

§ 208. Question whether certain damages claimed for delay in failing to deliver boilers for a steamship were caused by such delay *held* for the jury.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

(D) Computation and Amount, Double and Treble Damages, and Remission.

Review of amount of recovery, see Appeal and Error, § 1004.

DEATH.

Jurisdiction of admiralty in action for death, see Admiralty, § 21.

Of defendant after decree of foreclosure, collateral attack, see Mortgages, § 526.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

Reputation as to death, see Evidence, § 288.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 21. It is no defense to an action for wrongful death that another was also in fault for the tortious act.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

(B) Jurisdiction, Venue, and Limitations.

Suspension of limitations, see Limitation of Actions, § 114.

(D) Pleading and Evidence.

§ 58. Where, in an action for wrongful death, issue is taken on the fact of death, the

burden of proving it is on the plaintiff.—Northern Pac. Ry. Co. v. King (C. C. A.) 913.

§ 75. In an action for wrongful death, the fact of death may be proved by circumstantial evidence.—Northern Pac. Ry. Co. v. King (C. C. A.) 913.

§ 75. No inference that a passenger died from injuries sustained could be drawn, where it was affirmatively shown that he survived such injuries for a week or 10 days.—Northern Pac. Ry. Co. v. King (C. C. A.) 913.

(E) Damages, Forfeiture, or Fine.

§ 99. An award of $12,000, for the death of an engineer 31 years old, in good health and of good habits, who was earning from $1,300 to $1,500 a year and left a wife and child, *held* not excessive.—The Volund (C. C. A.) 643.

DEBTOR AND CREDITOR.

See Bankruptcy; Exemptions; Garnishment.

DECEIT.

See Fraud.

DECEPTION.

See Fraud.

Of public as element of infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 65.

DECLARATION.

In pleading, see Pleading.

DECLARATIONS.

As evidence, see Evidence, § 288.

DECREE.

In admiralty, see Admiralty, § 92.
Judgments in general, see Judgment.

DEDICATION.

Of inventions, see Patents, §§ 83–87.

DEEDS.

Deeds by or to particular classes of persons.

See Husband and Wife, § 14; Insane Persons, § 70, 71.

Mortgagors, see Mortgages, § 281.

Deeds of particular species of, or estates or interest in, property.

Mortgaged property, see Mortgages, § 281.
Trust deeds, see Chattel Mortgages; Mortgages.

DEFALCATION.

In general, see Embezzlement.

DEFAMATION.

See Libel and Slander.

DEFAULT.

In performance of contracts in general, see Contracts, §§ 289–306.

DEFRAUD.

See Fraud.

DELEGATION.

Of authority to members of county board, see Counties, § 50.
Of power of eminent domain, see Eminent Domain, § 9.

DELIVERY.

Of goods by vessel, see Shipping, § 113.

DEMAND.

As condition precedent to action on importer's withdrawal bond, see Customs Duties, § 86.

DEMISE.

See Landlord and Tenant.

DEMURRER.

See Equity, § 233; Pleading, §§ 201–212.

DEPORTATION.

Of immigrants excluded, see Aliens, § 54.

DEPOSITARIES.

Deposits incident to particular occupations, see Banks and Banking.

DEPOSITS.

By assignee in bankruptcy, see Bankruptcy, § 273.

DESCENT AND DISTRIBUTION.

See Dower.
Declarations or family records or reputation as to heirship, see Evidence, § 288.
Inheritance by, from, or through Indians, see Indians, § 18.
State laws as rules of decision in federal court, see Courts, § 363.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

Declarations or family records or reputation as to heirship, see Evidence, § 288.
Descent of Indian lands, see Indians, § 18.

DESCRIPTION.

Of property mortgaged, see Chattel Mortgages, § 50.

DESIGN.

Patentable novelty, see Patents, § 43.

DIRECTORS.

Of corporation, meetings, see Corporations, § 298.

DISABILITIES.

Particular classes of persons.

See Indians; Insane Persons.
Seamen, effect on right to share in earnings, see Seamen, § 28.

DISBURSEMENTS.

Costs in general, see Costs.
Right of assignee in bankruptcy to retain funds for repayment of disbursements, see Bankruptcy, § 273.

DISCHARGE.

From indebtedness, obligation, or liability.

See Accord and Satisfaction; Judgment, § 875; Mechanics' Liens, § 239.
Bankrupts, see Bankruptcy, §§ 407–414.

DISCRETION OF COURT.

Review of discretion in civil actions, see Appeal and Error, § 977.

DISCRIMINATION.

By carriers, see Carriers, §§ 13, 32.

DISEASE.

Contagious and infectious diseases of animals, see Animals § 34.

DISMISSAL AND NONSUIT.

Dismissal of suit for infringement of patent, see Patents, § 313.
Dismissal of suits in federal court, see Courts, § 280.
Power of creditors of bankrupt to direct trustee to compromise and discontinue suit, see Bankruptcy, § 231.
Waiver of denial of motion for nonsuit, see Trial, § 419.

II. INVOLUNTARY.

Federal court, see Courts, § 280.
Want of jurisdiction of federal court, see Courts, § 280.

DISTRIBUTION.

By composition in bankruptcy, see Bankruptcy, § 385.
Of estate of bankrupt, see Bankruptcy, §§ 318–360.

DISTRICTS.

Judicial district in which suit in federal court must be brought to compel issuance of patent, see Patents, § 114.
Judicial districts in which suits in federal courts must be brought, see Courts, §§ 270–272.

DITCHES.

See Waters and Water Courses, § 144½.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see Courts, §§ 311–322; Removal of Causes, § 26.

DIVIDENDS.

In hands of trustee in bankruptcy as subject of garnishment, see Garnishment, § 58.
On stock, see Corporations, § 156.
Payment of dividends to creditor of bankrupt, see Bankruptcy, § 360.

DIVISION.

Of damages in action for injuries to tow, see Towage, § 15.

DOCUMENTS.

As evidence, see Evidence, § 355.
Best and secondary evidence, see Criminal Law, § 400; Evidence, § 178.
Manner of introducing in evidence, see Trial, § 39.

DOMESTIC ANIMALS.

See Animals.

DOMICILE.

Of parties to action as determining jurisdiction of courts, see Courts, §§ 311–322; Removal of Causes, § 26.

DOUBLE LIABILITY.

Of stockholders, see Corporations, § 235.

DOWER.

Dower interest of bankrupt's wife as assets of bankrupt, see Bankruptcy, § 267.
What law governs dower interest of bankrupt's wife, see Bankruptcy, § 267.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

§ 45. Under Ohio Rev. St. §§ 5719, 6348, 6350f, 6350g, a general assignment for the benefit of creditors does not impair the dower right of the insolvent's wife in his real estate.—In re Hays (C. C. A.) 674.

§ 49. Where a mortgage given by a bankrupt to secure a debt, in which his wife joined to release her dower, is set aside as a prefer-

ence, and the property restored to his general estate, such mortgage is also inoperative to release or bar the wife's dower right and cannot be enforced by the mortgagee as a conveyance of her dower interest in the property.—In re Lingafelter (C. C. A.) 24.

DRAMSHOPS.

See Intoxicating Liquors.

DRAWINGS.

Accompanying application for patent, see Patents, § 167.

DREDGES.

Right to lien on dredge, see Maritime Liens, § 19.

DRUGGISTS.

Interstate commerce regulations as to drugs, see Commerce, § 41.

§ 2. Where claimants received from another state certain packages of asafœtida which was adulterated or misbranded when received, but did not deliver the same in unbroken packages for pay or otherwise, or offer to deliver it to another person while so adulterated or misbranded, they were not guilty of violating Pure Food and Drug Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1188) § 2.—United States v. Five Boxes of Asafœtida (D. C.) 561; Same v. Nine Boxes of Asafœtida (D. C.) 568.

§ 11. Asafœtida adulterated and misbranded received by claimants in interstate commerce, but tested and correctly branded before seizure, *held* not subject to forfeiture under Pure Food and Drug Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 769, 771 [U. S. Comp. St. Supp. 1909, pp. 1191, 1193]) §§ 7, 10.—United States v. Five Boxes of Asafœtida (D. C.) 561; Same v. Nine Boxes of Asafœtida (D. C.) 568.

§ 11. It is not essential to the condemnation and forfeiture of adulterated and misbranded drugs under Pure Food and Drug Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]) § 10, that the owner shall have been guilty of transporting or selling or offering the same for sale in violation of section 2.—United States v. Five Boxes of Asafœtida (D. C.) 561; Same v. Nine Boxes of Asafœtida (D. C.) 568.

DUE PROCESS OF LAW.

See Constitutional Law, § 280.

DUPLICITY.

In indictment or information, see Indictment and Information, § 125.

DUTIES.

Customs duties, see Customs Duties.
Excise duties, see Internal Revenue.

EARNINGS.

Of seamen, see Seamen, § 28.

EASEMENTS.

See Navigable Waters.

ELECTION OF REMEDIES.

In admiralty, see Admiralty, §§ 28–30.

ELECTRICITY.

Appropriation of waters for generation of electricity, see Waters and Water Courses, § 132.
Electric railroads, see Street Railroads.

§ 9. A court of equity has no power to prescribe by injunction the use by an electric street railway company of any particular system of circuit or negative return, even though it is shown that the system in use results in the continuous injury, and will result in the destruction by electrolysis by its return current of the pipes of a water company.—Peoria Waterworks Co. v. Peoria Ry. Co. (C. C.) 990.

§ 9. A water company *held*, on the evidence, entitled to an injunction to restrain injury to its pipes by electrolysis caused by the escape of electricity from the rails of an electric street railway company used as return conductors, but leaving defendant free to adopt such reasonable means to that end as it should be advised.—Peoria Waterworks Co. v. Peoria Ry. Co. (C. C.) 990.

ELECTROLYSIS.

Restraining injury to water pipes, see Electricity, § 9.

EMBEZZLEMENT.

§ 16. Repledge of pledged collaterals by brokers at a time when the customer had no transactions pending, and when the broker was indebted to the customer, constituted larceny.—In re T. A. McIntyre & Co. (C. C. A.) 955.

EMERGENCIES.

Compensation for emergency service to stranded vessel, see Shipping, § 75.

EMINENT DOMAIN.

Exercise of power as deprivation of property without due process of law, see Constitutional Law, § 280.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 9. A city under general authority only to condemn land for street purposes had no power to condemn part of a railroad's right of way for a street to be laid out longitudinally along the same.—Portland Ry., Light & Power Co. v. City of Portland (C. C.) 632.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 98. A consequential injury to land by reason of a dam built by the United States, which merely increased the extent and frequency of flooding in time of freshet, *held* not a "taking" of the land within the meaning of the fifth constitutional amendment, which entitled the owners to recover compensation.—Coleman v. United States (C. C.) 599.

IV. REMEDIES OF OWNERS OF PROPERTY.

Deprivation of property without due process of law as ground of jurisdiction of federal court, see Courts, § 282.
Right of action against United States, see United States, § 127.

EMPLOYER'S LIABILITY ACTS.

Fellow servants, see Master and Servant, § 182.
Jurisdiction of federal court, see Courts, § 256.

EMPLOYES.

See Master and Servant.

ENDOWMENT.

See Dower.

ENTIRETY, ESTATE BY.

See Husband and Wife, § 14.
Right to mechanic's lien under contract with husband, see Mechanics' Liens, § 73.

ENTRIES.

False entries in books of national bank, see Banks and Banking, §§ 256, 257.

ENTRY.

Of public lands, see Public Lands, §§ 31–39.

EQUITABLE ESTATES.

See Mortgages; Trusts.

EQUITABLE ESTOPPEL.

See Estoppel, § 63.

EQUITABLE LIENS.

On proceeds of insurance policy, see Insurance, § 580.

EQUITY.

Equitable estates, see Mortgages; Trusts.
Equitable estoppel, see Estoppel, § 63.
Equitable lien on proceeds of insurance policy, see Insurance, § 580.
Transfer of equity of redemption by mortgagor, see Mortgages, § 281.

Particular subjects of equitable jurisdiction and equitable remedies.

See Injunction; Quieting Title; Receivers; Specific Performance; Trusts.
Infringement of copyrights, see Copyrights, § 85.
Infringement of patents, see Patents, §§ 283–327.
Refusal of patent, see Patents, § 114.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 42. Whether a bill states a case for equitable relief is jurisdictional, and may therefore be raised by the court of its own motion.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

III. PARTIES AND PROCESS.

In suit to quiet title, see Quieting Title, § 30.

IV. PLEADING.

(A) Original Bill.

Multifariousness in bill for relief against interfering patent, see Patents, § 114.

§ 153. Whether a bill has equity depends, not on the general allegations of equity cognizance or conclusions, but on the facts alleged.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

(B) Plea, Answer, and Disclaimer.

In proceedings for relief against interfering patent, see Patents, § 114.

(E) Demurrer, Exceptions, and Motions.

§ 233. In federal courts of equity, the rule is established that a demurrer to a whole bill must be overruled if the bill, taken altogether, entitles complainant to some kind of relief.—St. Louis & S. F. R. Co. v. Allen (C. C.) 710.

VI. TAKING AND FILING PROOFS.

§ 358. Testimony taken in rebuttal will not be suppressed on motion or objection of defendant on the ground that it was not proper rebuttal testimony after the defendant has by leave of court taken testimony in surrebuttal.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Reference in action at law, see Reference.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Dower.
Bankrupts' estates, see Bankruptcy.
Conveyances to husband and wife, see Husband and Wife, § 14.
Estates for years, see Landlord and Tenant.

ESTOPPEL.

I. BY RECORD.

By judgment, see Judgment, § 668.

III. EQUITABLE ESTOPPEL.

Of particular classes of persons, or persons in particular relations.

Patentee, see Patents, § 168.

To assert or deny particular facts, rights, claims, or liabilities.

Construction of patent as affected by cancellation of claim, see Patents, § 168.
To claim priority of mortgage, see Mortgages, § 183.
To rely on limitations, see Limitation of Actions, § 13.
Validity of mechanic's lien, see Mechanics' Liens, § 76.
Validity of patent, see Patents, § 129.

(B) Grounds of Estoppel.

§ 63. Officers of a national bank may not hold themselves out to the Comptroller of the Currency, the bank examiners, and the business public as original subscribers for and holders of its capital stock, which they have never paid for, and yet escape liability on obligations given for such stock by a secret agreement among them that the stock shall be considered as belonging to the bank, and not to the one to whom it is issued.—Lyons v. Westwater (C. C. A.) 681.

EVIDENCE.

False swearing, see Perjury.
Practice in admiralty, see Collision, § 123.
Reception at trial, see Trial, § 39.

As to particular facts or issues.

See Customs and Usages, § 19; Usury, § 115.
Abandonment of invention, see Patents, § 87.
Bad faith, in suit for infringement of trade-mark, see Trade-Marks and Trade-Names, § 93.
Concealment of goods and proceeds by bankrupt, see Bankruptcy, § 414.
Fault of vessel in collision, see Collision, §§ 66, 85.
Fraudulent entries on public land, see Public Lands, § 120.
Jurisdiction of suit for infringement of patent, see Patents, § 288.
Knowledge of injunction, see Injunction, § 230.
Negligence of master causing injury to servant, see Master and Servant, § 278.
Patentable invention, see Patents, § 35.
Patentable novelty, see Patents, § 45.
Prior public use of patent, see Patents, § 81.
Residence of applicant for naturalization, see Aliens, § 68.

In actions by or against particular classes of persons.

See Master and Servant, §§ 265–278.
Shipowners, see Shipping, § 209.

In particular civil actions or proceedings.

Admiralty proceedings, see Collision, § 123.
For causing death, see Death, §§ 58–75.
For collision between vessels, see Collision, § 123.
For infringement of patent, see Patents, §§ 312, 326.
For infringement of trade-mark, see Trade-Marks and Trade-Names, § 93.
For injuries to servants, see Master and Servant, §§ 265–278.
For libel or slander, see Libel and Slander, §§ 101–105.
For limitation of liability of shipowner, see Shipping, § 209.
For violation of injunction, see Injunction, § 230.
On application for discharge of bankrupt, see Bankruptcy, § 44.
Relating to usury, see Usury, § 115.
To cancel land patent, see Public Lands, § 120.
To forfeit whisky, see Internal Revenue, § 46.

In criminal prosecutions.

See Criminal Law, § 400.
For making false entries in bank books, see Banks and Banking, § 257.

Review and procedure thereon in appellate courts.

Presentation of evidence, by bill of exceptions, case, or statement, see Appeal and Error, § 548.

I. JUDICIAL NOTICE.

§ 10. The federal Circuit Court takes judicial notice that a particular county is within the district.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

§ 47. Courts take judicial notice of the regulations of the Land Department and when passing on existence of particular regulation may resort to any source of information calculated to be helpful and trustworthy.—Leonard v. Lennox (C. C. A.) 760.

II. PRESUMPTIONS.

In action for injuries to servants, see Master and Servant, § 265.

§ 67. While a given condition, shown to exist at a given time may be presumed to have continued, there is not, on the other hand, any presumption that it existed previous to the time shown.—W. F. Corbin & Co. v. United States (C. C. A.) 296.

§ 76. The silence of a party as to a matter of which he has knowledge cannot authorize a finding against him on an issue upon which the other party has the burden of proof where there is a total lack of affirmative proof.—W. F. Corbin & Co. v. United States (C. C. A.) 296.

§ 82. Where a court had jurisdiction of the parties and subject-matter, it would be presumed that the subsequent proceedings were regular until the contrary was shown.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

III. BURDEN OF PROOF.

As to particular facts or issues.

Contributory negligence of vessel in collision, see Collision, § 123.
Fault of vessel in collision, see Collision, § 55.
Jurisdiction of suit for infringement of patent, see Patents, § 288.

In particular civil actions or proceedings.

For causing death, see Death, § 58.
For infringement of trade-mark, see Trade-Marks and Trade-Names, § 93.
For libel or slander, see Libel and Slander, § 101.
To forfeit whisky for violation of revenue laws, see Internal Revenue, § 46.

(C) Similar Facts and Transactions.

§ 129. In a proceeding by the United States under Rev. St. § 3455 (U. S. Comp. St. 1901, p. 2279), for the forfeiture of whisky in the distillers' original barrels, but alleged to be other than that contained in such barrels when they were branded and marked, it was competent for the government to introduce in evidence analyses of samples taken from the barrels and for comparison analyses of samples from a large number of barrels made in the same distillery about the same time and under similar conditions.—W. F. Corbin & Co. v. United States (C. C. A.) 296.

V. BEST AND SECONDARY EVIDENCE.

In criminal prosecutions, see Criminal Law, § 400.

§ 178. On proof of loss of claims against a county, secondary evidence is admissible in a suit to recover on them.—Ohio County, Ky., v. Baird (C. C. A.) 49.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 213. An effort to settle may be taken as an admission of liability when it is necessarily to be implied from it.—In re Breon Lumber Co. (D. C.) 909.

(D) By Agents or Other Representatives.

§ 244. A report made to Dun & Co. by their authorized representative in the regular course of his duty as to the assets and business of a corporation, and containing statements purporting to have been made by its president, *held* admissible, after the death of the representative making it, as prima facie evidence that such statements were so made.—Davis v. Louisville Trust Co. (C. C. A.) 10.

VIII. DECLARATIONS.

(C) As to Pedigree, Birth, and Relationship.

§ 288. Birth, marriage, death, and pedigree may be proved by hearsay declarations only of members of the family.—Northern Pac. Ry. Co. v. King (C. C. A.) 913.

X. DOCUMENTARY EVIDENCE.

Manner of introducing documentary evidence, see Trial, § 39.

(C) Private Writings and Publications.

§ 355. List of expenses verified by competent testimony may become admissible in evidence of damages.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works (C. C. A.) 38.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 417. The parol evidence rule does not apply where the written instrument does not express the entire agreement or understanding of the parties.—Haas Bros. v. Hamburg-Bremen Fire Ins. Co. (C. C. A.) 916.

(C) Separate or Subsequent Oral Agreement.

§ 445. The rule that a written contract may not be varied collaterally applies only to the negotiations which finally take form in the written contract itself, and does not affect subsequent transactions between the parties, although oral.—Rowland v. Biesecker (C. C.) 128.

(D) Construction or Application of Language of Written Instrument.

§ 450. The words "in full of all such claims," contained in a receipt, *held* ambiguous and open to explanation by parol.—Haas Bros. v. Hamburg-Bremen Fire Ins. Co. (C. C. A.) 916.

§ 460. In an action on a bond given to secure performance of a lease, evidence offered by the defendants, *held* erroneously excluded under the issues.—Henderson v. Mound Coal Co. (C. C. A.) 487.

XIV. WEIGHT AND SUFFICIENCY.

Circumstantial evidence of death, see Death, § 75.

As to particular facts or issues.

Concealment of goods and proceeds by bankrupt, see Bankruptcy, § 414.
Fraudulent entries on public land, see Public Lands, § 120.
Knowledge of injunction, see Injunction, § 230.
Negligence of master causing injury to servants, see Master and Servant, § 278.

In particular civil actions or proceedings.

For causing death, see Death, § 75.
For injuries to servants, see Master and Servant, § 278.
For violation of injunction, see Injunction, § 230.
On application for discharge of bankrupt, see Bankruptcy, § 414.
To cancel land patent, see Public Lands, § 120.

§ 594. In a suit for infringement of a trademark, defendant *held* not entitled to object to the insufficiency of proof as to the extent in which he was engaged in interstate commerce

in the sale of the article to which the offending mark was attached.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

§ 597. Conjecture is an unjust basis for a verdict, and substantial evidence of facts constituting a cause of action is indispensable to a verdict sustaining the cause.—Midland Valley R. Co. v. Fulgham (C. C. A.) 91.

EXCEPTIONS.

Necessity and sufficiency for purpose of review in criminal cases, see Criminal Law, §§ 1053–1059.
To instructions, see Trial, § 273.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see Appeal and Error, § 548.
Practice in federal courts, see Courts, §§ 352, 356.

EXCESSIVE DAMAGES.

See Damages, § 132.

EXCISE.

Duties, see Internal Revenue.
Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCLUSION.

Of Chinese, see Aliens, § 21.

EXECUTION.

See Garnishment.
Exemptions, see Exemptions.

EXECUTIVE COMMITTEE.

Of corporation, see Corporations, § 299.

EXECUTORY CONTRACTS.

In general, see Contracts.

EXEMPLARY DAMAGES.

For libel, see Libel and Slander, § 120.

EXEMPTIONS.

Of bankrupt, see Bankruptcy, § 399.
Mortgage of exempt property, see Chattel Mortgages, § 50.

II. TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY.

§ 79. The mortgaging or conveying of exempt property to a creditor is not against the public policy of the state of Michigan.—In re National Grocer Co. (C. C. A.) 33.

EXPENSES.

Element of damages, see Damages, § 45.

EXPROPRIATION.

See Eminent Domain.

EXTENSION.

Of time for filing exceptions to report of referee in federal court, see Courts, § 356.

EXTRA WORK.

Compensation for alterations and extra work by party to contract, see Contracts, § 232.

EXTRINSIC EVIDENCE.

In general, see Evidence, §§ 417–460.

FACT.

Judicial notice of facts, see Evidence, §§ 10–47.
Presumptions as to continuance of fact, see Evidence, § 67.

FACTORIZING PROCESS.

See Garnishment.

FACTORS.

See Brokers.

FALSE ENTRIES.

In books of national bank, see Banks and Banking, §§ 256, 257.

FALSE REPRESENTATIONS.

Fraud.

FALSE SWEARING.

See Perjury.

FAMILY.

See Husband and Wife.
Evidence of pedigree, birth, and relationship, see Evidence, § 288.

FAULT.

See Negligence.
As cause of collision, see Collision.

FEDERAL COURTS.

See Courts, §§ 256–407, 508.
Jurisdiction in bankruptcy proceedings, see Bankruptcy, § 294.
Removal of causes to federal courts from state courts, see Removal of Causes.

FEDERAL GOVERNMENT.

See United States.

FEDERAL QUESTIONS.

Grounds for jurisdiction, see Courts, §§ 282–299.

FELLOW SERVANTS.

See Master and Servant, § 182.
Negligence of master of vessel imputable to crew, see Negligence, § 89.

FEME COVERT.

See Husband and Wife.

FIDEI COMMISSUM.

See Trusts.

FIDUCIARY RELATIONS.

See Brokers; Principal and Agent; Trusts.
Between corporations and their officers or agents, see Corporations, § 308.

FILING.

Mortgage, see Chattel Mortgages, §§ 86-97.

FINANCIAL STATEMENTS.

False statement by bankrupt as grounds for refusal of discharge, see Bankruptcy, § 407.

FIRE INSURANCE.

See Insurance.

FISCAL MANAGEMENT.

Of counties, see Counties, § 171.
Of municipal corporations, see Municipal Corporations, § 999.

FISH.

Medical treatment for seamen on fishing vessels, see Seamen, § 11.
Shares of crew in earnings of fishing vessel, see Seamen, §§ 17, 28.

FLOWAGE.

Flooding lands as taking under law of eminent domain, see Eminent Domain, § 98.

FOG.

Collision of vessels, see Collision, §§ 80-85.

FOLLOWING TRUST PROPERTY.

See Trusts, § 358.

FOOD.

Duty of carrier to feed live stock, see Carriers, § 211.
Entrapment as defense to criminal prosecution, see Criminal Law, § 37.
Interstate commerce regulations, see Commerce, §§ 33, 41.
Medicines, see Druggists.

§ 7. Ordinary Croton water drawn from the pipes in New York City, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water" as the term is generally understood, and the labeling of the bottles as spring water constitutes a misbranding within the meaning of the food and drugs act (Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1191]).—United States v. Morgan (C. C.) 587.

§ 20. If a prosecution for adulteration or misbranding under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) is instigated by officers or agents of the Department of Agriculture, allegation and proof of the notice and opportunity to be heard required by section 4 of the act are essential to a conviction, since the prosecution may be under section 5.—United States v. Morgan (C. C.) 587.

§ 24. Macaroni to which a coal tar dye known as martius yellow had been added solely as a coloring matter *held* to contain an "added poisonous * * * ingredient which may render it injurious to health" within Food and Drugs Act June 30, 1906, c. 3915, § 7, par. 5, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1191), and, when shipped in interstate commerce, to be subject to condemnation and destruction under section 10 of the act; the evidence showing that such coloring matter is a poison which will kill.—United States v. 1,950 Boxes of Macaroni (D. C.) 427.

§ 24. Under Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), a district attorney may institute proceedings for misbranding or adulteration upon information other than the report of the officers of the Department of Agriculture, and in such case an examination of the goods by such department is not required as a condition precedent.—United States v. Seventy-Four Cases of Grape Juice (D. C.) 629.

FOOD AND DRUGS ACT.

See Druggists, §§ 2, 11; Food, §§ 7, 20, 24.
Entrapment as defense to prosecution for violation, see Criminal Law, § 37.
Interstate commerce regulations, see Commerce, §§ 33, 41.

FORECLOSURE.

Of mechanics' liens, see Mechanics' Liens, § 245.
Of mortgages, see Mortgages, § 526.

FOREIGN ATTACHMENT.

See Garnishment.

FOREIGN CORPORATIONS.

See Corporations, §§ 661-668.

FOREIGNERS.

See Aliens.

FOREIGN JUDGMENTS.

See Judgment, § 831.

FORFEITURES.

Of adulterated drugs, see Druggists, § 11.
Of adulterated or misbranded articles of food, see Food, § 24.
For violations of internal revenue laws, see Internal Revenue, § 46.
Of exemptions by bankrupt, see Bankruptcy, § 399.

FORMER ADJUDICATION.

Operation and effect in general, see Judgment, § 668.

FOURTEENTH AMENDMENT.

See Constitutional Law, § 280.

FRANCHISES.

Taxation of corporate franchises, claim against receiver of foreign corporation, see Corporations, § 688.

FRAUD.

In subscriptions to corporate stock, see Corporations, § 80.
Limitation of actions for relief on ground of fraud, see Limitation of Actions, § 99.
Offenses involving fraud, see Embezzlement.
Of plaintiff as defense to action for infringement of trade-mark or for unfair competition, see Trade-Marks and Trade-Names, § 85.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 21. A subscriber to the treasury stock of a corporation *held* entitled to rely on statements made by its president in a report to a mercantile agency, and to rescind the purchase on discovering that such statements were materially false and fraudulent.—Davis v. Louisville Trust Co. (C. C. A.) 10.

§ 23. Where plaintiff purchased an interest in a salmon fishing outfit on false representations that the property, located at a distance and inaccessible, comprised a store site and building, plaintiff was entitled to rely on the representation without exercising care to ascertain the truthfulness thereof.—Martin v. Burford (C. C. A.) 922.

III. CRIMINAL RESPONSIBILITY.

See Embezzlement.

FRAUDS, STATUTE OF.

IX. OPERATION AND EFFECT OF STATUTE.

§ 141. Conceding that a contract relating to a patent license is subject to the statute of frauds, it is only the continuing obligations which are affected, and not the effect of the license while unrevoked as a defense against a charge of infringement.—Rowland v. Biesecker (C. C.) 128.

FRAUDULENT CONVEYANCES.

By debtor prior to bankruptcy proceedings, see Bankruptcy, § 179.

I. TRANSFERS AND TRANSACTIONS INVALID.

(II) Preferences to Creditors.

By corporations to creditors in general when insolvent or in contemplation of insolvency, see Corporations, § 545.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(C) Right of Action to Set Aside Transfer, and Defenses.

Right of action by receiver of bankrupt, see Bankruptcy, § 115.

FREIGHT.

Carriage of goods, see Carriers, §§ 67–69; Shipping, §§ 108–132.
Carriage of live stock, see Carriers, §§ 211–219.

FUNDS.

Public funds, see Counties, § 171; Municipal Corporations, § 999.

GAME.

Interstate commerce regulations, see Commerce, § 61.

§ 3½. A state or territory has authority to provide by legislation that wild game, such as quail, shall not be shipped out of the state or territory even though the game was killed during the open season.—Rupert v. United States (C. C. A.) 87.

§ 9. Indictments under the Lacey Act of May 25, 1900, c. 553, §§ 3, 4, 31 Stat. 188 (U. S. Comp. St. 1901, p. 3181), for shipment from the territory of Oklahoma of the bodies of quail killed in violation of the game laws of the territory (Wilson's Rev. & Ann. St. 1903, Okl. §§ 3069, 3078) considered and *held* sufficient.—Rupert v. United States (C. C. A.) 87.

GAMING.

See Lotteries.

GARNISHMENT.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 58. Dividends in the hands of a bankrupt's trustee are not subject to attachment.—In re Hollander (D. C.) 1019.

GENEALOGY.

Evidence of pedigree, birth, and relationship, see Evidence, § 288.

GEOGRAPHICAL FACTS.

Judicial notice of, see Evidence, § 10.

GOOD FAITH.

Of purchaser of corporate bonds, see Corporations, § 473.

GOODS.

Mortgage, see Chattel Mortgages.

GOOD WILL.

§ 6. An assignee of the good will and business of a corporation may use the old name, with or without incorporation.—United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York (C. C.) 182.

GOVERNMENT.

See United States.

GRAND JURY.

See Indictment and Information.
Criminal responsibility for interfering with service of subpœna, see Obstructing Justice, §§ 14, 15.

GRANTS.

Of mineral lands, see Mines and Minerals, §§ 20–27.
Of public lands, see Public Lands.

HARBORS.

Collisions between vessels, see Collision, § 94.

HARMLESS ERROR.

In civil actions, see Appeal and Error, § 1033.

HAZARD.

See Lotteries.

HEALTH.

Contagious and infectious diseases of animals, see Animals, § 34.
Regulation of manufacture, dispensing and sale of medicines, see Druggists.
Regulation of manufacture, sale, and use of articles of food or drink, see Food.

HEARING.

In contempt proceedings, see Contempt, § 61.

HEIRS.

See Indians, § 18.

HIGHWAYS.

See Navigable Waters, § 24.
Crossing by railroads, see Railroads, §§ 327–350.

V. REGULATION AND USE FOR TRAVEL.

(C) Injuries from Defects or Obstructions.

Accidents at railroad crossings, see Railroads, §§ 327–350.

HIRING.

Of premises, see Landlord and Tenant.

HOMESTEAD.

Dower or rights of widow in real property of deceased husband, see Dower.
Exemption of personal property, see Exemptions.

HOMICIDE.

Civil liability for causing death, see Death, §§ 21–99.

HUNTING.

See Game.

HUSBAND AND WIFE.

See Dower.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Right to mechanic's lien on estate by entirety under contract with husband, see Mechanics' Liens, § 73.

§ 14. Under the decisions of the Supreme Court of North Carolina, which establish a rule of property controlling in the federal courts in that state, a conveyance of land to a husband and wife vests them with an estate by entireties, which cannot be aliened, burdened, or otherwise affected except by their joint action, and a mechanic's lien cannot be acquired thereon through a contract with the husband alone.—Healey Ice Mach. Co. v. Green (C. C.) 890.

V. WIFE'S SEPARATE ESTATE.

(B) Rights and Liabilities of Husband.

Consent to improvement by husband as affecting right to mechanic's lien, see Mechanics' Liens, § 75.

(C) Liabilities and Charges.

Estoppel to contest validity of mechanic's lien, see Mechanics' Liens, § 76.
Mortgage as recognition of mechanic's lien, see Mechanics' Liens, § 76.

HYPOTHECATION.

See Chattel Mortgages.
Of vessels, see Maritime Liens.

IDENTIFICATION.

Of subject-matter of written instrument, parol or extrinsic evidence, see Evidence, § 460.
Of trust property, see Trusts, § 358.

IDENTITY.

Evidence of identity of lease secured by bond, see Bonds, §§ 128, 460.
Of invention affecting question of infringement of patent, see Patents, § 247.
Of invention affecting right to patent, see Patents, § 72.
Of persons as affecting conclusiveness of former judgment, see Judgment, § 668.

IDIOTS.

See Insane Persons.

ILLEGALITY.

Of contracts, see Contracts, § 108.

ILLNESS.

Affecting right of crew to share in earnings of vessel, see Seamen, § 28.

IMBECILES.

In general, see Insane Persons.

IMITATION.

Of articles of food, see Food.
Of trade-mark or trade-name, as infringement, see Trade-Marks and Trade-Names, §§ 59–65.

IMMIGRATION.

See Aliens, §§ 40–54.

IMMOVABLES.

Mortgages, see Mortgages.
Sales, see Vendor and Purchaser.

IMMUNITY.

See Exemptions.

IMPEDING JUSTICE.

See Obstructing Justice.

IMPLIED CONTRACTS.

See Towage, § 7; Work and Labor.
For improvements as basis for mechanic's lien, see Mechanics' Liens, § 75.

IMPORTS.

Duties, see Customs Duties.

IMPROVEMENTS.

Liens, see Mechanics' Liens.

IMPUTED NEGLIGENCE.

See Negligence, § 89.

INCAPACITY.

In general, see Indians; Insane Persons.

INCHOATE DOWER.

See Dower, §§ 45–49.

INCOMPETENCY.

See Insane Persons.

INCUMBRANCES.

See Mechanics' Liens; Mortgages.
On exempt property, see Exemptions, § 79.

INDEBTEDNESS.

Of corporations in general, see Corporations, §§ 473–478.
Of counties, see Counties, § 171.

INDIANS.

§ 13. Under the general allotment act (Act Feb. 8, 1887, c. 119, 24 Stat. 388) lands allotted to Indians during the trust period still belonged to the United States; the allottees having only the right to occupy and cultivate the same.—Bond v. United States (C. C.) 613.

§ 13. Indian allottee by reason of allotment does not cease to be a ward of the government, and all disputes concerning the allotment, its occupancy, and possession are within the jurisdiction of the Secretary of the Interior.—Bond v. United States (C. C.) 613.

§ 16. A provision in leases of Indian coal lands for diligent operation by the lessees *held* not to confer on the Secretary of the Interior power to arbitrarily determine what should constitute such diligence by a general regulation requiring each lessee to mine a prescribed quantity of coal each year.—United States v. McMurray (C. C.) 723.

§ 16. Act June 28, 1898, c. 517, § 29, 30 Stat. 505, ratifying a previous agreement made with the Choctaw and Chickasaw Tribes of Indians, and providing for the leasing of their coal lands on terms and conditions therein prescribed, did not confer on the Secretary of the Interior power by a regulation to add to the terms so prescribed a requirement that lessees should mine a stated quantity of coal each year, and an action cannot be maintained against a lessee to enforce payment of royalties charged against him under such a regulation.—United States v. McMurray (C. C.) 723.

§ 16. Under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, an Indian allottee in the Quapaw reservation has full power to lease his allotment, except that the term shall not exceed 10 years, for mining or business purposes.—United States v. Abrams (C. C.) 847.

§ 16. Where an Indian allottee leased his allotment for mining purposes for 10 years, and within that time executed a second lease for 10 years to run concurrently to the same lessee, the second lease was valid under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72.—United States v. Abrams (C. C.) 847.

§ 16. An Indian allottee in the Quapaw Agency, having leased his allotment for mining purposes under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, *held* authorized during the term to cancel the lease and execute a new one for the maximum period.—United States v. Abrams (C. C.) 847.

§ 16. A Quapaw allottee having leased his allotment for mining purposes under Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, *held* authorized to assign the royalties payable to him under the lease.—United States v. Abrams (C. C.) 847.

§ 18. Act Cong. June 25, 1910, c. 431, 36 Stat. 855, providing for the determination of the heirship of Indian allottees by the Secretary of the Interior, *held* applicable to allottees who died before the expiration of the trust period, whether the allotments were made and whether the death occurred before or after the passage of the act.—Bond v. United States (C. C.) 613.

§ 18. Act Cong. June 25, 1910, c. 431, 36 Stat. 855, conferring on the Secretary of the Interior exclusive jurisdiction to determine heirship of Indian allottees and containing no saving clause, *held* to repeal Act Feb. 6, 1901, c. 217, 31 Stat. 760, conferring such jurisdiction on courts not only as to future, but also as to pending, causes.—Bond v. United States (C. C.) 613.

§ 27. The United States, though authorized to sue in its own name to cancel leases of Indian allotments extending for more than 10 years, in violation of Act Cong. June 7, 1897, c. 3, § 1, 30 Stat. 72, had no capacity to sue to vacate on other grounds leases which did not exceed the 10-year term.—United States v. Abrams (C. C.) 847.

§ 27. Where an Indian allottee, under Act March 2, 1888, c. 188, 28 Stat. 907, or his heirs after his death, attempted to alienate the land in violation of the 25-year restriction, the United States could sue alone to cancel the conveyance.—United States v. Rundell (C. C.) 887.

INDICTMENT AND INFORMATION.

Against particular classes of persons.

Officers and agents of banks, see Banks and Banking, § 257.

For particular offenses.

False entries in national bank books, see Banks and Banking, § 257.
Violation of banking laws, see Banks and Banking, § 257.
Violation of game laws, see Game, § 9.
Violation of pure food laws, see Food, § 20.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 87. An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States *held* sufficient.—United States v. Eccles (C. C.) 906.

§ 110. An indictment charging a statutory crime in the language of the statute is sufficient when the statute fully, directly and with certainty sets forth all the elements of the crime.—Rupert v. United States (C. C. A.) 87.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. An indictment, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States, is not bad for duplicity because it charges more than one overt act, alleged to have been in furtherance of the object of such conspiracy.—United States v. Eccles (C. C.) 906.

IX. ISSUES, PROOF, AND VARIANCE.

Prosecution for false entries in national bank books, see Banks and Banking, § 257.

INEVITABLE ACCIDENT.

Cause of injury by vessels, limitation of liability, see Shipping, § 208.

INFECTIOUS DISEASES.

Of animals, see Animals, § 34.

INFORMATION.

Criminal accusation, see Indictment and Information.
For contempt of court, see Contempt, § 54.

INFRINGEMENT.

Of copyright, see Copyrights, § 85.
Of trade-mark or trade-name, see Trade-Marks and Trade-Names, §§ 59–65, 85–93.

INHERITANCE.

By, from, or through Indians, see Indians, § 18.

INJUNCTION.

Jurisdiction of federal courts, see Courts, § 282.

Incidental to particular remedies or proceedings.

For infringement of patent, see Patents, § 297.
To quiet title to mining claim, see Mines and Minerals, § 125.

Relief against particular acts or proceedings.

Enforcement of rates of carriers, see Carriers, § 34.
Infringement of copyright, see Copyrights, § 85.
Infringement of patent, see Patents, §§ 283, 297.

Injuries to water pipes from electrolysis, see Electricity, § 9.
Judicial proceedings, concurrent and conflicting jurisdiction of state and federal courts, see Courts, § 508.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

§ 26. That the denial of an injunction restraining suits at law for breach of a contract to maintain a railroad division point at a certain place would result in many such suits being brought did not justify the issuance of such injunction to prevent irreparable damage to complainant.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

§ 26. A bill by a railroad company preparing to remove its division point to another place, and to restrain landowners from instituting suits in equity or at law to compel performance of the contract or to recover damages for its breach, *held* not maintainable to prevent an alleged multiplicity of suits.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

§ 26. A bill by a railroad company to restrain property owners from instituting suits at law against it for breach of a contract to maintain a division point at M. or in equity to specifically perform such contract *held* not maintainable as a bill quia timet, to remove a cloud on title, or as a bill of peace.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

(B) Property, Conveyances, and Incumbrances.

Jurisdiction of federal court, see Courts, § 285.

(E) Public Officers and Boards and Municipalities.

§ 85. A distiller is entitled to an injunction to restrain the enforcement by the Internal Revenue Bureau of an unauthorized order requiring a distilled product known to the trade as "spirits" to be branded as "alcohol," which as known in the trade is an inferior and cheaper product.—Union Distilling Co. v. Bettman (C. C.) 419.

(H) Criminal Acts, Conspiracies, and Prosecutions.

Jurisdiction of federal court, see Courts, §§ 282, 285.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

In suit for infringement of copyright, see Copyrights, § 85.
In suit for infringement of patent, see Patents, § 297.

(A) Grounds and Proceedings to Procure.

§ 137. Where an original bill for an injunction to restrain suits at law or in equity against complainant was without equity and the defendants' alleged right was doubtful, a restraining order would not be granted on a cross-bill on the denial of an injunction to complainant.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

(B) Continuing, Modifying, Vacating, or Dissolving.

Injunction against infringement of copyright, see Copyrights, § 85.

VI. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT.

§ 213. A party who has proper notice of an injunction is bound by it, though it is not served on him.—In re Rice (C. C.) 217.

VII. VIOLATION AND PUNISHMENT.

Injunction against infringement of patent, see Patents, § 326.

§ 228. Where an attorney aware of an injunction against his principal does an act in the name of the principal which is in violation of the injunction, he becomes guilty of contempt.—In re Rice (C. C.) 217.

§ 230. In contempt proceedings against respondents who were not served with an injunction they were charged with violating, their sworn denial of knowledge thereof *held* to relieve them from punishment for contempt.—In re Rice (C. C.) 217.

§ 230. On a rule to show cause why respondent should not be punished for contempt, evidence *held* insufficient to require a finding that respondents had notice of an injunction they were charged with violating prior to the act alleged to constitute a violation thereof.—In re Rice (C. C.) 217.

INJURIES.

In general, see Damages; Negligence; Torts.

INNOCENT PURCHASERS.

Of corporate bonds, see Corporations, § 473.

IN PAIS.

Estoppel, see Estoppel, § 63.

IN REM.

Remedies in admiralty, see Admiralty, §§ 28-30.

INSANE PERSONS.

V. PROPERTY AND CONVEYANCES.

Persons concluded by judgment confirming report of sale, see Judgment, § 668.
Rights of purchasers pending suit, see Lis Pendens, § 24.

§ 70. The probate court under Battle's Revisal N. C. 1873, c. 57, § 7, having jurisdiction to sell lands belonging to a lunatic for maintenance, and to pay debts unavoidably incurred for that purpose, and for the preservation of the lunatic's estate, was not deprived of jurisdiction because the petition also asked for such

sale to pay pre-existing debts.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

§ 71. A purchaser of a lunatic's realty at a judicial sale by the lunatic's commissioner is not bound to look beyond the decree if the facts necessary to give the court jurisdiction appear on the face of the proceedings.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

§ 71. Sales of the real property of a lunatic under probate proceedings *held* judicial sales.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

INSOLVENCY.

See Bankruptcy.
Of corporations in general, see Corporations, §§ 545–559.
Of street railroad company, see Street Railroads, § 58.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

(C) Preferences and Transfers by Insolvent, and Attachments and Other Liens.

By insolvent corporations in general, see Corporations, § 545.

INSTRUCTIONS.

Best and secondary evidence, see Criminal Law, § 400; Evidence, § 178.
By court to jury, see Criminal Law, §§ 761–763, 764; Trial, § 273.
Documentary evidence, see Evidence, § 355.
Parol or other extrinsic evidence, see Evidence, §§ 417–460.

Particular classes of written instruments.

See Bills and Notes; Bonds; Chattel Mortgages; Indictment and Information; Insurance; Mortgages.
Contracts in general, construction and operation, see Contracts, § 232.
Patents for public lands, see Public Lands, § 110.

INSURANCE.

Insurance policies as property vesting in trustee in bankruptcy, see Bankruptcy, § 143.

III. INSURANCE AGENTS AND BROKERS.

Equitable lien on insurance policy for advances to pay premiums, see Insurance, § 580.

V. THE CONTRACT IN GENERAL.

Application of proceeds of policy by creditor of bankrupt as pledgee, see Bankruptcy, § 323.
Loan for amount of surrender value as affecting policy as assets of bankrupt, see Bankruptcy, § 143.

(B) Construction and Operation.

§ 173. A fire insurance policy issued by a mutual company construed in respect to the amount of insurance which, under its terms, was to be determined by a comparison of the sum deposited as a premium with the average rate charged by stock companies doing business in the locality.—Exchange Mut. Fire Ins. Co. v. Warsaw-Wilkinson Co. (C. C. A.) 330.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

Premium paid surety company for stipulation for costs as item of costs in suit for collision, see Collision, § 154.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 248. A breach by a life insurance company of a contract made in a policy to make a loan to the insured is not a repudiation of the insurance contract, which entitled the insured to rescind and recover back the premiums paid.—Lewis v. New York Life Ins. Co. (C. C. A.) 433.

§ 248. An insured *held* not entitled to a rescission of a life policy, and to recover back the premiums paid, under the facts shown.—Lewis v. New York Life Ins. Co. (C. C. A.) 433.

§ 249. An insured *held* not entitled to a rescission of a life insurance contract, and to recover the premiums paid, on the case made by his pleading.—Lewis v. New York Life Ins. Co. (C. C. A.) 433.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(A) Marine Insurance.

§ 477. The towage of an injured vessel to what was agreed between the owner and insurer to be the nearest port where repairs could be made *held* a voyage of necessity, and the cost thereof in the nature of a general average charge, for which the insurer was liable under its policy.—La Fonciere Compagnie D'Assurances, etc., v. Dollar (C. C. A.) 945.

XVI. RIGHT TO PROCEEDS.

Application of proceeds of policy by pledgee of bankrupt, see Bankruptcy, § 323.

§ 580. The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee.—Healey Ice Mach. Co. v. Green (C. C.) 890.

§ 580. A fire insurance agent who made advances for an insured of premiums on policies which have expired, in the absence of a definite contract therefor, has no equitable lien for such advances on the proceeds of a subsequent policy on the property which was in force at the time of a loss.—In re Sejo Ice Cream Co. (D. C.) 627.

§ 580. A provision of a mortgage on real estate that, if the mortgagor does not keep the property insured, the mortgagee may do so and add the amount of the premiums paid to the mortgage debt, does not inure to the bene-

fit of an insurance agent who advances such premiums for the mortgagor.—In re Sejo Ice Cream Co. (D. C.) 627.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Parol evidence to explain receipt, see Evidence, § 450.

XVIII. ACTIONS ON POLICIES.

Parol evidence to explain receipt, see Evidence, § 450.

§ 635. The complaint in an action on a policy of marine insurance *held* to sufficiently allege the loss of the property insured.—Richmond Cedar Works v. Buckner (C. C.) 424.

INTENT.

In false financial statement by bankrupt as grounds for refusal of discharge, see Bankruptcy, § 407.

INTEREST.

See Usury.

Of trustee in transactions affecting trust, see Bankruptcy, § 365.

INTERFERENCE.

In patent law, see Patents, § 106.

INTERIOR DEPARTMENT.

See Public Lands, §§ 97–108.

INTERLOCUTORY INJUNCTION.

See Injunction, § 137.

Restraining infringement of patent, see Patents, § 297.

INTERNAL REVENUE.

Evidence of similar facts in action to forfeit liquors, see Evidence, § 129.

Regulations as to branding of liquors, see Intoxicating Liquors, § 122.

Restraining enforcement of unauthorized orders as to branding of liquor, see Injunction, § 85.

§ 46. In a proceeding under Rev. St. § 3455 (U. S. Comp. St. 1901, p. 2279), for the forfeiture of whisky contained in the original distillers' barrels on the ground that, when received by claimants, it was other than that in the barrels when they were branded and marked, evidence that the barrels were in such substituted condition when seized is not sufficient to show that they were when received by claimants.—W. F. Corbin & Co. v. United States (C. C. A.) 296.

INTERNATIONAL LAW.

See Aliens.

INTERPRETATION.

Of contracts, instruments, or judicial acts and proceedings.

See Mortgages, § 183.

Chinese exclusion acts, see Aliens, § 21.

Contracts in general, see Contracts, § 232.

Contracts of insurance, see Insurance, § 173.

Letters patent, see Patents, §§ 160–178.

License under patent, see Patents, § 211.

Parol or extrinsic evidence to aid interpretation of written instruments, see Evidence, §§ 450–460.

Pleadings, see Pleading, § 34.

INTERSTATE COMMERCE.

Power to regulate, see Commerce.

Regulation of transportation by carriers in general, see Carriers, §§ 32–37.

INTERVENTION.

By stockholders in creditor's suit against street railroad companies, see Street Railroads, § 58.

INTOXICATING LIQUORS.

V. REGULATIONS.

Restraining enforcement of unauthorized orders as to branding of liquor, see Injunction, § 85.

§ 122. Rev. St. § 3287 (U. S. Comp. St. 1901, p. 2130), is not repealed by implication by Food and Drugs Act June 3, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), and under its provisions circular No. 33 issued May 5, 1910, by the Commissioner of Internal Revenue, requiring distilled spirits marked in accordance with its requirements as "spirits" to be hereafter marked as "alcohol," is unauthorized and illegal.—Union Distilling Co. v. Bettman (C. C.) 419.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

For violation of internal revenue laws, see Internal Revenue, § 46.

INVENTION.

See Patents, §§ 16–35.

INVOLUNTARY BANKRUPTCY.

See Bankruptcy, §§ 60–74.

IRREPARABLE INJURY.

Ground for injunction, see Injunction, § 26.

ISSUES.

Presented for review on appeal, see Appeal and Error, § 169.

JOINDER.

Of causes of action, see Admiralty, § 30.

JOINT LIABILITIES.

For torts in general, see Torts, § 22.

JOINT TORT-FEASORS.

In general, see Torts, § 22.
Accord and satisfaction of claim, see Accord and Satisfaction, § 3.

JUDGES.

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JUDGMENT.

Practice in federal courts in general, see Courts, § 354.

In particular civil actions or proceedings.

Admiralty proceedings, see Admiralty, § 92.
Decisions of land officers, see Public Lands, § 108.

Review.

See Appeal and Error; Criminal Law, §§ 1053–1059.
Judgment on appeal or writ of error, see Appeal and Error, § 1166.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 28. Where a proceeding embraces two causes of action, one of which is within and the other without the court's jurisdiction, judgment on both causes is valid as to the subject-matter within the jurisdiction.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

Judgment on stipulation in admiralty, see Admiralty, § 92.
Practice in federal court, see Courts, § 354.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

Judgment on stipulation in admiralty, see Admiralty, § 92.

XI. COLLATERAL ATTACK.

(B) Grounds.

§ 501. Where a court had jurisdiction of the parties and subject-matter, its judgment could not be attacked collaterally for errors or irregularities in subsequent proceedings, except for fraud.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Decision of land officers, see Public Lands, § 108.

(B) Persons Concluded.

§ 668. Heirs of a lunatic, having become parties to a proceeding to settle the accounts of a commissioner who had sold certain timber in controversy on the lunatic's land, and not having excepted to the report which was subsequently confirmed, were estopped to deny the title of the purchasers.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

XV. LIEN.

Power of trustee in bankruptcy to compromise claim under judgment, see Bankruptcy, § 252.

XVII. FOREIGN JUDGMENTS.

§ 831. A foreign judgment in personam does not merge the original cause of action, and it is no bar to an action in a domestic court unless paid or satisfied.—Swift v. David (C. C. A.) 828.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

§ 875. A bond conditioned to pay a judgment, if affirmed on appeal in the foreign jurisdiction, *held* no bar to an action on the same cause of action in a domestic court.—Swift v. David (C. C. A.) 828.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

Presumptions as to judicial proceedings in general, see Evidence, § 82.

JUDICIAL DISCRETION.

Review of discretion in civil actions, see Appeal and Error, § 977.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 10–47.

JUDICIAL SALES.

Exemption of personal property, see Exemptions.
Of debtor's property pending bankruptcy proceedings, see Bankruptcy, § 117.
Of property of bankrupts, see Bankruptcy, §§ 258–269.
Sale of property of lunatic, see Insane Persons, § 71.
To foreclose mortgages, see Mortgages, § 526.

JURISDICTION.

Costs on reversal for want of jurisdiction, see Costs, § 238.
Objections to jurisdiction ground for abatement, see Abatement and Revival, § 3.
Of courts in general, see Courts.
Removal of actions from state court to United State court, see Removal of Causes.
Review of questions of jurisdiction, see Appeal and Error, §§ 185, 1166.

Jurisdiction of particular actions or proceedings.

By or against trustees in bankruptcy, see Bankruptcy, § 294.
For infringement of patent, see Patents, § 288.

Naturalization proceedings, see Aliens, § 67.
To order sale of property of insane person, see Insane Persons, § 70.
To review fraud orders of postmaster general, see Post Office, § 26.

Jurisdiction of particular classes of persons.

See Aliens, § 67.
Trustees in bankruptcy, see Bankruptcy, § 294.

Jurisdiction of particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 294.

Special jurisdictions and jurisdictions of particular classes of courts.

Admiralty jurisdiction, see Admiralty, § 21.
Appellate jurisdiction, see Courts, § 405.
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Federal courts in general, see Courts, §§ 256–407.
Federal courts in bankruptcy proceedings, see Bankruptcy, § 294.
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United States Circuit Courts of Appeals, see Courts, § 405.

JURY.

Instructions, see Criminal Law, §§ 761–763, 764; Trial, § 273.
Questions for jury in criminal prosecutions, see Criminal Law, §§ 761–763, 764.

KNOWLEDGE.

Affecting purchase of land, see Vendor and Purchaser, §§ 229–231.
Of agent imputed to principal, see Principal and Agent, § 177.
Prior knowledge affecting anticipation of invention, see Patents, § 51.

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Misbranding bottled waters, see Food, § 7.

LABOR.

See Master and Servant; Seamen; Work and Labor.
Liens on real property for work and materials, see Mechanics' Liens.
Salvage services, see Salvage.

LACHES.

Affecting particular rights, remedies, or proceedings.

For infringement of patent, see Patents, § 289.
For new trial, see New Trial, § 117.
Rescission of contract, see Contracts, § 270.

LANDLORD AND TENANT.

Acceptance of lease by trustee in bankruptcy, see Bankruptcy, § 255.
Lease of Indian lands, see Indians, §§ 16, 27.

VIII. RENT AND ADVANCES.

Claims provable against estate of bankrupt, see Bankruptcy, § 318.

(A) Rights and Liabilities.

§ 181. "Rent" defined.—In re Roth & Appel (C. C. A.) 667.

LAND OFFICE.

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LANDS.

Conveyance, see Vendor and Purchaser.
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LANGUAGE.

Of statute, following statutory language in indictment or information, see Indictment and Information, § 110.

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See Embezzlement.

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Statutory law, see Statutes.

LEASE.

See Landlord and Tenant.
Acceptance of lease by trustee in bankruptcy, see Bankruptcy, § 255.
Of Indian lands, see Indians, §§ 16, 27.

LEGISLATION.

In general, see Statutes.

LETTERS.

See Post Office.

LETTERS PATENT.

For inventions, see Patents.
For public lands, see Public Lands, § 110.

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As to dower interest of wife of bankrupt, see Bankruptcy, § 267.
Conflicting jurisdiction of courts, see Courts, § 508.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 4. "Express malice" in libel defined.—Mann v. Dempster (C. C. A.) 76.

IV. ACTIONS.

Right to open and close, see Trial, § 25.

(C) Evidence.

§ 101. Plaintiff need not prove the falsity of libel; it being for defendant to justify by showing truth of the statement.—Mann v. Dempster (C. C. A.) 76.

§ 104. Plaintiff in newspaper libel *held* entitled to introduce the whole article as bearing on question of malice.—Mann v. Dempster (C. C. A.) 76.

§ 105. A paragraph preceding one sued on as libel by innuendo *held* admissible.—Mann v. Dempster (C. C. A.) 76.

§ 105. Plaintiff in newspaper libel *held* entitled to introduce the whole article for consideration of the innuendo.—Mann v. Dempster (C. C. A.) 76.

(D) Damages.

§ 120. The mere fact of libel does not authorize recovery in excess of compensatory damages.—Mann v. Dempster (C. C. A.) 76.

(E) Trial, Judgment, and Review.

§ 123. Whether defendants in newspaper libel intended to charge by innuendo that plaintiff had with an immoral motive bought a house to cover an immoral relationship *held*, under the evidence, a jury question.—Mann v. Dempster (C. C. A.) 76.

LIENS.

See Maritime Liens; Mechanics' Liens; Mortgages, § 183.

Equitable lien on proceeds of insurance policy for advances to pay premium, see Insurance, § 580.

LIFE ESTATES.

See Dower.

LIFE INSURANCE.

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LIGHTERAGE.

Liability of vessels, see Shipping, § 113.

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Of claims of patents, see Patents, §§ 165–178.

LIMITATION OF ACTIONS.

Particular actions or proceedings.

For deportation of aliens, see Aliens, § 54.
For new trial, see New Trial, § 117.
To set aside land patent, see Public Lands, § 120.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 13. A receiver appointed in a creditors' suit against an insolvent corporation, and authorized to bring actions against stockholders for the collection of assessments made against them, is not estopped from asserting that the pendency of an appeal from the decree suspended the running of limitation against such an action because during such pendency he settled and received payment of claims against other stockholders.—Irvine v. Bankard (C. C.) 206.

(B) Limitations Applicable to Particular Actions.

§ 35. An action against a telephone company under Acts Tenn. 1885, c. 66, § 11, to recover the penalty imposed thereby of $100 per day for discriminating against an applicant for telephone service, is one to recover a "statutory penalty" required by Shannon's Code Tenn. § 4469, to be brought within one year after the cause of action accrued.—Brown v. Cumberland Telephone & Telegraph Co. (C. C.) 246.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 58. Limitation does not begin to run against an action by a receiver appointed under Rev. St. Ohio 1908, § 3260d, to enforce an assessment made against stockholders of an insolvent corporation until the date of the decree appointing him and making the assessment.—Irvine v. Bankard (C. C.) 206.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

To vacate land patent, see Public Lands, § 120.

§ 99. The fact that the coal freight agent of a railroad company promised a coal company that, in the future, it would be given as favorable rates as were given to any other shipper, which promise was not kept but lower rates were afterward given to other competing companies, did not constitute fraud which would prevent the running of limitation against an action to recover damages for the unlawful discrimination.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

(G) Pendency of Legal Proceedings, Injunction, Stay, or War.

§ 106. If an appeal is taken from a decree making an assessment on stockholders and appointing a receiver, the running of limitations in an action under Rev. St. Ohio 1908, § 3260d, to enforce the assessment, is suspended during the pendency of the appeal.—Irvine v. Bankard (C. C.) 206.

§ 114. Where a statute creating a liability for wrongful death requires a suit to be brought within a specified time, the limitation affects the right, and not the remedy, and is not affected by other statutes suspending limitations.—Kavanagh v. Folsom (C. C.) 401.

(H) Commencement of Action or Other Proceeding.

To vacate land patent, see Public Lands, § 120.

§ 119. Limitations do not cease to run in favor of the holder of the legal title to land as against a suit to set aside the patent until he is made a party to the suit, and process has been placed in the hands of the marshal with the intent that it be served.—United States v. Smith (C. C.) 545.

§ 127. Under the settled law of Pennsylvania, a new cause of action cannot be introduced into a pending suit by amendment after the statute of limitations has run against it.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co. (C. C.) 403.

LIMITATION OF LIABILITY.

Of shipowner, see Shipping, §§ 204–209.

LIQUIDATION.

In general, see Bankruptcy.
Of corporations in general, see Corporations, §§ 545–559.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

§ 24. A purchaser of land from the heirs of a lunatic pending settlement of the accounts of a commissioner who had sold the timber under a probate decree *held* concluded by an order confirming such sale.—Rexford v. Brunswick-Balke-Collender Co. (C. C. A.) 462.

LITERARY PROPERTY.

See Copyrights.

LIVE STOCK.

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Carriage of, see Carriers, §§ 211–219.

LOANS.

Action for breach of contract to make loan on insurance policy, see Insurance, § 249.
Breach of agreement by insurance company to make loans on policies as ground for rescission, see Insurance, § 248.
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LOCATION.

Of mining claim, see Mines and Minerals, §§ 20–27.

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Destruction or loss of primary evidence, as ground for admission of secondary evidence, see Evidence, § 178.

LOTTERIES.

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§ 3. Elements of a "lottery."—Brooklyn Daily Eagle v. Voorhies (C. C.) 579.

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MACARONI.

Condemnation and destruction of adulterated macaroni, see Food, § 24.

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MALICE.

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MARINE INSURANCE.

Extent of loss and liability of insurer on policy, see Insurance, § 477.

MARITAL RIGHTS.

See Husband and Wife.

MARITIME CONTRACTS.

For carriage of goods, see Shipping, § 108.
Liability of vessels and owners in general, see Shipping, § 75.

MARITIME LAW.

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MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(B) Under Statutory Provisions.

§ 19. Act Pa. April 20, 1858 (P. L. 363), does not give a lien on a dredgeboat without motive power for towage or for services rendered in raising her, and no lien therefor is given by the maritime law, where the services were ren-

dered at her home port under contract with the owner.—The Enterprise (D. C.) 746.

MARITIME TORTS.

Delay in delivery of or loss of or injury to goods shipped, see Shipping, §§ 123–132.
Jurisdiction of admiralty, see Admiralty, § 21.
Limitation of vessel owner's liability, see Shipping, §§ 204–209.
Loss of or injury to tow, see Towage, §§ 11–15.

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See Trade-Marks and Trade-Names.
Marking boundaries of mining location or claim, see Mines and Minerals, § 20.
Marking sunken craft in navigable channel, see Navigable Waters, § 24.

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See Husband and Wife.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

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Implied liabilities for services rendered not in performance of duties of employment, see Work and Labor.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

As preferred claim in bankruptcy, see Bankruptcy, § 348.
Medical treatment of seamen, see Seamen, § 11.
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III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Statutory actions for death, see Death, §§ 21–99.

(E) Fellow Servants.

§ 182. A subforeman or pusher *held* a person exercising superintendence, for whose negligence the master is liable for injuries to a servant under the New York employer's act (Laws 1902, c. 600).—Pennsylvania Steel Co. v. Lakkonen (C. C. A.) 325.

§ 182. The master of a vessel who has sole charge of its navigation is one "whose sole or principal duty is that of superintendence" within the meaning of the New York employer's act (Laws 1902, c. 600), and under such act the shipowner is liable for the negligence of the master causing an injury to a member of the crew under him.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

(F) Risks Assumed by Servant.

§ 221. An employé *held*, under the facts shown, to have assumed the risk from a defective appliance by which he was killed, which precluded a recovery from the employer for his death.—Sharon Fire Brick Co. v. Miller (C. C. A.) 830.

(H) Actions.

Jurisdiction of federal court, see Courts, § 256.
State laws as rules of decision in federal court as to sufficiency of notice of injury, see Courts, § 366.

§ 252. In an action for death of a servant, a notice of injury *held* a sufficient compliance with the New York employer's liability act (Laws 1902, c. 600, § 2).—Pennsylvania Steel Co. v. Lakkonen (C. C. A.) 325.

§ 258. In an action for injuries to a servant, plaintiff's complaint *held* to state a cause of action.—Cœur d'Alene Lumber Co. v. Goodwin (C. C. A.) 949.

§ 265. The happening of an accident causing injury to a servant raises no presumption of negligence on the part of the master.—Midland Valley R. Co. v. Fulgham (C. C. A.) 91.

§ 278. In an action for an injury to a conductor of a train, a verdict that the coupler between two freight cars was so defective that it would not couple automatically without the necessity of men going between the cars *held* based on conjecture, and not sustainable.—Midland Valley R. Co. v. Fulgham (C. C. A.) 91.

§ 286. In an action for the death of a servant by the fall of an iron saucer or washer from the top of a steel beam, whether the subforeman in charge of the work was negligent *held* for the jury.—Pennsylvania Steel Co. v. Lakkonen (C. C. A.) 325.

§ 286. Whether a master was negligent in failing to instruct a servant so as to prevent injury *held* for the jury.—Cœur d'Alene Lumber Co. v. Goodwin (C. C. A.) 949.

§ 289. An employé *held*, under the facts shown, not to have been guilty of contributory negligence as a matter of law.—Sharon Fire Brick Co. v. Miller (C. C. A.) 830.

MATERIALITY.

Of testimony as element of perjury, see Perjury, § 11.

MATERIALS.

Liens on real property for materials furnished, see Mechanics' Liens.

MECHANICS' LIENS.

Liens for construction and repair of vessels, see Maritime Liens.
Right of mechanic's lienholder to proceeds of insurance, see Insurance, § 580.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§ 73. Under the decisions of the Supreme Court of North Carolina, which establish a rule of property controlling in the federal courts in that state, a conveyance of land to a husband and wife vests them with an estate by entireties, which cannot be aliened, burdened, or

otherwise affected except by their joint action, and a mechanic's lien cannot be acquired thereon through a contract with the husband alone.—Healey Ice Mach. Co. v. Green (C. C.) 890.

§ 75. Under Revisal N. C. 1905, § 2015, by which the lands of a wife become subject to a mechanic's lien only for improvements made with her "consent or procurement," something more than mere knowledge that her husband is making the improvement is required.—Healey Ice Mach. Co. v. Green (C. C.) 890.

§ 76. A provision, in a mortgage given by a husband and wife on property the title to which was in both, that any sum which might be paid by the mortgagee to remove prior liens should be added to the debt secured, was not an acknowledgment by the wife of a prior mechanic's lien claimed on the property, which estopped her to contest its validity.—Healey Ice Mach. Co. v. Green (C. C.) 890.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§ 173. Under the mechanic's lien statute of North Carolina (Revisal 1905, §§ 2016, 2028), as construed by the Supreme Court of the state, where the claim for a lien is filed within the time and in the manner therein prescribed, the lien relates back to the beginning of the work or the furnishing of the materials.—Bankers' Trust Co. of New York v. T. A. Gillespie Co. of New Jersey (C. C. A.) 448.

§ 173. Under Rev. St. Me. c. 93, § 29, giving a mechanic's lien for labor or materials furnished in erecting, altering, or repairing a house, building, or appurtenance by virtue of a contract with or by consent of the owner, as construed by the Supreme Judicial Court of the state, the lien relates back and becomes effective as of the date of the contract under which the labor or materials are furnished.—Central Trust Co. of New York v. Bodwell Water Power Co. (C. C.) 735.

(C) Priority.

Priority of mortgage, see Mortgages, § 183.
Priority of mortgage by corporation, see Corporations, § 473.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(C) Extinguishment, Release, or Payment.

§ 239. Where a contractor furnished labor and materials for which it was entitled to a mechanic's lien, and other items for which it was not entitled to a lien, and on full statements made by the owner's engineer including both classes of work it made payments generally, the contractor was entitled to apply such payments to the nonlienable items.—Bankers' Trust Co. of New York v. T. A. Gillespie Co. of New Jersey (C. C. A.) 448.

§ 239. A contractor for the construction of a power plant for a corporation entitled to a mechanic's lien which took precedence of a mortgage on the insolvency of the corporation *held* not required in favor of the mortgage bondholders to credit on its claim an amount for which it had erroneously receipted as a payment.—Bankers' Trust Co. of New York v. T. A. Gillespie Co. of New Jersey (C. C. A.) 448.

VII. ENFORCEMENT.

§ 245. While Revisal N. C. 1905, § 2027, gives a right of action at law for the enforcement of a mechanic's lien, a Circuit Court of the United States sitting in equity has jurisdiction to entertain a bill for that purpose, especially where there are conflicting liens to be adjusted.—Healey Ice Mach. Co. v. Green (C. C.) 890.

MEDICAL TREATMENT.

Of seamen, see Seamen, § 11.

MEDICINES.

In general, see Druggists.
Equipment of fishing vessels, see Seamen, § 11.

MEDIUM OF PAYMENT.

In general, see Payment, § 18.

MEETINGS.

Of corporate directors, see Corporations, § 298.
Of creditors of bankrupt, see Bankruptcy, § 231.

MEMBERS.

Of corporations in general, see Corporations, § 235.

MEMORANDA.

Competency as evidence, see Evidence, § 355.

MENTAL CAPACITY.

See Insane Persons.

MERCANTILE AGENCIES.

Admissions by agent in report to agency, see Evidence, § 244.
False statement in reports to mercantile agencies as ground for rescission of subscription for corporate stock, see Corporations, § 80.
False statement to commercial agency as ground for refusal to discharge in bankruptcy, see Bankruptcy, § 407.
Right to rely on representations to agency, see Fraud, § 21.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

Location of placer claim as appropriation of water, see Waters and Water Courses, § 15.

(B) Location and Acquisition of Claims.

Requirement of land department as to nonsaline character of lands entered as homestead, see Public Lands, § 98.

§ 20. Where stakes were set to mark the boundaries of a mining claim and proper notices posted, it was a sufficient marking upon the ground, even though the corner stakes were not inscribed with the name of the claim.—Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C.) 748.

§ 27. A failure to perform the required annual assessment work on a mining claim does not in and of itself work a forfeiture but only permits a relocation, and cannot aid an adverse location which was made prior to the year in which the failure occurred.—Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C.) 748.

§ 27. The fact that a mining claim which has gone to final entry without adverse claim includes the original discovery on which a prior claim was based does not necessarily defeat the right of the prior locator to the remainder of his claim, provided other veins have been discovered on such portion, and it appears that there was no actual intent to abandon the claim.—Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C.) 748.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Conveyances in General.

Authority in federal court of decisions of state court construing sales, see Courts, § 367.
Parol evidence of identity of lease secured by bond, see Evidence, § 460.

(C) Leases, Licenses, and Contracts.

Bond to secure lease, see Bonds, § 128.
Indian lands, see Indians, § 16.
Lease of Indian lands, see Indians, § 16.
Royalties under lease of Indian lands, see Indians, § 16.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

§ 122. Where the surface of land is owned by one and the mineral by another, the owner of the mineral is bound to protect the surface, unless the right to destroy it is expressly reserved in plain terms.—Catron v. South Butte Mining Co. (C. C. A.) 941.

§ 122. Certain deeds conveying the surface of a mining claim *held* not to absolve the grantors from their obligation to so conduct their mining operations that the surface should at all times be sustained.—Catron v. South Butte Mining Co. (C. C. A.) 941.

§ 125. In a suit to quiet title, a decree enjoining defendants from mining in such a manner as to endanger complainant's right to the surface of the land *held* within the issues.—Catron v. South Butte Mining Co. (C. C. A.) 941.

MISAPPROPRIATION.

See Embezzlement.

MISBRANDING.

Forfeiture of misbranded articles of food, see Food, § 24.
Forfeiture of misbranded drugs, see Druggists, § 11.
Of bottled waters, see Food, § 7.

MISCONDUCT.

See Contempt.

MISREPRESENTATION.

See Fraud.
Affecting validity of subscription to corporate stock, see Corporations, § 80.

MONEY.

Embezzlement, see Embezzlement.

MONEY LENT.

Bill or note given for loan of money, see Bills and Notes.
Usurious loans, see Usury.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

Accord and satisfaction of claim for damages, see Accord and Satisfaction, § 3.

§ 28. The complaint, in an action under Sherman Anti-Trust Act July 2, 1890, § 7, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover damages for injuries to plaintiff's business, caused by an alleged combination and conspiracy between defendants in restraint of interstate trade and commerce, and to monopolize such commerce, considered, and *held* sufficient on demurrer.—Hale v. O'Connor Coal & Supply Co. (C. C.) 267.

MORTGAGES.

By or to corporation, see Corporations, § 478.
Of dower interest, see Dower, § 49.
Of personal property in general, see Chattel Mortgages.
Of street railroads, see Street Railroads, § 54.
Provisions in mortgage for payment of prior lien as acknowledgment of mechanic's lien on property of wife, see Mechanics' Liens, § 76.
Sale of mortgaged property by trustee in bankruptcy, see Bankruptcy, § 258.

I. REQUISITES AND VALIDITY.

(D) Validity.

Mortgage of dower right, see Dower, § 49.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

Street railway mortgage, see Street Railroads, § 54.

(C) Property Mortgaged, and Estates of Parties Therein.

Street railroad mortgage, see Street Railroads, § 54.

(D) Lien and Priority.

§ 183. Rev. St. Me. c. 93, § 29, giving a mechanic's lien for labor or materials furnished for the construction, alteration, or repair of a building, etc., "by consent of the owner," construed, and a mortgagee held not an "owner" nor to have "consented" to the displacement of its lien in favor of mechanics' liens arising under contracts with the mortgagor made subsequent to the mortgage merely because he may have had knowledge that the improvements were being made.—Central Trust Co. of New York v. Bodwell Water Power Co. (C. C.) 735.

IV. RIGHTS AND LIABILITIES OF PARTIES.

Equitable lien of insurance agent on insurance policy for premiums advanced to mortgagor, see Insurance, § 580.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 281. A mortgage on real estate assumed by the purchaser as a part of the purchase price is as to him a purchase-money mortgage.—In re Hays (C. C. A.) 674.

X. FORECLOSURE BY ACTION.

(J) Sale.

§ 526. Writ of assistance *held* properly issued; the decree in foreclosure, sale, and confirmation not being open to collateral attack.—Childs v. Ferguson (C. C. A.) 795.

MOTIONS.

For new trial, see New Trial, § 117.

MULTIFARIOUSNESS.

In bill for relief against interfering patent, see Patents, § 114.

MULTIPLICITY OF SUITS.

Avoidance, ground of jurisdiction of equity, see Injunction, § 26.

MUNICIPAL CORPORATIONS.

Street railroads, see Street Railroads.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

Delegation to municipalities of power of eminent domain, see Eminent Domain, § 9.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

Of counties, see Counties, § 50.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

Deprivation of property without due process of law as affecting jurisdiction of federal court, see Courts, § 282.

Unauthorized condemnation of property for street as deprivation of property without due process of law, see Constitutional Law, § 280.

(D) Damages.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Of counties, see Counties, § 171.

(E) Rights and Remedies of Taxpayers.

§ 999. A suit may not be maintained by citizens of an unincorporated town to relieve the town of an alleged cloud on titles to lots and blocks with which a homestead claim and surveys conflict.—Ripinsky v. Hinchman (C. C. A.) 786.

NAMES.

See Trade-Marks and Trade-Names.

Right of action by foreign corporation to restrain use of name, see Corporations, § 661.

Right of assignee of good will and business of corporation to use corporate name, see Good Will, § 6.

NATIONAL BANKS.

See Banks and Banking, §§ 256, 257.

NATIONAL GOVERNMENT.

See United States.

NATURALIZATION.

See Aliens, §§ 67, 68.

NAVIGABLE WATERS.

See Shipping.

Collision between vessels, see Collision.

Nonnavigable waters, see Waters and Water Courses.

I. RIGHTS OF PUBLIC.

Flooding of land by construction of dams as taking of property under law of eminent domain, see Eminent Domain, § 98.

§ 24. Under Act March 3, 1899, c. 425, §§ 15, 19, 30 Stat. 1152, 1154 (U. S. Comp. St. 1901, pp. 3543, 3546), which require the owner to mark a wreck in a navigable channel until it is removed or abandoned, the neglect to mark such a wreck is not a prima facie abondonment, nor is the failure to remove it, until the expiration of 30 days, and during all of such time

it is the duty of the owner to keep the place marked, and his failure to do so renders him liable for any injury done thereby to third persons, unless there has been an actual abandonment.—People's Coal Co. v. Second Pool Coal Co. (D. C.) 609.

§ 24. A respondent, which was bailee of a coal flat sunk in the Allegheny river in Pittsburg, *held* to be the "owner," within Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), and by reason of its failure to mark the wreck, as required by such act, liable for an injury caused thereby to libelant's vessel.—People's Coal Co. v. Second Pool Coal Co. (D. C.) 609.

NAVIGATION.

See Collision; Maritime Liens; Navigable Waters, § 24; Salvage; Shipping; Towage.
Administration of maritime law, see Admiralty.
Marine insurance, see Insurance, § 477.

NEGLIGENCE.

Causing death, see Death, §§ 21–99.

By particular classes of persons.

See Railroads, §§ 327–350, 358.
Employers, see Master and Servant, §§ 182–289.
Fellow servants, see Master and Servant, § 182.
Mineowners, see Mines and Minerals, §§ 122–125.
Salvors in performance of salvage service, see Salvage, § 22.
Shipowners, see Shipping, §§ 123–132.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Mines and Minerals, §§ 122–125; Railroads, §§ 327–350, 358.
Vessels, see Collision; Shipping, §§ 123–132; Towage, §§ 11–15.

Injuries to particular species of property.

Goods shipped, see Shipping, §§ 123–132.
Vessels, see Collision; Towage, §§ 11–15.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

Mines, see Mines and Minerals, §§ 122–125.
Vessels, see Collision.

II. PROXIMATE CAUSE OF INJURY.

Inevitable accident cause of injury by vessel, limitation of liability, see Shipping, § 208.

III. CONTRIBUTORY NEGLIGENCE.

Of passengers, see Carriers, § 333.
Of person injured by operation of railroad, see Railroads, §§ 327–335.
Of servants, see Master and Servant, § 289.
Of tow, see Towage, § 12.

(A) Persons Injured in General.

§ 82. One whose negligence contributes to his injury cannot recover from another, though the carelessness of the latter was the more proximate cause of the injury.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

(C) Imputed Negligence.

§ 89. The master of a vessel and members of his crew are not fellow servants in such sense that his negligence in the navigation of the vessel is imputable to them.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

(D) Comparative Negligence.

Division of damages for injuries to tow, see Towage, § 15.

IV. ACTIONS.

Damages, inadequate and excessive, see Damages, § 132.

(C) Trial, Judgment, and Review.

§ 136. Where the evidence clearly shows plaintiff guilty of negligence, the court should direct verdict for defendant.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Bonds.

NEWSPAPERS.

Jurisdiction of suit to review order of postmaster general excluding newspapers from mail, see Post Office, § 26.
Publication of libelous articles, see Libel and Slander.

NEW TRIAL.

Practice in federal courts, see Courts, § 353.
Review of proceedings on motion involving discretion of court, see Appeal and Error, § 977.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 117. A trial judge cannot set aside a verdict and judgment and grant a new trial where the trial term has long since expired and has not been extended by order.—Mann v. Dempster (C. C. A.) 76.

NON COMPOS MENTIS.

See Insane Persons.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Judicial notice, see Evidence, §§ 10–47.

As affecting particular classes of persons.

See Master and Servant, § 252; Principal and Agent, § 177.
Purchasers of corporate bonds, see Corporations, § 473.

Purchasers of land, see Vendor and Purchaser, §§ 229–231.

As affecting particular rights, duties, and liabilities.

Liability of master for injuries to servant as affected by notice of claim, see Master and Servant, § 252.
Liability of principal as affected by notice to agent, see Principal and Agent, § 177.

Of particular facts, acts, or proceedings not judicial.

Injury to servant, see Master and Servant, § 252.

NOVELTY.

Patentable novelty, see Patents, §§ 40–45.

OATH.

False swearing, see Perjury.

OBJECTIONS.

In judicial proceedings.

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 185–231.
To compositions with creditors of bankrupt, see Bankruptcy, § 381.
To jurisdiction, plea in abatement, see Abatement and Revival, § 3.

OBSTRUCTING JUSTICE.

Best and secondary evidence, see Criminal Law, § 400.

§ 4. Indorsement on a grand jury subpœna *held* not to show that it had become functus officio when accused is charged to have impeded administration of justice by inducing a witness to flee.—Heinze v. United States (C. C. A.) 322.

§ 14. Any presumption that an indorsement on a grand jury subpœna was a record of all the serving officer's doings *held* rebutted by his testimony.—Heinze v. United States (C. C. A.) 322.

§ 15. Admission of evidence in a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna *held* not reversible error.—Heinze v. United States (C. C. A.) 322.

§ 15. Testimony *held* admissible in a trial for obstructing justice by inducing one to leave the country to avoid service of a grand jury subpœna.—Heinze v. United States (C. C. A.) 322.

OBSTRUCTION.

Of navigable waters, see Navigable Waters, § 24.

OCCUPATION.

Rights acquired by occupancy of public lands, see Public Lands, § 31.

OFFENSES.

See Criminal Law.

OFFICERS.

Injunction involving officers or official acts, see Injunction, § 85.
Resisting officer, see Obstructing Justice.

Particular classes of officers.

See Receivers.
Corporate officers in general, see Corporations, §§ 298–308.
County board, see Counties, § 50.
Land officers, see Public Lands, §§ 97–108.
Trustees, see Trusts.
Trustees in bankruptcy, see Bankruptcy, §§ 140–372.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Of county boards, see Counties, § 50.

OPEN AND CLOSE.

Right to open and close in civil actions in general, see Trial, § 25.

ORAL AGREEMENTS.

See Frauds, Statute of.

ORDERS.

For payment of money, see Bills and Notes.
Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1053–1059.

ORES.

See Mines and Minerals.

ORGANIC LAW.

See Constitutional Law.

ORIGINAL BILL.

See Equity, § 153.

ORIGINAL PACKAGES.

Regulations of commerce, see Commerce, § 41; Druggists, § 2.

OVERTAKING VESSELS.

Collision with other vessels, see Collision, §§ 55, 94.

OWNERSHIP.

Mortgagee as owner, see Mortgages, § 183.
Of patents, see Patents, §§ 196–211.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.
Of property or rights as affecting right of garnishment, see Garnishment, § 58.

PAIS.

Estoppel in pais, see Estoppel, § 63.

PARENT AND CHILD.

Declarations or family records and reputation as to pedigree, birth, or relationship, see Evidence, § 288.

PARISHES.

See Counties.

PAROL AGREEMENTS.

See Frauds, Statute of.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 417–460.

PARTIES.

Character, ground of jurisdiction, see Courts, §§ 311–322; Removal of Causes, § 26.
Rights and liabilities as to costs, see Costs.

In particular actions or proceedings.

See Quieting Title, § 30.
Criminal prosecutions, see Criminal Law, § 59.
To cancel land patent, see Public Lands, § 120.
To reopen bankrupt's estate, see Bankruptcy, § 372.
To set aside conveyance by allottee of Indian land, see Indians, § 27.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Persons concluded by judgment in general, see Judgment, § 668.

Review as to parties, and parties to proceedings in appellate courts.

Persons entitled to review, see Appeal and Error, § 151.

To conveyances, contracts, or other transactions.

See Accord and Satisfaction, § 3.

I. PLAINTIFFS.

(B) Joinder.

Suit to remove cloud on title, see Quieting Title, § 30.

II. DEFENDANTS.

In suit to set aside land patent, see Public Lands, § 120.

(B) Joinder.

In action to set aside transfer by allottee of Indian land, see Indians, § 27.

III. NEW PARTIES AND CHANGE OF PARTIES.

Intervention by stockholders in creditors' suit against street railroad companies, see Street Railroads, § 58.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

Affecting limitations of suit to set aside land patent, see Public Lands, § 120.

PARTITION.

Of Indian lands, see Indians, § 13.

PASSENGERS.

See Carriers, § 333.

PATENTS.

For public lands, see Public Lands, § 110.

II. PATENTABILITY.

(A) Invention.

§ 16. Photography and blue printing are simply different phases of the art of light printing, and the mere transfer of a device used in one to the other does not involve patentable invention.—Elliott & Co. v. Youngstown Car Mfg. Co. (C. C. A.) 345.

§ 18. A change produced in a process or combination is not to be rejected as obvious or wanting in inventive thought because it tends to simplicity of action, but the simplifying of a device may in itself amount to invention.—Beryle v. San Francisco Cornice Co. (C. C.) 692.

§ 26. A new combination, with a new mode of operation, may be invention, even if all the parts thereof are old, and even if the function of the combination is also old.—Eagle Wagon Works v. Columbia Wagon Co. (C. C.) 148.

§ 26. Where a new combination of old elements in a patented device is immediately recognized as overcoming a prior defect, and goes into general use, it is persuasive evidence of invention.—Eagle Wagon Works v. Columbia Wagon Co. (C. C.) 148.

§ 26. If a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention, and such result need not be new and useful in a primary sense, but only approximately so.—Beryle v. San Francisco Cornice Co. (C. C.) 692.

§ 27. Application of an old patent to a new use, which would not readily occur to the skilled mechanic, *held* invention.—Warren Webster & Co. v. C. A. Dunham Co. (C. C. A.) 836.

§ 27. If the relations between an old machine and a new use of it are remote, and if the use of the old device produces a new result, the application may be patentable.—Warren Webster & Co. v. C. A. Dunham Co. (C. C. A.) 836.

§ 27. The application of an old machine or combination to new use is not invention, or subject of a patent.—Warren Webster & Co. v. C. A. Dunham Co. (C. C. A.) 836.

§ 27. A patent is not void as for a new use of an old thing, unless the old device can be used for the new purpose without material modification or change, and a very slight modifica-

tion is often the result of a wholly new conception and invention.—Hartford v. Moore (C. C.) 132.

§ 35. The recognition of a patent by the public, where licenses have been taken out or infringements discontinued, may be considered on the subject of invention, but not as against an adverse showing.—Elliott & Co. v. Youngstown Car Mfg. Co. (C. C. A.) 345.

(B) Novelty.

§ 40. Novelty of selection of old devices or elements remote in structure and purpose for a new use may evidence patentable invention.—Hartford v. Moore (C. C.) 132.

§ 42. A chemical compound in a new form may be patentable, where, by reason of its greater purity or efficiency or of its comparative cheapness, it is made a commercial, instead of merely a laboratory, product.—Union Carbide Co. v. American Carbide Co. (C. C. A.) 104.

§ 43. A design is patentable if it presents to the eye of the ordinary observer a different effect from anything that preceded it, and renders the article to which it is applied pleasing, attractive, and popular, even if it is simple, and does not show a wide departure from other designs, or if it is a combination of old forms.—Phœnix Knitting Works v. Bradley Knitting Co. (C. C.) 163.

§ 43. A design to be patentable must be new and original, but this requirement does not preclude the selection and adaptation of an existing form, provided it is more than the exercise of the imitative faculty, and the result is in effect a new creation producing a different effect on the eye of the ordinary observer.—Phœnix Knitting Works v. Grushlaw (C. C.) 166.

§ 45. A patent is prima facie evidence of novelty, and a party seeking to overthrow the presumption in its favor must make a case so persuasive as to leave no room for doubt or controversy.—Phœnix Knitting Works v. Bradley Knitting Co. (C. C.) 163.

(D) Anticipation.

§ 51. One who invents and constructs a machine, but permits it to slumber, and neither applies for a patent nor makes any public use of it, cannot resort to such invention as an anticipation of a subsequent patent obtained by another.—Welsbach Light Co. v. Cohn (C. C.) 122.

§ 64. An inventor having two applications for patents pending at the same time, both of which disclose his invention, may base his broadest claims on the one which he considers shows the best form of mechanism, although it may be the later application, and the patent issued thereon will not be anticipated by a later patent issued on his earlier application.—Welsbach Light Co. v. Cohn (C. C.) 122.

§ 72. A patentee cannot avoid anticipation of broad claims by showing the presence in the alleged anticipatory device of elements which would not obviate infringement of such broad claims.—Standard Mach. Co. v. Rambo & Regar (C. C.) 157.

(E) Prior Public Use or Sale.

§ 76. "On sale" and "public use," as used in the patent laws, defined.—Dittgen v. Racine Paper Goods Co. (C. C.) 394.

§ 76. The right to a patent *held* defeated under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), by prior use and sale for more than two years.—Dittgen v. Racine Paper Goods Co. (C. C.) 394.

§ 81. The defendant in an infringement suit who attempts to defeat the patent by evidence or prior public use not only has the burden of proof, but must establish the fact by clear and satisfactory evidence beyond a reasonable doubt.—American Bank Protection Co. v. Electric Protection Co. (C. C.) 350.

(F) Abandonment.

§ 83. A patent cannot be defeated or limited by intervening rights of third persons applying for and receiving patents between the filing of the application and the issuing of such patent, where there was no abandonment of either the application or invention, and no expansion of claims, merely because there was delay in prosecution of the claims, which was satisfactorily explained to the Patent Office.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C.) 503.

§ 87. An abandonment of an invention after the filing of an application for a patent, upon which a patent was subsequently granted, must be established by clear proof showing an intention to abandon, especially where the invention is a meritorious and valuable one.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C.) 503.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

False oath as perjury, see Perjury, § 11.

§ 101. It is not necessary that a patent for specific improvements on a burglar alarm system should include as an element of the combination the burglar alarm system itself.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

§ 106. The action of the Patent Office in ignoring its own rule 126, and passing an application to allowance without determining an issue of prior use raised in interference proceedings, *held* unauthorized by law.—Dittgen v. Racine Paper Goods Co. (C. C.) 394.

§ 112. The presumption in favor of a patent because of its allowance is not to be indulged, where controlling references were not considered in that connection.—Elliott & Co. v. Youngstown Car Mfg. Co. (C. C. A.) 345.

§ 112. The reinstatement of an application for a patent after several years, during which no action had been taken thereon, on a finding by the Patent Office that the delay was unavoidable within the meaning of Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384), is conclusive

on the courts that the application was not abandoned.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C.) 503.

§ 114. A suit pursuant to Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), to determine rights under interfering patents, admits of a wide range of investigation, covering fraud, negligence, and inadvertence on the part of the Patent Office, and the court has power to determine the original question of patentability, and may, declare both patents invalid.—Dittgen v. Racine Paper Goods Co. (C. C.) 394.

§ 114. A bill filed against an adverse party to obtain the issuance of a patent under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), and which also joins the Commissioner of Patents as a defendant to compel the granting of a reissue, which is an ex parte matter, is multifarious.—Gold v. Gold (C. C.) 544.

§ 114. The provision of section 1 of the federal judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470) as amended by Act 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), requiring civil suits to be brought in the district of which defendant is an inhabitant, does not apply to a suit brought, under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, of which the Circuit Court has exclusive jurisdiction, regardless of the citizenship of the parties or amount involved.—Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C.) 974.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

§ 129. One who becomes a stockholder in a corporation organized for the purpose of taking title to a patent and selling the same, and who participates in such sale, and receives his share of the profits, is estopped to attack the validity of the patent as against an innocent purchaser for value.—Welsbach Light Co. v. Cohn (C. C.) 122.

VII. REISSUES.

§ 136. Where the claims of a patent are narrower than the real invention, the error cannot be corrected by inserting the broader claims in a subsequent patent for improvements on the first, but only by a reissue.—Union Typewriter Co. v. L. C. Smith & Bros. Typewriter Co. (C. C. A.) 966.

§ 138. A reissue patent cannot be defeated by a patent to another issued before the reissue but after the original patent on which it is based.—American Bank Protection Co. v. Electric Protection Co. (C. C.) 350.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

§ 160. Manifest clerical errors in the claims of a patent may be corrected by reference to the specification and drawings, especially where the claim contains the words "substantially as described," or their equivalent.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

(B) Limitation of Claims.

§ 165. The rule is that each claim of a patent covers a complete invention, and is in substance an independent patent.—XXth Century Heating & Ventilating Co. v. Taplin, Rice-Clerkin Co. (C. C. A.) 96.

§ 167. A patent is to be liberally construed so far as is consistent with the language used so as to sustain the just claim of the inventor, and for that purpose each claim is to be read in the light of the specification and drawings.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

§ 168. Acquiescence by a patentee in the action of the patent office in rejecting claims made for "means" generally for performing a certain function, and the allowance of claims describing specific means precludes a construction of such claims which would include other means.—XXth Century Heating & Ventilating Co. v. Taplin, Rice-Clerkin Co. (C. C. A.) 96.

§ 168. A patentee, who canceled all the original claims in his application on objections by the Patent Office, and substituted a new claim which was allowed, is estopped to claim a construction of such claim which would make it equivalent to those canceled.—Langan v. Warren Axe & Tool Co. (C. C.) 143.

§ 172. The Schlesinger patent, No. 546,059, for a system of distribution of electricity for electric railways, claim 1, *held* not anticipated.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C.) 503.

§ 178. The Schlesinger patent, No. 546,059, for a system of distribution of electricity for electric railways, claim 1, *held* valid.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C.) 503.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

Estoppel to attack validity of patent, see Patents, § 129.

§ 196. Patents are creatures of the federal statute, and an assignment is sufficient if it conforms to the requirements of Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387), regardless of the state statutes.—Welsbach Light Co. v. Cohn (C. C.) 122.

§ 202. An assignment of an invention *held* to pass the equitable title to the patent.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

(C) Licenses and Contracts.

Requirements of statute of frauds, see Frauds, Statute of, § 141.

§ 209. A license under a patent in which the licensee promises to use diligence to push the use and sale of the patented article and not to sell competing machines not legally patented,

nor to competitors in business of the patentee, is not without sufficient consideration.—Rowland v. Biesecker (C. C.) 128.

§ 211. A license under a patent for a term of five years "with a privilege of ten years" gives the licensee the right to continue the license in force for the extended term and if any notice of his election to do so is necessary, beyond his continuing to make the patented machines, it may be given orally.—Rowland v. Biesecker (C. C.) 128.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

§ 230. Secondary or improvement patents, equally with those of a primary character, are entitled to be protected against infringement from equivalents to the full extent that a fair and reasonable construction of their claims will warrant.—Beryle v. San Francisco Cornice Co. (C. C.) 692.

§ 247. Where a patented combination is operative in itself, infringement is not avoided by the use with it of an auxiliary device which increases its efficiency.—Matchette v. Streeter Bros. (C. C.) 380.

§ 256. One who recharges patented acetylene gas tanks, in violation of the restrictions under which they were sold, *held* to be an infringer of the patent.—Commercial Acetylene Co. v. Autolux Co. (C. C.) 387.

§ 259. One who made and sold apparatus used and designed for use in recharging patented acetylene gas tanks, in violation of the restrictions under which they were sold, *held* chargeable with contributory infringement of the patent.—Commercial Acetylene Co. v. Autolux Co. (C. C.) 387.

(C) Suits in Equity.

§ 283. The fact that a defendant has discontinued the use of an infringing article does not deprive the complainant of the right to an injunction when the defendant contests the validity of the patent and has not disavowed an intention to further infringe.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

§ 283. The fact that the manufacturer of a patented device is unable to supply the demand therefor with promptness and that users are subjected to inconvenience by reason of the delay furnishes no legal excuse for infringement.—Commercial Acetylene Co. v. Autolux Co. (C. C.) 387.

§ 286. An assignee of a patent *held* entitled to maintain a suit for infringement.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

§ 287. Directors of a corporation cannot be held individually liable for infringement of a patent by the corporation merely because they signed a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices.—American Bank Protection Co. v. Electric Protection Co. (C. C.) 350.

§ 288. The burden rests on complainant in a suit for infringement of a patent to establish, not only that the infringement occurred within the territorial jurisdiction of the court, but also that defendant was regularly engaged in business therein.—Underwood Typewriter Co. v. Fox Typewriter Co. (C. C.) 541.

§ 289. The fact that the owner of a patent permitted a suit for its infringement to be dismissed without a trial on the merits is not such laches as to bar a second suit against the same defendant.—Welsbach Light Co. v. Cohn (C. C.) 122.

§ 289. The defense of laches to a suit for infringement of a patent *held* not sustained.—Byerley v. Sun Co. (C. C.) 138.

§ 297. In interference proceedings, the only question is one of priority, and it is conclusive of invention in a subsequent suit for infringement.—Elliott & Co. v. Youngstown Car Mfg. Co. (C. C. A.) 345.

§ 297. A preliminary injunction *held* properly granted on an unadjudicated patent, where its validity was reasonably certain, infringement was clear, and the defendant was a corporation organized to sell the patented machine, which sold its sales contract, and marked its infringing machines as patented on the date of the patent in suit.—Standard Typewriter Co. v. Standard Folding Typewriter Sales Co. (C. C. A.) 500.

§ 312. Evidence considered in a suit for infringement of a patent brought by an assignee after the death of the patentee against a former licensee, and *held* to establish the claim of defendant that the license had been extended in accordance with its terms.—Rowland v. Biesecker (C. C.) 128.

§ 313. A court will not entertain a motion by defendant to dismiss a bill for infringement of a patent made before a hearing and based on affidavits relating to matters of fact going to the validity of the patent or the question of infringement.—American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C.) 375.

§ 318. Profits and damages recoverable from an infringer of the Ripley & Wadsworth patents, for a process of making pressed prism plate glass, and a machine for practicing such process, considered on an accounting.—Pressed Prism Glass Co. v. Continuous Glass Prism Co. (C. C.) 151.

§ 318. Evidence *held* insufficient to entitle a defendant to a deduction from the profits for which it was accountable for infringement on account of claimed uncollectible accounts.—Peerless Brick Mach. Co. v. Miracle Pressed Stone Co. (C. C.) 526.

§ 318. Where, on an accounting for profits made by defendant from the sale of an infringing machine, the profits on certain sales made in direct competition with complainant were allowed, complainant was not entitled to also recover as damages the profits it would have made from the same sales on its own ma-

chines.—Peerless Brick Mach. Co. v. Miracle Pressed Stone Co. (C. C.) 526.

§ 318. Where the owner of a patent and the maker of an infringing machine were the only manufacturers having machines of the kind in the market, no competing machine being then known, the infringer is accountable for the entire profits made which must be attributed to the patented feature of the machine.—Peerless Brick Mach. Co. v. Miracle Pressed Stone Co. (C. C.) 526.

§ 325. A complainant in an infringement suit who recovers only on a part of the claims of a patent sued on is not entitled to recover costs as to such patent.—American Bank Protection Co. v. Electric Protection Co. (C. C.) 350.

§ 326. A defendant, charged with contempt for violation of an injunction against infringement of a patent, is entitled to all the rights of one charged with a criminal offense, and a court of equity will not grant an attachment for contempt in such case if the violation of the injunction is to a reasonable extent uncertain.—Armstrong v. Belding Bros. & Co. (C. C.) 173.

§ 326. Evidence *held* insufficient to warrant the punishment of a defendant for contempt for violation of an injunction against infringement of a patent.—Victor Talking Mach. Co. v. Greenberg (C. C.) 543.

§ 327. A decision of a Circuit Court sustaining the validity of a patent should be followed by another Circuit Court if the evidence in both cases is substantially the same.—American Bank Protection Co. v. Electric Protection Co. (C. C.) 350.

§ 327. A decree holding a patent valid necessarily determines that the invention covered thereby is both new and useful, and, on an accounting for infringement under such decree, evidence to show that the patented feature of the machine is of no utility is incompetent.—Peerless Brick Mach. Co. v. Miracle Pressed Stone Co. (C. C.) 526.

§ 327. Where the questions involved in determining the validity of a patent are fairly doubtful, the decision of one Circuit Court of Appeals sustaining the patent should be followed in another circuit if the record is substantially the same.—Underwood Typewriter Co. v. Fox Typewriter Co. (C. C.) 530.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

ENGLISH.

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1,864. Typewriting machine, cited..... 530

1888

7,269. Typewriting machine, cited..... 530

GERMAN.

60,594. Burglar proof device for safes, cited 350

UNITED STATES.

DESIGN.

37,504. Inkstand, held valid and infringed by patent No. 40,125..... 840
37,983. Prismatic reflector, cited..... 399
39,347. Neck scarf, held not anticipated, valid and infringed..... 163
40,125. Inkstand, held to infringe patent No. 37,504..... 840

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56,948. Dredging machine, cited..... 111
63,158. Electric circuit breaking clock, cited 350
64,024. Joint for carriage top brace, cited 132
67,375. Grab hook, cited..... 143
96,187. Pneumatic tube for transporting letters and parcels, cited..... 111
108,754. Hot air furnace, cited..... 96
109,193. Electro-magnetic apparatus for protecting safes, cited..... 350
113,434. Steam trap, cited..... 836
117,713. Electro-magnetic safe protector, cited 350
122,913. Method of protecting safes, etc., from burglars, cited..... 350
124,851. Pneumatic wool elevator, cited.. 111
168,282. Cotton cleaner, cited..... 111
170,887. Door-spring, cited..... 132
178,061. Process to manufacture a residuous substance, cited..... 138
181,078. Electric burglar alarms, cited.... 350
185,600. Pneumatic tube dredging machine, cited 111
191,702. Grates compound movement, cited 96
213,709. Pneumatic grain-elevator, cited.. 111
219,019. Pneumatic grain-conveyer, cited.. 111
235,892. Carriage top, cited..... 132
241,429. Sanding machine, cited..... 492
242,983. Vehicle spring brace, cited..... 132
246,211. Electric time circuit closer, cited 350
261,071. Electrical cabinet, cited..... 350
256,089. Heating apparatus, cited..... 836
284,860. Variable cam, cited..... 157
287,775. Electric time-lock, cited..... 350
294,766. Sanding machine, cited..... 492
296,535. Sanding machine, cited..... 492
305,976. Pneumatic grain transfer and storage system, cited..... 111
308,790. Apparatus for handling seed-cotton, cited..... 111
322,317. Electric time lock, cited..... 350
324,407. Type writing machine, cited.... 530
339,018. Electric railway, cited..... 503
351,408. Burglar alarm, cited..... 350
362,041. Apparatus for handling cotton, cited 111
369,334. Grates rotary, cited..... 96
370,350. Grab hook, cited..... 143
383,933. Switch or cut out for electric circuits, cited..... 350
393,039. Buffer and catch for cast-car, cited 132
395,314. Knitting machine, cited..... 157
414,048. Velocipede, cited..... 132
425,362. Circular knitting machine, cited.. 157
429,817. Alarm, cited..... 350
436,916. Tabulating attachment for typewriting machine, held not anticipated and valid; claims 4 and 5, also held infringed 530; held infringed..... 541

445,382. Sanding machine, cited..... 492
451,703. Thickening-thread-feed mechanism for knitting machines, cited.... 157
452,268. Tabulating attachment for typewriting machine, construed and held not infringed 530; cited... 541
454,171. Vehicle-lantern, cited..... 132
454,964. Steam-heating apparatus, held void for double use..... 836
457,258. Typewriter, cited..... 966
470,990. Typewriter, cited..... 966
472,607. Apparatus for elevating, distributing and feeding seed cotton to gins, held not infringed..... 111
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481,477. Typewriter, claims 37 and 38, held void for anticipation..... 966
488,474. Car spring, cited..... 132
490,870. Electrical magnetic alarm signal, cited 350
523,946. Bank safe, cited..... 350
524,130. Process of making asphaltic product, held not anticipated, valid and infringed..... 138
529,508. Automatic stitch-regulating mechanism for knitting machine, cited 157
530,411. Burglar alarm for safes, cited.... 350
532,291. Electric burglar alarm, cited..... 350
541,138. Crystalline calcium carbide, held not anticipated, valid and infringed 104
546,059. System of distribution of electricity for electric railways, claim 1, held not anticipated, valid and infringed..... 503
546,251. Skein-thread holder, cited..... 173
554,977. Fence, cited..... 340
563,527. Process of producing calcium carbide, held not infringed..... 111
563,836. Lamp globe, cited..... 399
570,906. Electric burglar alarm, claims 6 and 21, held void for lack of invention; claims 18 and 20, held not anticipated, valid and infringed 350
572,581. Upholstery, cited..... 340
573,903. Fire alarm, cited..... 350
575,187. Sanding machine, held void for lack of patentable invention... 492
581,570. Type writing machine, cited.... 500
587,931. Burglar alarm, cited..... 350
595,181. Grab hook, held void for lack of novelty and invention..... 143
608,048. Spring bed work, cited..... 340
620,952. Balance for under carriages of vehicles or cars, cited..... 132
626,670. Electrical burglar alarm, as limited by prior art, held not infringed 350
626,684. Electrical safe protection system, cited 350
627,054. Electrical burglar alarm system, claim 17, held not infringed... 350
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634,713. Store cabinet for sales accounts, cited 171
638,004. Machine for making incandescent mantles, held not anticipated, valid and infringed..... 122
639,031. Index, cited..... 171
639,225. Spring bed and seat bottom, cited 340
645,676. Circular knitting machine, claims 4 and 8, held broader than the patentee's invention and void for anticipation 157
655,247. Carriage, cited..... 132
658,103. Vacuum cleaning apparatus, cited 380
659,617. Means for inserting shirring string into incandescent mantle, cited 122
661,024. Machine for making pressed prism glass, damages for infringement determined 151
661,025. Process for making pressed prism glass, damages for infringement determined 151
661,710. Bill or account-slip holding book, cited 171
662,226. Cigar pocket, held void..... 394
664,383. Acetylene gas tank, held infringed 387
664,444. Pneumatic springs or cushion, cited 132
666,737. Burglar alarm system, cited..... 350
667,115. Burglar alarm system, claims 12, 13, 14, and 15, held not anticipated, valid and infringed..... 350
667,123. Electric protective system, cited 350
667,140. Process of treating hosiery to produce a silk or lisle finish, held void for lack of invention..... 518
667,142. Process of treating hosiery by singeing, held void for anticipation 518
672,116. Draw-gear and buffing apparatus, cited 132
674,024. Shaft coupling, held void for lack of patentable novelty..... 168
680,982. Burglar proof device for safes, cited 350
687,848. Prism glass globe or shade, cited.. 399
694,391. Spring wire work, cited..... 340
695,508. Shock-absorber for spring-supported vehicles, held not anticipated, valid and infringed..... 132
699,262. Dump wagon, held valid and infringed 148
701,461. Spring cushion and its support, cited 340
705,426. Display light, cited..... 399
707,855. Furnace grate, construed and held not infringed..... 96
708,230. Book for holding and filing sales slips, cited..... 171
708,496. Burglar alarm, construed and held valid and infringed 375; claims 1, 2, 3, 7, 8, and 10, held not anticipated, valid and infringed; claims 9, 11, 12 and 13, held not infringed..... 350
717,247. Credit-accounting appliance, cited 171
723,139. Machine for chipping the edges of glass articles, held valid and and infringed..... 697
727,609. Acetylene gas tank, cited..... 387
741,010. Vault-light construction, as limited by the prior art, held not infringed 691
754,242. Folding typewriter, held valid and infringed 500
758,937. Stocking singeing machine, held void for anticipation..... 518

760,728. Vault-light construction, as limited by the prior art, held not infringed 691
763,688. Prism glass shade reflector, cited.. 399
763,689. Reflector shade for artificial lights, cited 399
771,748. Electric time alarm, held not infringed 350
771,749. Burglar alarm, claims 3 and 6 held void for lack of invention, remaining claims, construed and held not infringed..... 350
771,774. Apparatus for copying drawing, claims 1, 2, 3, and 5, held void for anticipation and claim 4 held valid, but not infringed..... 345
774,473. Circular knitting machine, claims 22, held too broad and void for anticipation 157
777,024. Pneumatic cotton elevator and distributer, cited 111
781,455. Cigar pocket, held void..... 394
783,126. Account-recording appliance, construed and held not infringed.. 171
785,410. Spring structure, claim 2 construed, held valid, but not infringed 340
811,518. One-man brick machine, cited.... 526
821,306. Prismatic glass lamp shade or reflector, held valid and infringed 399
823,858. Pneumatic cotton-elevator, cited 111
829,752. Inkstand, cited..... 840
850,101. Drop for electric circuit, held not anticipated, valid and infringed 350
870,981. Vacuum cleaning apparatus, held not anticipated, valid and infringed 380
880,020. Vault lining for use in connection with an electrical alarm circuit, construed and held not infringed 350
887,995. Device for covering wooden moulding, held not anticipated, valid and infringed..... 692
893,087. Saw guard, claim 3 held void for lack of novelty; claims 1, 2, and 4 held not infringed..... 843
948,553. Typewriter, cited 500

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11,623. Electric burglar alarm, claims 6 and 21 held void for lack of invention; claims 18 and 20 held not anticipated, valid and infringed 350
12,358. Prism glass shade reflector, cited 399
12,437. Shock-absorber for spring-supported vehicles, held not anticipated, valid and infringed..... 132
12,789. Machine for chipping the edges of glass articles, held valid and infringed 697

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See Accord and Satisfaction.

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Dividends, to creditor of bankrupt, see Bankruptcy, § 360.
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I. REQUISITES AND SUFFICIENCY.

§ 18. The acceptance by a contractor for work of notes of a third party for sums which have become due under his contract do not operate as a payment of the debt in the absence of an agreement to that effect, either express or to be inferred plainly from the circumstances and conduct of the parties.—Bankers' Trust Co. of New York v. T. A. Gillespie Co. of New Jersey (C. C. A.) 448.

II. APPLICATION.

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IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

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See Lis Pendens.

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§ 11. Under Rev. St. §§ 4886, 5392 (U. S. Comp. St. 1901, pp. 3382, 3653), and Rule 46, an applicant for a patent could not be guilty of perjury in falsely stating in an affidavit that he was the "sole" inventor of the article for which a patent was applied.—Patterson v. United States (C. C. A.) 970.

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See Druggists.

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For breach of contract by carrier to furnish cars, see Carriers, § 69.
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For damages by combinations or monopolies, see Monopolies, § 28.
For injuries to servants, see Master and Servant, § 258.
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§ 34. After answer, plaintiff's complaint should be liberally construed.—Cœur d'Alene Lumber Co. v. Goodwin (C. C. A.) 949.

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For breach of contract to make loan on insurance policy, see Insurance, § 249.
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(B) Dilatory Pleas and Matter in Abatement.

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§ 201. Under Shannon's Code Tenn. § 4655, providing that "all demurrers shall state the objection relied on" a general demurrer to a pleading as "insufficient in law," is defective in form and insufficient.—Brown v. Cumberland Telephone & Telegraph Co. (C. C.) 246.

§ 212. A demurrer to a complaint for want of facts is waived by an answer to the merits.—Oregon R. & Nav. Co. v. Dumas (C. C. A.) 781.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

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In admiralty proceedings, see Admiralty, § 66.

§ 249. Plaintiff *held* not entitled to amend so as to change his cause of action from contract to tort.—Haas Bros. v. Hamburg-Bremen Fire Ins. Co. (C. C. A.) 916.

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Particular subjects of regulation, see Game, § 3½.

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Of insurance, se Insurance.

POOLS.

Combinations in violation of anti-trust acts, see Monopolies, § 28.

POSSESSION.

Of debtor's property pending bankruptcy proceedings, see Bankruptcy, §§ 115–117.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.
Of property or rights as affecting right of garnishment, see Garnishment, § 58.

POST OFFICE.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

§ 26. A federal court of equity has jurisdiction of a suit to determine whether or not the matter because of which it is proposed to exclude a newspaper from the mails has been legally held to be unmailable by the Postmaster General, under the statutes of the United States, and if his action is found to be unauthorized to enjoin the exclusion of such paper. —Brooklyn Daily Eagle v. Voorhies (C. C.) 579.

III. OFFENSES AGAINST POSTAL LAWS.

§ 34. Whether an advertisement offering a prize for the best essay on the name of a certain breakfast food is an advertisement of a lottery which would render the newspaper containing it unmailable under Rev. St. § 3894 (U. S. Comp. St. 1901, p. 2659), considered.—Brooklyn Daily Eagle v. Voorhies (C. C.) 579.

POWERS.

Of attorney, see Principal and Agent.

PRACTICE.

In patent office, see Patents, §§ 101–114.

In particular civil actions or proceedings.

See Bankruptcy; Injunction, §§ 137, 213; Quieting Title, § 30.
Assessment of damages, see Damages.
By or against Indians, see Indians, § 27.
By or against trustees in bankruptcy, see Bankruptcy, § 294.
By or against United States, see United States, § 127.
For breach of contract, see Contracts, § 353.
For causing death, see Death, §§ 58–75, 99.
For collision between vessels, see Collision, §§ 114–154.
For contempt, see Contempt, § 54.
For contempt for violation of injunction, see Injunction, § 230.
For damages by combinations or monopolies, see Monopolies, § 28.
For infringement of copyright, see Copyrights, § 85.
For infringement of patent, see Patents, §§ 283–327.
For infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, §§ 85–93.
For injuries from negligence in general, see Negligence, § 136.
For injuries to servants, see Master and Servant, §§ 252–289.
For libel or slander, see Libel and Slander, §§ 101–105, 120, 123.
For loss of or injury to tow, see Towage, § 15.
For new trial, see New Trial, § 117.
On bills or notes, see Bills and Notes, § 537.
On bonds in general, see Bonds, § 128.
To cancel patent for public land, see Public Lands, § 120.
To enforce mechanic's lien, see Mechanics' Liens, § 245.
To enforce regulations in respect to interstate transportation, see Carriers, § 34.
To establish and enforce rights or liens against estate of bankrupt, see Bankruptcy, § 209.
To foreclose mortgage, see Mortgages, § 526.

Particular proceedings in actions.

See Abatement and Revival; Costs; Damages, § 208; Evidence; Judgment; Limitation of Actions; New Trial; Pleading; Reference; Removal of Causes; Trial.
Instructions to jury, see Trial, § 273.
Notice of pendency of action, see Lis Pendens.

Particular remedies in or incident to actions.

See Garnishment; Injunction; Receivers.

Procedure in criminal prosecutions.

See Criminal Law; Indictment and Information.

Procedure in exercise of special or limited jurisdiction.

Admiralty, see Admiralty; Collision, §§ 114–154; Shipping, § 209.
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Equity, see Equity.
Naturalization, see Aliens, § 68.

Procedure in or by particular courts or tribunals.

See Courts.
Adoption by federal courts of practice of state courts, see Courts, §§ 332–357.
Federal courts in general, see Courts, §§ 332–357.
United States Circuit Courts of Appeals, see Courts, § 405.

Procedure on review.

See Appeal and Error; Criminal Law, §§ 1053–1059; New Trial.

PREFERENCES.

By carrier, see Carriers, §§ 13, 32.
By debtor prior to bankruptcy proceedings, see Bankruptcy, §§ 165–184.
By insolvent corporations in general, see Corporations, § 545.
In distribution of funds of bankrupt's estate, see Bankruptcy, §§ 345–348.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, § 1033.

PRELIMINARY INJUNCTION.

See Injunction, § 137.

PREMIUMS.

Premium paid surety company for stipulation for costs as item of costs in suit for collision, see Collision, § 154.

PRESCRIPTION.

See Limitation of Actions.

PRESUMPTIONS.

In civil actions, see Evidence, §§ 67–82.
On appeal or writ of error in civil actions, see Appeal and Error, § 924.

PRETENSE.

See Fraud.

PREVENTIVE RELIEF.

See Injunction.

PRINCIPAL AND ACCESSORY.

See Criminal Law, § 59.

PRINCIPAL AND AGENT.

See Brokers; Master and Servant.
Corporate agents, see Corporations, §§ 298–306.
Declarations by agent as evidence against principal, see Evidence, § 244.
Liability of agent for violation of injunction against principal, see Injunction, § 228.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Corporate officers and agents, see Corporations, § 308.

(B) Compensation and Lien of Agent.

Brokers, see Brokers, §§ 53–56.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

Declarations by agent as evidence against principal, see Evidence, § 244.

(E) Notice to Agent.

§ 177. In a suit to set aside patents to government land as fraudulent, defendants S. and a corporation organized by him to which the land was conveyed *held* not bona fide purchasers for value.—United States v. Smith (C. C.) 545.

PRINCIPAL AND SURETY.

See Bonds.
Premium paid surety company for stipulation for costs as item of costs in suit for collision, see Collision, § 154.

PRINTING.

Patentable invention relating to art of blue printing, see Patents, § 16.

PRIOR ADJUDICATION.

Operation and effect in general, see Judgment, § 668.

PRIORITIES.

Between mining locations, see Mines and Minerals, § 27.
Of claims against bankrupt's estate, see Bankruptcy, §§ 345–348.
Of claims against property in hands of receiver, see Receivers, § 154.
Of corporation mortgage over mechanic's lien, see Corporations, § 478.
Of mortgages, see Mortgages, § 183.
Prior knowledge or use affecting anticipation of invention, see Patents, § 51.
Prior patent as anticipation, see Patents, § 64.

PRIVITY.

With party to action, conclusiveness of adjudication, see Judgment, § 668.

PROBATE COURTS.

Power to order sale of property of insane person, see Insane Persons, § 70.

PROCEDURE.

See cross-references under Practice.

PROCEEDS.

Of insurance, rights of parties, see Insurance, § 580.

PROCESS.

See Garnishment.

II. SERVICE.

Evasion of service of process as contempt, see Contempt, § 17.

PROCESS PATENTS.

See Patents, § 230.

PROFITS.

Accounting by infringer of patents, see Patents, § 318.
Accounting by trustee in bankruptcy, see Bankruptcy, § 365.

PROHIBITION.

Of shipment of game out of state, see Game, §§ 3½, 9.
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, § 400; Evidence.
Of claims against bankrupt's estate, see Bankruptcy, § 328.
Reception of evidence at trial of civil actions in general, see Trial, § 39.
Taking and filing proofs in equity, see Equity, § 358.

PROPERTY.

Constitutional guaranty of right of property, see Constitutional Law, § 280.
Subject of commerce, see Commerce, §§ 33–41.
Subject of garnishment, see Garnishment, § 58.

Of particular classes of persons.

See Husband and Wife, § 14; Indians, §§ 13–18; Insane Persons, §§ 70, 71.

Particular estates or interests.

See Dower.

Particular species of property.

See Animals; Copyrights; Good Will; Mines and Minerals; Patents, §§ 196–211; Waters and Water Courses.
Corporate stock, see Corporations, §§ 80–156.

Remedies involving or affecting property.

See Garnishment; Lis Pendens; Quieting Title; Specific Performance.
Bankruptcy proceedings, see Bankruptcy.
Enforcement of mechanics' liens, see Mechanics' Liens.
Foreclosure of mortgages, see Mortgages, § 526.

Transfers and other matters affecting title.

See Chattel Mortgages; Mortgages.
Sale, see Vendor and Purchaser.
Taking for public use, see Eminent Domain.

Offenses against or involving property.

Embezzlement, see Embezzlement.

PROSTITUTION.

Deportation of alien prostitute, see Aliens, § 54.
Importation of female for purpose of, see Aliens, § 40.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 761–764.

PROVISIONAL REMEDIES.

See Garnishment; Injunction; Receivers.

PROVISIONS.

See Food.

PROXIMATE CAUSE.

Of injury in general, see Negligence, § 82.

PUBLIC CORPORATIONS.

See Counties; Municipal Corporations.

PUBLIC DEBT.

See Counties, § 171; Municipal Corporations, § 999.

PUBLIC DOMAIN.

See Public Lands.

PUBLIC FUNDS.

See Counties, § 171; Municipal Corporations, § 999.

PUBLIC GRANTS.

See Mines and Minerals, §§ 20–27; Public Lands.

PUBLIC LANDS.

Action by United States to set aside conveyance by allottee of Indian land, see Indians, § 27.

Action by United States to set aside lease of Indian land, see Indians, § 27.
Appropriation of water rights, see Waters and Water Courses, §§ 2–21.
Indian lands, see Indians, §§ 13–18.
Mineral lands, see Mines and Minerals, §§ 20–27.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(A) Surveys.

Notice to agent as notice to principal, see Principal and Agent, § 177.

(B) Entries, Sales, and Possessory Rights.

Joinder of parties in suit to remove cloud on title to land within town site, see Quieting Title, § 30.

§ 31. The general land laws do not apply to Alaska, though the government recognizes and sanctions possession pursuant to Act Cong. May 17, 1884, c. 53, 23 Stat. 24, 26.—Martin v. Burford (C. C. A.) 922.

§ 39. Occupiers of land within a contemplated, but unentered, town site *held* only to have a possessory right, which is insufficient to sustain a suit to remove a cloud on title.—Ripinsky v. Hinchman (C. C. A.) 786.

(I) Proceedings in Land Office.

Judicial notice of regulations of Land Department, see Evidence, § 47.

§ 97. The Commissioners of the General Land Office and the Secretary of the Interior can enforce by appropriate regulations every part of the public land laws as to which it is not otherwise specially provided.—Leonard v. Lennox (C. C. A.) 760.

§ 98. An applicant under the soldier's additional homestead law (Rev. St. § 2306 [U. S. Comp. St. 1901, p. 1415]) must comply with the regulation of the Land Department of November 19, 1901, by supporting his application by showing that the land is nonsaline.—Leonard v. Lennox (C. C. A.) 760.

§ 103. A federal court would not, in general, determine the validity of a homestead claim in advance of the determination thereof by the land department in pending proceedings.—Ripinsky v. Hinchman (C. C. A.) 786.

§ 108. Determination of the Secretary of the Interior that certain fraudulent stone and timber claims should pass to patent, based on fraudulent affidavits and proof, *held* no defense to a suit by the government to set aside the patents.—United States v. Smith (C. C.) 545.

(J) Patents.

§ 110. Applicant for patent must comply with all requirements of the statute and the authoritative regulations of the Land Department.—Leonard v. Lennox (C. C. A.) 760.

§ 110. Right to patent as affected by mineral character of land must be determined by conditions existing when the applicant complies with all requirements of the statute and regulations of the Land Department.—Leonard v. Lennox (C. C. A.) 760.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

Limitation of action to set aside patent, see Limitation of Actions, § 119.

§ 120. Defendants in suits by the United States to cancel certain stone and timber patents *held* not entitled to claim that the suits were barred by limitations because of the nonjoinder of a mere holding corporation within the limitation period.—United States v. Smith (C. C.) 545.

§ 120. Evidence *held* to require a finding that stone and timber entries were fraudulent, and not made for the sole benefit of the entrymen.—United States v. Smith (C. C.) 545.

§ 120. In general, the holder of the legal title to land is an indispensable party to a suit to set aside the patent.—United States v. Smith (C. C.) 545.

§ 120. Under Act March 3, 1891, c. 559, 26 Stat. 1093 (U. S. Comp. St. 1901, p. 1521), suits to vacate patents to government land for fraud are barred after six years from the date of the patent, and not from the discovery of the fraud.—United States v. Smith (C. C.) 545.

(L) Relief of Bona Fide Settlers and Claimants.

Jurisdiction of federal court to restrain trespass on homestead entry, see Courts, § 285.

(M) Conveyances, Contracts, and Exemptions.

Knowledge of agent as notice to principal, see Principal and Agent, § 177.

PUBLIC LAWS.

See Statutes.

PUBLIC POLICY.

Validity of contracts, see Contracts, § 108.

PUBLIC REVENUE.

See Internal Revenue.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations; Railroads; Street Railroads.
Electric light and heating companies, see Electricity.
Interstate commerce laws, see Commerce.
Steamboat companies, see Shipping.

PUBLIC USE.

Of invention affecting right to patent, see Patents, §§ 76–81.
Taking property for public use in general, see Eminent Domain.

PURCHASERS.

See Vendor and Purchaser.

PURE FOOD LAWS.

See Druggists, §§ 2, 11; Food, §§ 7, 20, 24.
Entrapment as defense to prosecution for violation, see Criminal Law, § 37.
Interstate commerce regulations, see Commerce, §§ 33, 41.

QUAIL.

See Game, § 3½, 9.

QUANTUM MERUIT.

See Work and Labor.

QUESTIONS OF LAW AND FACT.

In criminal prosecutions, see Criminal Law, §§ 761–764.

QUIA TIMET.

See Quieting Title.
Bill quia timet, see Injunction, § 26.

QUIETING TITLE.

Bill quia timet to remove cloud on title, see Injunction, § 26.
Suit by citizen for benefit of town, see Municipal Corporations, § 999.

I. RIGHT OF ACTION AND DEFENSES.

§ 10. In a suit to quiet title or to remove a cloud, plaintiff must succeed on the strength of his own title, and not on the weakness of that of his adversary.—Ripinsky v. Hinchman (C. C. A.) 786.

§ 10. One in possession of land merely, without legal or equitable title, cannot maintain a suit to quiet title or to remove a cloud therefrom.—Ripinsky v. Hinchman (C. C. A.) 786.

II. PROCEEDINGS AND RELIEF.

§ 30. Claimants of different land in an alleged town site, claiming under different rights, *held* not entitled to join in a suit to remove a cloud on title, in order to prevent a multiplicity of suits.—Ripinsky v. Hinchman (C. C. A.) 786.

RAILROAD COMMISSIONERS.

Jurisdiction of federal court of suit against railroad commission, see Courts, § 303.

RAILROADS.

See Street Railroads.
Allowance for use of tracks and equipment of shipper as unlawful discrimination, see Carriers, § 32.
As employers, see Master and Servant.
Carriage of goods and passengers, see Carriers.

I. CONTROL AND REGULATION IN GENERAL.

Control and regulation of common carriers, see Carriers, §§ 13–37.
Jurisdiction of federal court of suit against state railroad commission, see Courts, § 303.
Regulation of, as regulation of commerce, see Commerce, §§ 33, 61.
Stockyards company as railroad company and common carrier, see Carriers, § 211.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

Bill to enjoin suit to restrain removal of division point as bill quia timet to remove cloud on title or as bill of peace, see Injunction, § 26.
Grounds for denial of temporary injunction against removal of division point, see Injunction, § 137.
Irreparable injury as ground for bill to restrain suit to enjoin removal of division point, see Injunction, § 26.
Jurisdiction of federal court of suit to enjoin suits in equity to restrain removal of division point, see Courts, § 299.
Prevention of multiplicity of suit as ground for bill to enjoin suit to restrain removal of division point, see Injunction, § 26.
Specific performance of contract to locate and maintain division point, see Specific Performance, § 25.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.
Power to condemn railroad right of way for street, see Eminent Domain, § 9.

X. OPERATION.

Carriage of passengers, see Carriers, § 333.
Injuries to employés, see Master and Servant, §§ 182–289.

(F) Accidents at Crossings.

§ 327. Where a traveler at a crossing cannot look or listen without stopping, his failure so to do, contributing to his injury, is fatal to a recovery.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

§ 328. Duty of traveler at crossing to stop and listen determined.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

§ 335. Failure to signal at crossing *held* not to excuse traveler's failure to look and listen.—Chicago, M. & St. P. Ry. Co. v. Bennett (C. C. A.) 799.

§ 350. In an action against a railroad company to recover for an injury to plaintiff at a crossing, where there was substantial evidence in favor of plaintiff on the issues of defendant's negligence and plaintiff's contributory negligence, the court properly submitted such issues to the jury.—Philadelphia & R. Co. v. McGrath (C. C. A.) 687.

(G) Injuries to Persons on or near Tracks.

§ 358. A railroad company *held* not liable for injuries to a boy while crossing the track on a path between a cut of cars for failure to give warning before closing the cut.—Schmidt v. Pennsylvania R. R. (C. C. A.) 83.

RATE.

Transportation rates, see Carriers, §§ 32–37.

REAL ESTATE AGENTS.

See Brokers.

REAL PROPERTY.

Conveyances, see Vendor and Purchaser.
Injuries in operation of mines, see Mines and Minerals, §§ 122–125.
Liens for improvements, see Mechanics' Liens.
Mortgage, see Mortgages.

REBATES.

From freight charges, see Carriers, § 32.

RECEIPTS.

Parol evidence, see Evidence, § 450.

RECEIVERS.

Appointment of receiver as act of bankruptcy, see Bankruptcy, § 60.
In bankruptcy proceedings, see Bankruptcy, § 115.
Of corporations in general, see Corporations, §§ 545–559.
Of street railroad companies, see Street Railroads, § 58.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 154. Attorneys employed by officers of a corporation after the appointment of a receiver, to resist the court's action, *held* not entitled to payment of their fees by the receiver out of the fund.—Barker v. Southern Building & Loan Ass'n (C. C.) 636.

§ 154. An attorney employed by complainant in a suit to dissolve a building and loan association, after a receiver had been appointed, *held* not entitled to payment of his fees by the receiver out of the fund.—Barker v. Southern Building & Loan Ass'n (C. C.) 638.

VI. ACTIONS.

Accrual of cause of action, see Limitation of Actions, § 58.
Application of general statutes of limitation, see Limitation of Actions, § 58.
By receiver in bankruptcy, see Bankruptcy, § 115.
Citizenship of receiver as affecting jurisdiction of federal court, see Courts, § 311.
Estoppel to rely on limitations, see Limitation of Actions, § 13.

RECEPTION.

Of evidence at trial, see Trial, § 39.

RECOGNIZANCES.

Security for costs, see Costs, § 136.

RECORDS.

Of particular facts, acts, instruments, or proceedings not judicial.

See Chattel Mortgages, §§ 86–97; Trade-Marks and Trade-Names, § 45.

Of judicial proceedings.

Transcript on appeal or writ of error, see Appeal and Error, § 548.

Records as evidence, and evidence relating to matters of record.

In criminal prosecutions, see Criminal Law, § 400.

Records as notice, and as affecting priorities.

See Chattel Mortgages, § 197; Vendor and Purchaser, § 231.

REFERENCE.

Presumptions on appeal or writ of error, see Appeal and Error, § 924.

II. REFEREES AND PROCEEDINGS.

Presumptions on appeal or writ of error, see Appeal and Error, § 924.

III. REPORT AND FINDINGS.

Extension of time for filing exceptions in federal court, see Courts, § 356.
Practice in federal courts, see Courts, § 352.

§ 99. Questions of law alone are reviewable by trial court on exceptions to report of consent referee.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

§ 103. A federal court, on the coming in of the report of a referee to whom a common-law action has been referred by consent "to report his findings of fact, together with his conclusions of law thereon, subject to confirmation by the court, exception, and appeal," has no power to set aside such report, find new facts, and enter judgment thereon, but on the refusal to confirm the report the case stands for a new trial.—Elkin v. Denver Engineering Works Co. (C. C. A.) 684.

§ 103. On avoidance of report of referee for error, the court may not retry issues of fact, but must grant new trial under proper instructions on questions of law.—Boatmen's Bank v. Trower Bros. Co. (C. C. A.) 804.

REGISTRATION.

Of mortgages, see Chattel Mortgages, §§ 86–97.
Of trade-marks or trade-names, see Trade-Marks and Trade-Names, § 45.

REHEARING.

See New Trial.
After determination of appeal in bankruptcy proceedings, see Bankruptcy, § 468.

REINSTATEMENT.

Of application for patent, see Patents, § 112.

REISSUE.

Of patent, see Patents, §§ 114, 136–138.

RELATIONSHIP.

Declarations or family records and reputation as to relationship, see Evidence, § 288.

RELEASE.

See Accord and Satisfaction.
Of dower, see Dower, § 49.

RELIANCE.

On fraudulent representation as element of fraud, see Fraud, §§ 21–23.

REMAND.

By federal court of cause removed from state court, see Removal of Causes, § 107.
Of cause by appellate court, see Courts, § 356.

REMEDIES.

See Action.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

§ 4. A suit by an individual against a telephone company for a penalty under Act Tenn. 1885, c. 66, § 11, *held* removable to the federal courts under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

§ 4. Rule stated for determining whether a suit to enforce a penalty provided by a state statute is of a civil nature, removable as such under Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(A) Diverse Citizenship or Alienage in General.

§ 26. Under Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), providing for the removal of causes, a suit commenced in the state court in the federal district in which neither of the parties resides *held* not removable to the Circuit Court of that district by a nonresident defendant.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 86. A prayer *held* sufficient as a prayer to remove a cause to the federal court.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

§ 92. Rule as to sufficiency of record on removal of a cause to the federal courts stated.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

VII. REMAND OR DISMISSAL OF CAUSE.

§ 107. On petition to remand a cause to the state court, plaintiff's residence within the district *held* established by a recital in his declaration.—Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 248.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

Of filing or record of mortgage, see Chattel Mortgages, § 97.

RENT.

See Landlord and Tenant, § 181.
Rent accruing after filing of petition in bankruptcy as provable claim, see Bankruptcy, § 318.

REORGANIZATION.

Of corporation or association, double liability of stockholders, see Corporations, § 235.

REPORT.

Admissions in report to mercantile agency, see Evidence, § 244.
On reference, see Reference, §§ 99–103.
To mercantile agency, persons who may rely on representations, see Fraud, § 21.

REPRESENTATIONS.

False representations, see Fraud.

RESCISSION.

Of contract, see Contracts, § 270.
Of insurance policy, see Insurance, §§ 248, 249.

RESIDENCE.

Of parties as determining jurisdiction of federal courts, see Removal of Causes, §§ 26, 107.
Of petitioner for naturalization, see Aliens, § 68.

RES JUDICATA.

See Judgment, § 668.

RESOLUTIONS.

Of corporation fixing compensation of officers, see Corporations, § 308.

RESORT.

Appropriation of water to beneficial uses by summer resorts, see Waters and Water Courses, § 132.

RESTRAINT OF TRADE.

Trusts and other combinations, see Monopolies, § 28.

REVENUE.

See Customs Duties; Internal Revenue.

REVERSAL.

Of judgment or order in civil actions, see Appeal and Error, § 1166.

REVIEW.

See Appeal and Error; Criminal Law, §§ 1053–1059.
Of admiralty proceedings, see Admiralty, § 118.
Of appraisal of goods for duty, see Customs Duties, § 85.
Of bankruptcy proceedings, see Bankruptcy, § 467.

RIPARIAN RIGHTS.

See Waters and Water Courses, §§ 34, 35.

RISKS.

Assumed by servant, see Master and Servant, § 221.

RIVERS.

See Navigable Waters.
Collisions between vessels, see Collision, § 94.

ROADS.

See Street Railroads.

ROYALTIES.

Under mining lease of Indian lands, see Indians, § 16.

RULES OF COURT.

Practice in federal courts, see Courts, § 332.

SAILORS.

See Seamen.

SALARY.

Of corporate officers and agents, see Corporations, § 308.

SALES.

Prior public sale of invention as affecting patentability, see Patents, §§ 76–81.

Sales by or to particular classes of persons.

Trustees in bankruptcy, see Bankruptcy, §§ 258–269.

Sales of particular species of, or estates or interests in, property.

See Good Will, § 6; Intoxicating Liquors.
Bonds of street railway company, see Street Railroads, § 52.
Mortgaged property, see Mortgages, §§ 281, 526.
Real property in general, see Vendor and Purchaser.

Sales on judicial or other proceedings.

See Bankruptcy, §§ 258–269.
Foreclosure of mortgages, see Mortgages, § 526.

IX. CONDITIONAL SALES.

Claims provable against estate of bankrupt, see Bankruptcy, § 318.
Property passing to trustee in bankruptcy, see Bankruptcy, § 140.

SALINE LANDS.

Requirement of land department as to nonsaline character of lands entered as homestead, see Public Lands, § 98.

SALOONS.

See Intoxicating Liquors.

SALVAGE.

I. RIGHT TO COMPENSATION.

§ 1. "Salvage" defined.—The Minnie E. Kelton (D. C.) 237.

§ 15. The jettisoning of cargo of a stranded steamer without the orders or consent of the master by the crew of another vessel *held* not a ground for the recovery of salvage compensation by such vessel.—The Olympia (D. C.) 187.

§ 18. The jettisoning of cargo of a stranded steamer without the orders or consent of the master by the crew of another vessel *held* not a ground for the recovery of salvage compensation by such vessel, but the men engaged in the work *held* entitled to reasonable pay therefor, it appearing that it was of benefit to the steamer.—The Olympia (D. C.) 187.

§ 18. Where a tug under a time charter which was not a demise of the vessel rendered a salvage service at night, at a time when she was not actually working under the charter but was supposed to be laid up in port, the owner, and not the charterer, was entitled to the salvage award.—The Richmond (D. C.) 568.

§ 22. Negligence or skill in the performance of a salvage service, irrespective of resulting damages, must always influence the award and salvage may be reduced by lack of skill and energy displayed by the salvors; and where it results in a distinguishable injury there may not only be a forfeiture of all right to compensation but an affirmative award may be imposed against the salving vessel.—The Minnie E. Kelton (D. C.) 237.

II. AMOUNT AND APPORTIONMENT.

§ 26. The elements which usually go to influence the amount of a salvage award are the value of the property salved, the value of the property employed in the service and the hazard it undergoes, the risk and peril to the salvors, the labor expended and the promptitude, skill and energy brought to the service.—The Minnie E. Kelton (D. C.) 237.

§ 27. The salvors of a vessel disabled at sea and left temporarily by the master and crew anchored near the shore in no immediate danger *held* entitled to an award of one-sixth of the salved value of vessel and cargo.—The Minnie E. Kelton (D. C.) 237.

§ 28. The abandonment at sea by the master and crew of a vessel injured in a storm so that she was unmanageable, leaving her anchored a mile or two from shore in comparatively calm weather and with the full intention on the part of the master to obtain a towing vessel and return did not constitute her a derelict and a salvor is not entitled to compensation on that basis.—The Minnie E. Kelton (D. C.) 237.

§ 30. A tug *held* entitled to a salvage award of $1,500 for towing another tug off from a breakwater at Rockport, Mass., on which she was grounded.—The Richmond (D. C.) 568.

§ 31. The masters and crews of three tugs awarded the sum of $6,000 for salvage services rendered in saving a ship which took fire while in dry dock from burning buildings in the shipyard.—The Jefferson (D. C.) 416.

SATISFACTION.

See Accord and Satisfaction.
Of judgment, see Judgment, § 875.
Of mechanic's lien, see Mechanics' Liens, § 239.

SCHEDULE.

Of imports, see Customs Duties, § 44.

SEAMEN.

Negligence of master imputable to crew, see Negligence, § 89.

§ 11. There is no law requiring fishing vessels, which are generally not far distant from a port of supply, to carry a medicine chest; and as a rule the failure to do so cannot be charged as negligence, which will render the owners liable in damages to a member of the crew who is injured.—Welch v. Fallon (D. C.) 875.

§ 17. A member of the crew of a fishing vessel shipping on the lay who without his fault became separated from the vessel, and was unable to rejoin it during the voyage, is entitled to the same proportion of his share of the proceeds of the whole catch as the time of his actual service on board bears to the time of the whole voyage, the remainder of his share to be distributed between the other members of the crew.—Martin v. Carroll (D. C.) 708.

§ 28. A member of the crew of a fishing vessel, shipping on a lay, who was injured while in the service without his fault, and thereby disabled until after the voyage ended, is entitled to his share in the proceeds, as though he had remained on board and served until the end.—Welch v. Fallon (D. C.) 875.

§ 28. The term "half line," as used in the fishing business, defined.—Welch v. Fallon (D. C.) 875.

SEARCHES AND SEIZURES.

Seizure and condemnation of adulterated or misbranded drugs, see Druggists, § 11.

SECONDARY EVIDENCE.

See Criminal Law, § 400; Evidence, § 178.

SECRETARY OF THE INTERIOR.

Duty to ascertain legal heirs of Indian decedent, see Indians, § 18.
Mining regulations as to Indian lands, see Indians, § 16.

SECURITIES.

Substitution of securities by bankrupt as voidable preference, see Bankruptcy, § 165.

SECURITY.

See Bonds; Chattel Mortgages; Mortgages.
For costs, see Costs, § 136.
For costs in bankruptcy proceedings, see Bankruptcy, § 475.
For costs in federal court, see Courts, § 357.

SERVANTS.

See Master and Servant.

SERVICE.

Of injunction, see Injunction, § 213.

SERVICES.

See Master and Servant; Work and Labor.
Liens on real property for services rendered see Mechanics' Liens.
Of broker, sufficiency to entitle to compensation, see Brokers, §§ 53-56.
Salvage services, see Salvage.

SETTING ASIDE.

Report on reference, see Reference, § 103.
Sale of property of bankrupt, see Bankruptcy, § 269.
Verdict, see New Trial.

SETTLEMENT.

See Accord and Satisfaction.

SHARES.

Of corporate stock, see Corporations, §§ 80–156.

SHIPPING.

See Admiralty; Collision; Maritime Liens; Navigable Waters; Salvage; Seamen; Towage.
Marine insurance, see Insurance, § 477.

III. CHARTERS.

Liability of charterer for collision, see Collision, § 115.

IV. MASTER.

Negligence of master imputable to crew, see Negligence, § 89.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

Fellow servants under state laws, see Master and Servant, § 182.

§ 75. Compensation recoverable by a steam schooner for emergency services rendered to a stranded steamship, under employment by the owners, in taking off passengers, etc., considered.—Pacific Mail S. S. Co. v. Waimanalo Sugar Co. (C. C. A.) 927.

VII. CARRIAGE OF GOODS.

§ 108. On a libel for failure to furnish the tonnage contracted for on a shipping contract, the court properly *held* that all the shipments made were made pursuant to the contract.—Herr v. Tweedie Trading Co. (C. C. A.) 483.

§ 108. The word "ton," as used in a foreign shipping contract, *held* to mean a dead weight long ton, notwithstanding the presence of an option to the carrier to charge freight at space rates.—Herr v. Tweedie Trading Co. (C. C. A.) 483.

§ 113. A bill of lading *held* not to provide that lighterage fees should be at the expense of the ship, but to give the ship the option of going alongside and delivering at a dock or by lighter at her own expense, in case there was water and length enough to get the ship alongside the dock.—Herr v. Tweedie Trading Co. (C. C. A.) 483.

§ 123. A ship *held* liable for injury to cargo due to improper stowage.—Knohr & Burchard v. Pacific Creosoting Co. (D. C.) 856.

§ 123. A ship is responsible for proper stowage of her cargo, although the charter party gave a representative of the charterer the right to select the stevedores for loading, which fact did not deprive the master of his authority to control the manner of stowage, nor affect the warranty of seaworthiness, which includes proper stowage.—Knohr & Burchard v. Pacific Creosoting Co. (D. C.) 856.

§ 131. The measure of damages recoverable from a carrier for damage to cargo through its fault is the difference between the market value of the cargo at the time and place of delivery in the condition in which it would have arrived but for the carrier's fault and its market value in the condition in which by reason of such fault it did arrive, with interest from the time of delivery.—United S. S. Co. v. Haskins (C. C. A.) 962; Same v. A. Schilling & Co. (C. C. A.) 965.

§ 132. The consignee of cargo received in a damaged condition is not bound to sell it at public sale in order to establish its market value in its damaged condition, but may do so by other evidence in an action against the ship to recover for the damages.—United S. S. Co. v. Haskins (C. C. A.) 962; Same v. A. Schilling & Co. (C. C. A.) 965.

XI. LIMITATION OF OWNER'S LIABILITY.

§ 204. A steamer, which had been taken on shore and partially dismantled by the removal of her masts and motive power, but which would still float and was blown adrift in a storm, *held* a "vessel," within the meaning of Rev. St. § 4298, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (U. S. Comp. St. 1901, p. 2945), and her owners entitled to maintain a petition for limitation of liability because of damage done by her.—The C. H. Northam (D. C.) 983.

§ 208. The floating and breaking away of a steamer which had been placed on the beach to be dismantled, during an extraordinary storm and high tide, *held*, on the evidence, to have been without the privity or knowledge of the owners, and also to have been due to inevitable accident or vis major, and not to any want of reasonable care or skill, which would render either owners or vessel liable for any injury she may have done while drifting.—The C. H. Northam (D. C.) 986.

§ 209. Where a vessel, at the time of the commission of injuries for which her owners seek limitation of liability, had been so far dismantled as to have no market value as a vessel, for the purpose of fixing the amount of the stipulation to be given by petitioners, the net value of the materials in her after she is broken up may properly be taken.—The C. H. Northam (D. C.) 985.

SHIPWRECKS.

See Collision; Salvage.
Marine insurance, see Insurance, § 477.

SICKNESS.

Affecting right of crew in share in earnings of vessels, see Seamen, § 28.

SIGNALS.

From vessel, see Collision, § 81.

SLANDER.

See Libel and Slander.

SOLDIERS.

Regulations of land department as to additional homestead entry, see Public Lands, § 98.
Right to patent for additional homestead entry, see Public Lands, § 110.

SPECIAL PROCEEDINGS.

Detention and return of immigrants excluded, see Aliens, § 54.
Limitation of liability of shipowner, see Shipping, § 209.
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SPECIFICATION OF ERRORS.

In assignment of errors, see Appeal and Error, § 724.

SPECIFICATIONS.

Accompanying application for patent, see Patents, § 167.

SPECIFIC PERFORMANCE.

II. CONTRACTS ENFORCEABLE.

§ 25. Specific performance of a railroad's contract to maintain a division point at M. would not be allowed where to do so would impose a burden on interstate commerce, prevent a compliance with the hours of labor law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]), create congestion of traffic, and inflict irreparable loss on the railroad company.—Kansas City Southern Ry. Co. v. Quigley (C. C.) 190.

SPIRITS.

Regulations as to branding, see Intoxicating Liquors, § 122.
Restraining unauthorized order as to branding, see Injunction, § 85.

SPIRITUOUS LIQUORS.

Regulation of manufacture and sale, see Intoxicating Liquors.

SPRING WATER.

Misbranding bottled waters, see Food, § 7.

STATEMENT.

Admissions, see Evidence, §§ 213–244.
Declarations, see Evidence, § 288.
False financial statement by bankrupt as grounds for refusal of discharge, see Bankruptcy, § 407.

STATE RAILROAD COMMISSION.

Jurisdiction of federal court of suit against, see Courts, § 303.

STATES.

See United States.
Power to protect and regulate game, see Game, § 3½.

II. GOVERNMENT AND OFFICERS.

Power to prevent shipment of game out of state, see Game, § 3½.

VI. ACTIONS.

Jurisdiction of federal courts in suits against states, see Courts, § 303.

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.
Authority in federal courts of decisions of state courts as to validity and construction of state statutes, see Courts, § 366.
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Enforcement in federal court of rights under state statutes, see Courts, § 371.
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V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

Repeal of statute relating to Indians, see Indians, § 18.

§ 162. Effect of a general statute on earlier special statute stated.—Wong You v. United States (C. C. A.) 313.

VI. CONSTRUCTION AND OPERATION.

Authority in federal courts of decisions of state courts as to construction of state statutes, see Courts, § 366.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

STATUTES AT LARGE.

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STEALING.

STEAM VESSELS.

STIFLING.

STIPULATIONS.

STOCK.

STOCKHOLDERS.

STOCK IN TRADE.

STOCKYARDS COMPANIES.

STOWAGE.

Improper stowage of goods shipped, see Shipping, § 123.

STRANDING.

Compensation for services to stranded vessel, see Shipping, § 75.

STREAMS.

Riparian rights, see Waters and Water Courses, §§ 34, 35.

STREET RAILROADS.

Carriage of passengers, see Carriers, § 333.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 52. A written contract for the sale of bonds as modified by a supplemental agreement construed.—Smith v. Jones (C. C. A.) 819.

§ 52. Certain financial transactions for the refunding of bonds of a lessor street railroad company *held* to constitute a purchase and not a payment thereof.—Farmers' Loan & Trust Co. v. Central Park, N. & E. R. Co. (C. C.) 595.

§ 54. A street railroad mortgage covering all the contracts and leaseholds then owned by the mortgagor is sufficiently broad to cover an indebtedness from a lessor company to the mortgagor for money expended for betterments made on the leased property which by the terms of the lease the lessor agreed to repay.—Farmers' Loan & Trust Co. v. Metropolitan St. Ry. Co. (C. C.) 575.

§ 54. The after-acquired property clause of a street railroad mortgage construed with respect to the property subsequently coming within the mortgage thereunder.—Farmers' Loan & Trust Co. v. Metropolitan St. Ry. Co. (C. C.) 575.

§ 58. A petition for an order directing the receiver for an insolvent street railroad company to turn over to petitioners certain notes and claims against third parties denied.—Central Trust Co. of New York v. Third Ave. R. Co. (C. C.) 282.

§ 58. Where the assets of an insolvent street railroad company are being administered by a court of equity, in creditors' suits, and a committee of minority stockholders has been permitted to intervene on behalf of the stockholders represented and all others who may choose to join, to warrant the subsequent granting of leave to intervene to a second committee representing other minority stockholders whose interests are the same, some substantial reason should be shown why they are not, or cannot be, properly and adequately represented by the committee and counsel already in the case.—Pennsylvania Steel Co. v. New York City Ry. Co. (C. C.) 285.

II. REGULATION AND OPERATION.

Injuries to passengers, see Carriers, § 333.

STREETS.

Crossing by railroads, accidents, at crossings, see Railroads, §§ 327–350.

SUA SPONTE.

Determination of equitable jurisdiction, see Equity, § 42.
Dismissal for want of jurisdiction of federal court, see Courts, § 280.

SUBPŒNA.

Return as affecting criminal responsibiilty for impeding administration of justice by inducing witness to flee, see Obstructing Justice, § 4.

SUBSCRIPTIONS.

To corporate stock in general, see Corporations, § 80.

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For articles of food, see Food.

SUBSTITUTION.

Of security by bankrupt as voidable preference, see Bankruptcy, § 165.

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See Action; Equity.

SUMMER RESORTS.

Appropriation of water to beneficial uses, see Waters and Water Courses, § 132.

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Of counties in general, see Counties, § 50.

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Of interference proceedings in patent office, see Patents, § 106.
Of running of statute of limitations, see Limitation of Actions, §§ 114, 119–127.

SWEARING.

False swearing, see Perjury.

TARIFF.

See Customs Duties.

TAXATION.

See Customs Duties; Internal Revenue.
Franchise tax as claim against receiver of foreign corporation, see Corporations, § 688.
Nonpayment of taxes as defense to suit for infringement of corporate name, see Corporations, § 661.

VI. LIEN AND PRIORITY.

Franchise tax as claim against receiver of foreign corporation, see Corporations, § 688.

TELEGRAPHS AND TELEPHONES.

Secondary evidence of telegram, see Criminal Law, § 400.

II. REGULATION AND OPERATION.

Limitation of actions to recover penalty for discrimination, see Limitation of Actions, § 35.
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See Injunction, § 137.

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See Embezzlement.

TIME.

Computation of period of limitation, see Limitation of Actions, §§ 58–127.
Of offense, allegations in indictment or information, see Indictment and Information, § 87.

For particular acts in or incidental to judicial proceedings.

Motion or application for new trial, see New Trial, § 117.
Objection or exception to instructions, see Trial, § 273.
Proof of claims against bankrupt's estate, see Bankruptcy, § 328.

For particular acts not judicial.

Application for reissue of patents for inventions, see Patents, § 138.
Filing chattel mortgage, see Chattel Mortgages, § 97.
Return of merchandise delivered under importer's bond, see Customs Duties, § 86.

TITLE.

Of purchaser at sale of property of lunatic, see Insane Persons, § 71.
Of trustee in bankruptcy to property of bankrupt, see Bankruptcy, §§ 140–155.
Removal of cloud, see Quieting Title.

Particular matters affecting title.

See Mortgages.
Sale of real property in general, see Vendor and Purchaser.

Particular species of property or rights.

See Patents, §§ 196–211.

Title necessary to maintain particular actions.

See Quieting Title, § 10.

TORTS.

Amendment of pleading changing cause of action from contract to tort, see Pleading, § 249.
Joinder of claims in contract and tort in libel in admiralty, see Admiralty, § 30.

Liabilities of particular classes of persons.

See Railroads, §§ 327–350, 358.
Employers, for injuries to employés, see Master and Servant, §§ 182–289.
Mineowners, see Mines and Minerals, §§ 122–125.
Shipowners, see Shipping, §§ 123–132.

Liabilities respecting particular species of property or instrumentalities.

See Mines and Minerals, §§ 122–125; Railroads, §§ 327–350, 358.
Vessels, see Towage, §§ 11–15.

Particular torts.

See Fraud; Libel and Slander.
Causing death, see Death, §§ 21–99.
Death in collision, see Admiralty, § 21.
Injuries from negligence, see Negligence.
Injuries from operation of railroads, see Railroads, §§ 327–350, 358.
Injuries to servants, see Master and Servant, §§ 182–289.
Loss of or injury to goods by carrier, see Shipping, §§ 123–132.
Loss of or injury to tow, see Towage, §§ 11–15.
Maritime torts, see Admiralty, § 21; Collision; Shipping, §§ 204–209; Towage, §§ 11–15.

Remedies for torts.

See Damages.
Accord and satisfaction of claim against joint tort-feasors, see Accord and Satisfaction, § 3.
Jurisdiction of admiralty, see Admiralty, § 21.

§ 22. Where two parties are jointly responsible to a third party for one wrong, while the wronged party may sue either or both, and recover judgments against either or both, he can have but one satisfaction for the same wrong. —Clabaugh v. Southern Wholesale Grocers' Ass'n (C. C.) 706.

TOWAGE.

Collisions with tugs and vessels in tow, see Collision, §§ 61–66.
Separate suit for towage and services in raising dredge as cross-libel in pending suit by dredge owner for injuries to dredge through negligent towing, see Admiralty, § 62.

§ 4. One undertaking a towage contract is not a common carrier nor liable as such, but his obligation is to perform the service with the reasonable care and skill which a prudent and experienced person should use under similar circumstances, and beyond this he is not responsible.—J. T. Morgan Lumber Co. v. West Kentucky Coal Co. (D. C.) 271.

§ 4. One engaging to perform a towage service is neither an insurer nor a common carrier, and his obligation is only to use reasonable care

and diligence and ordinary skill in the performance of the work.—The Leader (D. C.) 743.

§ 7. Where the owner of a steamer, on being asked his charge for towing a dredge and two barges between two points on the Ohio river, answered that he was paid $150 by another company for a similar service, and was thereupon engaged, there was an implied contract for that sum, and he cannot afterward charge by the day for the service, because of delay on account of low water.—The Enterprise (D. C.) 746.

§ 11. An injury to a dredge while being towed by a steamer down the Ohio river *held* not due to any negligence of the steamer, which rendered her liable therefor.—The Leader (D. C.) 743.

§ 12. The breaking up of a log raft in tow of two tugs *held* due to the fault of the tugs and also of the owner of the raft, who interfered with their operations and the damages divided.—J. T. Morgan Lumber Co. v. West Kentucky Coal Co. (D. C.) 271.

§ 15. The rule in admiralty for the division of damages is not limited to cases of collision, but may be applied in any case where a loss results from the fault or negligence of both parties, and without regard to the issues raised by the pleadings, if it appears from the record to be required to meet the ends of justice.—J. T. Morgan Lumber Co. v. West Kentucky Coal Co. (D. C.) 271.

§ 18. Both vessels *held* in fault for a collision in Buffalo river between a steamer coming in to her dock and a tug which was to take her in tow, the steamer for excessive and unlawful speed and the tug for not keeping out of her way.—Trauffler v. Detroit & Cleveland Nav. Co. (D. C.) 256.

TOWNS.

See Counties; Municipal Corporations.

TOWN SITES.

See Public Lands, § 39.

TRADE.

Combinations in restraint of trade, see Monopolies, § 28.

TRADE-MARKS AND TRADE-NAMES.

III. REGISTRATION, REGULATION, AND OFFENSES.

§ 45. Where complainant had used descriptive words as a trade-mark since 1888, and in interstate commerce since before April 1, 1895, and obtained registration thereof in April, 1906, the words acquired a secondary meaning, and became available as a trade-mark under Trade-Mark Act (Act Feb. 20, 1905, c. 592, 33 Stat. 725 [U. S. Comp. St. Supp. 1909, p. 1278]) § 5.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

§ 59. The trade-mark "Knoxall" as applied to lead pencils constituted an infringement on the phrase "Beats-All" previously used on pencils by complainant.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

§ 65. Trade-mark infringement depends not alone on similarity to eye and ear, but on whether the different marks readily lead the mind of customers to confusion.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

(C) Actions.

Right of action for infringement of name of foreign corporation, see Corporations, § 661.
Uncontroverted evidence, see Evidence, § 594.

§ 85. The use of a trade-mark "Beats-All" on a penny pencil *held* not fraudulent as against a defendant using a trade-mark "Knoxall" on a similar pencil, so as to preclude the maintenance of a bill for infringement.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

§ 93. Proof of bad faith to sustain a bill for infringement of a trade-mark does not obtain where defendant continued to use the mark after warning.—American Lead Pencil Co. v. L. Gottlieb & Sons (C. C.) 178.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Beats-all."—American Lead Pencil Co. v. L. Gottlieb & Sons..... 178
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TRAINS.

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TRANSFERS.

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As preferences by debtor, see Bankruptcy, §§ 165–184.
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Of exempt property, see Exemptions, § 79.
Of good will, see Good Will, § 6.
Of mortgaged property or of equity of redemption by mortgagor, see Mortgages, § 281.
Of patents, see Patents, §§ 196–202.
Of personal property as security, see Chattel Mortgages.
Of real property as security, see Mortgages.
Of shares of corporate stock, see Corporations, § 123.

TRANSPORTATION.

Of animals, see Carriers, §§ 211–219.
Of animals, violation of quarantine regulations, see Animals, § 34.
Of goods, see Carriers, §§ 13–37, 67–69; Shipping, §§ 108–132.

Of goods, regulation of commerce, see Commerce, § 33.
Of passengers, see Carriers, § 333.

TRESPASS.

Injuries to trespasser, see Collision, § 139; Railroads, § 358.

TRIAL.

Practice in admiralty, see Collision, § 154.

Proceedings incident to trials.

See New Trial; Reference.
Assessment of damages, see Damages, § 208.

Trial of actions by or against particular classes of persons.

See Master and Servant, §§ 286–289; Railroads, § 350.

Trial of particular civil actions or proceedings.

Libel and Slander, § 123.
Admiralty proceedings, see Collision, § 154.
Contempt proceedings, see Contempt, § 61.
For breach of contract, see Contracts, § 353.
For collision between vessels, see Collision, § 154.
For injuries at railroad crossings, see Railroads, § 350.
For injuries from negligence, see Negligence, § 136.
For injuries to servant, see Master and Servant, §§ 286, 289.
On bills or notes, see Bills and Notes, § 537.

Trial of criminal prosecutions.

See Criminal Law, §§ 761–763, 764.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25. An admission by defendants in libel *held* not to give them the right to open and close.—Mann v. Dempster (C. C. A.) 76.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 39. Documents or other things produced by a witness on request in his cross-examination and marked for identification are not before the court as evidence, unless offered and admitted as such.—Byerley v. Sun Co. (C. C.) 138.

VI. TAKING CASE OR QUESTION FROM JURY.

In criminal prosecutions, see Criminal Law, §§ 761–763, 764.

(A) Questions of Law or of Fact in General.

As to particular facts, issues, or subjects.

Contributory negligence of servant injured, see Master and Servant, § 289.
Damages, see Damages, § 208.
Negligence of master causing injury to servant, see Master and Servant, § 286.

In particular civil actions or proceedings.

See Libel and Slander, § 123.
Assessment of damages, see Damages, § 208.
For injuries at railroad crossings, see Railroads, § 350.
For injuries from negligence, see Negligence, § 136.
For injuries to servants, see Master and Servant, §§ 286–289.
On bills or notes, see Bills and Notes, § 537.

VII. INSTRUCTIONS TO JURY.

In action for breach of contract, see Contracts, § 353.

(A) Province of Court and Jury in General.

In criminal prosecutions, see Criminal Law, §§ 761–763, 764.

(F) Objections and Exceptions.

§ 273. Exceptions to instructions reserved after the jury retired cannot be reviewed, though the adversary assents.—Mann v. Dempster (C. C. A.) 76.

IX. VERDICT.

Review of sufficiency of evidence, see Appeal and Error, § 1004.
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, § 1033.
Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, § 169.

§ 419. Denial of a motion for nonsuit at the close of plaintiff's evidence is waived by defendant introducing its evidence.—Cœur d'Alene Lumber Co. v. Goodwin (C. C. A.) 949.

TRIBUNALS.

See Courts.

TROVER AND CONVERSION.

See Embezzlement.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTEES.

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TRUSTS.

Combinations to monopolize trade, see Monopolies. § 28.
Particular fiduciary relations, see Brokers; Principal and Agent.
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IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

Individual interest of trustee in bankruptcy, see Bankruptcy, § 365.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 358. Where a trustee draws money belonging to cestuis que trust, and thereafter makes a deposit to the same account, the deposit will be applied to the benefit of all the defrauded cestuis que trust ratably.—In re T. A. McIntyre & Co. (C. C. A.) 960.

TUGS.

See Towage.
Collision between tugs or tows and other vessels, see Collision, §§ 61–66.
Compensation for salvage services, see Salvage.

TWENTY EIGHT HOUR LAW.

Regulation of transportation of animals, see Carriers, §§ 37, 211, 219.

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See Bonds.
Security for costs, see Costs, § 136.

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UNITED STATES.

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Customs duties, see Customs Duties.
Indians, see Indians.
Jurisdiction of federal courts in cases arising under laws of United States, see Courts, § 285.
Mineral lands, see Mines and Minerals, §§ 20–27.
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